

CASE MANAGEMENT – THE CIVIL JUSTICE REFORM GROUP’S APPROACH

*Brian Sherrard, Barrister and Principal Legal Assistant
to the Lord Chief Justice of Northern Ireland**

INTRODUCTION

Background

On 21 February 1998 the Lord Chancellor, the Right Honourable Lord Irvine of Lairg, announced the formation of the Civil Justice Reform Group (CJRG). Under the chairmanship of Lord Justice Campbell the CJRG was tasked with examining the civil justice system in Northern Ireland with a view to assessing how it could be made as accessible, economical and efficient as possible. The review was, from the outset, framed in terms of the “Access to Justice” reports published by Lord Woolf in 1995 and 1996 with the CJRG specifically required to have regard to the conclusions contained therein.¹ Central to Lord Woolf’s analysis of how the English system (assessed as excessively adversarial, expensive, slow and complex) could be improved was the concept of case management. Unsurprisingly then, the CJRG was expressly tasked with assessing the possible contribution of “hands-on case management” to an improved system.

The object of this article is to discuss the CJRG’s approach on the question of case management. The conclusion reached was an enthusiastic endorsement of a system designed to place primary responsibility on the parties, motivated by a range of incentives, but preserving ultimate responsibility in the courts.

What is “hands-on” case management?

The expression “hands-on” case management does not appear in the Civil Procedure Rules. Neither do Lord Woolf’s interim or final reports offer a definition. It is submitted, however, that a close reading of the reports supports the proposition that “hands-on” case management is not equivalent to judicial case management but denotes a concept confined to those cases of such value, length or complexity as to fall within the strongly interventionist environment of the multi-track. Indeed, chapter 7 of the interim report, dealing exclusively with the fast track, makes no reference to “hands-on” case management, yet, as discussed below, both the small claims track and fast track are subject to an unprecedented level of judicial control. In short, “hands-on” case management is just one aspect of a much larger concept. On this analysis the vast majority of cases in England and Wales will fall outside “hands-on” case management but remain subject to judicial case management. Moreover, whether falling within “hands-on” case

* The author assisted the Civil Justice Reform Group in the preparation of its interim and final reports.

¹ *Access to Justice*, Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales; *Access to Justice*, Final Report to the Lord Chancellor on the Civil Justice System in England and Wales.

management or otherwise the success of the system is heavily dependent on the co-operation of the parties and it would be wrong to assume that litigant rooted management has completely disappeared. Indeed, whole rafts of reforms (considered below in the context of Northern Ireland case management) have ensured that the parties remain central. The system provides precedent for the proposition that one size of case management cannot fit all. Its diversity demonstrates that the central tenet of Woolf is effective management from wherever it stems.

Components to case management under the Civil Procedure Rules

Judicial Case Management falls to be considered under two related headings: i) the preliminary stage – allocation; and ii) post allocation – preparation for trial.

Allocation

Judicial allocation of proceedings is one of the main innovations of the Woolf reforms. Each claim is commenced by a claim form which, when defended, must be allocated to a case management track: the small claims track, the fast track or the multi-track.² Allocation in each case is a judicial decision although the Civil Procedure Rules provide the Court with guidance as to which case management track is appropriate.³ The track into which a case is allocated will dictate the general degree of case management to be applied to it. On the defence being filed the Court will send the parties an allocation questionnaire.⁴ Each party must file the completed allocation questionnaire no later than the date specified in it. Upon filing, or when the period for filing has expired, a Master or District Judge will proceed with the allocation. Although most allocation decisions will be made upon the basis of the pleadings and allocation questionnaires, the Court may order a party to provide further information and, perhaps more significantly, may hold an allocation hearing if it thinks it is necessary.⁵ An allocation decision may be readdressed in two ways, through reallocation or an appeal.

The scope of each case management track is specified in the rules. In summary, the small claims track is the normal destination for claims valued at not more than £5,000 and personal injury claims for not more than a £1,000. The fast track is designed for claims with a value of not more than £15,000 and the multi-track is for claims above that amount or claims of lower financial value but greater duration or evidential complexity than those normally to be allocated to the fast track.⁶

The Master or District Judge will not simply allocate the case to its appropriate track but in most cases will expect to have enough information to give case management directions. Standard directions for each track are set out in Practice Directions contained within the Civil Procedure Rules.

