

FINAL REPORT OF THE CIVIL JUSTICE REFORM GROUP – STILL KEEPING WOOLF FROM THE DOOR

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The *Interim Report of the Civil Justice Reform Group* (hereafter the *Interim Report*) was the subject of detailed comment in this journal in 1999.¹ The consultation period for the proposals in that report has now passed and the *Final Report* was issued in June 2000. The purpose of this article is to comment on the proposals in the *Final Report* in the light of the comments previously expressed about the *Interim Report*.

The *Final Report* retains the general ethos of the *Interim Report*. Instead of three tracks for disposing of civil cases (small claims, fast track and multi-track) it is proposed that there be three tiers, to correspond to three different courts (Small Claims Court, County Court, and High Court). The proposals to preserve self allocation of cases to these courts and not to have a central allocation system similar to that operating under the Civil Procedure Rules 1998,² and to avoid the more heavy handed style of case management operating under those Rules, have also been retained. Since the *Final Report* adopts a similar format to the *Interim Report* and the 1999 article provided comment in similar fashion, the discussion which follows will proceed on that basis too. Thus the proposals in relation to the three tiers will be examined in turn, followed by proposals for the civil justice system in general. There will also be some comment upon additional matters on which the *Final Report* alone picks up. The observation should also be made that in neither report has any attempt been made to assess the human rights implications of the proposals.

THE SMALL CLAIMS COURT

The first set of recommendations in both reports are concerned with jurisdictional questions such as monetary limit and the types of claim which can be litigated in the Small Claims Court. The *Final Report* reiterates the *Interim Report* in recommending an increase in the monetary limit to £2,000 and graciously accepts the opinion of several respondents that further increases be based on thorough research into the business of the Small Claims Court and the needs of its users. Personal injury cases should be kept out of the Small Claims Court, to protect unrepresented claimants in particular. This is a wise recommendation on the whole although it might have been helpful if the Group had considered whether claimants should be allowed to opt for Small Claims Court adjudication if they wished. In relation to road traffic accidents the Group recognised the access to justice problems which might arise if claims for property damage, especially

¹ See Capper, “Keeping Woolf from the Door – the Reform of Civil Procedure in Northern Ireland” (1999) 50 *NILQ* 434.

² The *Final Report* notes the 1999 Annual Report of the Civil Justice Council and its “recent and persuasive criticism” of the £80 case allocation fee levied in England and Wales. At para 107 the *Final Report* describes central allocation as “a costly administrative albatross.”

insurance excess cases, had to be taken to this forum. Nothing further was said about the current list of “excepted” proceedings.

With regard to pre-hearing procedure the *Interim Report’s* recommendations remain completely unaltered. This is good with respect to service of proceedings outside the jurisdiction, the removal of a small claim to the District Judge’s civil bill list, the ban on granting injunctive relief and specific performance, and the preservation of the principles disposing of pleadings and discouraging interlocutory motions. It is deeply disappointing, however, that the Group persisted with its attachment to default judgments for the Small Claims Court. The *Final Report* fails to acknowledge that many vulnerable litigants are defendants sued for debt, for whom the present requirement that a claim be proved provides a measure of protection. The problem giving rise to this recommendation, that of claimants with contested cases having to wait lengthy periods of time while uncontested cases are processed, could be better addressed by the introduction of separate hearing dates for contested and uncontested cases.³

In relation to procedure at hearing the Group has now finalised its position to a much greater extent than it had in the *Interim Report*. A little surprisingly, perhaps, the Group opted for unrestricted use of expert evidence in the Small Claims Court. It concluded that the “no costs” rule provided a sufficient disincentive to prevent court users from calling experts unnecessarily. This may be so for private litigants who often would not have the resources to retain a large number of experts. But it may not be so for business users who might well exploit their deeper pockets to try and overwhelm private litigants by over use of experts. Some measure of control over this process would fit better with the informal ethos of the Small Claims Court. Where expert evidence is used the recommendation that this be in the form of a written report unless the District Judge orders otherwise is preserved. The Group also recommended that the power of the court to instruct an expert be preserved but that it be used sparingly. As the *Final Report* points out the burden rests with plaintiffs to prove their case and on defendants to make out their defence. The court should not direct proofs for the parties and if it is found that expert evidence is necessary the proper course should generally be to adjourn the hearing to enable the parties to obtain it themselves. Somewhat puzzling is the recommendation that the cost of a court appointed expert be borne by the losing party. No reasons are given for this recommendation which does not seem to be consistent with the usual “no costs” rule. In any event it may not have been the losing party’s fault or for its benefit that a court appointed expert was instructed.

