



MASTER OF
THE ROLLS

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**THE WOOLF REFORMS:
A SINGULAR EVENT OR AN ONGOING PROCESS?**

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1. It is a great pleasure to be here this afternoon at the culmination of what has undoubtedly been the singularly most prestigious gathering of judicial and practitioner experts in civil procedure, in the last ten years. It is a pleasure to be here even if this is the graveyard slot. I am only sorry that the day job has prevented me from attending throughout. As ever I start with an apology. Contrary to what the programme might suggest, I am not Alison Potter. Worse for you, she has put me in to say a word about costs in the future which she was going to address.
 2. Apart from being the current Master of the Rolls, I am also the Head of Civil Justice, which is a role which arose out of Lord Woolf's the Interim Report.¹ In those capacities I perhaps have an obligation to say at least something about the Woolf reforms. After all, everyone else has done so. One thing is certain. Whatever any of us say will not be the last word on the subject. In many ways, what Chou En-Lai said of the French Revolution is equally applicable to the Woolf Reforms today. As I am sure you all know, Chou En-Lai was reputed to have been asked, nearly two hundred years after it took place, what he thought the significance of the French Revolution was. His famous reply was: "*It's too soon to tell.*" It seems to me that, not yet ten years since 26 April 1999, the same is true of the Woolf Reforms and the CPR.

¹ Woolf MR, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO) (1995) (Woolf (1995)) at chapter 4, paragraph 13.

3. Before I go any further I must acknowledge what must be obvious to everyone. It is that I could not possibly have produced what I have to say on my own. I have had the great advantage of the assistance of John Sorabji, who is both a lawyer and scholar². All the good bits are his. The rest are mine.
4. I return to Woolf. I do not intend to express a view on the reforms generally today, although I do not share the views of those who say that they have not improved the system. In my opinion, with the notable exception of costs (to which I will return), they have been a considerable success. This afternoon, rather than examine their success I intend to focus on a concrete change which Woolf's reforms have made to English civil justice and procedural reform. To my mind they have effected a cultural change in civil justice and procedural reform both now and for the future.

The Crisis in Civil Justice

5. The starting point for an assessment of the change which Woolf effected must be examination of what went before. Reform is, of course, a constant feature of all justice systems throughout the world and not just our own. Justice Coulter Osborne has, for instance, recently completed an examination of Ontario's civil justice system.³ Hong Kong has also recently undergone a similar exercise under the guidance of a working party appointed by Chief Justice Li.⁴ In Australia in early 2008 Peter Cashman completed and published an exhaustive review of Victoria civil justice system.⁵ Closer to home Lord Gill, the Lord Justice Clerk, is currently completing a fundamental review of the Scottish civil justice system.⁶ Modern day examples of reform can be multiplied. So can historical ones, especially in England and Wales, where there is long tradition of civil justice reform some more successful than others.
6. We have this long tradition of reform because we also have a long tradition of our civil justice system falling prey to what (I am reliably informed) Neil Andrews, of Cambridge University, refers to as the unholy trinity of complexity, cost and delay. As Pound put it in

² MA (Oxon), M Phil, LL.M.

³ Civil Justice Reform Project: Summary of Findings & Recommendations (Attorney General's Office) (<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/>); also see Effective and Affordable Justice – Report of the Civil Justice Reform Group Working Party (British Columbia Review Task Force) (2006)

⁴ Civil Justice Reform Final Report (Chief Justice's Working Party on Civil Justice Reform, Hong Kong Special Administrative Region, People's Republic of China) (2004) (<http://www.civiljustice.gov.hk>)

⁵ Civil Justice Review Report (Victorian Law Reform Commission: Report, 14 March 2008)

⁶ Modern Laws for a Modern Scotland: A Report on Civil Justice in Scotland (Scottish Executive) (2007); Scottish Civil Courts Review: A Consultation Paper (Scottish Civil Courts Review) (2007)

1906 ‘(d)issatisfaction with the administration of justice is as old as law.’⁷ History has shown his conclusion to be as accurate an assessment of the past as it was a foretelling of what the remainder of the 20th Century had in store. From a historical perspective, Magna Carta, as in so many things, led the way in seeking to remedy the law’s delays and expense, when in 1215 its article 40 declared: “*To no one will we sell, to no one will we refuse or delay, right or justice.*”⁸

7. Things had not improved much by the 14th century because in 1328 the Statute of Northampton required that the sovereign was not to ‘*disturb or delay common Right, and though such Commandments do come, the Justices shall not therefore leave to do right in any point.*’⁹ Things were little better by 1731, when as Holdsworth notes a book was published called a ‘*Short Apology for the Common Law, with Proposals for Removing the Expence (sic) and Delay of Equity Proceedings.*’¹⁰ As Tolkien might have put it, short apologies stem from long delays, although what he actually said in *Lord of the Rings*, was that ‘*short cuts make long delays*’.¹¹ If history teaches us anything, it is that there are no short cuts to the elimination of long delays or excessive expense in civil litigation.
8. As we all know, things got no better during the 18th Century. In fact the ills affecting the civil justice system, whether in courts of common law or courts of equity, became ever more chronic. In *Bleak House*¹² Dickens gave as accurate a portrayal of the complexity, expense and delay of 19th Century justice as you will find in Bentham, Bowen, Birrell, Sunderland, or more recently Sir Jack Jacob’s accounts of the period.¹³ I need only refer to William Blake Odgers, Lord Lyndhurst LC and Lord Bowen (perhaps better known as Lord Justice Bowen) to give a flavour of the 19th Century crisis in civil justice. Odgers noted that justice in the common law courts was, as he put it,

⁷ Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, (40) *American Law Review* at 729.