² CPR Part 26.

³ CPR Part 26.6 – 26.8.

⁴ CPR Part 26.3.

⁵ CPR Part 26.5(4).

⁶ CPR Part 26.6

Post Allocation Case Management Tracks

In accordance with the general principle of proportionality running through the Civil Procedure Rules, the extent of post allocation Judicial Case Management depends upon the designated track. The small claims track is the least managed, the clear expectation being that directions made on allocation will be sufficient.⁷ However, even on this tier there is an opportunity for the Court to hold a preliminary hearing on the basis that special directions are necessary to ensure a fair trial.⁸ A preliminary hearing may also be held where it appears necessary for a party to attend at Court to ensure that he understands what he must do to comply with the special directions. Moreover, as the rules specifically state that the Court may add, vary or revoke directions it must be the case that judicial scrutiny subsists until final disposal of the claim.

A more pronounced form of case management is a central feature of the fast track where on allocation the Court will give directions for the management of the case and set a case management timetable.⁹ At this stage the Court will also fix a trial date or “trial window”, a period within which the trial is to take place. The rules stipulate that the standard period between the giving of directions and the trial will not be more than 30 weeks.¹⁰ Key variations to the case management timetable may only be made upon application to the Court.¹¹ The most significant management upgrade from a small claims track is the introduction of a “listing questionnaire” which must be returned to the Court by the parties by the date specified in the Notice of Allocation.¹² That date will not be more than 8 weeks before the allocated trial date or start of the trial window period. The listing questionnaire may provoke a listing hearing and represents the Court’s second substantive opportunity to issue directions. Post listing questionnaire directions will include a trial timetable setting out the time allowed for each aspect of the trial.¹³ The Practice Direction informing the fast track states that a party dissatisfied with a direction should either apply to the Court for it to be reconsidered or lodge an appeal.¹⁴

The most intensive form of case management is reserved for claims allocated to the multi-track.¹⁵ Upon allocation the Court will give directions for the management of the case and set a timetable for the steps to be taken before trial.¹⁶ The allocation Court may also fix a “case management conference” or “pre-trial review”. Although case management remains with the Master or District Judge he or she may consult and seek the directions of a judge of a higher level about any aspect of case management.¹⁷ A case management

⁷ CPR Part 27.

⁸ CPR Part 27.6.

⁹ CPR Part 28.

¹⁰ CPR Part 28.2(4).

¹¹ CPR Part 28.4.

¹² CPR Part 28.5.

¹³ CPR Part 28.6.

¹⁴ CPR 28PD.4(3)(1).

¹⁵ CPR Part 29.

¹⁶ CPR Part 29.2.

¹⁷ CPR 29PD.3(10)(2).

conference or pre-trial review may also be fixed at any time after the claim has been allocated and the rules do not preclude the number of such hearings that may take place.¹⁸ Variation of key aspects of the case management timetable may only be made upon application to the Court.¹⁹ As in the fast track the parties are required to complete a listing questionnaire which may in certain circumstances provoke a listing hearing.²⁰ A pre-trial review may arise on receipt of the listing questionnaires.²¹ The Practice Direction linked to the multi-track anticipates that directions made by the Court may be challenged by way of either reconsideration or appeal.

ANALYSIS OF CASE MANAGEMENT UNDER THE CIVIL PROCEDURE RULES

Preliminary management – claim commencement and case allocation

From the outset the CJRG adopted Lord Woolf’s vision of an effective civil justice system.²² At the core of that vision was the concept of proportionality. The assertion in Lord Woolf’s interim report that “Procedures and cost should be proportionate to the nature of the issues involved” found ultimate expression in the overriding objective of the Civil Procedure Rules which states:²³

- (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 -
 -
 - (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;....

Marrying the overarching principle of proportionality to Lord Woolf’s interrelated recommendations as to claim commencement and case allocation presented the CJRG with its initial case management challenge. Under Lord Woolf’s recommendations, and now in the Civil Procedure Rules, claims are commenced and pursued by the same novel process consisting of a “claim form” and “particulars of claim”.²⁴ Essentially, the same originating process is to be adopted regardless of the value of the claim. The move appears to have been uncontroversial in England and Wales perhaps because the same Writ system previously attached to both the County Court and High Court.

¹⁸ CPR Part 29.3.

¹⁹ CPR Part 29.5.