On the subject of representation, also discussed under the broad umbrella of procedure at hearing, the *Final Report* has nothing further to say on the questions of lay representation and what role professional lawyers should play in the Small Claims Court. There is a helpful acknowledgement that more advice and assistance needs to be made available for users of the Small Claims Court but the specific recommendations made here are not likely to go very far in meeting that need. Valuable though interactive video equipment, a website, and court located help desks may be, most of this would probably benefit existing court users and might have little impact in

³ See the discussion at (1999) 50 *NILQ* 434 at 438.

terms of reaching those lacking the resources or the confidence to use the system at all. What is really needed here is greater investment to enable the voluntary advice sector to provide a more comprehensive service for the Small Claims Court.

One further matter must be addressed before leaving the subject of procedure at hearing. In *Scarth v United Kingdom*⁴ the European Commission of Human Rights upheld the complaint of a litigant sued for debt in the Small Claims Court in England that the hearing in private infringed his right to a “fair and *public* (emphasis added) hearing. . . by an independent and impartial tribunal established by law” guaranteed by article 6(1) of the European Convention on Human Rights and Fundamental Freedoms. Both the *Interim Report* and the *Final Report* seem to assume that there is no issue about whether hearings in the Small Claims Court should be in private. One can readily imagine that many private litigants especially, whether plaintiffs or defendants, would not want a public hearing. But the current rule does not give them the option of waiving the right to a public hearing or even provide that hearings shall be in private unless a party successfully applies to the District Judge for a public hearing. The solution to the *Scarth* problem might best be found in the second of these two approaches.

The Group’s final position in relation to appeals from the Small Claims Court differs only in matters of detail from that set out in the *Interim Report*. Thus the Group accepted the advice of most respondents that leave to appeal should be sought from a County Court judge and not the District Judge. The Group now recommends that an appeal on the grounds of serious irregularity of procedure should only be possible where this is shown to have affected the *outcome* of proceedings. Given the informality of small claims hearings there must be a probability that unmeritorious appeals on the ground of serious irregularity would be fairly numerous, so this is a sensible limitation. The County Court judge would be able to deal with applications for leave on paper and to dispose of appeals at the same time and in the same way. The time limit for appeal should be 21 days in line with other appeals from the County Court and the appeal by way of case stated to the Court of Appeal should be preserved. No recommendation is made to require losing appellants to pay costs unless the appeal turns out to be clearly unreasonable.

No changes are made to the *Interim Report’s* other recommendations relating to costs and fees. The lack of proportionality between the fee payable to initiate a small claims application or the enforcement of an award on the one hand and the amount at stake on the other is a genuine impediment to the attainment of justice as the *Final Report* acknowledges. Neither is there anything in the *Final Report* to address the criticism made in this journal that the Group had no overall concept of a Small Claims Court or the role it should play in the civil justice system.⁵

THE COUNTY COURT

In light of the high level of success which the County Court in Northern Ireland has enjoyed in transacting business without inordinate complexity,

⁴ [1999] *EHRLR* 332.

⁵ See (1999) 50 *NILQ* 434 at 436-437.

cost and delay, it is unsurprising that the proposals in the *Final Report* differ very little from those in the *Interim Report*.

With respect to monetary limits on the District Judge's civil bill list and that of the County Court in general the Group has stood by the recommendations made in the *Interim Report*. This is welcome so far as the general limit on the County Court is concerned but the author finds the Group's attempt to allay fears about the increased workload of the District Judges somewhat unsatisfactory. In the *Final Report* the Group said that "... such concerns do not reflect the saving of time that will inevitably be occasioned by the introduction of a default small claims procedure."⁶ Indeed they do not, but they do reflect the view that a default small claims procedure should not be introduced.

