for resolving their disputes, recourse to self-help is likely to follow. Secondly, access to the civil courts to enforce and defend legal rights has an important part to play in establishing a healthy relationship between individuals and the law. If a citizen is unable to enforce or defend his rights according to the law this will both diminish his self-esteem as a member of society and diminish his respect for the law itself. Thirdly, it is of the essence of a democracy that all citizens should be able to participate in a democratic, non-violent way in the formation of policy. In the making of policy, the courts by their decisions play an important part and litigants, with their lawyers, have an integral role in this judicial law-making process. Finally, it is a fundamental constitutional right that citizens have access to the courts to prosecute or defend their rights.

Despite some impressive assessments in comparative tables,[3] there is a widely held perception that the civil justice system[4] in Hong Kong is in urgent need of reform. There are complaints that it is too costly, too slow, too complex and too readily susceptible to abuse. These criticisms are not, of course, peculiar to Hong Kong. Almost identical criticisms have been voiced in recent years in England, Australia, Canada, Singapore and other common law jurisdictions. I wish at the outset to express my own view that, based upon the common experiences of these jurisdictions, the primary fault lies not in the ineptitude or inflexibility of Hong Kong litigants, practitioners or judges but in the nature of our adversarial system as it has historically developed. That is not to say, however, that litigants, practitioners and judges are wholly free from blame.

Since many of these problems have been identified in other common law jurisdictions, the experiences and reforms of these other jurisdictions clearly merit close consideration in Hong Kong. Indeed so many recent working papers, reviews and reforms in this area have been instigated across the common law globe in the last decade that it might properly be designated 'the decade of civil justice reform'.[5]

3 For example, Hong Kong was ranked second only to Singapore in the 1998 World Competitiveness Yearbook in a global survey covering 46 countries conducted by IMD, an independent foundation. Survey respondents were asked to assess whether the national legal framework was supportive of the competitiveness of the economy. The legal framework includes the entire set of laws and the way they are administered as well as adjudicated by the judiciary. The results were published by the Singapore Judiciary in its Annual Report for 1998.

4 As the Honourable Murray Gleeson, Chief Justice of the High Court of Australia, points out in his Commentary on the Paper by Lord Browne-Wilkinson delivered at the Judges' Conference in September 1998, to describe the administration of civil justice as a 'system' might create a false impression. He says: 'It conveys the idea of a group of participants, judges, lawyers, administrators and litigants, working together towards a common objective; presumably, the fair, efficient, expeditious and relatively inexpensive resolution of civil disputes. In truth what happens in practice is nothing like that. The so-called "stakeholders" in the "system" in many respects have conflicting, rather than common, interests. They are not working together. It is not in their interests to do so.'

5 A note of warning about the efficacy of reform given by Michael Zander, QC, *continued on the next page*

A conference was held in Hong Kong in May 1999 to discuss this mass of reform and its applicability to Hong Kong. The conference proved immensely popular and was dignified by excellent speakers from Hong Kong and other common law jurisdictions. Butterworths, the law publishers, kindly agreed to publish a book which would be based upon, but wider in content than, the papers delivered at the conference. This is the book.

The purpose of this book is three-fold:

(1) to identify what problems exist in our system of civil justice;
(2) to identify what changes have been made in other common law jurisdictions in response to similar problems; and
(3) to determine the extent to which the such changes might be beneficially introduced into Hong Kong.

In this introductory chapter my aim is to sketch the context in which these global developments are taking place and identify aspects of our civil justice system in Hong Kong which might benefit from reform. I will also summarise briefly the main reforms which have been introduced in the last decade in other common law jurisdictions. The Woolf reforms are dealt with in greater detail in chapter 2 and the Singaporean reforms in chapter 3. In the final chapter, we will consider whether any of these reforms could usefully be introduced into Hong Kong.

2. THE CONTEXT FOR REFORM

By dint of history Hong Kong, like many other British colonies and protectorates, has inherited the adversarial system of justice. It has been practised here for more than 140 years and has stood the test of time well notwithstanding the tensions caused by a mobile and ethnically divers population enjoying massive economic development. It seems to me that never before in our history has the importance of maintaining the rule of law in Hong Kong been given such prominence by

should, however, be noted. He points out in 'What Can Be Done About Cost and Delay in Civil Litigation', Israel Law Review, Vol 31 1997, 703, at pp 714 and 716 that numerous reforms have been proposed (and some implemented) in England such as the Evershed Committee's Report 1963, the Winn Committee on Personal Injuries 1968, the Cantley Working Party in 1979 and the Review of Civil Justice instigated by Lord Hailsham in 1985. Of the lessons to be learnt from these reports, he makes two comments: (a) the lesson is not that one gives up attempting to make progress but that expectations should be set rather low. The idea that around the corner there are wonderful solutions to these problems is an illusion. Whatever the remedies proposed and whether or not they are acted upon, the problems seem to persist. Or, if a remedy seems to have some effect, the effect creates a new set of difficulties. The solution, therefore, becomes the start of the next problem; (b) research is essential as much after reforms are implemented as in the process of their formulation. In fact, to implement reforms without conducting research as to how they are working is an abuse of the process. It is, however, a very common abuse. See also his criticisms in 'What Can be Done about Cost and Delay in Civil Litigation?', 1997, Vol 16, Civil Justice Quarterly, pp 703–723.

Examples of firmer case management already introduced by the judiciary in civil trials in Hong Kong include:

- judges attempting to reduce prolix advocacy;[41]
- the widespread introduction of skeleton arguments, lists of authorities and chronologies;[42]
- the requirement for the exchange of witness statements,[43] together with an order that witness statements shall stand in place of evidence in chief;[44]
- the introduction of split trials in personal injury actions;[45]

41 Lord Templeman said in *Banque Financiere de la Cite SA v Westgate Insurance Co Ltd* [1991] 2 AC 249, 280–281 'Proceedings in which all or some of the litigants indulge in over-elaboration cause difficulties to judges at all levels in the achievement of a just result. Such proceedings obstruct the hearing of other litigation. A litigant faced with expense and delay on the part of his opponent which threaten to rival the excesses of *Jarndyce v Jarndyce* must perforce compromise or withdraw with a real grievance ... . The present practice is to allow every litigant unlimited time and unlimited scope so that the litigant and his advisers are able to conduct their case in all respects in the way which seems best to them. The results not infrequently are torrents of words, written and oral, which are oppressive and which the judge must examine in an attempt to eliminate everything which is not relevant, helpful and persuasive. The remedy lies in the judge taking time to read in advance pleadings, documents certified by counsel to be necessary, proofs of witnesses certified by counsel to be necessary, and short skeleton arguments of counsel, and for the judge then, after a short discussion in open court, to limit the time and scope of oral argument. The appellate court should be unwilling to entertain complaints concerning the results of this practice'. These comments were give some effect by *Practice Note (Court of Appeal; Procedural Changes)* [1995] 3 All ER 850, CA and *Practice Note (Court of Appeal; Procedure)* [1995] 3 All ER 850, CA, which introduce changes to reduce the time allowed for appellate arguments and *Practice Direction (Civil Litigation: Case Management)* [1995] 1 WLR 262, which stresses the necessity for judges 'to assert greater control over the preparation for and conduct of hearings than has hitherto been customary'. The latter Practice Direction gives notice that the court will exercise its discretion to limit '(a) discovery; (b) the length of oral submissions; (c) the time allowed for the examination and cross-examination of witnesses; (d) the issues on which it wishes to be addressed; and (e) reading aloud from documents and authorities'. In Hong Kong High Court Practice Direction No 4.1 'Civil Appeals to the Court of Appeal' gives the Court power to direct the length of time to be allowed to each party for oral argument.

42 See High Court Practice Directions No 4.1 'Civil Appeals to the Court of Appeal' and No 5.5 'Submission of Authorities'.

43 Under RHC, Ord 38 r 2A(2); see *Halsbury's Laws of Hong Kong*, Civil Procedure, Vol 5, [90.0923]. In *Cheung Kai Wing v Mok Sheung Shum (t/a Mok Sum Kee)* [1993] 2 HKC 113, 126, the court said: 'It is no exaggeration to say that Ord 38 r 2A has revolutionised the way in which civil litigation is conducted in England and in Hong Kong'.

44 RHC, Ord 38 r 2A(7). The witness statement should not be ordered to stand as evidence in chief where the witness' evidence is likely to be controversial or the witness' credibility is likely to be in issue: *Mercer v Chief Constable of the Lancashire Constabulary* [1991] 2 All ER 504, [1991] 1 WLR 367, CA.