²⁰ CPR Part 29.6.

²¹ CPR Part 29.7.

²² CJRG interim report paragraph 6.1.

²³ CPR Part 1.

²⁴ CPR Part 7. An alternative procedure for claims at Part 8 CPR exists for proceedings previously commenced by originating summons.

Not so in Northern Ireland where the CJRG viewed unified proceedings as something of a dichotomy, preferring to conclude that proportionality could best be achieved by maintaining separate initiating processes throughout the tiers, reflective of the value and complexity involved. The CJRG argued that the present scheme allowed the legal profession liberty to initiate proceedings efficiently, concentrating time and effort on those cases in which detail is desirable and useful. It concluded that “simple proceedings risk being made unduly complex and professional time would arguably be consumed on less significant matters, unnecessarily increasing costs, at the expense of those requiring most attention.”²⁵

Critics of the CJRG’s approach could argue with some justification that the content of each issued claim form differs dramatically depending on the nature of the claim. Notably however, the main thrust of the Woolf reforms is not towards blanket unification of procedure and significant differences exist between the newly created tiers. In Northern Ireland, the very least that can be said is that the existing processes have the advantage of familiarity and have successfully stood the test of time. Furthermore, the physical layout of the existing processes is indicative of the detail appropriate. This is particularly relevant with regard to the small claims application form, the process most often used by personal litigants. Criticisms of a possible deficiency of information in County Court and High Court proceedings may have had more credibility in the absence of the CJRG’s ringing endorsement of pre-action protocols which should, in most cases, ensure that the claim and defence are fully understood well in advance of issue.

While it is perhaps possible to detect an emotional attachment to existing processes, in particular the civil bill, the CJRG’s suggested reform of the Writ indicates that this was not a determining factor. It is submitted, rather, that the primary reason for retaining separate processes is contained within the CJRG’s clear antipathy towards judicial allocation of proceedings. Separate processes are consistent with, and can contribute towards, an effective system of party-determined case allocation.

Under Part 26 of the Civil Procedure Rules all defended claims, regardless of value, complexity or the willingness of the parties to co-operate towards resolution, require an initial judicial determination. Again, the CJRG was clearly aware of a tension between this requirement and the objective of proportionality and wholly rejected the introduction of judicial case allocation in Northern Ireland. Its reasons for doing so included:

- (a) existing practitioner expertise in case allocation;
- (b) existing costs sanctions aimed at deterring inappropriate allocation;
- (c) lack of evidence to suggest that practitioner led allocation was failing;
- (d) doubts as to whether a procedural judge would be in a better position to judge appropriate allocation than legal representatives familiar with the client and case;

²⁵ Interim report paragraph 10.10.

- (e) the likelihood of increased delay;
- (f) increased burden on courts, the legal profession and judiciary; and
- (g) existence of procedures to remedy inappropriate allocation before trial.

It could be argued that the CJRG showed considerable restraint in its assessment of the impact of judicial allocation in Northern Ireland. A number of other important factors were not expressly specified but may be implied:

- (a) Excessive intervention: It is, quite simply, excessive to subject every case, regardless of circumstances, to judicial scrutiny. When there is evidence to suggest that most claims settle without need for judicial attention it seems inappropriate to devote judicial time to an exercise that can be carried out more effectively by litigants. The inevitable delay would be worsened by the possibility of allocation hearings, the opportunity to apply for reallocation and appeal of allocation decisions;
- (b) Judicial complement: There are seven Masters of the High Court and four District Judges in Northern Ireland, all of whom are already fully engaged in important work;
- (c) Full cost recovery: The costs attendant upon the appointment of additional judicial officers and the increase in administration would, under present circumstances, have to be recovered, with implications for fees and, accordingly, access to justice.

The CJRG's rejection of judicial allocation and willingness to work within the existing allocation scheme is implicit in a number of recommendations aimed at tightening control of allocation. Removal powers were to be extended to County Court judges. Importantly, the recommendation included a power to remove a case to the High Court on the judge's own motion. The CJRG advised further clarification on the law surrounding remittal to the County Court and recommended that the onus should be placed upon a plaintiff in a contested remittal to establish that the case ought to remain in the High Court.²⁶

The CJRG drew comparisons between the standard allocation directions applied to most cases under the CPR and the rule based automatic provisions relating to expert evidence and discovery contained in the Supreme Court Rules and County Court Rules. In rejecting allocation directions the understated but obvious conclusion was that the same objectives could be achieved automatically and without unnecessary, costly and time-consuming judicial intervention in each and every case. Those cases in which rule imposed co-operation could not be achieved could then be addressed on the basis of need. The exchange of witness statements, an important feature of allocation direction, is not a feature of Northern Ireland civil justice and was rejected by the CJRG.²⁷ Other, more innovative, aspects addressed in the

²⁶ Final report paragraphs 57-62.