Proposals for removal of cases to the High Court are essentially the same as in the *Interim Report* and proposals for remittal are now settled at placing the onus on the plaintiff to establish that the case should remain in the High Court. This seems to place the emphasis in the right place but the author would have liked to see the whole matter of removal and remittal examined more thoroughly along the lines suggested a year ago.⁷

To reinforce the Certificate of Readiness the *Final Report* makes a number of proposals designed to ensure that there is greater consistency within and between County Court divisions. Within County Court divisions it is proposed that the County Court judge for the division take personal control over the call-over of cases where the Certificate of Readiness is not lodged within six months; this responsibility should not be delegated to a District Judge or court official and only performed by a peripatetic judge where the assigned judge is unavoidably detained. Between divisions the Group proposes that the Lord Chancellor appoint one County Court judge with overall responsibility for ensuring that the procedures of the County Courts are applied uniformly and efficiently. So long as these proposals do not entirely eliminate local practice they could provide a useful drive towards consistency.

The remaining proposals in the *Final Report* can be discussed relatively briefly. The problem of managing court lists, ensuring that sufficient cases are listed to dispose of business quickly but not too many are listed that they end up being adjourned or settled unwillingly, is handed over to the profession who are exhorted to provide realistic hearing times and to communicate better with colleagues and court staff. There is still, however, no acknowledgement that part of this problem is caused by the inability or unwillingness of the profession to settle cases before listing when they do not require a hearing. Consultation revealed almost universal support for the retention of the right of appeal to the High Court by way of rehearing. It also turned up the absence of a scale of costs for civil bill appeals. A scale did exist under the Rules of the Supreme Court (Northern Ireland) 1936 but it did not survive the reformulation of those rules in 1980. The County Courts (Northern Ireland) Order 1980, article 66(2)(f) provides for a scale to be made and it was rightly recommended that this power be exercised. For the

⁶ See *Final Report* para 84.

⁷ See (1999) 50 *NILQ* 434 at 441-442.

County Court itself the Group received proposals that scale costs be uplifted to the level prescribed for the fast track in England and Wales. Wisely the Group did not make a firm recommendation on this as the task is really one for the County Court Rules Committee. In the author's view it would be sacrificing one of the beauties of the Northern Ireland civil justice system to uplift fees to English levels unless it could be demonstrated that the financial rewards were deterring capable practitioners from undertaking the work. The other proposal in the *Final Report* about costs is one to encourage the County Court Rules Committee to agree scale fees for expert witnesses with relevant professional bodies. This is a good proposal because it is unsatisfactory that expert witnesses can charge fees which may not comply with the principles of proportionality central to the Group's recommendations.

THE HIGH COURT

The main proposals in the *Interim Report* related to judicial case management and scale costs. The only difference in the *Final Report* is that the latter proposes that scale costs be set by the Supreme Court Rules Committee rather than the proposed Civil Justice Council. The *Final Report* has a different conception of the role of the Civil Justice Council than that of the *Interim Report*. It sees the Council as an advisory and not a policy making body so it is inappropriate that it set scale costs. Separate rule making bodies are proposed for the County and High Courts, again in contrast to the *Interim Report*, and the power of the County Court Rules Committee to set scale costs has already been mentioned.

The observations made in this journal last year in relation to judicial case management and scale costs are not acknowledged but it would be unfair to assume they have not been noted. The author would urge the profession to make the Certificate of Readiness system work in the High Court because resort to judicial case management for the typical High Court action would be regrettable. The anomalies in the Belfast Solicitors' Association and Comerton scales can be lived with but it might be no bad thing to revisit them in the future to see how these scales are working under a new system.

THE CONDUCT OF LITIGATION

(a) Pre-action Protocols

No new proposals are made here although it is worth noting that consultees do not appear to have argued that pre-action protocols are unnecessary because a negotiation culture already exists in Northern Ireland. As the *Final Report* acknowledges the negotiation often occurs at the door of the court.⁸ By giving structure to negotiations and setting out deadlines and expectations protocols might encourage earlier settlement, which itself might either save costs or render modest cost increases worthwhile. There should be full consultation with interested parties to ensure that the best protocols for this jurisdiction are drafted.

⁸ See *Final Report* para 105.