45 See *Halsbury's Laws of Hong Kong*, Civil Procedure, Vol 5, [90.0949].

- the introduction of special lists and a more prominent role for case management within those lists;[46]
- the making of special provisions for case management in long trials;[47] and
- the recognition of the court's power to fix a timetable for the trial.[48]

To avoid a proliferation of appeals from decisions affecting case management, the Court of Appeal has made it clear that it will be reluctant to interfere with procedural decisions made by a judge in the management of the case before him[49] and will only do so in exceptional circumstances.[50]

This change in judicial role has not, however, been received uncritically.[51] The changing role of judges has been criticised on the following grounds:

46 Several Special Lists have been established in Hong Kong which are presided over by specialist judges to which particular proceedings are assigned. These Lists are the Commercial List, the Construction and Arbitration List, the Administrative Law List, the Personal Injuries List and the Admiralty List. See High Court Practice Directions No 1.1 'Admiralty', No 8.3 'Commercial List'; No 8.4 'Construction List'; No 20 'The Personal Injuries List'; No 28 'Administrative Law List'; No 29 SL 1.1 'Commercial List; and No 29 SL 2 'Construction and Arbitration List'. Practice Directions make provision for more active case management by the holding of pre-trial reviews etc. A good example is the Personal Injuries List where provision has made by Practice Direction for automatic directions and a pre-trial review. For a detailed consideration of personal injury actions, see ch 4.

47 An important recent development is the requirement for long cases, other than those allocated to the Special Lists, to be assigned to a particular judge who deals with all aspects of the case both at the interlocutory and trial stages: see High Court Practice Direction No 5.7 'Long Cases', taking effect from 1 March 1998. The express aim of the Practice Direction is to set in place a system for the prompt and efficient preparation for and hearing of trials of cases where the hearing is likely to be lengthy.

48 See, for example, the role of the trial judge in *Carrian Investments Ltd v Price Waterhouse* (1993) Civ App No 128 of 1993 and *Yeung Man Fung v Hung Fan Keung Henry* (1995) Civ App No 199 of 1994. In *Vernon v Bosley (No 2)* (1994) Times, 5 August, when the trial was clearly overrunning its allocated time, the court set a timetable for the remaining evidence and the examination, cross-examination and re-examination of witnesses was given a segment of the remaining allocated time.

49 *Thermawear Ltd v Linton* (1995) Times, 20 October, CA (trial of one issue before the others).

50 *Cheung Yee Mong, Edmond v So Kwok Yan, Bernard (t/a Gloria English School)* (1995) Civ App No 243 of 1995 ('the court will not review decisions of a judge at first instance on matters of case management unless it is satisfied that the judge's decision was plainly wrong', per Godfrey JA; 'case management is pre-eminently within the province of the trial judge and it is only in wholly exceptional circumstances that [the appellate court] will interfere', per Bokhary JA).

51 The involvement of judges in case management is open to criticism primarily on the grounds that it will undermine the traditional adversarial nature of our system of civil justice. Lord Woolf, whose reforms lean heavily on greater case management, justifies this by saying that the responsibility of the parties and the

continued on the next page

(D) Recovery of costs by litigant to be affected by his failure to accept offer of settlement or by his commencing or conducting litigation unreasonably

Several provisions have existed in our Hong Kong rules for some time whereby a litigant will or might be penalised as to costs for not accepting a settlement offer or for failing to conduct the litigation in a manner best suited to its swift (and therefore relatively inexpensive) resolution. The rules require that, in exercising its discretion as to the award of costs, the court must take into account, to such extent as may be appropriate, any offer of contribution[131] brought to its attention in pursuance of a reserved right to do so,[132] any payment into court and the amount of such payment,[133] any written offer to accept liability up to a specified proportion where there has been an order for a split trial of the issue of liability before the issue of damages[134] and any written offer made without prejudice save as to costs.[135] This rule provides a clear financial incentive to pre-trial settlement. Additionally in certain instances a successful party might be deprived of his costs for good cause.[136] Costs may also be taxed on the indemnity basis where a party pursues litigation for an improper motive.[137]

Lord Woolf has taken this principle even further in two ways. First he has introduced Pre-action Protocols.[138] The purpose of pre-action Protocols is stated to be:

- to focus the attention of litigants on the desirability of resolving disputes without litigation;
- to enable them to obtain the information they reasonably need in order to enter into an appropriate settlement;
- to make an appropriate offer; and
- if a pre-action settlement is not achievable, to lay the ground for the expeditious conduct of proceedings.

The Protocols are enforceable by way of costs orders. Practice Direction 'Protocols' provides that, if the court concludes that non-compliance with a pre-action protocol has led to the commencement of proceedings which

131 Ie an offer of contribution between co-defendants under RHC, Ord 16 r 10.
132 RHC, Ord 62 r 5(a).
133 RHC, Ord 62 r 5(b). This is a reference to a payment in made under RHC, Ord 22. Where the plaintiff recovers no more than the sum paid in, he will normally be awarded his costs of the action up to the payment in and the defendant will normally be awarded his costs after the payment in: see *Halsbury's Laws of Hong Kong*, Civil Procedure, Vol 5, [90.0462] and [90.1131].
134 Ie under RHC, Ord 33 r 4A(2): RHC, Ord 62 r 5(c).
135 Ie a 'Calderbank letter' under RHC, Ord 22 r 14: RHC, Ord 62 r 5(d).
136 See *Halsbury's Laws of Hong Kong*, Civil Procedure, Vol 5, [90.1140].
137 See *Halsbury's Laws of Hong Kong*, Civil Procedure, Vol 5, [90.1167].
138 There are only two Pre-action Protocols presently in force: the Pre-action Protocol for Personal Injury Claims and the Pre-action Protocol for the Resolution of Clinical Disputes.

otherwise might not have been commenced, or to costs being incurred which might have been avoided, the court may order the defaulting party to pay all or part of those costs, or to pay those costs on an indemnity basis.[139]

Secondly, Lord Woolf has both extended and made more flexible the principle exemplified by payment in and Calderbank letters. He says:

> I would stress that the importance which I attach to offers to settle has, if anything, increased since I wrote the Interim Report. I believe they are capable of making an important contribution to the change of culture which is fundamental to the reform of civil justice.[140]

The provisions in the new rules for making and accepting offers to settle extend to all fast track and multi-track cases and provide a more flexible version of the former rules. Further, the regime of providing a financial incentive by way of costs has been extended to pre-action offers (called 'offers to settle') made *either by the plaintiff or the defendant*. If an offer to settle made by any party is not accepted and the claim proceeds to trial, the court will take that offer into account when making an order as to costs.[141] The ability of the plaintiff by making an offer to settle to put the defendant at risk of highly adverse financial consequences constitutes a significant shift in the balance of power in litigation and should prove to be of immense tactical advantage to plaintiffs which was formerly lacking.[142]

(E) Incidence and taxation of costs

The new Civil Procedure Rules provide that, when awarding costs the court is required to have regard to all the circumstances and in particular:

- the extent to which the parties followed any particular pre-action protocol (see above);
- the extent to which it was reasonable for the parties to raise, pursue or contest each of the allegations or issues;
- the manner in which the parties pursued or defended the action or particular allegation or issues;

139 Practice Direction 'Protocols', para 2.3.
140 Woolf 'Access to Justice', Section III, ch 11, para 2.
141 CPR, r 36.10(1). Where the plaintiff (now claimant) after trial recovers more than the sum stated in his offer to settle, the court may award costs to the claimant on an indemnity basis together with interest at a rate not exceeding 10% above base rate: CPR, r 36.21.
142 For example, if the claimant makes an offer to settle for, say, £80,000 and at trial is awarded £100,000, the claimant will recover not only his costs but also, subject to the court's discretion, indemnity costs and additional interest on those costs to compensate the claimant for having had to go through the litigation unnecessarily and for the delay in recovering his damages which he would have received earlier had his offer been accepted: see further 'ADR and Settlement Offers', Anna Gouge (1999) Vol 18, No 4, Litigation, at pp 8–17.

When comparing the very impressive performance of the Singapore Judiciary particularly in its achievement of a very short period between the setting down and hearing of cases it must be borne in mind that the number of civil cases filed in Singapore is very much lower than in Hong Kong. In 1998, 8,235 originating processes were issued in the High Court, which included 2,000 writs of summons, and 60,000 original processes in the Subordinate Courts, which included 32,000 writs of summons.[232]

(v) Delay in conduct of trial

Lord Woolf's proposals to reduce delay in the conduct of trials centre around the court taking an active role in determining in advance the time that can be devoted to the trial and taking a more active role in the conduct of the trial itself. In respect of cases allocated to the small claims track, the time limited for the hearing will be fixed in advance. Further, the judge may ask questions of any witness himself before allowing any other person to do so, may refuse to allow cross-examination of any witness until all witnesses have given examination in chief and may limit cross examination to a fixed time or to a particular issue.[233] In respect of cases allocated to the fast track, the hearing must take no more than one day and the judge may limit the time available for examination of witnesses. Even in the case of multi-track cases the court will play a more active role in managing the time available for the hearing. It is expected that delays in the conduct of trials should, therefore, be reduced if not eliminated.