²⁷ Final report recommendation 62.

standard directions, such as the consideration of ADR, could be addressed effectively through obligations imposed by way of pre-action protocol and the overriding objective, considered later.

Post allocation management – small claim track, fast track and multi-track

Allocation under the Civil Procedure Rules is to “tracks” rather than courts. The CJRG observed that the tracks proposed by Lord Woolf were substantially equivalent to the jurisdictions of the Small Claims Court, County Courts and High Court.²⁸ Accordingly, the CJRG welcomed the concept of “tiering” but concluded that nothing further needed to be done to achieve that objective.²⁹ Thus in Northern Ireland post allocation case management falls to be considered under the heads of the Small Claims Court, the County Courts and the High Court, the comparators being the small claims track, the fast track and the multi-track respectively.

The Small Claims Court

The Small Claims Court has operated in Northern Ireland since 1979. The CJRG’s interim report made an exhaustive examination of the system then in place and concluded that it worked satisfactorily to achieve its purpose: to be a forum in which smaller value disputes may be settled in a straightforward, efficient and inexpensive manner. The thrust of the CJRG’s recommendations concerned substantive differences between the model operated in England and the Northern Ireland equivalent. Fundamental variations included the court’s financial jurisdiction and the exclusion of personal injury and road traffic claims. The success of the existing system was recognised by the thoughtful rejection of major change, with the CJRG expressly conceding its concern not to sacrifice the positive aspects of the jurisdiction.³⁰

As noted above, under the Civil Procedure Rules the small claims track is the least managed of the three. Management arises in two contexts: the directions made on allocation and those made during preliminary hearings. Post allocation management is limited to the opportunity to conduct “preliminary hearings” – an existing feature of the English system – at which special directions may be made. The procedure of the Small Claims Court in Northern Ireland is set out in the County Court Rules (Northern Ireland) 1981, which makes no specific provision for directions or preliminary hearings. That said, the CJRG noted that such hearing were a rare occurrence but did not go on to recommend that they become a feature of the process. The primary reason for that decision appears to be the wish to avoid undue complexity. The CJRG considered that where necessary interlocutory relief could be sought but that it should not be encouraged.

A holistic examination of the Small Claims Court in Northern Ireland might reveal why the CJRG was reluctant to make further reference to case

²⁸ Interim report paragraph 6.3.

²⁹ See, for example, paragraph 8.22 of the Interim report in which the principle of tiering is used to argue against the introduction of straightforward but high value cases into the County Courts.

³⁰ Interim report paragraph 7.4.

management. In particular, the CJRG was aware that the nature of claims dealt with in Northern Ireland was radically different from that in England and Wales. The continued exclusion of both personal injury and road traffic litigation together with a very modest financial jurisdiction and a strict no costs rule should generally ensure that overly complex or protracted matters are left to the County Courts. In any event, where complications arise the system is sufficiently informal and flexible to allow some latitude.

Ironically the most significant “innovation” by the CJRG with reference to case management in the Small Claims Court has long been a familiar feature elsewhere in the civil justice system. The CJRG noted that while less than 14% of small claims were contested the remainder had to be formally proved due to the absence of a default judgment procedure. The CJRG hesitated before ultimately recommending the introduction of such a procedure, fearing unfairness could result in penalising legally unsophisticated respondents. This concern was met by additional recommendations providing for clear warnings and a mechanism whereby a default judgment could be set aside.³¹

The County Courts

The County Courts in Northern Ireland encompass courts staffed by District Judges and courts staffed by County Court judges. The District Judges’ Court deals with defended claims worth up to £5,000, with claims up to £15,000 falling within the jurisdiction of the County Court.³² Proceedings are commenced by way of “civil bill”, a process unique to Ireland.