⁸ Magna Carta (1215), chapter 40.

⁹ 2. Edw. III, cap. 8.

¹⁰ Holdsworth, *Blackstone’s Treatment of Equity*, (43) *Harvard Law Review* (1929 – 1930) 1 at 2.

¹¹ Tolkien, *The Lord of the Rings*, (1968, one volume edition, 1988 reprint) (Unwin Hyman Ltd) at 101.

¹² (Penguin Classics) (1996).

¹³ Bentham, *The Works of Jeremy Bentham* (ed. Bowring) (1843) (William Tait, Edinburgh), *Principles of Judicial Procedure, with the outlines of a Procedure Code* (Vol. 2), *Letters on Scotch Reform* (Vol. 5), *Rationale of Judicial Evidence* (Vol. 6); Bowen, *Progress in the Administration of Justice during the Victorian Period*, and Birrell, *Changes in Equity, Procedure and Principles*, in *A Century of Law Reform* (MacMillan & Co) (1901); Sunderland, *The English Struggle for Procedural Reform*, (29) *Harvard Law Review*, (1925 – 1926) 725; Jacob, *The Reform of Civil Procedural Law and Other Essays in Civil Procedure* (Sweet & Maxwell) (1982).

*“ . . . sadly hampered in the year 1800 by cumbrous procedure and pedantic technicalities which caused the suitors expense, delay, vexation and disgust. It took years for a merchant to recover a debt due to him. . . .[and even then] . . . half the actions were decided not on their real merits, but on questions of form and pleadings.”*¹⁴

Things were just as bad in the Courts of Chancery, where Lyndhurst LC noted parties only came to *‘when dire necessity [compelled] them to do so.’*¹⁵ The reason for this was, as Bowen put it, because

*“ . . . [for] all its distinction and excellence, the Court of Equity was practically closed to the poor. The middle classes were alarmed at its very name, for it swallowed up smaller fortunes with its delays, its fees, its interminable paper process.”*¹⁶

Justice was something then, as Bentham put it in 1808, that was only open to *‘but a favoured few, to whom a golden ticket open[ed] the way.’*¹⁷ There is, of course, little justice in that.

9. What of the 20th century? Things were little better, notwithstanding the fundamental reforms brought about by the 1873 – 1875 Judicature Acts, which swept away the old common law and chancery courts and replaced them with a shiny new Supreme Court and, from 01 November 1875, the new Rules of the Supreme Court, the RSC.¹⁸ Indeed, things were in some ways worse. Holdsworth noted how the RSC increased procedural complexity contrary to its avowed intent.¹⁹ Snow, the creator of the White Book, and Bowen both noted that the introduction of the RSC witnessed a 20% increase in litigation

¹⁴ Odgers, *Changes in Procedure and in the Law of Evidence*, in *A Century of Law Reform* (MacMillan & Co) (1901) at 212.

¹⁵ Lyndhurst LC, cited in Birrell, *ibid*, at 389.

¹⁶ Bowen, *ibid*, at 527ff.

¹⁷ Bentham, *The Works of Jeremy Bentham* (ed. Bowring) (1843) (William Tait, Edinburgh), *Letters on Scotch Reform* Vol. 5 at 47

¹⁸ The RSC were originally a Schedule to the 1873 Supreme Court of Judicature Act. They did not however come into force until they were replaced by those rules annexed as a Schedule to the Supreme Court of Judicature Act 1875. The RSC came into force on the day the 1875 Act came into force: see section 16 of the 1875 Act. The 1875 Act commenced on 01 November 1875. The 1875 Rules were subsequently replaced by the RSC 1883 (SI unnumbered of 1883), see Statute Law Revision Act 1883 and *In re Mills' Estate* [1887] LR 34 ChD 24 at 41 – 42.

¹⁹ Holdsworth, *The New Rules of Pleading of the Hilary Term, 1834*, (1) Cambridge Law Journal (1921 – 1923) 261.

in a matter of years.²⁰ The same complaints would echo down through the 20th Century: Newbolt made the same complaints in the 1920s, Hamson commented to similar effect in the 1940s and Gower joined the club in the 1950s.²¹ And so it went until, in Cyril Glasser's telling phrase from 1994, the conclusion was drawn that English civil justice was '*in a state of crisis*'.²² Cynicism, which, as the American playwright Lillian Hellman put it, is '*an unpleasant way of saying the truth*', might lead us to conclude that it had always been in a state of crisis.²³ But there are crises and then there are crises.

