ENGLAND'S PROCEDURAL REVOLUTION

David Cairns, B Cremades & Asociados, Madrid

asks how relevant Woolf *is to New Zealand*

For five years the reform of civil procedure has occupied a prominent place in legal debate in England. This debate began when Lord Woolf's *Access to Justice: Interim Report* ("*Interim Report*") appeared in June 1995. The *Interim Report* was followed in July 1996 by *Access to Justice: Final Report* ("*Final Report*") and, after widespread debate and consultation, the promulgation in 1998 of the new Civil Procedure Rules ("CPR"). The CPR apply at both County Court and superior Court levels, substantially replacing the rules of the Supreme Court and the County Court Rules. Since coming into force on 26 April 1999 there has been a stream of refinements and additions to the CPR, adding detail to the new system. The discussion continues unabated: features, interviews, survey results and comment abound in professional journals and the client newsletters of the major law firms (*The Interim Report* and *Final Report* are available at http://www.open.gov.uk/lcd/majrepfr.htm. The CPR and their accompanying Practice Directions are available at http://www.beagle.org.uk. The CPR are divided into "Parts" dealing with discrete topics, which in turn are divided into rules. Many Parts are supplemented by Part-specific Practice Directions).

The CPR have frequently been called a "procedural revolution". In his *Foreword* to the new rules the Lord Chancellor, Lord Irvine LC, suggests common law procedure is at its most significant period of development since the merger of law and equity and the emergence of the recognisably modern civil procedure in the Judicature Acts of the 1870s.

Lord Woolf's *Interim Report* and *Final Report* are written in a direct style, and do not shrink from identifying the faults of civil procedure, or pointing the finger of blame. The three key problems they identified with civil justice were cost, delay and complexity. These problems were interrelated and stemmed from "the uncontrolled nature of the litigation process". Lord Woolf attacked an "adversarial culture" "in which the litigation process is too often seen as a battlefield where no rules apply". Existing rules were "flouted on a vast scale"; timetables were "generally ignored", pleadings, "whether through incompetence or deliberation" often failed to establish the facts the rules required; discovery was "completely out of control"; there was excessive resort to interlocutory hearings, and expert evidence was undermined by partisan pressures. The powers of the Courts, he said, had "fallen behind the more sophisticated and aggressive tactics of some litigators". The blame for excessive delay, "an additional source of stress to parties who have already suffered damage" was placed squarely on the shoulders of the legal profession. "Delay is of more benefit to legal advisers than to parties. It allows litigators to carry excessive caseloads in which the minimum possible action occurs over the maximum possible timescale. In a culture of delay it may even be in the interest of the opposing side's legal advisers to be indulgent to each other's misdemeanours. Judicial experience is that it is for the advisers' convenience that many adjournments are agreed." (*Interim Report*, ch 3, paras 1-11, 30-31, and 41.)

Lord Woolf said the intention of his reforms was to change fundamentally the landscape and "culture" of litigation. The features of the new landscape moulded by the CPR are to be:

(a) litigation is to be avoided wherever possible;
(b) litigation is to be less adversarial and more cooperative;
(c) litigation is to be less complex;
(d) the timescale of litigation is to be shorter and more certain;
(e) the cost of litigation is to be more affordable, more predictable, and more proportionate to the value and complexity of individual cases;
(f) parties of limited financial means are to be able to conduct litigation on a more equal footing;
(g) there are to be clear lines of judicial and administrative responsibility for the civil justice system;
(h) the structure of the Courts and the deployment of Judges is to be designed to meet the needs of litigants;
(i) Judges are to be deployed effectively so that they can manage litigation in accordance with the new rules and protocols;
(j) the civil justice system is to be responsive to the needs of litigants.

The indications after one year are that the CPR are achieving their objectives. Fewer proceedings are being issued; more proceedings are being settled sooner; the judiciary is using its discretion under the new case management regime, showing less tolerance towards delays and, significantly for the long-term efficacy of the new regime, willingly disregarding old precedent. In *Biguzzi v Rank Leisure plc* [1999] 4 All ER 934, for example, Judge Kennedy QC adopted this robust approach to House of Lords precedent in considering an application to strike out a statement of case (at 936-937; the House of Lords authority concerned was *Birkett v James* [1977] 2 All ER 801):

> it is my firm belief that authorities decided under the old procedure should not be taken as binding or probably even persuasive upon this Court, any more than looking

> back to the old rules to interpret the new should be so. This is a new regime ....
>
> I have to say that this Court's view, after extensive training and a good deal of discussion and thought, is that the new order will look after itself and develop its own ethos and that references to old decisions and old rules are a distraction.

The appeal came before a Court that included Lord Woolf MR, who endorsed the approach of the Judge (at 940):

> In relation to the decision of the Judge which is under appeal, I can see no failure on his part to recognise the relevant principles. He took the right course as to the previous authorities. The whole purpose of making the CPR a self-contained code was to send the message which now generally applies. Earlier authorities are no longer generally of any relevance once the CPR apply.