The CJRG considered the Northern Ireland County Courts to be broadly equivalent to Lord Woolf’s recommendations for a fast track. Lord Woolf, who, in a keynote address at the “Access to Justice” conference held in Belfast in June 1998 questioned whether the fast track could have any useful application in Northern Ireland, supported it in this proposition.

The most striking similarity between the County Court and Lord Woolf’s recommended fast track was, of course, the limited financial jurisdiction. Perhaps more significantly, however, the County Court had long enjoyed a system of statutory fixed costs, concise “pleadings” and effective case management – all salient features of the recommended fast track.

In rejecting the fast track model of case management the CJRG asserted its support for case management “where necessary”. The CJRG stated:

“Judicial monitoring of the progress of a case expedites litigation and ensures that cases going for trial have been properly prepared; case management promotes certainty and encourages parity between otherwise unequal parties. While delay might not in itself add to the cost of litigation in the county court (on account of the fixed scale for inter party costs), inefficiency and improper preparation are anathema to a

³¹ Interim report paragraph 7.41.

³² The Small Claims Court deals with cases up to £2,000, although its jurisdiction is limited in other respects.

modern civil justice system which aims to maximise and facilitate access to justice.”³³

The CJRG concluded that the objectives of fast track case management were met by the “certificate of readiness” system in place in the County Courts. Simple in construction, the system relies upon the parties informing the court by way of certification that a case is ready to proceed. If the certificate is not lodged within 6 months of the notice of intention to defend the case is automatically referred to the judge for directions. The CJRG summed up the system thus:

“Proceedings are monitored from the service of the notice of intention to defend. Discovery, if desired, is obtained by prescribed notice and must be complied with within a fixed timescale, while the exchange of medical and other evidence is automatic. The timing of both requests for and replies to particulars is controlled. In the event of non co-operation, orders are available from the court, sometimes on an almost summary basis, and are supported by sanctions not only in terms of costs but also potentially affecting the future running of the case and the evidence that may be called. The parties are given a period of six months from the notice of intention to defend in order to prepare their cases. If the plaintiff has not submitted a Certificate of Readiness to the court before the end of six months, the matter will then be listed before the judge or district judge. At the resulting hearing the judge may make whatever order he or she considers appropriate. This system has proved to be effective in practice in concentrating the minds of litigants but, unlike the automatic dismissal of cases (which has been tried and failed in England and Wales), the certificate of readiness call-over enables the court to deal with each case on its merits.”³⁴

Post allocation case management in the fast track may be considered under three heads:

- (a) The 30 week progression; The CJRG rejected the 30 week timetable system for reasons of speed and complexity. In Northern Ireland the progression of County Court cases to disposal was found on average to be quicker than that prescribed under the fast track. Paragraph 8.39 of the CJRG’s interim report noted that the average time between notice of intention to defend (served within 3 weeks of service of the civil bill) and disposal was 38.9 weeks. The 30 week fast track timetable only started post allocation, which itself could only take place post service of the defence. The average time between service of proceedings to trial for cases dealt with in Belfast Recorder’s Court in May 1998 was 44.6 weeks. The CJRG established that the English equivalent would allow parties the opportunity to take anything up to 60 weeks from service to disposal. Furthermore, challenges to case management directions by way of further application to

³³ Interim report paragraph 8.31.

³⁴ Interim report paragraph 8.33.

the court or appeal may result in prevarication and expense. A point not raised by the CJRG but worthy of consideration is the potential impact of pre-action protocols on the Northern Ireland timetable. It would be hoped that the time between issue and disposal might shorten further due to early co-operation, exchange of evidence and issue clarification.