10. Two questions arise. First, how did they deal with these crises in the 19th and 20th Century? Secondly, how did Woolf's treatment of the crisis Glasser referred to differ from that approach? It is to those questions that I now turn.

19th and 20th Century Reform

11. In the 19th and 20th centuries, civil justice reform treated the reform process as a singular event. The logical starting point for such an assessment is the First Common Law Commission. I gloss over the earlier Chancery Reform Commission, which reported in 1826,²⁴ on the grounds that it came to the patently absurd conclusion that there was little wrong with justice in the Chancery Court and what there was that was wrong with it was either an inevitable consequence of the nature of its proceedings or a consequence of misbehaviour or idleness on the part of the legal profession.²⁵ As the Chancery Commissioners put it, one of the sources, and perhaps the real source, of the problems afflicting the Chancery Court was '*the carelessness of some parties, the obstinacy or knavery of others, or the inattention or ignorance of agents*.'²⁶ As white washes go, the 1826 Report could have taught Ariel and Persil a lot.

²⁰ Snow, *The Reform of Legal Administration: An Unauthorised Programme*, (1892) 8 Law Quarterly Review 129; Bowen, *The Law Courts under the Judicature Acts*, (2) Law Quarterly Review (1886) 1 at 8; Humphrey, *The Judges' Report on Practice from a Chancery Point of View*, (1892) 8 LQR 289.

²¹ Newbolt, *Expedition and Economy in Litigation*, (39) Law Quarterly Review (1923) 427; Hamson, *Civil Procedure in France and England*, (10) Cambridge Law Journal (1948 – 1950) 411; Gower, *The Cost of Litigation: Reflections on the Evershed Report*, (19) Modern Law Review (1954).

²² Glasser, *Solving the Litigation Crisis*, *The Litigator* (1994) 1 at 1.

²³ Hellman, *The Little Foxes*, (1939).

²⁴ Report by the Commissioners required to Inquire into the Practice of Chancery (02 March 1826) (1826/143) (1826 Chancery Commission Report)

²⁵ Lobban, *Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery*, Part I, 22 Law & History Review (2004) 389 & 586.

²⁶ 1826 Chancery Commission Report at 8 – 9.

12. The First Common Law Commission was appointed in 1828. Its remit was to examine justice in the common law courts and propose reforms that would render procedure simpler and justice more efficient and cost-effective. Its aim was, in the words of its 1st Report from 1829, to “*render proceedings shorter, cheaper and more certain.*” It was to “*endeavour in each part of the subject under examination, to point out the shortest and least expensive course, consistent with the safe administration of justice to both the litigant parties.*”²⁷ By the safe administration of justice the Commissioners adverted to arriving at justice on the merits of the case. Their recommendations, spread over five reports, and those of their successors appointed in 1850 as the second Common Law Commission, did just what they set out to do. As did the successors to the unlamented First Chancery Commission, who were also appointed in 1850 and whose explicit aim was also to make recommendations to improve the administration of justice.²⁸ It did so through looking at ways to reduce litigation delay and expense.²⁹ What did they set out to do? First, of all they all aimed at ensuring that the courts’ ability, as Best CJ put it, to secure that decisions on their substantive merits were enhanced.³⁰ Secondly, they all aimed at ensuring that this aim was achieved at greater expedition and less cost than was the case. So all attempts at reform address the same underlying problems. How did they seek to do so?

13. First, they all recommended discrete structural and procedural reforms intended to render the justice system simpler. Procedure was to be simplified, through for instance the reduction in ways to commence litigation, the reduction of procedural legal fictions and the effective abolition of the forms of action at common law.³¹ The Chancery Court also underwent a process of procedural simplification: it too saw the simplification of the means by which litigation was commenced and conducted; it saw the abolition of the complete joinder rule; and it gained more judges, although not many more, in an effort to ensure that it could operate more effectively and efficiently.³² Secondly, a less exacting approach was to be taken at common law to formal compliance with technical procedural

²⁷ First Report of the Common Law Commissioners into the Practice and Proceedings of the Superior Courts of Common Law (House of Commons) (1829) (the 1829 Report) at 7; First Report of Her Majesty’s Commissioners into the Process, Practice and System of Pleading in the Superior Courts of Common Law (HMSO) (1851) (the 1851 Report) at 2ff.

²⁸ First Report of Her Majesty’s Commissioners into the Process, Practice and System of Pleading in the Court of Chancery (HMSO) (1852) (The 1852 Report) at 1.

²⁹ *Ibid* at 1 – 5.

³⁰ Second Report of the Common Law Commissioners into the Practice and Proceedings of the Superior Courts of Common Law (House of Commons) (1830) (the 1830 Report), Appendix B at 46 & 56 – 57.

³¹ The 1829 Report *passim*; The 1830 Report *passim*; Third Report of the Common Law Commissioners into the Practice and Proceedings of the Superior Courts of Common Law (House of Commons) (1831) at 6ff; The 1851 Report at 1 – 4 & 21ff.