Lord Woolf's proposals have been endorsed by successive Lord Chancellors, and both Lords Mackay and Irvine have seen them as part of a wider programme of the reform of civil justice. There was perhaps a change in emphasis when the Labour Government came to power – Lord Mackay had a more explicit market based approach, while Lord Irvine has emphasised accessibility to justice and "a faster, fairer, more open legal system". (See Lord MacKay LC "Civil Justice Breaking Through" in (1998) *Arbitration* s 70, 72; Lord Irvine LC "Keynote Address to the Law Society of England and Wales Annual Conference, Cardiff 18th October 1997"; reprinted (1998) *Arbitration* 246.) The pace and scope of change, however, has not been affected. The Access to Justice Act 1999 implemented further changes, reforming the legal aid system, encouraging conditional fee arrangements and expanding the rights of audience of solicitors and the powers of the Law Society to discipline professional misconduct. The reforms thus clearly link civil procedure, legal aid, and the structure of the legal profession as key determinants of the accessibility and affordability of civil justice. Reform is now spreading to specialist jurisdictions; changes have already been made to intellectual property legislation in the United Kingdom "to increase speed, lower costs and increase certainty" in Patent Office proceedings in accordance with the principles and recommendations of Lord Woolf's reports, and the Lord Chancellor has recently announced a comprehensive review of the accessibility, coherence and performance of administrative tribunals *(Patent Office Corporate Plan 2000*, p 2 and Tribunal Practice Notice (TPN 1/2000) "Practice in Proceedings before the Comptroller" – both documents available at http://www.patent.gov.uk/; press statement, Lord Chancellor's department, 18 May 2000 "Lord Chancellor Commissions Wide-Ranging Review Of Tribunals", available at http://213.38.88.195/coi/coipress.nsf).

RAMIFICATIONS FOR NEW ZEALAND

New Zealand's last comprehensive reform of civil procedure occurred in 1985 with the enactment of the High Court Rules. Refinement is an ongoing process through the Rules Committee, and recently we have seen substantial changes through the progressive introduction of case management and a new regime for assessing costs. The High Court Rules appear to be regarded, within the profession at least, as adequate. There are, however, a number of reasons why New Zealand practitioners and all those involved in the administration of justice should interest themselves in the revolution in civil procedure in England:

- the apparent success of the CPR, particularly their incentives to early settlement, commands respect and compels attention to whether the reform of civil procedure might deliver similar cost and efficiency savings in New Zealand. A year after their introduction the CPR reportedly boast an approval rating of 80 per cent amongst solicitors, a reduction in new proceedings in excess of 20 per cent, and enthusiastic claims that a change in litigation culture has been achieved (see *The Lawyer*, 8 November, 1999 ("Woolf Court cases fall by third"); *The Lawyer*, 15 May 2000 ("litigators are content after the reform"); *The Times*, 2 May 2000 ("Verdict on Woolf: it's a qualified success"). The reduction in new proceedings must, of course, be interpreted with care until it is clear that it is permanent);
- the English reforms place civil procedure in a wider context than it has traditionally been perceived. Lord Woolf has stressed the "high constitutional importance" of access to the Courts. His *Interim Report* took as its starting point Lord Diplock's statement in *Bremer v South India Shipping Corp Ltd* [1981] AC 909 at 917:

  > Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are Courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant.
- if the rules of civil procedure create unreasonable obstacles – including expense or delay – to attaining justice then the constitutional rights of the subject are violated. Civil procedure is being elevated from the professional to the constitutional domain;
- policy makers in England see civil procedure as firmly within the matrix of issues to be addressed to control the costs of civil justice. Lawyers might see legal aid or the structure of the legal profession as issues unrelated to, say, case management or discovery, but if policy makers view case management or the abolition of discovery as a source of substantial savings in civil legal aid then the legal profession must be prepared to address these issues on this basis;
- many of the underlying problems addressed in Lord Woolf's reports as causative of the vices of unnecessary expense, complexity and especially delay in litigation clearly afflict civil procedure in New Zealand. The High Court is not currently meeting its own expectations as to the timely resolution of defended proceedings – the *Department for Courts Annual Report 1999* (p 62) reported that 58.7 per cent of defended civil proceedings in the High Court were disposed of within 52 weeks, against a target of 65 per cent, a variance of – 9.7 per cent, – and given that New Zealand has accepted in principle the key philosophical change proposed by Lord Woolf of universal case management, it seems an appropriate time to consider the contribution that a partial or total revision of the High Court Rules might make to the efficiency of the administration of justice;
- a premise of Lord Woolf's reports is that the legal profession was failing the administration of justice. Lawyers are the villains of the reports. Considerable responsibility for the excessive cost, delay and complex-

ity of litigation, and therefore the inaccessibility to justice of many people, is laid at the feet of aggressive lawyers willing to use civil procedure as a tactical tool to advance their clients' interests;

- Lord Irvine LC has even suggested one of the beneficial side effects of the reforms of civil justice will be to help to rehabilitate the public reputation of lawyers (see *Keynote Address, 252*). If the conduct of civil litigation can have such a profound effect on the public confidence in the legal profession, then it should be a matter of concern to all lawyers;
- the sphere of shared procedural concepts of New Zealand and England has been drastically reduced. New Zealand practitioners accustomed to referring to "the White Book" for contemporary English authority on procedural issues will find it increasingly less helpful in future;
- the reforms signify a transfer of responsibility within litigation from counsel to the Judge. The CPR initiate a move from an adversary system to a system of managed justice. This is likely to have a significant long-term impact not only on civil procedure in England but also advocacy, the role of the Judge and the nature of the trial. The adversary system is one of the most distinctive features of common law justice, and signs of its abandonment in the land of its birth deserve close attention;

In a future article I propose to consider five key features of the CPR: case management, the statement of truth, discovery, expert evidence and incentives to settlement. All these involve areas where civil procedure in New Zealand either is evolving or should evolve in the same direction as England. I will begin, however, with brief reference to two features of the CPR – plain English and the overriding objective – which are so fundamental to the philosophy of the reform that they cannot be by-passed without comment.