- (b) The listing questionnaire; Under the Civil Procedure Rules a listing questionnaire offers a further opportunity to issue case management directions and fix or confirm a date for trial. In some cases the court will convene a listing hearing. Needless to say, further directions carry the risk of further challenge by way of application to redirect or appeal. The CJRG was doubtful about the utility of fixing a firm date at too early a point. While recognising that a fixed date might assist preparation the CJRG considered that the present listing arrangements in the County Court (whereby a date is set by liaison between the parties and the court office) presented a more realistic model.³⁵ The Interim Report stated: “The system is pragmatic enough to recognise that vicissitudes emerge from time to time that compel the need for flexibility. The parties are only offered a date upon expressing their readiness to proceed and as a result of the certificate of readiness system they are denied the opportunity to prevaricate case preparation. Moreover, parties can fairly accurately predict the time they will have to wait before being offered a date in their particular district. This enables the parties, by that time properly acquainted with any practical difficulties in the case, to fix a date that is suitable for themselves and their witnesses. The system also recognises that on occasion, through no fault of the litigants or their representatives, cases cannot proceed as quickly as might be hoped. They are, however, kept under scrutiny, this avoiding the possibility that one party is delaying in order to exploit another.”³⁶
- (c) The trial timetable; Having already rejected the suggestion that cases be allocated to “track” depending on complexity rather than value, and having questioned the English approach to evidence-in-chief by witness statement, the CJRG expressed concern about the unreality, and possible injustice, of imposing time constraints on County Court proceedings. In one of its more robust assertions the CJRG stated: “To artificially restrict evidence in the name of brevity is to deny proper access to justice....While the Group is conscious of the need to facilitate the public, it is not convinced that fixed dates and case timetables are workable in practice. Efficient day-to-day case disposal depends upon communication and co-operation between the judiciary, court staff, lawyers and court users.”³⁷

³⁵ Interim report paragraph 8.41.

³⁶ Interim report paragraph 8.41.

³⁷ Interim report paragraphs 4.42-43.

The High Court

The CJRG identified the lack of case management as the major weakness of the Queen’s Bench Division of the High Court.³⁸ The court lacked any *independent* control of proceedings from the date on which the defendant entered an appearance until the case was set down for trial.³⁹ In other words, in the absence of action by one of the parties, cases may drift indefinitely without censure. On being set down for trial cases are entered into a provisional list which may be called over on a number of occasions before a trial date is fixed. Where listing difficulties arise the listing officer refers the case to the senior Queen’s Bench Judge who will make appropriate directions. Despite the absence of management, however, in 1997 cases were disposed of 52 weeks earlier than equivalent cases in England and Wales.

The CJRG’s recommendations as to case management in the High Court fell into three categories: importing the certificate of readiness, general case management power and case management after setting down. In addition, the recommendation to include inter party scale costs in the Supreme Court Rules should provide a disincentive to prevarication.⁴⁰

Importing the certificate of readiness

Based on positive experiences in the County Courts, Commercial List and Chancery Division, the CJRG was persuaded that case management could make a contribution to the High Court. Faced with the choice between the multi-track and the “certificate of readiness” system in the County Courts the CJRG recommended the latter. Having analysed the proposed procedure under the multi-track the CJRG stated:

“Under the proposed multi-track in England and Wales, it will not be unusual for proceedings to come under judicial scrutiny on several occasions before trial. Case management will start with allocation, a process which will, on occasion, necessitate a hearing and may be subject to review. On allocation, the court may give directions which in themselves may be open to appeal or variation...Even in those cases where directions are given, the court may arrange for a case management conference. Such a conference will require careful preparation by legal representatives and should be attended by a lawyer who is expected to be sufficiently acquainted with the case to be able to make decisions as to issues and evidence. The Group is concerned that such a conference will inevitably add to the expense of litigation – and that legal representatives may be asked to narrow or admit issues irrevocably or make potentially significant decisions in such an environment and before trial.”⁴¹

³⁸ Interim report paragraph 9.28.

³⁹ The CJRG recognised that the court could intervene on an application by a party.

⁴⁰ Final report recommendation 49.

⁴¹ Interim report paragraph 9.30.

In summary, the CJRG stated its High Court case management objectives as follows:

“...the Group is unenthusiastic about the degree and nature of case management involved in the proposed multi-track in England and Wales. Accordingly, it proposes the incorporation of a system of case management in Northern Ireland that will:

- encourage litigants to conduct proceedings efficiently, fairly and expeditiously;
- provide the court with a stronger supervisory function without encouraging unnecessary or costly judicial intervention;
- encourage compliance with rule-based timetables; and
- be flexible enough to recognise the vicissitudes of litigation.”⁴²

The CJRG modified the County Court certificate of readiness system by recommending that parties be allowed a period of 9 months between defence and set down. The 9 month period is to be considered the outer limit for set down and the CJRG further recommended that the time for filing should only be open to extension with leave of the court, thus ensuring that slippage cannot arise at that stage. If the case is not set down within the requisite period it will automatically be listed before the senior Queen’s Bench Judge for directions. The parties would then be expected to explain the progress of the case and the judge would have power to make any order he considers appropriate.⁴³

The general case management power

A relatively inconspicuous, but potentially significant, recommendation of the CJRG was to allow the High Court a general case management power arising of its own motion or by a party on the basis that management is necessary for expeditious disposal of the proceedings.⁴⁴ The (inherent) power of the court to intervene is made much more specific, but more importantly, the CJRG recommended that Practice Directions indicate the circumstances in which case management under this head may arise. To some extent this may be seen as a concession to the more proactive case management arising under the multi-track. The recommendation is sufficiently open to allow Practice Directions to specify entire categories of proceedings which may require more invasive or immediate management.