³² The 1852 Report *passim*; 53 George III, c. 24; the Court of Chancery Act 1851.

rules; a point emphasised by section 222 of the Common Law Procedure Act 1852, which implemented reforms proposed by the Common Law Commissioners in 1851.³³

14. Thirdly, various Commissions recommended that the common law and equity systems should no longer exist in splendid isolation from each other. The common law was to be given certain powers previously reserved to the Chancery Court, such as the power to order discovery, to award specific performance or injunctive relief. Equally, the Chancery Court was given the power to award damages.³⁴

15. These are but some examples of the structural and procedural simplifications that were proposed and implemented during the 19th Century. This approach to reform reached its zenith in the 1870s, when not long before the final set of reforms that looked at improving the two aspects of our civil justice system, the Judicature Commission was appointed in 1867.³⁵ It proposed, famously, the replacement of the binary justice system and the replacement of the various common law courts, the chancery court and various others, such as the Admiralty Court and the ecclesiastical courts with a single omnicompetent Supreme Court that would administer both law and equity. As I have already noted, it brought about the introduction of what was by a long way the simplest civil procedure code that England and Wales had as yet seen: the RSC.

16. The Judicature Act reforms, the creation of the Supreme Court and the RSC's introduction marked the high point of 19th Century reform. They were in many ways the apotheosis of the approach that it was the streamlining of the court structure and procedure that would eliminate complexity, cost and delay in litigation. Hence the introduction of a single High Court and the final abolition of the forms of action and the elimination of the need for practitioners and judges to refer to a wide variety of extremely weighty guides to civil procedure, such as Daniell's Chancery Practice; Stephen's Pleading in Civil Actions; Tidd's Practice, a guide to common law process; or Chitty's Precedents in Pleading. The new simpler world meant that only one practice book was

³³ The 1851 Report at 11 – 21.

³⁴ For instance, The 1830 Report at 21 – 31; 1852 Report at 23; Second Report of Her Majesty's Commissioners into the Process, Practice and System of Pleading in the Superior Courts of Common Law (HMSO) (1853) at 34ff; The Third Report of the Chancery Commission on the Process, Practice, and System of Pleading in the Court of Chancery and the Law and Jurisdiction of the Ecclesiastical and Other Courts in Relation to Matters Testamentary (HMSO) (1856) at 3 – 4.

³⁵ The First Report of the Royal Commission to inquire into the Operation and Constitution of the High Court of Chancery, Courts of Common Law, Central Criminal Court, High Court of Admiralty, and other Courts in England, and into the Operation and Effect of the Present Separation and Division of Jurisdiction between the Courts (No 4130; 1868 – 1869)

now needed, viz the Annual practice, soon to be known as the White Book (then under the editorship of Thomas Snow).

17. This approach to reform continued during the 20th Century. Every ten years or so a new procedural reform committee or commission was appointed. 1908 saw the Gorell Committee's appointment. 1913 saw the St Aldwyn Committee's appointment. In 1922 it was the Swift Committee's turn, before 1932 saw the appointment of not one but two reform bodies: the Hanworth Committee and the Peel Commission. 1947 then saw the appointment of the Evershed Committee, which took until 1953 before it finally reported. It was followed by the Winn Committee in 1968 and the next year Beeching had something to say about civil justice, although the main focus of his report were the Assizes and Quarter Sessions. Cantley issued a report in 1979, while Oliver's report into the Chancery Division was published in 1981 before the pace of reform picked up towards the end of the 1980s. The Civil Justice Review reported in 1988. Heilbron/Hodge aired their views in 1994 and Middleton gave his views in 1997. Finally Lord Woolf joined the fray. He published the two reports that form the focus of today's debate in 1995 and 1996.
18. Apart from Woolf, all the reports to which I have referred adopted the same basic approach as had been adopted in the 19th Century. They each had the same aim: to reduce litigation complexity, cost and delay, although I should perhaps except the Peel Committee, as they explicitly stated that they were not looking to reduce litigation cost through their report.³⁶ They each adopted the traditional approach to achieving that aim: namely structural and procedural reform. In the confines of today's lecture I can only advert to one report as an example. I take the Evershed Report, although I would commend each of the reports to you if you have a quiet week or two.
19. Evershed's report explicitly called for '*some kind of 'new approach.'*' That was an approach that, as the report put it,

"All concerned should be more sharply aware of the burden of costs on the ordinary litigant and the general duty to reduce it. A litigant's legal advisers owe him a special obligation which, at all stages, should be active in their minds, and an educative effort is required to which we earnestly hope that the Bar Council and the Law Society will give their full support. We hope also that the Judges will provide sanctions against

³⁶ Report of the Royal Commission on the Despatch of Business at Common Law (1936) (Comm. 5065) at 11 – 12.