(vi) Complexity

Perhaps the most remarkable reform that Lord Woolf has achieved has been the scrapping of most of the Rules of the Supreme Court (and by association the mass of information provided in the White Book) under the banner of simplification and their replacement by a new set of Civil Procedure Rules. The new Civil Procedure Rules will apply in both the High Court and county courts[234] and all actions will be commenced in the same manner by a claim.[235] Many technical names have been changed:

232 This information is taken from the Singapore Judiciary Annual Report, 1998.
233 Practice Direction No 27, para 4.3.
234 The same position prevails in Singapore.
235 The claim will set out the facts alleged by the claimant, the remedy the claimant seeks, the grounds on which the remedy is sought and any relevant points of law. The defence will set out the defendant's detailed response to the claim and make clear the real issues between the parties: ch 1, para 9. Both 'statements of case' (the term 'pleadings' has now been abolished) will have to include statements of truth by the parties verifying their contents, so that tactical allegations will no longer be possible: CPR, r 22.1(6)(a)(i). A person who make a false statement in a document verified by a statement of truth, or who causes such a statement to be made, without an honest belief in its truth, is guilty of contempt: CPR, r 32.14(1).

for example, the plaintiff becomes the claimant, pleadings are known as statements of case, a liquidated claim becomes a claim for a specified amount, interlocutory judgment with damages to be assessed becomes judgment for an amount and costs to be decided by the court and the term taxation is replaced with assessment.[236]

The rules have also been made more accessible to the public by the publication of a 'Court User's Guide to the Civil Justice Reforms', which explains the civil process and contains many helpful flow charts.

A significant new change in approach has been introduced by the rules which is to be welcomed. Lord Woolf has provided in the rules a single foundational principle or grundnorm to guide the civil justice system at large. Rule 1.1 provides:

(1) The overriding objective of these Rules is to enable the court to deal with cases justly.
(2) The court must apply the Rules so as to further the overriding objective.
(3) Dealing with a case justly involves:
  (a) ensuring, so far as is practicable, that the parties are on an equal footing;
  (b) by saving expense;
  (c) dealing with the case in ways which are proportionate:
    (i) to the amount of money involved;
    (ii) to the importance of the case;
    (iii) to the complexity of the issues; and
    (iv) to the parties' financial position;
  (d) ensuring that it is dealt with expeditiously; and
  (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

It is expected that these overriding principles should assist judges in interpreting and applying the new rules.

(vii) Amenability to abuse

As we have seen above, indulgence in massive satellite litigation can be an effective tactic in the hands of the stronger party. Although the English courts have been critical of unnecessary satellite litigation and condemned it as an abuse of the court's process,[237] it is difficult for the judiciary to

236 Although Lord Woolf has acknowledged that, in some instances, the use of technical words can be convenient, his philosophy is that current legal terminology had become associated with the former procedural system that was to be reformed. Simpler language would help to support a change in attitude away from a legalistic, technical interpretation of words designed to further the lawyer's own objectives and to gain advantage over his opponent to an attitude which is open and fair and seeks to further the purpose and intention of the new rules.
237 The English Court of Appeal in *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 2 All ER 181 stressed that it was important, both from the point of view of other litigants and also the due administration of justice, for the court's time not to be absorbed in dealing with satellite litigation created by non-compliance with the rules.

The practice direction provides that the disclosure statement should expressly state that the disclosing party believes the extent of the search to have been reasonable in the circumstances and in setting out the extent of the search should draw attention to any particular limitations on the extent of the search which were adopted for proportionality reasons and give the reasons why the limitations were adopted, eg the difficulty or expense that a search not subject to those limitations would have entailed or the marginal relevance of categories of documents omitted from the search.

Thus for the first time an opposite party will be told who has made the search and the extent of that search will be set out. He can then form a view as to whether the search was reasonable. Whereas before he might have suspected but been unable to prove that his opponent had conducted an inadequate search, now he will have evidence which might support an application for specific disclosure under rule 27.12(1), described below.

The duty of standard disclosure continues until the proceedings are concluded: rule 27.11(1).

By rule 27.12(1), the court may make an order for specific disclosure, ie an order that a party shall do one or more of the following things –

(a) disclose documents or classes of documents specified in the order;
(b) carry out a search to the extent stated in the order;
(c) disclose any documents located as a result of that search.

An application for an order must be supported by evidence. When deciding whether to make an order for specific disclosure, the court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs – rule 27.12(4). It will take into account all the circumstances of the case and, in particular the overriding objective.

The court has power in certain specified circumstances to order disclosure before proceedings start and order disclosure by a person not a party.

A person who wishes to claim that he has a right or duty to withhold inspection of a document or part of a document must state in writing that he has the right and the grounds on which he claims it, either in the list in which the document is disclosed or to the person wishing to inspect. An application may be made for the court to decide whether such a claim should be upheld.

Where a party inadvertently allows a privileged document to be inspected, the party who has inspected the document may use it or its contents only with the consent of the court.

A party to whom a document had been disclosed may use it only for the purpose of the proceedings in which it is disclosed, except where (a) the document has been read to or by the court, or referred to, at a hearing which has been held in public; or (b) the court gives permission.

(f) Case management

In both of his reports, Lord Woolf described the introduction of judicial

case management as crucial to the changes which were necessary in the civil justice system. His key message, as he described it, was that:

> Ultimate responsibility for the control of litigation must move from the litigants and their legal advisers to the court.

Noting the concern expressed by the Bar Council, the Law Society and others that his proposals would require far more staff and other resources, Lord Woolf expressed the belief that 'the additional resources required should be well within the bounds of what is possible'. He based that belief on the expectation that a result of implementing his proposals would be a more focused and directed use of time and the diversion of cases from the court system through encouraged settlements and the encouragement of a resort to alternative dispute resolution (ADR). Realistic provision would have to be made for reading time for judges, as well as the provision of more clerical assistance. Information technology could free court staff from other tasks to support judges in case management.

In relation to arguments that cost and delay in civil litigation were not excessive, he pointed out that survey findings indicated that the current system provided higher benefits to lawyers than to their clients. It was only when the claim value was over £50,000 that the average combined costs of the parties were likely to represent less than the claim.

Essential elements of his proposals for case management included:

(1) allocating each case to the track and court at which it can be dealt with most appropriately;
(2) encouraging and assisting the parties to settle cases, or, at least, to agree on particular issues;
(3) encouraging the use of ADR;
(4) identifying at an early stage the key issues which need full trial;
(5) summarily disposing of weak cases and hopeless issues;
(6) achieving transparency and control of costs;
(7) increasing the client's knowledge of what the progress and costs of the case will involve; and
(8) fixing and enforcing strict timetables for procedural steps leading to trial and for the trial itself.

(i) The tracks

The small claims track

This is the normal track for claims for not more than £5,000.

The fast track

This is the normal track for any claim for which the small claims track is not the normal track and which has a financial value of not more than £15,000, but only if the court considers that:

and case management, new procedures and avenues for dispute resolution, and a new judicial philosophy towards the progress of proceedings.

2. EFFECTS OF THE SLOW PROGRESS OF PROCEEDINGS

Lament about delay has been expressed through the course of history. Shakespeare, always ready to expose the social evils of his time, states his view in Hamlet's great soliloquy:

> For who would bear the whips and scorns of time, the oppressor's wrong, the proud man's contumely, the pangs of despised love, the *law's delay* … [2]

In '*Bleak House*', Charles Dickens exhorts potential litigants to suffer the wrongs done to them rather than spend their lives (and cause their progeny to spend their lives) immersed in the interminable intricacies of Chancery procedure. Chancery, Dickens says, '… so exhausts finances, patience, courage, hope; so overthrows the brain and breaks the heart; that there is not an honourable man among its practitioners who would not give … the warning: "suffer any wrong that can be done to you, rather than come here".'[3]

Such strong sentiments are understandable when one considers the effect of delay. The claimant is prevented from obtaining relief for an unreasonable period of time, often in circumstances when he most needs it. His remedy may never be obtained if his opponent is able to dissipate his assets and avoid enforcement by reason of the additional time he has gained. There may be injustice at the trial or hearing if, by reason of delay, evidence is no longer available or witnesses forget material facts. Delay may also cause the party severe distress, and increase the amount of costs he will have to pay. He may not be in a position to finance drawn-out litigation, in which case he may be compelled to settle on unfavourable terms or abandon a meritorious claim. Delays take up the time of the courts and therefore militate against the public interest in quick access to justice. Lawyers, knowing that delay is a tolerated aspect of the litigation process, may lack the motivation to pursue cases with utmost endeavour. Furthermore, the prospect of delay often discourages potential litigants from using the legal process to pursue their rights. In a nutshell, delay causes injustice and undermines public confidence in the legal process. As Jacob says, if procedure lies at the heart of the law, then expedition lies at the heart of procedure:[4]

---

the Supreme Court and the subordinate courts are the Supreme Court of Judicature Act (Cap 322, 1985 Rev Ed) and Subordinate Courts Act (Cap 321, 1985 Rev Ed) respectively.