Case management after setting down

The CJRG drew attention to the lack of case management until after setting down but was positive about case scrutiny after that point. Reflecting the approach taken to listing in the County Courts, the CJRG considered the listing mechanisms to be satisfactory. A case that drifts will be subject to

⁴² Interim report paragraph 9.31.

⁴³ Final report recommendation 44.

⁴⁴ Interim report paragraph 9.40. Final report recommendation 46.

judicial scrutiny, but not before the parties are given an opportunity to arrange matters for themselves.⁴⁵

ADDITIONAL RECOMMENDATIONS INFLUENCING THE FUTURE OF CASE MANAGEMENT IN NORTHERN IRELAND

The CJRG reports rejected omnipresent judicial case management in favour of litigant based management, backed up by recourse to the courts. In deciding against a patriarchal approach the CJRG places faith in the legal community. That decision was made possible by evidence suggesting that the civil justice system in Northern Ireland was not dogged by the same degree of complexity, expense or delay as in England and Wales. An analysis of what drives cases to conclusion in Northern Ireland should dwell upon the advantage of fixed costs which offer no financial incentive to prevaricate. Mention should also be made of existing case management, and in particular the certificate of readiness system in the County Courts. Although it could not be measured, most of us would probably like to think that the small, close knit and geographically confined legal community contributes to a level of co-operation that might not be possible in another environment.

While the CJRG may have rejected Woolf style case management it made a number of recommendations aimed at ensuring that cases are effectively managed. The introduction of a certificate of readiness system and rule based costs into the High Court are explicit examples, but perhaps the most effective incentives are contained in the CJRCs general recommendations concerning the future of the civil justice system. In particular:

- (a) The overriding objective: In its final report the CJRG introduced a recommendation for the incorporation of an overriding objective into the Rules of the Supreme Court and County Court Rules. The express aim of the objective is to “provide a touchstone by which the parties and the court can base and judge good practice while setting the agenda of co-operation and communication that will run consistently throughout the Rules.”⁴⁶ The overriding objective encapsulates the spirit of the civil justice reforms and the courts in England have not been slow to seize upon it. Indeed, one commentator has suggested that in England there has been an over reliance on the overriding objective with the risk of inadequate and underdeveloped analysis of other aspects of the Rules.⁴⁷ In Northern Ireland the overriding objective will not only set an agenda of co-operation and proportionality but may provide useful leverage in achieving effective case management.
- (b) Pre-action protocols: The CJRG enthusiastically endorsed the adoption of pre-action protocols to provide parties with a

⁴⁵ Final report recommendation 47.

⁴⁶ Final report paragraph 12.

⁴⁷ See, for example, the commentary at paragraph 1.3.2 of “Civil Procedure” Volume 1, Spring 2002, (The White Book) (*Sweet and Maxwell*).

framework of appropriate steps to be taken prior to issue of proceedings. Protocols should herald a new attitude to civil justice in Northern Ireland with emphasis upon co-operation between the parties, clarity and openness. The CJRG hoped that pre-action protocols would result in a civil justice environment in which the issue of proceedings is a last resort. Furthermore, where proceedings must be issued the parties will already have sufficient information at their disposal to facilitate efficient resolution. The CJRG reflected upon the “negotiation culture” that exists in Northern Ireland and concluded that pre-action protocols could build upon this in order to achieve more efficient resolution. The availability of cogent information, provision of basic discovery, consideration of expert evidence and opportunity to pursue alternative dispute resolution should leave parties better equipped at an early stage in the process and thus free to make informed decisions.