(b) Pleadings

Two matters surfaced during the consultation period. The simple one was the argument that four weeks to serve a defence might provide inadequate time to conduct a sufficient investigation to prepare that defence. The Group thus proposed that six weeks be provided to prepare the defence. The more complex matter was the observation that the single more comprehensive claim form would present difficulties for solicitors who were compelled to issue proceedings just before the expiry of the limitation period when they would have dealt with this problem in the past by issuing a protective writ followed later by a statement of claim when detailed instructions were taken. The Group now proposes that solicitors be permitted to issue an abridged claim form augmented by a more detailed form with the leave of the court when *necessarily* issued just before expiry of the limitation period without any default on their part. It is also proposed that rules of court or a practice direction provide that these applications be treated sympathetically when instructions are only given at the last moment. The author's first reaction to this was to wonder why a plaintiff who gives instructions at the last moment should be treated so indulgently but in the end the proposal can be supported because the alternatives are worse. Solicitors might have to choose between refusing to act or taking on the case and risk being sued for negligence if they did not manage to initiate proceedings in time.

(c) Witness Statements

All the *Final Report* does by way of building upon the *Interim Report* is to encourage the parties to exchange witness statements voluntarily where evidence is unlikely to be in dispute. In relation to exchange of witness names the Group said it could see advantages to this in theory but "in light of the responses to the Interim Report it has concluded that the prevailing circumstances are not such to allow this to be recommended."⁹ No attempt was made to articulate what prevailing circumstances did not allow this to be recommended so it is difficult to express any more favourable view of this proposal than the sceptical one expressed last year.¹⁰ Indeed the question should be raised whether the absence of a requirement at least to exchange witness names might not infringe the right to a fair hearing guaranteed by article 6(1) of the European Convention on Human Rights.¹¹

(d) Discovery

The proposals made in the *Final Report* are not substantially different from those in the *Interim Report*.

⁹ See *Final Report* para 117.

¹⁰ See (1999) 50 *NILQ* 434 at 447.

¹¹ The Strasbourg institutions have not laid down any specific requirements in relation to witness statements or evidence generally but have recognised that every party must be allowed to know and to comment upon all the evidence adduced and all legal submissions made by others. See *Brandsletter v Austria* (1993) 15 EHRR 378; *Ruiz-Mateos v Spain* (1993) 16 EHRR 505.

(e) Settlement Offers

The principle of the *Interim Report's* proposals is retained but the *Final Report* now makes specific proposals about the penalties to be applied where a party wrongly refuses to take advantage of a settlement offer. Where a judgment for the plaintiff is more advantageous to the plaintiff than the plaintiff's settlement offer the Group now proposes that the court should order interest on the whole or part of any sum of money (excluding interest) awarded to the plaintiff at a rate not exceeding 10 per cent above judgment rate for some or all of the period starting with the latest date on which the defendant could have accepted the offer without needing the permission of the court. The court should also award interest on the plaintiff's costs at the same rate and should be obliged to make both of these orders, save when it considers it would be unjust to do so. In deciding whether such an order would be unjust the court should take all the circumstances of the case into account, including the terms of any offer, the stage of the proceedings when any offer or payment was made, the information available to the parties when the offer or payment was made, and the conduct of the parties in giving or refusing to give information for the purposes of enabling the offer or payment to be made or evaluated. An identical "injustice" discretion should attach to the penalty to be applied when a plaintiff fails to beat a defendant's offer or payment. These proposals are in line with the model contained in Part 36.21 of the Civil Procedure Rules 1998 and the responses made to the *Interim Report*.

(f) Summary Judgment

No change has been made to the *Interim Report's* proposals.

(g) Expert Witnesses

There are few differences of substance between the *Final Report* and the *Interim Report* with regard to this matter although the Group's position on single experts is stated more fully. The Group is against court appointed single experts on the grounds that parties might be denied the fullest opportunity to present their case and that wealthy parties might instruct their own expert to provide material to undermine the court appointed expert in cross examination. To this might be added concerns emanating from article 6(1) of the European Convention on Human Rights. In *Mantovanelli v France*¹² the European Court held that the applicants had been denied a fair trial because they had not been given an opportunity to give instructions to the expert or to see documents referred to in the expert's report; they had, however, been allowed to cross examine the expert. However the Group has now proposed that the parties be encouraged to agree upon a single expert where they can and that pre-action protocols make provision for this. Where parties have unreasonably failed to consider a joint appointment and an expert is unnecessarily retained the court should have power to disallow the costs of that expert. These additional proposals are welcome but much depends here on the effectiveness of the costs sanction.