2 *Hamlet*, Act 3, scene 1, lines 70–72.

3 *Bleak House*, Ch 1 (p 3 of the 'Bantam Classic').

4 Sir Jack IH Jacob, *The reform of civil procedural law*, London: Sweet & Maxwell (1982), p 92.

> … delay in the legal process strikes deep into the very heart of civil litigation. It affects the litigant parties as well as the courts and even the state itself; it inhibits the recourse of deserving litigants to the courts; it induces settlements which may be neither fair nor just; it offends public opinion; and it diminishes the regard and respect for the law and the legal system. It is pervasive in its consequences. For some litigants, litigation is a miserable business; it sours their lives, and the longer it lasts the more deleterious will the consequences be on their personal, family and social relations. In many instances, delay causes the litigation to become an all-absorbing mania affecting the way of life of whole families, so that the litigant comes to suffer what the doctors have been able to diagnose as 'litigation neurosis'.[5]

3. REASONS FOR DELAY

The traditional adversary process was never primarily motivated by the desire to avoid delaying justice. It was propelled by other forces which had little, if anything, to do with ensuring that the general public could obtain quick access to, and speedy relief from, the courts of law. The nature of adversarial litigation is such that it is the parties who are responsible for the preparation and presentation of their cases. They decide on the legal and factual issues to be presented to the court and have complete control in the matter of factual investigation for that purpose. This necessarily means that the pace at which proceedings are pursued is largely dictated by the parties. The traditional role of the court is to adjudicate when called upon to do so during the interlocutory stages and at the trial. Hence, Lord Diplock said of the English system of civil litigation:

> The underlying principle … is that the court takes no action in it of its own motion but only on the application of one or the other of the parties to the litigation, the assumption being that each will be regardful of his own interest and take whatever procedural steps are necessary to advance his cause.[6]

As this pronouncement all too clearly shows, the rules are almost exclusively orientated on the parties' private purposes; not the efficient operation of the civil process in the public interest. Essentially passive in nature, the court will only assume an active role to ensure that the proceedings are conducted in a fair and just manner. The judge will ensure that the parties comply with the rules of evidence and procedure. He might also intervene where he wishes to clarify a matter such as a point of law or evidence.[7] Therefore, it was never the primary responsibility of the courts to control the course of the case or the pace at which it was conducted. There has not been a general philosophy that the backlog of cases should be avoided in order to ensure that potential

---

5 *Ibid*, at pp 93–94.

6 *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229, at p 254.

7 See *Jones v National Coal Board* [1957] 2 QB 55.

burden of the parties and simply wasted the court's time. In particular, trial dates which had already been fixed had to be vacated. The situation existed primarily because the parties were usually reluctant to settle at the initial stages of the action for fear of showing weakness by their willingness to compromise. An essential objective of the pre-trial conference in relation to civil cases is to determine whether the suit can be resolved amicably, and if not, to consider the steps which need to be taken to ensure that the parties are ready for trial. The parties are informed by notice in prescribed form of the date and time appointed for the conference. They may be required to narrow the issues in dispute so that trial time is not taken up by immaterial matters. Apart from fixing the time for trial, the registrar will give the appropriate directions to ensure that the parties are prepared for trial. Therefore, the pre-trial conference saves time and expense by allowing the court to scrutinise the progression of cases, and by enabling it to take a direct role in expediting litigation. These measures have reduced the use of the court's time. As hearing dates are not fixed until the parties establish that they are ready, there are far fewer adjournments just before trial. Approximately 120,000 pre-trial conferences[47] were conducted between 1992 and 1997 concerning ordinary suits and divorce cases. In the course of this time, 17,304 cases (or 94.7% of the existing case-load) were determined before trial.[48]

(e) Adjournment

An example of court involvement at a more basic level is the policy concerning adjournments. One or two adjournments for short periods may be innocuous enough and have little effect on the progress of a case. However, when a legal culture allows adjournments almost as a matter of course the temptation to take refuge in such magnanimity is often too great to resist. From the perspective of the lawyer, an adjournment is often the ideal solution to the problem of limited time. Of course, the combined effect of readily granted adjournments in all cases before the courts can only stultify the legal process. Hence, a new strict policy towards adjournments. They are only allowed if a strong argument for their justification can be made out. Once hearing dates have been fixed an adjournment will only be granted if 'no alternative course is available'.[49]

47 The pre-trial conference is considered under '5. Introduction of rules and related measures to speed up court processes' and '6. Active role of the court'.
48 *The Straits Times*, 7 September 1998, at p 23.
49 *Supreme Court Singapore, The re-organisation of the 1990s*, at p 52. Also see Pt V of the Supreme Court and Subordinate Courts Practice Directions (1997).

(f) Other developments affecting the court's role as a manager of proceedings

New provisions concerning the summary disposal of points of law and documentary construction empower the court to exercise its own initiative to require summary disposal even if the parties do not consent.[50] The rationale here is that if a matter can be satisfactorily resolved summarily and such an adjudication would be in the interest of justice, the additional time and expense required by a full trial cannot be justified. Therefore, the court should have a supervisory role in this respect.

Whereas previously the court would only order a matter to be heard by the registrar on the application of the parties, the pertinent rule has been amended to allow the court to so act on its own motion on the basis that the circumstances of the case warrant this mode of trial.[51] This development assumes, not unreasonably, that the court should have a role in determining the appropriate mode of adjudication (even if the parties have not put their minds to this), and ensures that the allocation of proceedings maximises the use of court resources.

While it is arguable that the court has always had the inherent power to revoke a subpoena on its own initiative, the courts rarely exercised this prerogative. The introduction of a rule which expresses this power makes it clear beyond doubt that the court should exercise a supervisory jurisdiction over the subpoena process to ensure that it is not abused. Indeed, parties may have to justify to the court why they intend to call certain witnesses if the relevance of their testimony is unclear or the evidence can be provided in a more suitable form.

Another modification enables the court to make any order or give directions incidental or consequential to any judgment or order which it may want to do, *inter alia*, in the interest of expediting the relief to which a party is entitled.[52]

7. INTRODUCTION OF RULES AND RELATED MEASURES TO SPEED UP COURT PROCESSES

The following developments are considered in the chronological order of the litigation process to illustrate their overall impact.

(a) Life of the writ

The period of validity of the writ of summons can have an important impact on the progress of proceedings. The longer this period, the more

50 Ie, O 14, rr 12, 13 (RC).
51 See O 36, r 1 (RC), which was amended by the RC in 1996.
52 O 92, r 5 (RC). Although this provision replaced the former O 44 (RSC), which was deleted by the Rules of Court, 1996, it is much wider than O 44 (RSC), which specified the areas in which the court might make orders.

non-monetary claims.[149] Furthermore, this Order is suffused with technical rules which have generated a body of complex case law. The first stage of change was signalled in 1991 when rule 13 of Order 22 was introduced to enable a party to make a 'without prejudice' offer in proceedings which were not within the scope of the payment-in procedure.[150] For example, a claim for an injunction, or a declaration, or an account, or ancillary relief in matrimonial proceedings (such as the division of property), could be the subject of this process. It was provided that a party could, at any time, make a written offer to any other party in the proceedings expressed to be 'without prejudice save as to costs', and which relates to any issue in the proceedings.[151] The purpose of this 'without prejudice' clause was to put the defendant in the same position with regard to costs as if the payment-in procedure had operated. An offer on such terms could not be communicated to the court until the stage for determination of costs, at which time the offer could be taken into account by the court for the purpose of exercising its discretion as to costs.[152] This procedure was only to be utilised if the party could not have protected his position by payment into court. If a payment into court could have been made, the court would not have taken the 'without prejudice' offer into account.[153]

Both procedures could come into operation where the plaintiff claimed damages as well as non-monetary relief. For example, if he claimed an injunction to restrain the defendant from continuing a certain activity and damages for the harm which had been caused, the defendant might make a payment-in regarding the damages and write a letter 'without prejudice' as to costs indicating his willingness to modify his activity in the plaintiff's favour. If the plaintiff refused to accept the defendant's proposal, the court could take the letter into account in determining whether the plaintiff acted reasonably, and make the appropriate order as to costs.[154] The procedure was also considered in relation to the written offer of contribution available to tortfeasors and third parties.[155]

149 See *Moon v Dickinson* (1890) 63 LT 371; *Young v Black Sluice Commissioners* (1909) 73 JP 265.
150 R 13 was introduced by the RSC (Amendment No 3) Rules, 1991.
151 See the former O 22, r 13(1) (RSC). This procedure was approved in *Calderbank v Calderbank* [1976] Fam 93, which involved matrimonial proceedings; and in *Computer Machinery Co Ltd v Drescher* [1983] 1 WLR 1379, which concerned an injunction and other proceedings.
152 See the former O 22, r 13(2) and O 59, r 5(c) (RSC).
153 See the proviso to the former O 22, r 13(2) (RSC).
154 As to the weight which is accorded to a letter 'without prejudice' as to costs, see *Corby District Council v Holst & Co Ltd* [1985] 1 WLR 427; *McDonnell v McDonnell* [1977] 1 WLR 34.
155 See the former O 16, r 10 (RSC). This rule was abrogated as a result of the introduction of O 22A (RC).