*disregard of the means available of avoiding costs by close scrutiny of the costs incurred at all stages of the action.”*³⁷

How was this new approach to be implemented? The answer was simple: an array of discrete recommendations as to how elements of civil procedure could be simplified. A simpler form of commencing proceedings was recommended as was greater use of an improved summons for directions as a means to control the litigation process so as to ensure claims progressed economically and efficiently. Parties were to ensure that only documents necessary to the real issues in the dispute were disclosed. Documentary evidence was to be used more readily in order to reduce the need to call oral evidence.³⁸ These are only examples, but they are familiar to us because they resonate with recommendations that Woolf would make over 40 years later. The key point is that they were discrete procedural reforms that, when implemented, were expected, without more, to bring about the anticipated improvement in procedural efficiency and economy. This can be seen from the report itself, which (for example) rejected any suggestion that the indemnity rule might need to be modified in order to bring down the ‘*tendency to incur costs on an extravagant scale*’ to which the indemnity rule was believed to give rise.³⁹ It rejected reform of the costs rule because, as it put it:

*“It is hoped that the procedural reforms recommended . . . will have the desired effect of eliminating extravagances and securing economy in the conduct of litigation . . .”*⁴⁰

It is no understatement to say that there really was something of the expression hope springs eternal about this. It is perhaps fair to add that, immediately after the passage just quoted, the report noted that, if the hoped for improvement in litigation economy did not materialise, further consideration would have to be given to limiting cost recovery and perhaps restricting cost recovery by reference to pre-established cost scales.

20. The Evershed reforms failed to give rise to any marked or sustained improvement. Its centrepiece, the supposedly more robust summons for directions, failed to give rise to effective court control of the litigation process and did not, as was intended, effect greater

³⁷ Committee on Supreme Court Practice and Procedure, Final Report (Comm. 8878 of 1953) (Evershed 1953) at 9

³⁸ Evershed (1953) at 319ff.

³⁹ Evershed (1953) at 337.

⁴⁰ Evershed (1953) at 337.

economy and efficiency in litigation.⁴¹ The issue of costs and the indemnity rule was not revisited.

21. I have only been able to provide a brief *tour d'horizon* of the 19th and 20th Century reform process. It was a process that had a singular aim: eliminating unnecessary complexity, cost and delay. It was a process that sought to achieve that aim in one way: through the introduction of discrete structural and procedural reform. Once enacted these reforms were, as the Evershed report exemplified, expected, or at least hoped, to be the vehicle for achieving the reform's aim. Nothing more was thought to be needed. Reform was to be a one-off. Once implemented no more was needed or expected. Unfortunately similar one-off reforms recurred at frequent intervals, always to combat the same problems of complexity, cost and delay. In each case what was attempted was limited to discrete and concrete structural and procedural reform.

The Woolf Reforms

22. That was the past, so how did the Woolf Reforms change things? I must stress that I am not suggesting that the Woolf reforms did not include discrete and concrete structural and procedural reform. They did. The two Woolf Reports and, by extension the CPR, contain example after example of discrete structural and procedural reforms. For example they include the introduction of procedural case tracks⁴² and of pre-action protocols,⁴³ the elimination of the *Peruvian Guano* test for discovery and its replacement with standard and specific disclosure.⁴⁴ Examples could be multiplied. The most significant procedural change was firmly in keeping with the tradition of ensuring that reform simplified the procedural system. It was the replacement of the RSC (which were 124 years of age in 1999) and their counterpart the County Court Rules; with the CPR as a new code of civil procedure.⁴⁵ The CPR were both similar to and different from the RSC and the CCR.

23. For example the drafting was simplified and the long accretion of case law was no longer to bind the court's in their interpretation of the rules (although, in certain circumstances, as the Court of Appeal has made clear in, for instance, *Godwin v Swindon*⁴⁶ and *Garret v*

⁴¹ Diamond, *The Summons for Directions*, (1959) 75 Law Quarterly Review 43; Zander, *What can be done about cost and delay in civil litigation*, 31 (1997) Israel Law Review 703

⁴² CPR 27 – 29; Woolf (1995) at chapter 6ff.

⁴³ CPR PD – Pre-action Protocols; Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, London) (1996) at chapter 10.

⁴⁴ CPR 31, Woolf (1995) at chapter 21.

⁴⁵ SI 1998/3132.

⁴⁶ [2001] EWCA Civ 1478; [2002] 1 WLR 997.

*Saxby*⁴⁷, pre-CPR decisions would still have persuasive effect). This was as Woolf explicitly intended it to be⁴⁸.