KEY FEATURES OF THE CPR

Plain English

The CPR are drafted in plain English. This has meant the demise of much familiar terminology in favour of plainer alternatives: plaintiffs are now claimants, discovery is now disclosure, statements of claim are now claims, and pleadings are statements of case; an Anton Piller order is a "search order" and a Mareva injunction a "freezing injunction". Further, the CPR contain, in addition to the definition section, a "Glossary" as a layman's guide to the meaning of certain common legal expressions retained in the CPR (such as affidavit, counterclaim, injunction, and privilege).

The use of plain English is not simply a cosmetic change nor is it intended, as in the plain English drafting of banking and insurance contracts, to facilitate the comprehension of the text while leaving the substantive meaning unchanged. Rather the use of plain English serves two functions integral to the philosophy of the new rules. Firstly, it emphasises the *new constitutional significance* of civil procedure. Access to justice is a constitutional right and therefore the rules which define access to the Courts should be readily comprehensible by the ordinary citizen. Secondly, plain English eliminates much legal terminology encrusted with precedent, thereby achieving *a radical break with the past* and privileging the text of the CPR over common law practice. A dramatic illustration of the simplification and break with the past achieved through plain English is in Part 18 which consists of two rules relating to "Obtaining Further Information". The provision of further information pursuant to Part 18 replaces the historic concepts of interrogatories and particulars, and makes irrelevant all the accumulated case law relating to these defunct concepts.

The overriding objective

Part 1 of the rules states an overriding objective. Rule 1.1 provides:

(1) these rules are a new procedural code with the overriding objective of enabling the Court to deal with cases justly;

(2) dealing with a case justly includes, so far as is practicable:

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate:

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases.

The Courts are accustomed to interpreting legislation to give effect to its objectives. Further the content of the overriding objective is unexceptionable, simply "embodying the principles of equality, economy, proportionality and expedition which are fundamental to an effective contemporary system of justice". (*Final Report*, s I ("Overview"), para 8.)

The significant feature of the overriding objective is that it is more than a statement of purpose or guide to interpretation. Rather it imposes positive obligations on the Courts and the parties. Rule 1.2 provides that the Court must seek to give effect to the overriding objective when it exercises any power under the rules or interprets any rule, and R 1.4 adds that the Court must further the overriding objective by actively managing cases. Therefore dealing with cases justly is imperatively linked to active case management.

Further, R 1.3 states that the "parties are required to help the Court further the overriding objective", an innovative duty that must logically impose new obligations on legal advisers. This duty is expressed in rather weak language, and is a little puzzling. Parties to litigation rarely appear on the "equal footing" to which R 1.1(2) aspires and it is difficult to see how they are expected to make themselves more equal; similarly, the parties often have highly subjective perceptions of the importance of their own cases, and see proportionality in an entirely different light to the Court. A solicitor may counsel reasonableness to difficult clients and advise them of the possible costs consequences of their actions, but in the final analysis has an obligation to represent them. The ambit of the R 1.3 duty is thus uncertain, but is likely to prove to include compliance with any applicable pre-action protocols, frankness and cooperation regarding the elements in R 1.1(2) during the case management process, compliance with timetables, proper preparation so as to ensure cases are ready to proceed on their scheduled dates, and reasonable efforts towards settlement. In this way the responsibility to deal with cases justly in fact remains with the Court, and properly so. ❑

PROCEDURES UNDER *WOOLF*

David Cairns, B Cremades & Asociados, Madrid

continues his review of England's procedural revolution

CASE MANAGEMENT

Lord Woolf considered that "the unrestrained adversarial culture" was "to a large extent responsible" for the deficiencies he identified in the administration of justice. Accordingly there was now no alternative to a fundamental shift in the responsibility for the management of civil litigation from litigants and their legal advisers to the Courts. "Unmanaged adversarial procedure" had led to an unacceptable situation; the solution proposed was "a Court-managed system" (*Interim Report*, ch 4, paras 1 and 2; ch 5 paras 2 and 10). The introduction of judicial case management is therefore the keystone of the new CPR.

Judicial case management is not a new idea. Lord Woolf referred to experiments in case management in English Courts, and also to its use in overseas jurisdictions (including New Zealand). However, notwithstanding a uniform trend in common law jurisdictions towards judicial case management it is not without its problems and its efficacy has yet to be conclusively established. Lord Woolf strongly endorsed case management, and it is instructive to examine briefly the distinctive features of his vision of successful case management.

Case management under the CPR is to be comprehensive and a regular part of all proceedings. The central principle is that the Court will manage every case, but the type of management will vary according to the needs of the case. (*Final Report*, ch 5, para 2.) The CPR apply at both High Court and County Court level and all cases at both levels are to be allocated immediately upon the filing of the defence to one of three "tracks" for case management purposes: the small claims track, the fast track and the multi-track. The hallmarks of the small claims and fast tracks are basic management, fixed timetables and standard procedure. Case management on the multi-track, which includes all major commercial disputes, involves greater judicial involvement (see Part 26 and its accompanying Practice Direction for the rules relating to track allocation. In general terms the fast track is for claims of a financial value of less than G15,000 where the trial is expected to last no longer than one day, and where there is limited expert evidence).

Secondly, case management is active in that the responsibility for the management of cases rests with the Court, not the parties. Case management is not a matter of judicial discretion; R 1.4 imposes a positive duty on the Court actively to manage cases. While Lord Woolf targeted lawyers as responsible for the failure of the adversarial system there is in his analysis an implicit criticism of judicial passivity or remoteness in the face of the widespread flouting of timetables by lawyers, the abuse of discovery and disproportionate attention to peripheral issues (On passivity or remoteness as a judicial vice (the opposite vice to bias) see David J A Cairns *Advocacy and the Making of the Adversarial Criminal Trial 1800-1865* (OUP, 1998) at 110-117). The change in forensic culture called for by Lord Woolf includes Judges as well as solicitors and advocates, and is supported by proposals for additional judicial training and changes to the judicial structure.