As mentioned, the purpose of the written offer 'without prejudice as to costs' pursuant to the former rule 13 of Order 22 was to cater to the circumstances to which the payment-in procedure did not apply. The rule merely supplemented the existing process. A new regime of rules was still needed to replace or offer an alternative to the existing payment-in procedure. This came about in 1993 when the 'offer to settle' process was introduced.[156] The 'offer to settle', which was set out in Order 22A (RSC) and is the same Order in the RC, consists of a comprehensive and self-contained group of rules which operate independently of the payment-in machinery.[157] It has a different perspective altogether. Indeed, the all-encompassing nature of the new procedure is likely to become more popular than settlement by the payment-in process, particularly in view of the advantages of the former over the latter. The 'offer to settle' is much simpler and more flexible by contrast to the technical rules of the payment-in procedure. The manner in which the offer is made and accepted and the consequences involved are clearly set out by the rules. The forms to be used by the parties are straightforward. The process applies to all forms of relief (not just to money claims), and is available to plaintiffs and other parties to the proceedings (not just to defendants). It extends to offers of contribution and third party claims. The flexibility of the 'offer to settle' lies in giving a party the complete freedom to formulate the offer to suit the circumstances of the case. Expense and inconvenience are avoided because money does not have to be lodged in court or anywhere else. A significant advantage of the new procedure is that the plaintiff can make use of it. The payment-in process only enables defendants to take the initiative by paying money into court. If the plaintiff wished to make an offer, he had to set down the terms of his offer in a letter and reserve his right to raise the letter for the purpose of determining costs.[158] In this respect, the new procedure puts all parties on even terms. Having pointed to the benefits of the 'offer to settle' procedure, it should be said that an advantage of the payment of money into court is that it actually secures the plaintiff's claim by ensuring that the sum offered in settlement is in court. In the case of an offer to settle, the agreement has yet to be backed up by payment of the settlement sum, although, of course, there is a binding contract.

(c) Court dispute resolution by the subordinate courts

Reference has already been made to the pre-trial conference. The pre-trial conference involves a separate procedure governed by Order 34A

156 See the RSC (Amendment No 2) Rules, 1993.
157 The procedure is based on similar rules which operate in Canada and in certain Australian states. See r 49 of the Ontario Rules of Civil Procedure; Pt 22 of the New South Wales Rules, and O 26 of the Victoria Rules.
158 See the consideration of the former r 13, above.

There is no welfare state system in Hong Kong so partial or total disability means a loss of income, support and future benefit to a greater or lesser degree. Commercial litigation when compared with personal injury litigation has considerable advantage. It is pursued with greater, exemplary speed, effectiveness and the prospect of immediate security and return. Financial concerns have the wherewithal to pursue remedies to protect their viability, and liquidity when threatened by the tortious activity of rivals or breach of contract of its partners to an agreement. Why should not the individual, who is in general terms even more vulnerable than some corporate entity, have the benefit of timely efficient and economic process?

Personal injury caused by trauma, ranges from the transient and trivial to the devastating or catastrophic. In many cases it is fatal. Where the injury creates a reliance or dependence upon the family or the loss of financial support for that family and even grief, and psychological or psychiatric injury consequent upon grief, the full extent of human vulnerability can be seen. The variation in human reaction and its ability or inability to cope with physical damage is infinite and leaves no room for robust objective assessment by the layman.

Such injury and loss can be caused by negligence of the victim himself or herself, by another, or by a combination of both. In cases where the victim is solely responsible, there is often a degree of equanimity and acceptance of such responsibility, or of fate, which enables such person to adjust with reasonable composure and self sufficiency. However, where the fault wholly or partly is that of a stranger, there is inevitably a different reaction. In such a case it is often difficult and insensitive to try and convince the victim that society has equated his or her suffering, disability and loss with a certain sum of money.

But society has conventionally accepted this approach over the years in all common law jurisdictions. Sometimes, the yardstick for assessment is very arbitrary. Variations are wide. It is relatively easy to assess direct financial loss – eg loss of wages, loss of pension rights, expenses involved in coping with the consequences of the injury. The greatest problem lies in convincing an injured person that there is a conventional sum to represent his pain, suffering, injury and loss of amenity. It is frequently referred to as the figure for compensation. It is not. No sum of money can compensate a person for his loss in this regard. He or she would rather be the whole man or woman he or she was prior to the incident. This then is a significant obstacle to recovery and adjustment to the change of life style consequent upon any injury which has caused some change in the way of life. But the greatest obstacle is the delay in and cost of the necessary means of obtaining such compensation. The very system seems to any victim or external observer, heavy, complex, slow and in many respects, unnecessary. Very many injured persons deteriorate as a consequence of the combined effect of these anomalies. New illnesses develop. Allegations of malingering emerge, as if piling insult upon injury. Very, very few human beings actually revel in their misery and make positive efforts not to recover. The human force and spirit is geared to triumph over adversity, not to succumb to it. Of course, there are exceptions but in the nature of things they are very few.

There is an element of the population of Hong Kong which is transient; some of it is itinerant. I suspect that proportionally it is higher than any other region or country which has a common law tradition in compensation for personal injury. Statistically, this is almost certainly provable but such is the common experience it is unnecessary to examine that evidence. There is therefore an overriding need to ensure that all victims and especially those who live abroad, or those who decide to emigrate, may be compensated quickly and are not subject to the vagaries of a distant system. There is sometimes an exploiting by defendants of what they see as a tactical advantage. I have known such a tactic pay dividends. I do not regard that as consistent with a legal system which prides itself on providing a level playing field. They are entitled to that – why should the static, long-term population expect anything different?

2. THE WOOLF PROPOSALS IN THE UNITED KINGDOM

In over 30 years of practice as a solicitor and junior and leading counsel in the United Kingdom, I have progressively been puzzled at the cumbersome system of personal injury litigation with its formal pleadings and adversarial ventures into interlocutory proceedings, and discovery in particular. In employers liability cases, there have frequently been anxious disputes over disclosure of the state of an employer's knowledge at relevant times, and the records of previous incidents, with consequent delay and expense.

The generating influence of Lord Woolf's proposals was a recognition that the system of litigation, time-honoured as it was, was slow, expensive, complex, unequal in that the wealthy could always put the under-resourced litigant at a disadvantage, uncertain in duration, and uneconomic. These factors are all linked. His appraisal was virtually universally recognised and welcomed. One of its many problems in implementation is the sea-change in public funding for litigation which accompanied it. I do not propose to examine it in detail. Experience at two seminars/conferences in the United Kingdom which I attended last year on behalf of the judiciary disclosed a great deal of goodwill on the part of practitioners to meet Lord Woolf's objectives and criteria but growing scepticism as to whether the Lord Chancellor's fabric for the reforms, in the context of drastic reduction in public funding for plaintiffs, will in fact facilitate Lord Woolf's aims.

It is arguable that the powers of control and case-management have been 'with' the judges for a very long time. They have always had a wide discretion to do what is necessary for the fair, economic and prompt resolution of cases. But the pressure of work upon the judges themselves and a lack of will in the administration of the system have combined to allow the initiative to remain with the lawyers themselves.

solicitors. I make no criticism of that fact. There is no reason why they should not do so but the vast majority of the unhelpful, disorganised and sometimes inadequate pleadings emanate from firms of solicitors. It is not unusual to have to work one's way through a confused description of various defendants, their contractual relationship and breaches of duty, occupying sometimes two pages or more before finding out what the plaintiff's job was, who employed him and what happened to him to give rise to the action. In running down actions, there is often a long description of the highway concerned, the compass directions of travel of vehicles involved in a collision, and the owners and/or drivers of such vehicles, before discovering that the plaintiff was knocked down on a pedestrian crossing, or was a rear seat passenger in one of the vehicles. The particulars of negligence often say the same thing two or three times in scarcely different language.

There is no great art in settling pleadings but they can illustrate a well-ordered mind and likely to be well presented case. They have a clear purpose and should be drafted to achieve that. Recently, a succession of statements of claim settled by one particular firm of solicitors, when compared with the plaintiffs' proofs of evidence, showed that they had slavishly copied these with one or two formal paragraphs paying lip-service to the conventional notion of a pleading.

It is never necessary to plead 'res ipsa loquitur' in a statement of claim. In an overwhelming case where it applies, it may justify a pleading to that effect if only to concentrate the mind of those advising the defendant on liability. But in the vast majority of running down cases, it is pleaded inappropriately giving rise to the immediate reaction that further consideration should be applied to the meaning of the term.

