

## Background

In 1995 there was a survey carried out by National Consumer Council[1] which found that 3 out of 4 people who are involved in serious legal disputes were dissatisfied with the civil justice system. It was found that of the 1,019 respondents, 77 per cent believed that the system was too slow, 74 per cent stated that the system was too complicated and 73 per cent said that it was unwelcoming and outdated.[2]

A cursory look at history reveals that Pre-Trial process has been the subject matter of reports and inquiries more than sixty over the past hundred years. Since 1968 there has been the Winn Committee[3], the report of the Cantley Committee[4], the massive Civil Justice review 1985-1988[5] and the Heilbron-Hodge Working party jointly set up by the Bar and the Law Society[6]. These have not been discussed in this Essay as , new system of Civil procedure took effect on the basis of the recommendations made by Lord Woolf in his June 1995 Interim Report[7] and his July Final report both of which are entitled 'Access to Justice'[8].

Lord Woolf:

For long senior members of judiciary boldly defended the significance of civil justice and were concerned about the degradation and the problems inflicting the civil justice system[9]. Genn further stated that he was aware of the sorry state of the civil courts[10].

It was in this background of the continued criticism of civil justice system that the previous Conservative Government appointed Lord Woolf to carry out a far reaching review and overhaul the civil justice system. His inquiry is the 63rd such review in 100 years[11]. The 3 perennial problems of cost ,delay and complexity have been inflicting the civil justice system for ages and it was these ills that Woolf reforms along with the previous attempts at reform of civil justice wanted to redress[12]. The whole ethos of civil justice is bound to fail if litigation which in itself is a costly affair cannot provide timely, less expensive and simple justice.

Lord Woolf wanted to eliminate the defects in the civil justice system which were identified as being: too expensive, too slow, lacking equality between powerful and wealthy litigants and under-resourced litigants, too uncertain in terms of the length and cost of litigation, too fragmented and too adversarial[13].

Therefore in this light it should be stated over here that in March 1994, the Lord Chancellor set up the Woolf enquiry whereby ways of reducing delay and accessibility of civil proceedings, and of reducing their cost were to be looked[14]. On 26th April 1999 New Civil Procedure Rules and the accompanying Practice Directions came into force. These rules constitute the most fundamental reform of the civil justice system of the 20th century, introducing the main recommendations of Lord Woolf in his final report, Access to Justice. He described his proposals as providing 'A new landscape for civil justice for the 21st century'[15].

## Woolf Reforms- The need for reform

The whole ethos of Woolf reforms was centred around avoiding litigation and promoting settlement between parties at dispute[16]. While it will be analysed in detail whether the much needed reforms fulfilled their purpose or not, it can be stated in the affirmative that the Reforms were very well received

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by various quarters of the legal profession[17]. However, the reforms have not escaped criticism and one of the major critic is Michael Zander.

The inquiry by Woolf published its final report in 1996 and thereafter the proposals resulted in the Civil Procedure Act 1997 and the Civil Procedure Rules 1998 which are the same[18] for the County court and High Court. It needs to be commented over here that the changes sought by Woolf Reforms bear effect through the Civil Procedure Act 1997 and the CPR 1998, although these have been supplemented by new practice directions and pre-action protocols[19] .

Lord Woolf when he began his examination of the Civil law process identified diverse problems[20]. Interim report published by him in June 1995 states that 'the key problems facing civil justice today are cost, delay and complexity, these three are interrelated and stem from the uncontrolled nature of the litigation process. In particular there is no judicial responsibility for managing individual cases or for the overall assessment of the civil courts[21].....;

Heilbron Hodge who called for a 'radical appraisal of the approach to civil litigation from all its participants' paved the way for Woolf report and accompanying reforms . It was analysed[22] by Lord Woolf that without effective Judicial control the adversarial process of the civil courts was 'likely to degenerate into an environment in which the litigation process is too often seen as a battlefield where no rules apply' immediate effect of which would be disproportionate expense and unpredictable delay[23].

Being pretty considerate to all these problems Lord Woolf envisaged a New Landscape for the Civil justice which includes the following features[24]:

- Ø Litigation will be avoided wherever possible
- Ø Litigation will be less adversarial and more co operative.
- Ø Litigation will be less complex.
- Ø The timescale of litigation will be shorter and more certain.
- Ø The cost of litigation will be more affordable, more predictable, and more proportionate to the value and complexity of individual cases.
- Ø Parties of limited financial means will be able to conduct litigation on a more equal footing
- Ø There will be clear lines of judicial and administrative responsibility for the civil justice system
  
- Ø Judges will be deployed effectively so that they can manage litigation in accordance with the new rules and protocols
- Ø The civil justice system will be responsive to the needs of litigants.