Thirdly, case management is structured and clearly defined. Rule 1.4 links active case management to the overriding objective, giving an explicit statement to litigants, legal advisers and the judiciary of the matters to be addressed in the case management process:

1.4 (1) the Court must further the overriding objective by actively managing cases;

(2) active case management includes:

(a) encouraging the parties to cooperate with each other in the conduct of the proceedings;

(b) identifying the issues at an early stage;

(c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;

(d) deciding the order in which issues are to be resolved;

(e) encouraging the parties to use an alternative dispute resolution procedure if the Court considers that appropriate and facilitating the use of such procedure;

(f) helping the parties to settle the whole or part of the case;

(g) fixing timetables or otherwise controlling the progress of the case;

(h) considering whether the likely benefits of taking a particular step justify the cost of taking it;

(i) dealing with as many aspects of the case as it can on the same occasion;

(j) dealing with the case without the parties needing to attend at Court;

(k) making use of technology; and

(l) giving directions to ensure that the trial of a case proceeds quickly and efficiently.

Further, detailed Practice Directions set out the case management requirements for each of the three tracks. Matters previously party-controlled (within the ambit of general principles), particularly settlement, alternative dispute resolution, the scope of discovery and the use of experts of trial, are now case management issues. There is an emphasis on the early identification and resolution of issues and the setting of a trial date as soon as practicable. Lord Woolf saw the early fixing of a trial date or a trial "window" as the key

to effective case management (*Final Report*, ch 5, para 20. On the fast track the hearing date is fixed at the time of track allocation, at a standard period of not more than 30 weeks: see R 28.2).

Fourthly, case management is not simply imposed on the existing procedural structure, but is assisted by complementary procedural reforms. Some of these reforms are of a fundamental nature, such as the implementation of much firmer judicial control over the scale of discovery and the use of experts, and expanded powers of summary judgment and striking out. Some are directed at increasing party and solicitor compliance, such as the new provisions relating to sanctions and costs. Some are merely facilitative, such as the Court's general powers of management, ability to make orders on its own initiative, and the use of questionnaires and new technology to inform the Court without the necessity of appearance.

Finally, Lord Woolf recognised that judicial consistency was essential to effective case management. There must not be a proliferation of local practices. It was "not acceptable for Judges' approaches to be so different as to lead to significant differences in costs between similar cases. This is likely to result in forum shopping, which must be discouraged". (*Final Report*, ch 5, paras 35-36.) Judicial training and the issue of uniform Practice Directions facilitate the achievement of this objective.

In England as in other common law jurisdictions many lawyers are sceptical as to the benefits of judicial case management. Professor Michael Zander QC, a strong critic of Lord Woolf's proposals, argued that a major review in the United States (the RAND study) had reported that judicial case management adds to the cost of litigation, and while it may also shorten the length of proceedings "the most effective device to achieve that result is the simple one of giving the parties a trial date from a very early stage and then adhering to that date ..." ("The Woolf Report: Forwards or Backwards for the New Lord Chancellor" (1997) 16 CJQ 208, 215-221. The RAND study and the US experience of case management are further discussed in Richard L Marcus "Malaise of the Litigation Superpower" in *Civil Justice in Crisis* (ed Zuckerman, Oxford, 1999) at 104-108). Lord Woolf, however, rejected the criticisms of case management (see *Interim Report*, ch 5, paras 21-26; *Final Report*, ch 1, para 3-7), which he described as an extension backwards in time of the role of the trial Judge. His reports and the new CPR leave no doubt as to his view that the management of litigation is better entrusted to Judges, rather than to the legal advisers chosen by the parties to represent their interests in a dispute, and in doing so has imposed, in my view, heavy expectations on the English judiciary.

PLEADINGS: THE STATEMENT OF TRUTH

The most innovative feature of the new rules relating to pleadings (now called the "statements of case"; Lord Woolf considered that the term "pleadings" had "acquired an unfortunate flavour of obfuscation rather than clarity") is the statement of truth.

Rule 22.1 provides that the following documents must be verified by a statement of truth:

(a) statements of case, ie a claim, defence or reply; and any amendments to a statement of case;

(b) "further information" under R 18.1 (ie in NZ terms, further particulars and interrogatories);

(c) witness statements (including an expert report);

(d) an "application notice" (in NZ terms, a notice of interlocutory application) where the applicant wishes to rely on matters there set out as evidence.

A statement of truth is simply a statement by a party (or in the case of a witness statement, the maker of the statement) that it believes the facts stated in the document are true. A legal representative may sign a statement of truth on behalf of a party. It is punishable as a contempt of Court to make a false statement in a document verified by a statement of truth without an honest belief in its truth (R 22.1(4) and (6); R 32.14. For the form of the statement of truth see Practice Direction to Part 22, R 2, and Practice Direction, Part 35, R 1).

There is a long-established distinction in common law procedure between pleading (formal and sequential exchanges in writing prior to the trial, for the purpose of defining the issues) and evidence (traditionally presented orally and as a "single event" at the trial, for the purpose of enabling the jury to determine the issues). This distinction has broken down with the decline of the civil jury and the increasing reliance on written evidence. Case presentation is further confused by the move from oral advocacy to written submissions, meaning that the parties now submit three sets of documentation (pleadings, evidence, submissions), conceptually distinct but in reality prepared by the same person or team in an increasingly uniform style. The consequences of these changes in New Zealand has at the very least been a loss of purpose in pleading. Statements of Claim are often generated quickly to satisfy client demands to initiate proceedings, and often with the collateral objectives of giving the widest possible scope to discovery or exerting commercial or political pressure. The parties and their legal advisers rely on being able to amend the pleadings to properly define the issues after discovery or as a result of trial preparation, or pleadings are simply dispensed with altogether in favour of an "agreed statement of issues".