¹² (1997) 24 EHRR 370.

(h) Sanctions

Some respondents to the *Interim Report*, and the author in this journal last year, pointed out that many of the welcome proposals for reforming the way litigation is conducted might not work in the absence of effective sanctions. The *Final Report* describes the nature of this problem very clearly at the beginning of a new set of recommendations designed to meet the problem of ineffective sanctions. It acknowledges that lawyers who are meeting each other regularly in court are reluctant to seek sanctions against those who have broken the rules and that judges who have been brought up in this culture are reluctant to impose sanctions of their own motion. In consequence when litigation is compromised (as it usually is) breaches of the rules are compromised too.¹³ The Group now proposes that serious infringements of the rules should be met with automatic sanctions, subject to a power to grant relief in appropriate cases. But these sanctions (striking out, costs orders, and prohibitions on adducing evidence) are not likely to work unless either a procedural judge imposes them or the innocent party takes steps to enforce them. The former will not happen because judicial case management has been ruled out and the latter is not likely to happen because the *Final Report* gives no reason to suppose there will be a change in litigation culture from the one it so eloquently described. As the author suggested last year, it may be the case that if lawyers cannot make the new system work better than the old, they may have to accept judicial case management however unpalatable that may be.¹⁴

THE FUTURE OF THE CIVIL JUSTICE SYSTEM

Chapter 6 of the *Final Report* covers two of the matters dealt with in the corresponding chapter of the *Interim Report*, namely Alternative Dispute Resolution (ADR) and the development of civil justice policy through the Civil Justice Council. It also contains two significant new topics, one on the use of information technology and the other on judicial and professional training.

(a) Alternative Dispute Resolution

The *Final Report's* coverage of ADR is most disappointing. The proposals of the *Interim Report* are repeated without addition and there is no further discussion other than to say that the Group welcomes the recent extension of legal aid to ADR.¹⁵ It remains the situation that the Group has no conception of the potential value of ADR.

(b) Information Technology

Although the *Interim Report* had recognised the importance of information technology to the civil justice system it had not made any detailed recommendations on the subject. Now the Group recommends that prior to implementation of civil justice reform the Northern Ireland Court Service

¹³ See *Final Report* para 124.

¹⁴ See (1999) 50 *NILQ* 434 at 444.

¹⁵ See *The Writ*: Journal of the Law Society of Northern Ireland; Issue No. 102 May 1999; page 3.

ensure that the Group's proposals are supported by adequate and compatible IT and that the judiciary receive continuing IT training.

The Group also stated itself to be keen to encourage the appropriate use of "litigation support technologies" and among these the following were discussed – document imaging, which allows documents to be scanned into a computer and presented on screens around a courtroom; real time transcription whereby a stenographer transcribes court proceedings and the text appears instantly on computers in front of the judge and legal representatives; and virtual reconstruction displays such as 360 degree photographs. As some of these innovations may have implications for the law of evidence the Group suggested that they be formally addressed by a body such as the Law Reform Advisory Committee. The same approach was recommended for telephone and video conferencing, which was suggested in the *Interim Report* as a more convenient way of taking evidence from expert witnesses such as doctors.

Several important but uncontroversial proposals are made about use of the Internet. First it is proposed that basic information for court users appear on the Court Service website. The sort of information in mind is the kind covered by various Court Service leaflets containing practical advice on the location of courts, how they may be reached by public transport and what facilities they have for waiting and refreshment. As many court users have no access to the Internet it would be sensible, however, to retain the leaflets as well. For legal practitioners the Group proposed the extension of the Statute Law Database to Northern Ireland; the publication of Northern Ireland judgments on the web, to be available within hours of delivery; updated court rules to be available on line as they are in England and Wales;¹⁶ and the publication of daily cause lists this way. The Group recognised its encouragement of document exchange, service and filing by email as perhaps more controversial. To make this, and the other IT initiatives proposed, more successful, the Group proposed a strategic partnership between the Court Service, the Law Society and the Bar Council with a view to establishing a plan of action for developing an electronic legal community.

