

**DELIVERED AT THE CONFERENCE ON THE REVISION OF THE CIVIL  
PROCEDURE RULES OF LAGOS STATE – 19<sup>TH</sup> – 21<sup>ST</sup> FEBRUARY 2002**

**PAPER:** COMMENCEMENT OF CIVIL ACTIONS, FRONT LOADING etc.

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**1. INTRODUCTION**

It would be difficult to describe the present system of Rules and structure of courts without referring, albeit concisely, to the historical basis and philosophical underpinnings of the machinery of justice. Indeed the functions of our courts and the basis for reform of their rules can only be understood when put in some historical context.

The Woolf Reforms which culminated in the new Rules of the Supreme Court of England 1998 represented a comprehensive re-appraisal and incorporation of many past endeavours which remained unimplemented or at best partially implemented.

It is certainly from these reforms that our present proposals draw their inspiration. Nevertheless we must be careful to fashion our reforms to suit our peculiar circumstances while drawing on the experience and lessons of other Commonwealth jurisdictions in which the common law system of adjudication is in use.

**2. COMPARATIVE BACKGROUND**

The principles which underpin the Woolf reforms and the Practice Notes recently implemented in Australia, particularly, the District court of New South Wales on the subject of case management of Civil actions are much akin to the ones that underpin our own proposals for reform. Namely, that the civil justice system must be just in results delivered, fair and seen to be so. It must ensure an equal opportunity for litigants to state their cases and answer their opponents. The procedure and cost should be proportionate to the nature of the issues involved - It must have the attributes of speed, be understandable to those who use it, effective, organised and adequately resourced.

Since the fundamental reformation of the structure and functions of English Courts under the Judicature Acts of 1873-75, 60 reports on Civil procedure and re-organisation of civil courts have been procured in England. The Civil Justice Review Report of 1988 and the Report of the Joint Independent Working Committee, set up by the General Council of the Bar and Law Society of England in 1992 have sought to implement reforms to the Rules of English courts. The latter stated that the philosophy of litigation should primarily be to encourage early settlement of disputes. Litigants and their lawyers need to have imposed on them, an obligation to prosecute and defend their proceedings with efficiency and dispatch. Procedures should be simple and easily comprehensible to both layman and lawyer alike.

On 24<sup>th</sup> Jan 1995 the Lord Chief Justice of England issued a Practice Direction (1995) 1WLR 262 – setting out new requirements in the preparation and control of cases. He said, “We have over the year been too ready to allow those who are litigating to dictate the pace at which cases proceed”.

### 3. PROCEDURAL PROBLEMS

Much akin to our own rules and system, there is no clear judicial responsibility for managing individual cases. Without effective judicial control, the adversarial process has encouraged an adversarial culture, which has degenerated into an environment in which the process is too often seen as a battlefield where no rules apply. In this environment, questions of delay, expense, compromise and fairness are of low priority. Expense becomes disproportionate and unpredictable. Delay is frequently unreasonable.

Litigation is reduced purely to adversarial tactics and where their worst excesses are not controlled, substantive and meritorious issues and claims are wholly sacrificed. The powers of the courts have fallen behind the more sophisticated and aggressive tactics of some litigators. Interlocutory hearings increasingly represent tactical skirmishes, aimed at delaying rather than enhancing the progress of the case.

**The “cards on the table” or “full and candid disclosure” principle is not fully met by mere filing of pleadings. Furthermore, the discovery process is often left unpursued due to an indolent plaintiff or recalcitrant Defendant**

and if pursued, the procedure remains unmonitored and unenforced so that it creates further delay and cost. The inevitable result of the foregoing is to discourage settlement.

Empirical study in major commonwealth jurisdiction have shown that settlement occur at too late a stage in the proceedings to be meaningful, such settlements more often than not, arising out of frustration. The benefits to the parties of fair settlements and the courts, through the avoidance of over listing of suits borne out of an early settlement are thus lost.

#### 4. **PROPOSALS FOR REFORM**

Successive attempts at reform which focus on procedural changes alone have failed to overcome the problem. There must be a fundamental shift in the responsibility for the management of civil litigation from litigants and their legal advisers to the courts.