The CPR, both through the statement of truth and through the abolition of particulars and interrogatories in favour of the "provision of further information" under R 18, conflate pleading and evidence, recognising that this distinction has outlived its usefulness in a civil procedure dominated by written statements and Judge-alone decision-making. The CPR require that the parties or their legal advisers certify that all statements put before the Court, whether to define or prove a party's position, are true. The statement of truth will compel legal advisers to spend more time investigating a client's claim prior to the issue of proceedings, and therefore act as a brake on frivolous, misconceived and exaggerated claims, and place Judges in a much better position at an early stage of proceedings to decide strike-out applications and to exercise their case management powers efficiently.

A statement of truth makes the parties and their legal advisers responsible and answerable for the accuracy of pleadings. It is a remarkably simple, costless and effective mechanism to improve the usefulness of pleadings. Its adoption in New Zealand deserves to be addressed by the Rules Committee.

DISCLOSURE

In Lord Woolf's view the complexity of modern business life and the proliferation of technology capable of creating and copying documents had got far ahead of the law of discovery.

The authoritative test for the relevance of documents for discovery purposes for over a century in England and New

Zealand has been the statement of Brett LJ in *Compagnie Financiere du Pacifique v Peruvian Guano Campany* (1882) 11 QBD 55 at 63:

> It seems to me that every document relates to the matters at question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly", because, as it seems to me, a document can be properly said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry which may have either of these two consequences.

Lord Woolf believed that this test had created "a monumentally inefficient process, especially in larger cases. The more conscientiously it is carried out the more inefficient it is". His Lordship considered the radical solution of abolishing discovery entirely, or limiting disclosure to documents on which a party intended to rely (as in continental systems). However, he concluded that "disclosure contributes to the just resolution of disputes and should therefore be retained, but in a more limited form". (*Interim Report*, ch 21, paras 15-20; *Final Report*, ch 12, paras 37 and 45; For recent Court of Appeal decisions in New Zealand following *Peruvian Guano* on relevance see *M v L* [1999] 1 NZLR 747 at 750, and *NZ Rail v Port of Marlborough* [1993] 2 NZLR 641 at 644.)

At the heart of Part 31 of the CPR relating to disclosure and inspection of documents are the new concepts of "standard disclosure" and "reasonable search". Rule 31.5 makes it clear that an order for disclosure means standard disclosure unless the Court otherwise directs. Pursuant to R 31.6 standard disclosure requires a party to disclose only:

(a) the documents on which he relies; and
(b) the documents which –
  (i) adversely affect his own case;
  (ii) adversely affect another party's case; or
  (iii) support another party's case; and
(c) the documents which he is required to disclose by a relevant practice direction.

Standard disclosure eliminates from the disclosure obligation what Lord Woolf called the "story or background" documents and, with reference to *Peruvian Guano*, the "train of inquiry documents"; that is, documents which might lead a party to a train of inquiry enabling him to advance his own case or damage that of the other party (*Interim Report*, ch 21, paras 22-23; *Final Report*, ch 12, paras 30-40).

The concept of standard disclosure would fail in its purpose if a party still had to trawl through all its documents to identify those within the concept. Therefore R 31.7 provides that a party's obligation is to make a reasonable search, with reasonableness being evaluated in light of:

(a) the number of documents involved;
(b) the nature and complexity of the proceedings;
(c) the case and expense of retrieval of any particular document; and
(d) the significance of any document which is likely to be located during the search.

In the disclosure statement in the list of documents a party must set out the extent of the search made to locate documents, and the Court has the power on an application for specific disclosure to specify the nature of a further search to be carried out by the party. (Rules 31.10 and 31.12.)

Lord Woolf recognised the criticism that his scheme might encourage parties to turn a blind eye to documents which might damage their cases. However, discovery had always depended on the honesty and diligence of the parties and that if "the principle of disclosure is to be retained at all, it is important not to make the non-existent ideal the enemy of the better-than-nothing solution". What he proposed, which has now been promulgated, offered "not a perfect, but a realistic, balance between keeping disclosure in check while enabling it still to contribute to the achievement of justice". (*Final Report*, ch 12, paras 43-46. Another jurisdiction recently to abandon the *Peruvian Guano* test, limiting disclosure to documents directly relevant to an allegation in issue, is Queensland. Justice Davies of the Queensland Court of Appeal has written that the new rules "appear to be having the effect of substantially reducing the costs of discovery ... with no noticeable increase in judgment error": see Hon Justice Davies "Civil Justice Reform in Australia" in *Civil Justice in Crisis* at 191.

The CPR also include other disclosure refinements, most importantly an expanded jurisdiction of disclosure before proceedings start – designed to facilitate early settlement – and specific provisions relating to public interest immunity, inadvertent disclosure and the disclosure of copies (see RR 31.16, 31.19, and 31.20).

EXPERT EVIDENCE

Lord Woolf saw expert evidence as one of the two main generators of unnecessary cost in civil litigation, and as a deteriorating problem. In his *Interim Report* he quoted from an article describing modern expert witnesses as "a new breed of litigation hangers on, whose main expertise is to craft reports which will conceal anything that might be of disadvantage to their clients. The disclosure of expert evidence .... has degenerated into a costly second tier of written advocacy" (*Interim Report*, ch 23, paras 1-2, 10-11). His proposals on experts provoked considerable opposition, particularly his proposals relating to single joint experts.