(c) Judicial and Professional Training

It almost goes without saying that the implementation of civil justice reform is more likely to be successful if both the judiciary and practitioners are trained in how to manage the new system. For the judiciary the *Final Report* recommends that the Judicial Studies Board undertake the task of training and makes a strong plea that this organisation be properly resourced to enable it to do so. The Law Society and the Bar Council are called upon to organise professional training courses for their members. The *Final Report* stresses that training must begin well in advance of the coming into force of the new system and calls for the revised rules, practice directions and protocols to be available several months ahead of commencement. It is to be hoped that both the Judicial Studies Board and the professional bodies prepare themselves as proactively for this development as they did for the coming into force of the Human Rights Act 1998.

¹⁶ See www.open.gov.uk/lcd/index.htm.

(d) The Development of Civil Justice Policy

The *Final Report* drops the proposal for a unified Civil Procedure Rules Committee in favour of retaining separate rules committees for the High Court and the County Court. The rationale for this change is that the Group considered it more consistent with its proposal to retain separate procedures in the two courts. The Group appears to have listened to the comments of respondents who suggested that the rules committee(s) should have some lay membership capable of raising concerns of court users and accordingly the *Final Report* proposes that two lay persons should be appointed to each rules committee.

There are some significant changes of emphasis in relation to the proposed Civil Justice Council. First of all the rumours about the Lord Chief Justice's alleged lack of enthusiasm for the Council produced no ill effects because of the overwhelming support for the Council from respondents to the *Interim Report*. Secondly the Group emphasised that the Council must be properly funded if it is to be able to carry out effective research and must also be able to rely on the practical assistance of the Northern Ireland Court Service in the provision of detailed and accurate statistical information. The author is in possession of some anecdotal information that there was some dissatisfaction about the non-availability of informative statistics relating to civil justice in Northern Ireland and that the *Final Report* was supposed to contain some discussion and proposals about the problem. One sentence in the *Final Report* appears to be all there is.¹⁷ Thirdly the lay membership of the Council would be increased from between four and six to between six and eight, again in line with respondents' comments. Finally the role of the Council is more clearly stated than it was in the *Interim Report*. It is to be an advisory rather than a decision making body and its primary role is to monitor the reform and progress of the civil justice system. This clarification, together with the other revised proposals in relation to the Council and the rules committees, makes it acceptable not to take up the enhanced role for the Council which the author suggested in 1999.¹⁸

SPECIALIST JURISDICTIONS

An entirely new set of recommendations is to be found in chapter 7 of the *Final Report*. These relate to the originating summons procedure and clinical negligence cases and can be discussed quite briefly despite the length of the chapter. The proposals in relation to the originating summons call for the importation of the procedure laid down in Part 8 of the Civil Procedure Rules 1998 for cases not suited to the statement of claim, but suitably modified by practice direction to meet any special Northern Ireland circumstances. There seems to be no reason for Northern Ireland to go completely its own way on these proceedings.

For clinical negligence cases the Group took the position that these presented special difficulties and required much more procedural direction and case management. A pre-action protocol for clinical negligence cases is now

¹⁷ In paragraph 172.

¹⁸ This was that of a policy making body to which the Civil Procedure Rules Committee would be answerable. See (1999) 50 *NILQ* 434 at 452.

proposed and, once proceedings have been issued a directions hearing before a Queen's Bench judge should be introduced. Both processes should be adapted from the applicable English models. Once again this seems the correct approach but it is important to stress that Northern Ireland circumstances have to be given a high priority so there should be the widest possible consultation with interested parties to ensure that these are identified and taken into consideration.

CONCLUSION

The *Final Report* contains some notable additions to the *Interim Report* but few changes or surprises. As the *Interim Report* was a generally sound set of recommendations the assessment of the *Final Report* must be similar. That is not to say that the *Interim Report* contained no room for improvement but it is a disappointing feature of the *Final Report* that it does not offer much improvement upon the original recommendations save where topics were not covered before. The area where this is most noticeable is in relation to judicial case management, especially in the High Court. We are not to have a procedural judge to require the parties and their advisers to do what they should do by the time they should do it but many of Lord Woolf's other recommendations for change in practice would still be introduced. Despite this and the occasionally self congratulatory tone of the *Final Report*, that document does give the legal professions and the judiciary an opportunity to make a better civil justice system for Northern Ireland.