- (c) Sanctions: The CJRG noted that a benevolent approach existed towards procedural transgressions in Northern Ireland. While this was, to some extent, admirable and avoided an overly officious approach the CJRG was committed to the view that breach should not necessarily be perceived as an inconsequential norm of litigation.⁴⁸ The CJRG recommended that the breach of rules, practice directions and protocols should be met with effective, automatic and relevant sanctions. It also concluded that courts should have a more general discretion to examine how the parties have conducted themselves during litigation. In other words sanctions will underwrite not just compliance with the rules but also the spirit of the reforms as encapsulated in the overriding objective.
- (d) Summary judgment: The group recommended an enhanced form of summary judgment in both the High Court and County Court arising upon the application of a party or on the motion of the court, based upon a single test: the absence of a realistic prospect of success. The recommendation provides an opportunity for weak cases to be taken out of the system and, indirectly, provides an incentive towards realistic and timely evaluation.⁴⁹
- (e) Offers to settle: The CJRG recommended adoption of a system of payment into court/offers to settle based on the model provided by part 36 of the Civil Procedure Rules. In short, the recommendation was aimed at inviting consideration of early settlement, with both defendant and plaintiff able to formally set down their position and with sanctions attendant upon subsequent failure by the other party to beat that position.⁵⁰
- (f) Information technology: The CJRG was keen to promote the use of information technology in civil justice. This may ultimately prove to be the most influential reform, with potential to be felt at

⁴⁸ See final report paragraph 124

⁴⁹ Final report recommendation 57.

⁵⁰ Final report recommendations 55 and 56.

every stage from initial exchange of information to service of proceedings and virtual hearings. The easier it is to facilitate the needs of the parties the more likely it is that cases will be run effectively.⁵¹

CONCLUSION – Preserving the Status Quo – Factors Underlying the CJRG’s Approach to Case Management

The CJRG audit of the civil justice system concluded that case management was unnecessary in the Small Claims Court, satisfactory in the County Court and required in the High Court. The preceding discussion illustrates that while adopting a fundamentally different approach to the means of achievement the CJRG recognised and accepted the objectives informing case management. It is too early to assess the success of the case management reforms in England and Wales. The Lord Chancellor’s Department has commissioned research by Nottingham Law School into this area and publication is expected in early 2003. An early study published by the Lord Chancellor’s Department in March 2001 was cautiously positive but did not pretend to offer a complete analysis.⁵² Undoubtedly the most comprehensive research to date was recently produced by the Law Society and Civil Justice Council. The report did not concentrate on post issue matters, but did make the following interesting observations on case management:

“...interviewees frequently highlighted perceived failings within the courts. This was particularly true of those involved in clinical negligence litigation, which is heavily court based, but similar points were repeated by those involved in housing disrepair and, to a lesser extent, personal injury litigation. Respondents criticised the courts for inefficiency and delay, suggesting that some courts were unable to list applications quickly enough for procedural timetables to have much bite. Case management was far more positively received in London than outside, where there were problems with providing experienced judges and apparently inconsistent decisions.”⁵³

A number of underlying factors may be said to underwrite the CJRG’s conclusions. First and foremost the CJRG found that the existing system was working well even when set against the targets used in the Woolf review. To adopt intensive case management to deal with a small minority of bad cases would have been disproportionate. Moreover, deficiencies in the present

⁵¹ Final report recommendations 73-77.

⁵² *Emerging Findings. An early evaluation of the Civil Justice Reforms.* (LCD, March 2001).

⁵³ *More Civil Justice? The impact of the Woolf reforms on pre-action behaviour.* (The Law Society and Civil Justice Council, May 2002). A number of similar observations have been made in practitioner journals. See, for example – Jeremy Fleming, “Trying Woolf” *Law Society’s Guardian Gazette*, (2000) Vol 97 No 17 p 18; Richard Harrison, “The state of the revolution” (2000) 150 *NLJ* 541; David di Mambro, “The aftermath of Woolf” (June 1999) sourced at Butterworths online, www.butterworths.com, commentary on civil procedure.

system may be adequately addressed through other recommendations falling outside those directly on case management. The CJRG was obliged to consider the cost of litigation in Northern Ireland. The jurisdiction is fortunate to have a tradition of fixed costs and the CJRG was keen to avoid compromising the successful aspects of the system. Intensive case management cannot be delivered without cost: work is created for the parties and court and judicial time is expended. The expense involved in intensive case management appeared to the CJRG to be disproportionate to the doubtful benefits accruing.