The main problems with expert evidence were excessive or inappropriate use of experts and the partisanship of experts. This problem was succinctly stated by the Court of Appeal in *Abbey National Mortgages plc v Key Surveyors Nationwide Ltd* [1996] EGCS 23:

> For whatever reason, and whether consciously or unconsciously, the fact is that expert witnesses instructed on behalf of parties to litigation often tend .... to espouse the cause of those instructing them to a greater or lesser extent, on occasion becoming more partisan than the parties.

The solution to the problems of expert evidence was to bring expert evidence firmly under the control of the Court. The CPR use the following means to achieve this objective:

Expert evidence a case management issue

The CPR make expert evidence a case management issue, with the Court at case management conferences deciding what expert evidence is reasonably required, and possessing the power on its own initiative to give directions for the use of a single joint expert. Further, R 35.4 provides that no

party may call an expert witness without the Court's permission, and where permission is granted it will be for a named expert in a specified field.

Overriding duty to the Court

Rule 35.3 provides:

(1) It is the duty of an expert to help the Court on the matters within his expertise.

(2) This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.

The intention to "departisanise" the expert is here made explicit; an expert is further required to certify in his report that this duty to the Court has been understood and complied with (R 35.10, and accompanying Practice Direction). The expert is further isolated from their instructing party by the removal of legal professional privilege from instructions to experts, who are now required to state the substance of all material instructions, whether oral or in writing, on which the report is written. Further, one party is entitled to put questions to an expert instructed by another party regarding the contents of a report by that expert. The expert's answers are then treated as part of their evidence (RR 35.6 and 35.10).

Expert evidence restricted

Rule 35.1 creates a duty on the Court and the parties to restrict expert evidence "to that which is reasonably required to resolve the proceedings". This restriction is bolstered by the prohibition on calling evidence without the Court's permission, and the provision for single joint experts.

Single joint experts

The predecessor of the CPR, the rules of the Supreme Court, provided (like RR 324 to 333 of the High Court Rules) for the appointment of single joint experts, but the provision was hardly ever used. However, single joint experts, well-established in continental practice, were strongly endorsed by Lord Woolf on the grounds of impartiality, cost effectiveness, equality and the facilitation of settlement, although he acknowledged that the "culture" shift to single joint experts might take some time (*Final Report*, ch 13, paras 20 and 21). Accordingly RR 35.7 and 35.8 provide for the power to direct evidence by a single joint expert and for the instructions to a single joint expert, and Practice Directions encourage the use of a single joint expert unless there is good reason not to do so (Practice Direction, Part 28, R 3.9; Part 29, R 4.10. Early indications are that joint experts are being favourably received: see *The Lawyer*, 10 April 2000, p 31; "While conclusive statistics are yet to appear, the signs are that joint experts are being used in about half the multi-track cases ...").

The most severe problems with expert witnesses in England have arisen in personal injury and medical negligence cases, which in New Zealand are placed outside the jurisdiction of the High Court by the Accident Rehabilitation and Compensation Insurance Act 1992. Nevertheless the excessive and inappropriate use of expert witnesses is undoubtedly a feature of some classes of litigation in New Zealand, and Lord Woolf's reconceptualisation of the role of the expert is well worth consideration in New Zealand.

EARLY SETTLEMENT

"It is a curious feature of our present procedure", Lord Woolf wrote in his *Interim Report*, "as reflected in the rules of Court, that, although the majority of disputes end in a settlement, the rules are mainly directed towards preparation for trial. My aim is to increase the emphasis on resolution otherwise than by trial". (*Interim Report*, ch 24, para 1.) Accordingly the first feature of the new landscape to be created by the CPR identified by Lord Woolf in the "Overview" of the *Final Report* was that "litigation is to be avoided wherever possible" (*Final Report*, s I ("Overview"), para 8). The entire CPR are imbued with the philosophy of the early identification of issues and resolution of disputes, and it is instructive to examine their approach to alternative dispute resolution and settlement.

First, active case management includes encouraging alternative dispute resolution and assisting settlement. The Court is granted an almost complete discretion as to how it performs this duty; the only explicit new case management power directed at encouraging alternative dispute resolution and settlement is the power to stay proceedings prior to track allocation, and initially for one month only, while the parties attempt alternative dispute resolution or some other means to settlement (see RR 1.4 and 26.4).

Lord Woolf thought the Courts should encourage but not compel resort to alternative dispute resolution, and so his *Interim Report* rejected both compulsory alternative dispute resolution as a preliminary to litigation, and the introduction of any Court-annexed alternative dispute resolution scheme. (*Interim Report*, ch 18, paras 3-4, 30-32. For a review of the place of ADR in the civil justice system, with reference to Lord Woolf's Interim Report, see A Marriott "Tell it to the Judge – but only if you feel you must" (1996) 12 *Arbitration International* 1-25.) It therefore has a relatively minor place in the CPR; instead Lord Woolf looked to achieve an increased rate of the early settlement of litigation through rearranging and reinforcing the incentives of lawyers and parties to settle. A priori this does not appear easy; negotiation is a skill not sufficiently valued by litigators, and often conducted in a lacklustre, mechanical fashion, subordinated to other priorities or short-term tactical objectives, until an imminent hearing date concentrates the minds of all concerned. The proverbial settlement on the steps of the Court, when all the costs of trial preparation have already been incurred, is often symptomatic of chronic flawed negotiation skills, and the rise of mediation – facilitated negotiation – confirms both the significance of effective negotiation and the modern litigator's inability to perform the negotiator's role adequately. Nevertheless, a year after the introduction of the CPR, there has been almost universal praise for its success in encouraging early settlement.