The lack of disciplined approach to defences settled is also evident. Too frequently there have been applications at the pre-trial review stage to amend the defence to allege 'volenti non fit injuria' or contributory negligence, and sometimes even to deny what was admitted in the original defence years earlier, eg employment of the plaintiff. The explanation has usually been that counsel has seen the papers and advised such amendments. Given that a defence is supposed to be pleaded at the outset on the statements and documents obtained, there seems to be little, if any, excuse for such last minute thoughts. They are likely, in general, to be given short shrift.

At the Check List Review, the parties will be expected to have their pleadings in proper order with any justified request for particulars made and answered. Only in an exceptional case will an interlocutory application for such, before this hearing, be justified.

(c) Statements from factory inspectors, police, etc

Proofs of evidence are, in the normal course of events, obtained at a very early stage of a claim during the necessary investigation. In accidents

at work, sometimes the Factory Inspector or Department of Labour official obtains statements from witnesses and makes a report. The police act similarly in relation to motor vehicle collisions (and other incidents producing injury) and usually a plan is prepared; sometimes photographs are taken. If proceedings in the Magistrates Court result, there is a record of such. It is impossible to settle a statement of claim without this available information. Although a 'holding' defence can be settled on the basis of a blank denial pending receipt of statements, proofs, reports or other documents, it requires prompt amendment upon receipt of the material which enables it to deal properly with the claim and crystallise the issues. The Check List Review will require the parties to narrow down the issues to the minimum. To that end all statements have to be filed so that the court can make provision for service/exchange if the parties have not already achieved this themselves. I consider it quite inappropriate that counsel should settle such statements. That is not their function nor are they equipped to do so. Whilst I accept that they can very properly advise as to areas which should be further investigated with a witness, the solicitors should do the actual proofing.

(d) Discovery

In running down actions, discovery will rarely afford any problems or conflict for the practitioners or parties. Accidents at work however often generate documents by the employer or other concern eg sub-contractor, principal contractor on site. Changes to be introduced in the United Kingdom will lay to rest the 'Peruvian Guano' principle (*Compagnie Financiere du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55. Concentration in any given case must be upon what is relevant to and necessary for the identification and resolution of the issues.

Plaintiffs' solicitors should obtain and disclose all documents in support of the various heads of damage claimed – if they obtain and rely upon any medical records (other than the contents of medical reports) they must disclose these. If any reports which they disclose make any reference to other reports or correspondence, those too must be disclosed. The defendants in turn must disclose, apart from any statutory records or reports of the incident, any report of an investigation into the accident which was not brought into existence for the purposes of or in contemplation of the litigation. All wage records of comparable employees must be disclosed in cases where there is a claim for continuing whole or partial loss of earnings, just as readily as the plaintiff's pre-accident wage records.

In practice, the defendants can be expected to prepare for disclosure as soon as they are faced with a claim, and, at the latest, upon receipt of the writ. The plaintiff's more limited ambit of disclosure may inevitably be on a piecemeal basis but the expectation must be of prompt disclosure as soon as the area or aspect is clarified. In the disclosure of documents relating to heads of damage, it is very much in the parties'

discovery has assumed a similar role in the late 20th century.[27] In many common law systems, the test of relevance for the purpose of discovery is still the one set out in *The Compagnie Financiere et Commerciale Du Pacifique v The Peruvian Guano Company* (1883) 11 QBD 55.[28] In the very well-known words of Lord Brett:

> … [E]very document relates to matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may* – not which *must* – **either directly or indirectly** enable the party … either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly', because, as it seems to me, a document can properly be said to contain information which may enable the party … either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to **a train of inquiry** which may have either of these two consequences … (bold emphasis added)[29]

An examination of the situation in the United States suggests that the test of relevance is at least as broad, if not broader, under the Federal Civil Procedure Rules than in other common law jurisdictions. Consider, for example, the following comment:

> Relevance, for discovery purposes, is exceptionally broad. Information sought need not be admissible at trial nor need the information itself be relevant. If the information sought to be discovered 'appears reasonably calculated to lead to the discovery of admissible evidence' on the subject matter of the lawsuit, it is discoverable. In short, a 'fishing expedition' is proper if it might unveil probative evidence.[30]

It is evident that the tests of relevance under both the Federal Rules in the United States and *Peruvian Guano* are extremely broad. This has been identified as a problem in need of reform in both England and the United States, but American discovery reform has fallen short of amendments specifically aimed at narrowing the broad test of relevance.[31] The American discovery reform debate, especially in the last decade, seems to have focused more on discovery abuse and less on the broad test of relevance.[32] It is evident from the recent reforms in England,

27 The Woolf Report laid a good deal of the blame for the perceived problems with discovery at the doorstep of the broad definition of relevance: see below, beginning at p 7.

28 Referred to below as the *Peruvian Guano* case. See below, pp 160–162, and 166, for a discussion of the case. For a recent application of this test, see *Dolling-Baker v Merrett* [1990] 1 WLR 1205 (CA). See also the discussion in Matthews and Malek, fn 1, pp 92–95.

29 *Peruvian Guano*, p 63.

30 Thomas A Mauet, *Pretrial*, 3rd ed, 1995, Aspen Publishers Inc, p 174, and the other sources referred to there in fn 1 and 2. Some recent American discovery reform initiatives are discussed below, at pp 179–182.

31 See discussion below at pp 179–182.

32 *Ibid*.

however, that the broad scope of relevance given to us by *Peruvian Guano,* and followed for more than 100 years, has become the chief target of many discovery reform advocates, and has been rejected as unsuitable for litigation in the 21st century.[33]

Why is the broad *Peruvian Guano* test no longer suitable? Isn't it just the kind of test we need to be in step with the increasingly non-adversarial, 'cards face up on the table'[34] approach to litigation? The most obvious answer to this question is that litigation in Lord Brett's day was far less complex than it is 115 years later. The scope and complexity of the products liability, commercial, intellectual property, antitrust and professional negligence cases in today's courts, could not reasonably have been anticipated by Lord Brett or the advocates who argued the case before him.[35] We can see from our turn of the 20th century perspective that this case cried out for a floodgates argument. We can also understand, however, that neither Lord Brett nor the advocates who appeared before him could reasonably have been expected to appreciate how much more complex and documented life in the 20th century would become.[36]

There is at least one other reason why a floodgates argument would not have been made in the *Peruvian Guano* case. Perhaps the advocates could never have anticipated that Lord Brett would state such a broad test to deal with such a narrow problem. While we are very familiar with the 'train of inquiry' test articulated by Lord Brett, we have probably long since forgotten the facts and issues of the *Peruvian Guano* case (if we ever knew them). The plaintiffs in that case were suing for damages for breach of contract. The defence was that there was no contract, the parties never having got past the negotiation stage. The defendant requested certain documents and letters referred to in the plaintiff's minute-book, because they had been prepared after the date of the alleged breach and might therefore have been relevant to the defence that the

33 The most obvious example is the recent reform of discovery law and procedure in England following the inquiry of Lord Woolf into civil justice. The inquiry and reforms are discussed below.

34 *Davies v Eli Lilly* [1987] 1 WLR 428.

35 The point here is that the substantive law is much more complex than it was at the end of the last century. This is a function of time and progress, but the broad scope of discovery must also have contributed to the development of the substantive law. See the discussion of the relationship between broad discovery and the growth of the substantive law in Jack H Friedenthal, *'A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure'*, 1981, 69 Cal LR 806, 818. See also Richard L Marcus, *'Discovery Containment Redux'* (1998), 39 BCL Rev 747, at pp 749–50 ('Marcus').

36 This increasing complexity in substantive law often occurs in much shorter timeframes that the one separating Lord Brett from us. For example, in the 1970s in the United States, antitrust cases were identified as the source of all discovery evils, whereas in the 1990s they had been displaced for this purpose by products liability cases. See Marcus, fn 35, p 775. Perhaps ten years from now, 'Y2K' cases will have assumed this role.

> … [I]nitial disclosure should apply to **documents of which a party is aware**[75] at the time when the obligation to disclose arises. It is for consideration whether the formula should be enlarged to include potentially adverse documents of which a party would have been aware if he had not deliberately closed his mind to their existence. It is not, I believe, possible to formulate the test in absolutely precise terms; it has to be recognised that the obligation of discovery has involved, and will continue to involve, good faith and judgment. My aim is to provide a test for disclosure of adverse documents on a reasonably circumscribed basis in the first instance. The court and parties will have to work out in practice the appropriate balance between what should properly be disclosed under the test and what can legitimately be left for the opponent to canvass on an application.[76]

When we consider these comments in the context of the discovery culture to which lawyers and judges have become accustomed, we would be justified in reacting skeptically to these comments of Lord Woolf. The point was, of course, not lost on Lord Woolf. He acknowledged in his report both the likelihood of a short-term increase in litigation to resolve disputes about discovery rights and obligations[77] and the need for change in the prevailing culture.[78] This is a realistic approach; a short term increase in litigation is an inevitable result of civil justice reforms.[79]

It has been suggested that Lord Woolf did not ultimately get what he wanted, and that the final rules reflect a more modest change in the definition of relevance than had been advocated by Lord Woolf in the Interim Report and embodied in the draft rules.[80] A comparison of the draft rules and the final rules does not support this contention.