24. Rule simplification did not simply stem from drafting in plain English.⁴⁹ It also stemmed from abolishing the twin set of procedural rules, one for the High Court and the other for the County Courts and from the introduction of such features, such as a single common Part 7 claim form to begin actions (except those of course, that have a different non-contentious purpose and begin under Part 8). Finally then, Woolf completed the work started by the Uniformity of Process Act 1832 as he brought us to the position that for contentious claims there is one uniform means to begin them. As I said earlier, there are no short cuts where procedural reform is concerned; there is no doing in haste and repenting at leisure.
25. Much was indeed new in Woolf's brave new world, not least the procedural rules. Such novelty was however firmly in the tradition of 19th and 20th Century reform. It intended to bring about a reduction in complexity, cost and delay through improving the structure of the civil justice system and its procedural rules. In this it did not differ in kind from the reforms proposed by the First Common Law Commissioners in the 1830s, the Judicature Commissioners in the 1870s, Evershed MR in the 1950s or the ill-fated Civil Justice Review of 1988. If the Woolf reforms had stopped there they would have been no different from those that came before. They would simply have trusted to the fact that, once enacted, the reforms would render civil justice simpler, more efficient and economical.
26. However, Woolf did not trust to fate and the innate superiority of the discrete reforms he proposed to achieve those ends. It is, I think, here that the profound change that Woolf introduced and which differentiates his reform from his many predecessors enters the picture and transforms the Woolf reforms into a continuing event and one which guides us today. I refer to the proposals Woolf made for reforming the litigation culture, both among legal practitioners and those they represent and among the judiciary.
27. Woolf called for a new approach to civil justice. He did so in the Interim Report by reference to the 1995 Case Management Practice Direction. He put it this way:

⁴⁷ [2004] EWCA Civ 341; [2004] 1 WLR 2152.

⁴⁸ Woolf (1995) at Chapter 26, paragraph 31.

⁴⁹ Woolf (1995) at Chapter 26, paragraph 32ff.

“On 24 January 1995, the Lord Chief Justice and the Vice-Chancellor issued a Practice Direction ((1995) 1 WLR 262) setting out new requirements in the preparation and control of cases. In announcing it the Lord Chief Justice said:

“The aim is to try and change the whole culture, the ethos, applying in the field of civil litigation. We have over the years been too ready to allow those who are litigating to dictate the pace at which cases proceed.”

In summary, there is now widespread support from judges, lawyers and academics, as well as from those who use the courts, for a new approach to civil litigation.”

Woolf endorsed that need for a new approach to civil litigation. He was, as I noted earlier, not the first to do so. Evershed MR had in identical terms called for a new approach to litigation in his Final Report of 1953.⁵⁰ That new approach failed to materialise. Notwithstanding six years work from its appointment in 1947, three interim reports and the final report and 229 paragraphs of reform recommendation, each intended to effect that new approach, it failed. Two questions arise here. First, why did Evershed’s and the other 19th and 20th Century reports fail? Secondly, why has Woolf succeeded?

28. The answer to the first question is to my mind clear. For example in 1834 new rules of court were introduced in order to render common law process less technical. Within a short time rather than becoming less technical it had become more technical. More claims failed as a consequence of procedural errors post-1834 than had failed for such reasons before the new rules were introduced. This subversion of the new rules and their intended liberalisation of the common law’s approach to technicality arose for an obvious reason: the existing culture of lawyers and judges.

29. Changing the rules is one thing; changing how the rules are interpreted and applied is another thing entirely. The most perfect system implemented imperfectly is an imperfect system. The 1834 rules failed because they were interpreted consistently with the prevailing litigation culture that was profoundly technicalist. That prevailing culture in order to counterbalance the new rules attempt at liberalisation ensured the pendulum swung in the opposite direction from that in which it was intended to go. The same is

⁵⁰ Evershed (1953) at 9 & 28ff.

more or less true of all our 19th and 20th Century procedural reforms, including those in the 1870s. Time does not permit further consideration of the details today.

30. In my opinion, Woolf's greatest insight was the realisation that discrete structural and procedural reforms were not both necessary and sufficient conditions for successful reform. Woolf proposed explicitly that not only should there be structural and procedural reform but that our litigation culture had to change as well. If the discrete structural and procedural reforms were to achieve the end of enabling litigation to be conducted expeditiously and economically, litigation had to be carried out in a radically different way. Implementation, and the manner in which it was carried out, was as important as what was to be implemented. Evershed's wait and hope approach was no longer viable. For Woolf, discrete reform was necessary but it was not sufficient. It is this fact that not only differentiates the Woolf reforms from their predecessors but ensures that those reforms are more than a traditional singular event but, instead an ongoing process, which to my mind promises well for the future. This is the reason why Woolf's reforms have succeeded to a much greater degree than earlier reforms and why, his new approach to civil justice will continue to guide future reform.
31. How then did Woolf set about changing our litigation culture? How did he change the way the discrete reforms were implemented? As I see it, he did so in three ways: first, through the introduction of active case management; secondly, through the introduction of the overriding objective; and thirdly, through the imposition of a duty on litigants and their representatives to assist the court in furthering the overriding objective.
32. The first aspect of how Woolf changed our litigation culture was the introduction of active case management, a reform first proposed in 1826 by the First Chancery Reform Commission. That commission had at least one good idea, even if it took over 180 years to be enacted here. Other jurisdictions, most notably the US, had followed the path it proposed much earlier. But perhaps this is a case of England doing what Churchill attributed to the US: viz trying all other options before alighting on the right one.⁵¹ Active case management reversed the traditional picture of civil justice that saw the parties in total control of the progress of claims. It did so by placing the control of the litigation process in the hands of the court. No longer would the court be passive, as Jack Jacob put it.⁵²

⁵¹ Churchill, *attrib*, "You can always count on Americans to do the right thing - after they've tried everything else."