Hence the genesis of reforms. For paucity of space I shall be discussing the main reforms that have an immediate effect on cost and delay: Pre-Action protocol, Part 36, Judicial Case Management and ADR. These were the brainchild of Lord Woolf, in this context I will compare Judicial Statistics as regards the impact of these reforms and will also evaluate the criticisms meted out to these reforms from various corners.

The proposed objective of all these reforms was to[25] :

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- 1) Encourage settlement/ avoid litigation
- 2) Encourage parties to be less adversarial/ more cooperative
- 3) Reduce Complexity of litigation.
- 4) Reduce Delay
- 5) Reduce Cost

It is but utmost important to discuss the reforms to see whether these objectives have been met or not.

## Pre-action Protocols

The idea was pioneered by Lord Woolf and can be considered as one of the most important innovations of the Woolf Reforms. Pre-action Protocols focus on the conduct of parties in the pre litigation stage which will be taken into account by the courts both during the case and also towards the end when the final decision regarding allocation of costs is taken. Pre-action protocols serves an effective means to this end as they are accompanied by the practice directions which describe their chief objective as encouraging exchange of early and full information about the prospective claim, avoiding litigation by promoting settlement and where litigation ought to be the last resort ,to support the efficient management of litigation[26]. It was stated by Lord Woolf in the Final report on Access to Justice (1996) that Pre-action protocols are intended to 'build on and increase the benefits of early but well informed settlements'[27].Clearly one can say that if parties know everything before hand, it does promote healthy environment by way of co-operation and the civil litigation process can be avoided. There have been 9 pre-action protocols produced so far covering vast areas of practice such as personal injury, medical negligence and housing[28] . By 2003 they also existed for construction and engineering, defamation, professional negligence and judicial review. What was even batter was the fact that all these were supplemented by a Pre-action protocol practice direction[29].

## The purport of these protocols is to[30] :

1. Set down pre-court procedures
2. Encourage good communication and early settlement

Further these protocols cast a duty on the claimant to give the defendant details of the claim and on the other hand the defendant must respond to these claims within a stricter period of time. The protocols state that the key documents on which the party case wholly rests must be disclosed at an early stage. Both the defendant and the claimant must agree on the use of an expert witness where relevant. If the parties fail to comply with these pre-action protocols the immediate result is penalty whereby the party at fault must pay some or all costs of the proceedings. [31]

Claims however, should not be issued until at least three months after the initial letter of claim once the claimant has written to the prospective defendant disclosing his claim [32].

Evaluation/impact of the protocols will be carried out in the next section but it may be mentioned here that although pre action protocols may be expensive and can lead to front loading of costs in cases which would settle without them they might be able to prevent the unnecessary costs of issuing proceedings and listing for hearing in the same cases. Another benefit that follows from the protocols could be that they might give the parties a healthy steer towards Alternative Dispute Resolution[33].

## Part 36 (encouragement to settle out of court)

As a result of the Woolf Reforms Part 36 was put in place which promotes greater incentive for the parties to settle their differences now. Under Part 36 procedures exist for either party to make an offer to settle their disputes and was significantly revised with effect from 6th April 2007. Now a part 36 offer can be made before the proceedings start and also in the appeal proceedings. 'Offeror' is referred as a party making the offer and 'Offeree' is the one who is receiving it. Upon acceptance of offer by the claimant a duty is cast on the defendant to pay the sum offered within 14 days, failure to do so will allow the claimant to enter judgement. Any pre- action offer to settle while making an order for costs will be taken into consideration by courts. A side refusing it will be treated less generously. It happens in offers which are open to the other side for at least 21 days after the date they were was made. Lord Woolf suggested that for a settlement offer to qualify as an offer under Part 36 it must be made in writing with the intention to have the consequences of part 36. As regards Defendant making the offer, a period of not less than 21 days must be specified whereby defendant liability for claimants will be established if the offer is accepted. Revised Part 36 however allows the withdrawal of any offer after the expiry of the 'relevant period' as defined in Rule 36.3.1.c without the court's permission[34].