At the highest level, Lord Woolf's attacks on excessive adversarialism and his calls for a change in the culture of litigation raise the profile of negotiation. Many of his reforms indirectly encourage reasonableness in negotiation: for example, the duty of the parties (and their advisers) to assist the Court to further the overriding objective, the better investigation and evaluation of claims prior to issue encouraged by the statement of truth, and the early exchange of information facilitated by pre-action disclosure. However, the CPR also include direct incentives to settlement in the form of pre-action protocols and new rules relating to offers to settle and costs.

Pre-action protocols

These are designed to ensure constructive dialogue between the parties before proceedings are issued, and so extend the rules of civil procedure backwards from their conventional

starting point of the commencement of proceedings. To date pre-action protocols are in force only in respect of medical negligence and personal injury cases, and for ancillary relief in family law, but some twenty others are in draft or development, including protocols relating to intellectual property, judicial review, wrongful dismissal, solicitors' negligence and debt recovery. The protocols cover matters such as the form and content of the "letter of claim" (as the letter before action is now called), the form and content of the response, the times when such communications should be made, and the information that the parties should exchange prior to commencing proceedings. The Court will take non-compliance with any applicable protocol into account when giving directions for the management of the proceedings, and when making orders as to costs (Pre-action Protocols Practice Direction, RR 1.4 and 2.1; CPR R 44.3(5)(a)).

Formal offers

Part 36 of the CPR establishes a new regime of formal offers (called "Part 36 offers") to complement payments into Court ("Part 36 payments"). Part 36 offers are normally made by the claimant, but in some circumstances, such as in respect of non-money claims, can be made by the defendant. Part 36 offers are made "without prejudice save as to costs", and so represent a statutory recognition and development of the *Calderbank* offer (*Calderbank v Calderbank* [1975] 3 WLR 586). The powerful attraction of a Part 36 offer to the claimant, and the need for them to be evaluated with care by the defendant, is that if the claimant recovers more at the trial than its offer then the Court may award interest on the judgment at up to ten per cent in excess of the base rate, costs on an indemnity basis, and interest on costs at up to ten per cent above the base rate (R 36.21). Further Part 36.10 provides that offers made by either party prior to the commencement of the proceedings, if they comply with this rule, will be taken into account by the Court in making any order as to costs.

Costs

Finally, the CPR contains extensive general provisions dealing with costs. The general rule remains that costs will follow the event (R 44.3(2)), but the Court must now have regard to the conduct of the parties in pursuing or defending the claim, which includes conduct before as well as during proceedings, and any efforts made before or during the proceedings to try and settle the dispute (R 44.5(3); "the conduct of the parties" is defined in R 44.3(5). There is also provision for "wasted costs" orders against legal representatives who have acted improperly, unreasonably or negligently and caused unnecessary costs (R 48.7 and Part 48 Practice Direction).

CONCLUSIONS

The CPR are a bold reform of English civil procedure, and the impressions after a year are that boldness has been rewarded with success. English adversary procedure as it existed in the mid-1990s was measured against the demands of a modern civil justice system and in many respects was found wanting; solutions have been identified strictly on the basis of simplicity and cost and time effectiveness, and these solutions have been rapidly implemented. The implementation of the CPR is itself a matter of admiration; civil procedure reform having traditionally been a graveyard for the best intentions of the most determined reformers. The keys to the success of the reform have been the frank portrayal of deficiencies, clear solutions, the maintenance of the pace of change – always so important to iconoclastic reform – and the promise of a cheaper, simpler, more accessible civil justice system that has silenced opposition and ensured the political will to make it a reality.

In a broader context the CPR have fundamentally changed the balance between legal advisers and the Judge in modern civil procedure. The adversary system has been measured against modern standards of accessibility, cost and efficiency and had its wings severely clipped. Secondly, a new constitutional dimension to civil procedure has been recognised, and it will be interesting to watch its development. The English Courts will now demand higher standards of their own procedures, and perhaps this can be seen as an inevitable consequence of the higher standards the Courts have demanded over the last thirty years from administrative tribunals (now recognised constitutionally in New Zealand in s 27 of the New Zealand Bill of Rights Act). The relationship between civil procedure and fundamental rights is likely to be further developed in England when the Human Rights Act 1998, which gives effect to various rights and freedoms guaranteed under the European Convention on Human Rights, comes into force later this year (An attempt has already been made (and rejected by a Court of Appeal led by Lord Woolf MR) to use art 6 of the European Convention on Human Rights (the right to a fair trial) to challenge a decision that denied a party, that had agreed to the instruction of a single joint expert, leave subsequently to call its own expert: see *Daniels v Walker*, *The Times*, 17 May 2000.) Thirdly, the CPR and Lord Woolf's reports have some distinct civil law leanings, especially in the scepticism towards discovery, the firm endorsement of single joint experts, and the more pronounced role for the Judge. Again, it will be interesting to watch whether this "continental drift" heralds some closer form of procedural accommodation between common and civil law systems within the European Union. Certainly Lord Woolf has diverted English procedure away from the possibility of US style adversarial excesses, particularly in relation to discovery. Finally, it will be interesting to see how profound and permanent a change in litigation culture the CPR achieve. The aspiration is a more resolution-orientated and less tactical litigation culture which, if achieved, is not only likely to benefit the civil justice system, but also to raise the standards of negotiation, case preparation and, conceivably, professional ethics amongst litigators.