This philosophy must mean that litigants, once they commence proceedings no longer have sole and unfettered control over the way in which they take the case forward.

The views of the Woolf Report and indeed, the preface to these proposals by the Hon. Attorney General of Lagos State & Commissioner for Justice converge in this regard where the judicial case management of civil actions is strongly urged.

Indeed prior to the Woolf reforms in the Civil Justice Review report of 1988 in England it was strongly recommended that there be greater judicial control of case progress.

It is proposed that careful attention be given to the example of the district court of New South Wales in Australia, Practice Note No. 33 on case management of Civil actions which took effect from 1<sup>st</sup> January 2002 and is applicable to Construction list, Commercial list, Defamation and Family relationship actions. The four types of actions aforementioned are called specialist list actions and will be directly managed by the judge from time of commencement or from the time of entry into the list under the existing rules.

The objective of this Practice Note is that 90% of civil actions be completed within 12 months of commencement and 100% within 2 years. Disposal of actions within the court's timeframes requires that action be expeditiously

prepared by the parties. Actions must thus not be commenced until they are ready to meet the requirements of the timetable as to preparation and hearing. If compliance with a requirement is not possible due to the Statute of Limitations or other special consideration, the court may, on the application of a party, vary this requirement.

Plaintiff's solicitors must accept that there is no rest period after commencement of an action, and in general, preparations for trial must be well underway before commencement.

Legal practitioners must advise their clients, in writing at the time of commencing an action or filing a defence of the court's insistence on actions being ready when the system so requires, that the court will dismiss actions or strike out a defence where parties do not meet time standards, timetables or comply with court orders and that problems such as Plaintiffs failing to notify their solicitors of a change of address or failing to attend promptly upon medical appointments can lead to the action being dismissed.

Applications for adjournments are made by Notice of Motion and Affidavit in support at the earliest opportunity and must be made before the day of hearing and heard before a list judge. Applications for adjournments will not be entertained on the day of hearing.

**In cases, which cannot proceed on the day of hearing, the defaulting party will be asked to show cause why his claim or defence should not be dismissed or struck out. Costs orders, payable within a nominated time can be made against a party or alternatively against a legal practitioner who may be called upon to show cause, why he should not personally pay the costs.**

The challenge thus facing the proposers of the reforms encapsulated in this document compiled by the Lagos State Ministry of Justice is how to preserve the best features of the present adversarial system while giving a more interventionist role to the courts. We must not erode the fundamental tenets of the common law system in favour of the inquisitorial procedure of civil law systems such that the transparency and impartiality of the arbiter can be called into question.

Under the current English rules Part 7 deals with commencement of procedures and Part 16 deals with contents of the documents required for commencement.

The fundamental shift in Part 16 is that a “Statement of claim” now restyled, as “Statement of case” must be verified by a statement of truth. A defence must provide a comprehensive response to the Particulars of claim, as a simple denial will not suffice.

In part 7 the user-friendly term, “Claim Form” has replaced the terms Writ and Summons. A person who wishes to make a claim no longer issues a High Court writ or county court summons, but instead issues a Claim Form. The Statements of case should enable the court and the parties identify and define the real issues in dispute. In particular they should enable the court to allocate the case to the appropriate track, to give appropriate case management directions.

**Likewise, with the proposed rules, the amendments recommended put this onus on the plaintiff. The recommendations have been implemented in the Federal High Court and are now recommended in the context of order 3 R1. by the combined recommendation of Human Rights law service and National Institute of Advanced Legal studies. Save for the recommendation that the Judicial/statutory authorities be included in the list of front loaded documents by a plaintiff in commencing action. I have great difficulty in criticizing the proposals for reform in the context of commencement of actions. Likewise order 7 Rule 1 on the subject of widening the scope of persons who may serve processes of court is equally acceptable to me.**

Finally, it is important to ensure that these processes and documents do not become unduly technical, particularly the witness statements, which in other jurisdictions have grown from being simple written records of the witnesses’ evidence to being very complex documents, drafted on the witnesses’ behalf by counsel.

Distinguished Chairman, Lords of Appeal, Honourable High Court Judges, Honourable Attorney Generals, members of the Inner and Outer Bar, Ladies and Gentlemen. I thank you for listening.

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