(iv) Disclosure under the draft rules

Disclosure was addressed in Part 27 of the Draft Rules. Section 27.2 defined the scope of the duty to disclose as follows:

> 27.2(1) Where a party is required by a direction under Part 25 to disclose documents by way of standard disclosure, he must disclose–
> (a) documents on which he relies; and
> (b) documents of which he is aware which to a material extent adversely affect his own case or support another party's case; and

75 These words suggest a relatively limited duty to search. This is discussed below at pp 169–170.
76 Interim Report, p 171, para 34.
77 *Ibid*, pp 171–72, para 35.
78 *Ibid*, p 172, para 39.
79 See for example the comments of Zander, fn 53.
80 Margaret Hemsworth, *Disclosure Under the New Civil Procedure Rules*, New Law Journal, 11 September 1998, 1300, at p 1311.

> (c) [*any documents which he is required to disclose by any practice direction*][81]

The first category, 'documents on which he relies', is straightforward. In *Peruvian Guano* language, it would encompass documents which are directly relevant.

The second category is not as straightforward. It has several components. First, it applies to *documents of which the party is aware*. This suggests that the onus on a party to conduct a search for documents is minimal. There was no guidance in the draft rules as to what the extent of any such search would have been. This category would embrace documents which harm a party's case or assist the other party's case, but only if the document harms or assists *to a material extent*. This would appear to be intended to avoid the perceived drawbacks of the wide *Peruvian Guano* test, and especially the very broad scope of discovery and concomitant duty to disclose created by the indirectly relevant and train of inquiry aspects of that test. Whereas that broad test takes from parties any discretion to withhold a document on the basis that it might be marginally relevant but not relevant to a material extent, this draft rule gives parties that discretion.

It is not clear how one would have determined the parameters of materiality under this draft version of the rule. It certainly could not have been by reference to past discovery practice, for this proposed rule was clearly intended to be a sharp departure from that practice.[82] While there is no specific definition in the Interim Report, there are some vague guidelines. The overriding themes of Lord Woolf's comments on this topic are that there must be a more controlled approach to discovery,[83] that *Peruvian Guano* discovery must be avoided except in a very limited number of cases,[84] and that disclosure would therefore be 'on a reasonably circumscribed basis in the first instance'.[85] It followed from these aims, he said, that judges would have to be 'judicious' in their approach to a party who had not initially disclosed a document subsequently held to be material.[86] Sanctions would be appropriate in such a case only if it was clear from the circumstances that the non-disclosing party must have known of the existence and the materiality of the document.[87] While

81 This sub-paragraph was tentatively added, presumably because relevant practice directions had not yet been drafted. This provision is included in the final rule, and the relevant Practice Direction is published with the rule.
82 The vigour with which the *Peruvian Guano* test was rejected is evident in the comment of Lord Woolf that 'it would be extremely rare, perhaps only in cases involving allegations of dishonesty, that *Peruvian Guano* discovery would be required.' (Interim Report, pp 170–171, para 32). It follows that the test would be even more rigorous in a fast-track case.
83 Interim Report, pp 67–68, paras 18–20.
84 *Ibid*, p 168, para 20.
85 *Ibid*, p 171, para 34.
86 *Ibid*, p 172, para 36.
87 *Ibid*.

areas in our judicial process which qualify to become the first targets of possible reform.

The initial findings of our Committee identified a few areas upon which we can focus our discussions.

1. INTERLOCUTORY APPLICATIONS AND IMMEDIATE TAXATION OF COSTS

One of the things which struck us most when we reviewed the efficiency or otherwise of our legal process is the abundance of unnecessary interlocutory disputes being dragged out at the expense of judicial time and costs. Daily abuses of interlocutory procedure are not uncommon resulting in considerable delays to speedy resolution of disputes. One of the ways to prevent abuse of interlocutory procedure is to strengthen the court's power to sanction those who improperly seek to benefit from such abuses. We suggest that the most effective sanction is to impose orders for immediate payment of costs.

At the moment, the normal order for costs for interlocutory matters are either 'costs in the cause' or 'costs in any event'. Both orders mean that costs will not become a concern to the parties until the end of the case which may be some months if not years away. That is not at all conducive to deterring unmeritorious applications or objections to interlocutory relief. There are other disadvantages of such orders:

(1) The taxation may come years later and the solicitors eventually involved with taxation may not have the same degree of knowledge of the particular interlocutory dispute as the one previously handling the application.
(2) There is often no trial. Cases do settle or simply fade away.
(3) Such orders, sometimes meant to be a form of sanction against unreasonable litigating behaviour often not only fail to achieve that goal but are being used as bargaining chips by some to manoeuvre into tactical positions.
(4) Orders of this nature, such costs orders even provide an incentive for parties to go to trial, when the case would otherwise settle.

Orders for 'costs reserved' are no better:

(1) Such an order simply means that both the court and the parties will have to invest more time and thus more costs later on to revisit the issue.
(2) The trial Judge may be at a serious disadvantage compared to the Judge or Master who heard the interlocutory application.
(3) Sometimes, such orders are even overlooked.
(4) Orders of this nature, of course, also share the same vice identified above as orders for 'costs in the cause' or 'costs in any event'.

On the other hand, the arguments against immediate taxation can be summed up briefly as these:

(1) Separate taxation is a waste of judicial time and resources and even futile: Lord Evershed MR in *Thompson Schwab v Costaki* [1956] 1 WLR 335, at 341.
(2) Separate taxation will clog up court lists and the amount is too small to justify the process of normal taxation.
(3) Judges at trial are sometimes better informed for conducting the taxations.

We are not convinced that the last argument is necessarily a good one, whereas the first two arguments can be met by a properly worded rule which encourages on the spot assessment by the Court or agreement by the parties.

But we think the most pressing argument is that immediate taxation and payment of costs will shape litigants' behaviour in the right direction. It would increase the litigants' awareness to their need to behave responsibly and economically. Properly engineered, a change of the relevant rules and our practice in this regard will in the long run result in shorter proceedings and lower costs. We find the Woolf Report recommendations on this aspect acceptable to us.

Our present rules actually do provide jurisdiction to order immediate taxation under RHC O 62 r 4(1). Order 62 r 9(4) also provides the power for the court to order a proportion specified up to a stage of the proceedings or a lump sum instead of taxed costs. There is, however, no express provision for immediate enforcement and payment.

These powers, however, are seldom exercised in Hong Kong. The same is true in England.[1] This provision, of course, has now been replaced as of 26 April 1999.

It is noteworthy that, even before the implementation of the Woolf Reforms in England, summary assessment of costs has been encouraged in England: see Practice Direction (Costs Summary Assessment) [1999] 1 WLR 420, where a number of points were made:

(a) Such orders should be made in 'short and simple' interlocutory applications, including those for summary judgment. After the coming into effect of the Civil Procedure Rules, the Practice Direction would be amended so that the restriction to interlocutory applications is removed.
(b) The court would be required to consider at the conclusion of the hearing, whether costs should be summarily assessed or not. They should do so if a 'costs in any event' order is appropriate, *unless* there is good reason to the contrary, for instance if there are substantial grounds for disputing a sum.
(c) The court might order payment of costs by a certain date, or by instalments.

---

1 See *White Book* at para 62/7/14, at p 1134 as regards the English equivalent in O 62 r 7(4)(b).

most usefully be considered. It is indicated where these reflect new Woolf rules. Most of this, it will be apparent, involves introducing new mandatory procedures which force solicitors and their clients to act, quite frankly, more responsibly and more critically in the conduct of litigation. As indicated earlier, it is solicitors and their clients who initiate the litigation process and it is at that level that most of the work, and most of the inefficiency, is encountered.

(1) Compulsory completion by solicitors and clients at the outset of a retainer letter setting out charging rates and confirming that the solicitor has explained the basic procedure involved in the litigation process and that the client understands that every effort should be made to expedite the process and not cause delay. The letter should require estimates to be given and contain an undertaking from the solicitor to update the estimates regularly. (Not in Woolf, but in part reflecting requirements in New South Wales)

(2) The statement of claim to be endorsed on a writ, unless there are good reasons not to do so, eg because of a limitation period problem, or because early discovery is going to be sought. (In line with the intention embodied in the Woolf pre-action protocols and note 7.4.2 of the new *White Book*.) There is rarely a good reason why it should not be possible for the plaintiff to prepare at the very outset the statement of claim. Indeed, the Woolf Reforms encourage plaintiffs to prepare at the outset not just the full particulars of the claim but a 'pack' containing key documents and other evidence. The apparent disadvantage of this is the front-loading of costs. The significant advantages however are the pressure it can put on the defendant and the early crystallisation of the real issues in the case.