⁵² Jacob, *The Fabric of English Civil Justice*, (Stevens & Co) (1987) at 7.

33. Active case management needs a purpose. To what end was the court to manage litigation? The answer to this might appear to be obvious: viz to ensure that claims are determined on the substantive merits. For Woolf, that was not an entirely accurate answer. It was only half the answer. The other half was that the court was to ensure that litigants were afforded a fair process, or as Woolf put it, procedural justice was to be as important as substantive justice once his reforms were implemented. How was this to be achieved?
34. The answer to that is provided by the second aspect to which I referred a moment ago. It is the overriding objective or, as he first described it in the Interim Report, the general objective.⁵³ While other jurisdictions, such as the US Federal Rules of Civil Procedure in its Rule 1, have overriding objectives, so far as I am aware, none had one in the form that Woolf proposed. No other jurisdiction at the time adopted an overriding objective in the terms Woolf suggested and subsequently adopted in CPR Part 1. It is only since Woolf that some other jurisdictions have now adopted or recommended the adoption of Woolf overriding objectives. Queensland in Australia and Ontario in Canada are examples.
35. The overriding objective crystallises Woolf's commitment to procedural justice now being as important as substantive justice. This is elaborated in CPR 1.1(2) by providing that dealing with a case justly includes ensuring that parties are on an equal footing, saving expense, dealing with a case in ways that are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party, ensuring that the case is dealt with expeditiously and fairly and allotting an appropriate share of the court's resources to it. It follows that justice is now more than justice in the individual case it is justice in all cases.
36. The third aspect of the means by which Woolf went beyond the traditional approach to reform is the requirement in CPR 1.3, which imposes a duty on litigants and their representatives to assist the court in furthering the overriding objective. The hope from the Evershed report I noted earlier, that parties would assist the court in furthering the aim of keeping down costs, was translated by Woolf into an obligation set out in the CPR itself.
37. Taken together, these three aspects of Woolf's reforms provide the basis on which our litigation culture could and (I think) has been changed since 26 April 1999. Of the three

⁵³ Woolf (1995) at chapter 26, paragraph 30.

the most significant is the overriding objective as it sets out for the first time in the history of English civil justice an explicit guiding principle for the conduct of litigation; a point I know Adrian Zuckerman has made in the past.⁵⁴ That principle which guides the court in the exercise of its discretion and its management of cases every day and in every case, as well as the conduct of litigants, ensures that our litigation culture and civil justice system are constantly influenced and shaped by Woolf's vision. It ensures that Woolf's reforms are a ever ongoing process.

Now and the Future – Costs

38. How then has Woolf's vision changed our culture? What shape have the reforms taken as an ongoing process? In answering these questions I will focus on what seem to me to be a number of fundamental changes which active case management, the overriding objective and the parties' duty to the court have affected.

39. The first change which has come about is what seems to me to a marked reduction in satellite litigation; that is litigation which does not further the efficient and economical progress of claims to their final determination on the merits. There are depressing exceptions to this which include disputes about CFA and about service, but in in general the combination the three aspects of Woolf's continuing influence have ensured that this type of litigation has been significantly reduced. [I would note in this context what Dyson LJ himself noted giving the judgment of the court (of which I was also a member) in one of the last cases on the, since 01 October 2008 former service rules. Dyson LJ noted in *Hoddinott & Others v Persimmon Homes (Wessex) Ltd*⁵⁵, as reported by the District Judge whose original decision had given rise to the appeal before the Court of Appeal, that few applications for extensions of time to serve were now being made.⁵⁶] Litigant conduct has I think changed, at least to some degree. This is not to say that we can be complacent. The need to ensure that satellite litigation is avoided is something over which the court must be ever vigilant if it, and litigants, are to act consistently with the overriding objective. It was to that end that the Court of Appeal in *R (Buglife – The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corporation* had this to say (through me) in the developing area of protective costs orders:

⁵⁴ Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice*, (2006) (Thomson) (2nd edition) at 3.

⁵⁵ [2007] EWCA Civ 1203; [2008] 1 WLR 806.

⁵⁶ [2007] EWCA Civ 1203; [2008] 1 WLR 806 at [59].

*“In our opinion the courts should do their utmost to dissuade parties from engaging in expensive satellite litigation on the question whether PCOs and thus cost capping orders should be made.”*⁵⁷

The courts should adopt this approach because satellite litigation fails to ensure that litigation is economically and efficiently progressed to a merits based determination. Equally, they should do so because such litigation requires the use of a disproportionate amount of the court’s resources on any one case to the detriment of its ability to ensure, consistently with CPR 1.1(2)(e), that fair and proportionate judicial resources are available for all other litigants.