Michael Zander stated that when the defendant paid a sum of money into the court account as an offer of settlement, the case would end upon acceptance of the money. However if the offer is refused by the claimant, the defendant can still increase his payment-in. Upon further refusal the case will go on trial and will be determined by the outcome. If the Claimant does not recover, more than the amount paid in, the court will order him to pay the cost of both sides from the date of payment-in. It would be worth mentioning over here about the technique called as Calderbank letter because technically the system applied only to cases which concerned a damage or other money claim whereas under this if the defendant makes an offer of settlement 'without save as prejudice to costs' it would virtually be treated by the courts in the same way as if it was payment into court. Pre -CPR this rule 36 was applied inflexibly. Post 1999 the courts can mitigate the harshness of the traditional rule where the claimant was automatically ordered to pay the cost of both the sides upon failure to secure a penny more than the amount paid in by the defendant. New rules now provide for the Claimant's offer which was considered to be a big change. For money claims Part 36 payment apply. However, where the claim is not monetary the defendant can still make a part 36 offer (as opposed to part 36 payment) and thereafter the same basic rules shall apply. However courts discretion is open . All in all allowing the claimant to make an offer of settlement under the CPR has proved to be a welcome step[35]. The analysis of Part 36 will be discussed in the next section.

## Case Management

This is the most significant innovation as it was perceived by Lord Woolf that case control by judiciary rather than leaving the conduct of the case to the parties will bring the cases to trial quickly and efficiently[36]. It can be seen that the litigants in this new system will have much less control over the pace of the case than in the past. As the case is now subject to timetable parties will not be able to draw out proceedings and cause delay. A positive duty is cast on the court which means[37] :

### CPR 1.4(1)

- 1) encouraging parties to co-operate with each other in conduct of the proceedings
- 2) identifying the issues at an early stage

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3) encouraging parties to use ADR

4) helping parties to settle whole or part of the case.

Under the CPR Cases must be assigned to 1 of the 3 tracks: small claims, fast track or multi-track as all these have their own separate regime depending primarily on financial value of claim[38].

## Small Claims

Limit for small claims cases is 5,000 except for personal injury and housing cases where it is 1000.

Proportionate procedure is followed where straight forward claims with a financial value of not more than 5,000 can be decided without needing substantial pre hearing preparation and the formalities of substantial trial and also without incurring large legal costs[39]. The procedure is controlled by district judges on an informal basis[40].

## Fast Track

Cases involving amounts betweenw 5,000-25,000 are for this track unless they are deemed unsuitable. A set timetable of no more than 30 weeks to trial, limited pre -trial procedure, trial restricted to no more than 3 hours which was further extended to 5 hours, restriction on oral evidence form experts and recovery of standard fixed costs was the concept well established over here[41].

## Multi track

Cases involving amounts in excess of the fast track limit or cases with lesser amounts which are considered too complex or too important to be dealt with as small claims or fast track cases are dealt with here[42].

Evaluation of the impact of judicial case management on reduction in cost, delay and complexity will follow in the next section.

## ADR

ADR though have not part of the Court system it has been brought into connection through the CPR. Lord Woolf in his Final Report urged that people should be told and encouraged to resort to growing number of grievance procedures, or the ADR before taking up the judicial review proceedings. These ADR are featuring prominently in the rules as CPR 1.4(1) states that 'the court must further the overriding objective by actively managing cases'. However, Woolf commented that ADR cannot be imposed compulsorily on parties at dispute in civil litigation[43]. There are no complex court procedures to be adhered while using ADR and also it saves a lot of time and avoids the ever escalating litigation costs.

## Experts

This was another area with which Woolf was concerned. It was contended by him that expert evidence was a major cause because of which excessive expense, delay in some cases and complexity increased. He

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wanted to do away with the system where both the both parties could appoint their own experts, rather wanted a single expert who would owe his allegiance to court rather than the parties. Given the criticism to his proposal he admitted that though significant shift towards single experts is not possible but it was possible to initiate a shift in that direction[44].

## 2) Three Rivers DC v Bank of England[83]

The case started in November 1995 and ended after 10 years in November 2005 with the claimant abandoning the claim against the bank. Law Lords over here reverted to pre-CPR philosophy and the majority decision resulted in 10 more years of fruitless litigation with skyhigh costs. Zuckerman commented that such an approach would be fatal to CPR reforms unless the judiciary be persuaded to embrace the overriding objective of dealing with cases justly[84].

It needs to be mentioned that though there was criticism, it was only in minority and the reforms have achieved a lot as they were directed to promote a culture of settlement and co-operation.