(3) All pleadings to be accompanied by 'statements of truth', signed by either the party or their solicitor. (See Part 22 of the Woolf rules.) 'If a party is required to certify his belief in the accuracy and truth of the matters put forward the pleading is less likely to include assertions that are speculative and fanciful and designed to obfuscate' (note 22.0.2, ibid). Amendments to pleadings only to be made by consent or with the permission of the court (Part 17, rule 17.1 of the Woolf rules.) Similarly, any application to amend a pleading must be accompanied by a signed, detailed written explanation of the reason for the amendment. Too often, in Hong Kong, pleadings are filed which are patently unsustainable.

(4) Where the defendant denies an allegation, he must state his reasons for doing so and if he intends to put forward a different version of events from that given by the plaintiff he must state his own version. This is a direct quotation from Part 16, Rule 16.5 (2) of the Woolf rules. It should prevent a defendant from simply denying an allegation when in fact he intends to put forward a different positive case, and should therefore ensure that the issues in dispute are clearly identified at an early stage in the case.

(5) Where an interlocutory application is opposed and the party seeking to oppose it seeks an adjournment of the application to a longer hearing, the party seeking to oppose must file at court and serve on the applicant as early as is possible a written statement of the grounds of opposition. Alternatively, the rules could be amended to provide that the applicant must make the request in writing first to the respondent, and if the respondent does not respond at all, the applicant can seek the required order ex parte. (The latter is the approach taken in Part 18, Rule 5.5 of the Woolf rules.) Interlocutory applications, for example for further and better particulars, are usually listed for a short initial hearing (in the 'three minutes list') but then adjourned for argument to a much longer hearing before a Master, for example for an hour long hearing. Typically such an adjourned hearing will not take place for several weeks, if not one or two months, because of the heavy workload of the Master. Frequently, one then finds that shortly before the adjourned hearing the opposing party agrees to the order sought, or at least a substantial part of it. The result is then that there has been an unnecessary delay. This only has to happen twice in the early stages of a case to cause several months' delay.

(6) A streamlined discovery process. First, too often in Hong Kong parties still do not comply with Order 24, Rule 1, automatically requiring parties to give discovery within 28 days of the final pleading being served, either the reply or the defence, if no reply is served. Instead, they tend to wait until pressed to give discovery by an application by the other party to court. The court should penalise such an approach, which reflects either delaying tactics or at best a lack of case management or understanding of the principles of discovery on the part of the solicitors. Secondly there should be more limited scope of discovery. The Woolf rules do not impose the very wide *Peruvian Guano* test previously applicable, and applicable in Hong Kong, but limit discovery to documents relied upon by the party and documents that adversely affect their or another party's case or support another party's case. They also require only a reasonable search to be undertaken for documents. (See Part 31 of the Woolf rules.) Thirdly, however, they do require a certificate to be signed by or on behalf of the party themselves, not merely the solicitor, that the discovery exercise has been properly carried out (see the new practice direction and Form A annexed to it.) Ideally, in Hong Kong, one might go a step further and require solicitors to provide clients with a standard form explanation of the discovery process. The same might be made the case for other steps in the litigation process.

A further useful and significant change might be to introduce a new costs order regime along the lines of that provided for in the Woolf Rules. This reflects the procedure in New Zealand. In particular, Rule 44.7 provides that the court may make a summary assessment of the

(a) submissions on preliminary points of jurisdiction or law: to be made in writing;
(b) opening and closing submissions of counsel: to be reduced to writing;
(c) witness statements: statements/proofs of evidence of witnesses of fact and expert witnesses to stand as evidence in chief; and
(d) oral evidence: the arbitrator should decide at the earliest possible opportunity what evidence will need to be given orally;

(7) *inquisitorial or partially inquisitorial proceedings*: the Ordinance permits an arbitrator to act inquisitorially, unless the parties agree to the contrary. An inquisitorial method may be suitable for dealing with particular issues, though the tribunal would not be absolved from the duty to put its findings to the parties for comment so that they are not taken by surprise;[204]

(8) *expert evidence:*
(a) 'without prejudice' meetings: experts from like disciplines may be ordered to meet on a 'without prejudice' basis to narrow down and agree technical issues (eg methods of conducting scientific experiments and analysing the results);
(b) number of experts: the number of experts from each relevant discipline may be limited;
(c) mode of giving evidence: in a relatively straightforward case the giving of oral evidence may be dispensed with;
(d) tribunal-appointed expert: a single expert may be appointed by the tribunal in lieu of the appointment of experts by each party;[205]
(e) further controls over party-appointed experts: measures to dissuade parties from retaining 'hired gun' experts who ultimately contribute nothing to the proceedings, at the expense of wasted time and costs. One such measure is Lord Woolf's proposed Expert's Declaration,[206] whereby an expert's report must conclude with a declaration that the report includes everything the writer regards as being relevant to the opinion

204 *Fox v PG Wellfair Ltd (in liquidation)* [1981] 2 Lloyd's Rep 514 (Court of Appeal, England); *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39; *Apex Tech Investment Ltd v Chuang's Development (China) Ltd* [1996] 2 HKC 293 (Court of Appeal).

205 Cf Access to Justice – Interim Report (1995, Lord Chancellor's Department, London), at 186–187; Access to Justice – Final Report (1996, HMSO, London), ch 13. There is, however, a risk that the parties may wish to appoint their own experts in any event in order to help them to put questions to the tribunal's expert, thus saving little in costs.

206 Access to Justice – Interim Report (1995, Lord Chancellor's Department, London). The Expert's Declaration is now a statutory requirement in litigation: see CPR, r 35.10(2).

he has expressed in his report and that he has drawn to the attention of the court (or tribunal) any matter which would affect the validity of that opinion. The Academy of Experts, which is based in London, has been actively promoting the use of the Expert's Declaration in Hong Kong;[207]

(9) *limiting time on oral evidence and advocacy*: the arbitrator may adopt a 'chess clock' or 'guillotine' procedure to limit the time taken for examining witnesses and oral advocacy. This will require advance reading of all core papers by the tribunal and a strict approach to applications which would prejudice the set times, such as applications for adjournments or to admit further witnesses, while at the same time not breaching natural justice by prejudicing a party's ability to present his case properly.[208] Time may also be saved if meetings or hearings are held and evidence given by conference telephone or by teleconferencing;

(10) *cost capping*: a party's recoverable costs may be limited by order of the arbitrator in advance of their being incurred.[209] This is discussed in the next section of this paper.

7. A NEW APPROACH TO MINIMISING COSTS

And so there has been much time spent, and much ink spilled, on the problem of how to reduce costs and how to reduce delay. We have seen bright ideas, and not so bright ideas. Some people think that they know the answer: Aladdins have appeared on the scene rubbing their lamps and conjuring up genies who can, it appears, wave their magic wands and exorcise the demons of cost and delay. But most of us realise, I think, that the nut is very hard indeed to crack, and that our problems will not simply disappear at the wave of a wand.[210]

207 As to the preparation of expert witness' reports, see *Whitehouse v Jordan* [1981] 1 WLR 246, at 256–257, per Lord Wilberforce (House of Lords). The principles enunciated in this case and others are summarised in what is known as the *Ikarian Reefer* principles: see *National Justice Compania Naviera SA v Prudential Assurance Co, The Ikarian Reefer* [1993] 2 Lloyd's Rep 68, at 81–82, per Cresswell J. These principles were applied to Hong Kong by Kaplan J in *UBC (Construction) Ltd v Sung Foo Kee Ltd* [1993] 2 HKC 458. For further guidance and discussion, see *University of Warwick v Sir Robert McAlpine* (1988) 42 BLR 1, at 22–23, per Garland J; the Academy of Experts, *Guidance Notes for Experts* (Academy of Experts, London) at Part 4; Andrew Bartlett, 'The preparation of experts' reports' (1994) 60 JCIArb 2, 94; Clive Hardy, 'Rethinking Roles in Expert Evidence after Woolf' (1999) 65 JCIArb 2, 86.

208 For a sample procedure, see Harold Crowter, 'The Pro-Active Arbitrator' (1998) 64 JCIArb 2, 89, at 90. See also Ronald Bernstein, John Tackaberry, Arthur Marriott & Derek Wood, *Handbook of Arbitration Practice* (3rd ed 1998, Sweet & Maxwell, London), at 108.

209 S 65 of the 1996 Act; s 2GL of the Ordinance.

210 Lord Goff of Chieveley, Opening Address by the President (Chartered Institute of Arbitrators Annual Conference, Cardiff 1986) (1987) 53 JCIArb 1, 9, at 14.