Despite the present optimism, however, more time is required before a final judgment can be made of the Woolf reforms. Much faith has been invested in judicial case management, and serious doubts have been expressed as to whether this will prove justified. Further, features of the methodology of Lord Woolf's reports cause some disquiet. The legal profession was an easy scapegoat to bear the blame for the cost, delay and complexity of civil litigation, but there was little acknowledgment of the pressures faced by the legal profession, or any analysis of features of modern professional, commercial or technological life that may have caused a perception of a deterioration in the profession's performance within the civil justice system. Similarly, Lord Woolf failed to adequately address the virtues of the adversary system, particularly its investigative thoroughness. There was insufficient attention to the subtle but real value of the freedom of the parties and their legal advisers to develop and present a claim or defence as they think best from which, proponents of the adversary system claim, common law justice derives its high quality, not in terms of cost, efficiency and simplicity, but in terms of factual com-

pleteness, truthfulness and legal correctness. Lord Woolf was prepared to take the qualitatively high standard of English justice as a given; he never systematically examined the extent to which his reforms might increase the percentage of error (*Interim Report*, ch 4, paras 5 and 6; Lord Woolf quoted with implicit approval a statement of Lord Devlin that: "Every system contains a percentage of error; and if by slightly increasing the percentage of error, we can substantially reduce the percentage of cost, it is only the idealist who will revolt.").

Finally, we return to the implications for New Zealand of the procedural revolution in England. Firstly the CPR should not be ignored; Courts throughout the common law world face similar problems of cost, delay and complexity and the solutions of the CPR, the progress of their implementation, and the analysis of the background reports offer a rich source of ideas and solutions for possible application in New Zealand. It raises the possibility of a thorough review of the High Court Rules, perhaps as part of a general review of the structure of the Courts. The Law Commission would appear to be the proper body to undertake such a review, given that advising on accessibility to justice is one of its principal functions (s 5(d) of the Law Commission Act 1985. The Law Commission is presently considering undertaking a review of the structure of the Courts, provisionally entitled Access to Justice). Secondly, the implications of access to justice as a constitutional value deserve attention in New Zealand. Thirdly, England and New Zealand share similar trends in favour of judicial case management, and the comprehensive and aggressive introduction of case management in England is likely to bring into sharp focus both its virtues and vices. Finally, if a full review of the High Court Rules is not considered necessary or appropriate at this time there are some highly beneficial features of the CPR capable of piecemeal introduction in New Zealand through the Rules Committee; in effect, New Zealand has the opportunity to "cherry pick" the best of the Woolf reforms. The introduction of a certificate of truthfulness in pleadings, consideration of a system of pre-trial offers to supplement payments into Court, the "departisanisation" of the expert, and a formulation of a modern discovery standard all fall within this class. ❑

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obligations under the contract, for instance, the payment of any monetary compensation, replacement, or repair.

The reality is, however, that where those other conditions have already been fulfilled what is the redress? To undo the repair? Reclaim the replacement? Sue and recover the money?

For small amounts, certainly anything less than $20,000, the cost of doing so would be prohibitive but, even more significantly, litigation merely increases the undesirable publicity that the party may have wished to avoid in the first place.

While there may be risks for the mediator where confidentiality is breached by the parties, the greatest damage is to mediation itself – its reputation, its effectiveness and its value. Where confidentiality of either process or outcome is breached we all lose – lawyers, mediators and parties, so we all have an investment in addressing this issue.

We need to ask how can undertakings relating to confidentiality and "without prejudice" be better protected.

It may be that, although litigation following a breach is of limited attraction in many cases, we would benefit from a high profile example of a wronged party who is willing to act in the public good by suing for the breach. That would serve as a warning to others.

The issue might well be addressed by the Employment Relations Authority in the future as breach of a confidentiality clause would clearly be evidence of absence of "good faith". One of the key elements in the Bill is good faith and the explanatory notes describe it at p 2:

> The principle of good faith underpins the Bill, both generally and specifically. The simple requirement of the concept is that the parties to employment relationships (unions, employers and employees) deal with each other in good faith. The intention is that those dealings be based on fair dealing and mutual trust and confidence. This includes, but is not limited to, not directly or indirectly misleading or deceiving each other.

However, reactive measures alone are not enough. We need to raise consciousness in a number of ways. We must educate wherever possible, both the parties and their representatives. Those who pay for the process should understand that they lessen the return on their investment if confidentiality is not respected.

The Law Society also has a role to play here. In particular, the ADR subcommittee should consider the implications as increased mediation under the Employment Relations Act and Court-ordered mediation add to those areas where public and private mediation already occurs.

The media which frequently facilitate breaches of confidentiality need to be subjected to greater censure. Complaints to the Press Council are a case of too little, too late and injunctions require an anticipatory stance which is often impractical and certainly not useful as a standard precaution.

Does legislation have a role here? Perhaps there is a place for a Mediation Act in the way we have an Arbitration Act so that a statutory protection could be provided for mediated outcomes in the way it is provided for awards under the Arbitration Act 1996.

The Mediation Act 1997 which came into force in the Australian Capital Territory in July, 1998 provides an interesting precedent in this regard. In a discussion at [2000] NZLJ 21 the commentator concludes that the Act "ties up in just a few pages a number of loose ends which have plagued the mediation professionals in New Zealand for some time". Of most relevance here are the provisions relating to the admissibility in evidence of communications made in mediation and undertakings given there, and the protection of confidential information unless there is a situation sufficiently grave to warrant disclosure.

While legislation such as this protects the mediator and the mediation process it cannot, without the inclusion of some legal sanction, silence the parties should they choose to go public, nor the news media who disclose confidential information.

In summary, the protection of confidentiality is a concern to all professional mediators. As the situation currently stands, and with particular recognition of the Employment Court's decision in *Crummer*, mediators should avoid making broad assurances regarding confidentiality that they cannot guarantee. On the other hand, in being realistic about the extent of confidentiality and thereby protecting their own reputation, they need to avoid damaging the credibility of the mediation process as a consequence. ❑