40. Secondly, Woolf’s cultural shift required the court and litigants to place greater emphasis on resolving disputes consensually. This is an aspect of active case management that Woolf understood as being central to the new litigation culture.⁵⁸ It is an aspect of the post-Woolf landscape that the court has taken great pains to support with both the carrot and the stick. The active pursuit of settlement stems from CPR 1.4(1)(e) and (f) and 3.1 and CPR 26.4 (1) which enables parties to make a written request with their allocation questionnaire for, or the court of its own initiative to order, a stay of proceedings while settlement via ADR is attempted. It is equally encouraged by CPR 44.5(3 (a)(ii) and the guidance given by the Court of Appeal in *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002, which (despite the controversy over its comments on the ability to require parties to engage in a mediation process) shows that the courts approach cases in a Woolf consistent way. Equally, the courts have given further encouragement to consensual settlement recently in the context of the reformed Part 36 offer. In both *Carver v BAA Plc*⁵⁹ and *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd*⁶⁰ the court has encouraged settlement through clarifying that the test for bettering a Part 36 offer is now one that looks to whether acceptance of the offer was more advantageous than going to trial, with all the costs attendant on going to trial. Encouragement comes in many ways, but each of those ways furthers the change in culture introduced by Woolf and given expression in the overriding objective.

41. Those are but two examples of how the Woolf reforms have succeeded to shape, or rather reshape, our litigation culture on an ongoing basis. This brings me however to the central failing of the Woolf reforms: namely costs. In 1953 Evershed stated that the aim of his

⁵⁷ [2008] EWCA Civ 1209 at [31].

⁵⁸ Woolf (1995) at Chapter 4.7.

⁵⁹ [2008] EWCA Civ 412; [2008] 3 All ER 911.

⁶⁰ [2008] EWHC 2280 (TCC).

report was to “*encourage a ‘new approach’ towards less costly litigation . . .*”⁶¹ If it failed, he stated that the question would have to be addressed as to whether the indemnity rule would need to be modified in some way. His new approach failed. No one took up his suggestion as to examining the role that the indemnity principle plays in our justice system.

42. Cost is without doubt the Woolf reform’s central failing. Litigation costs are still disproportionate. They are still excessive in a significant number of cases. While the Woolf reforms (at any rate in my opinion) have succeeded in other areas, they have not grappled effectively with the problems of litigation costs. To that end it seemed to me earlier this year that the time was ripe to grasp the nettle. To that end on 03 November this year I announced a fundamental and independent review of the costs of civil litigation. That fundamental review will commence in January 2009 and will be undertaken by Lord Justice Jackson. He will, I have absolutely no doubt, be indefatigable in his pursuit of the solution to the many problems associated with costs. Costs may give rise to perennial problems, but Sir Rupert Jackson and I do not accept that those problems are insoluble.

43. In conducting the review Sir Rupert will be, as Woolf was, assisted by a number of expert assessors drawn from the judiciary and the legal profession. He will also be assisted by an expert assessor who is an economist. In conducting the review, Sir Rupert will:

“Establish how present costs rules operate and how they impact on the behaviour of both parties and lawyers.

Establish the effect case management procedures have on costs and consider whether changes in process and/or procedure could bring about more proportionate costs.

Have regard to previous and current research into costs and funding issues; for example any further Government research into Conditional Fee Agreements - ‘No win, No fee’, following the scoping study.

Seek the views of judges, practitioners, Government, court users and other interested parties through both informal consultation and a series of public seminars.

⁶¹ Evershed (1953) at 319.

Compare the costs regime for England and Wales with those operating in other jurisdictions.

Prepare a report setting out recommendations with supporting evidence by 31 December 2009.”⁶²

44. The review will take place in three phases. First, between January and April next year a working paper will be prepared. It will be prepared based on evidence obtained from meetings of court users and professionals, the consideration of any written submissions received and the study of overseas costs rules. The second phase will encompass a series of public seminars and a three month consultation period and last from May to July next year. The final report will be prepared from September until its publication in December 2009.
45. This review will leave no stone unturned. It will, for instance, address the issue Evershed raised and left unanswered when its reforms failed. It will address the indemnity rule. It will do so with an open mind, just as it will address all issues surrounding costs. As reviews go it will be the most far reaching review of litigation costs we have seen. It will be a review that is entirely consistent with the approach Woolf advocated in his two reports. It will be so because it will look for answers to the problems of cost that are consistent with the new approach to litigation Woolf’s reforms introduced. That is to say, whatever conclusions it reaches will be ones that are consistent with the overriding objective and the commitment to proportionality to which it gives expression. Nothing is rules in or out. See the terms of reference and Rupert Jackson’s paper of 27 November 2008. He will need your assistance. Please provide it if you possibly can.
46. In conclusion, it seems to me that it is in the underlying objective with its critical principle of proportionality that, despite the failure of the Woolf reforms to cure the problems of costs, lies the answer to the question as to the continuing value of those reforms. That value lies in the fact that the principle they gave expression to not only guides the courts and litigants today in the manner in which they conduct litigation, something which no previous reform has done, but equally and as importantly, guides the nature of ongoing reform. The Woolf reforms not only set their own agenda but they set our agenda both for today and for the future. Their lasting legacy is that they have engendered a revolution in civil justice: a Woolfian revolution that, as Chou En-Lai may well have said, is still on-going.

⁶² http://www.judiciary.gov.uk/publications_media/media_releases/2008/2108.htm

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