MASTER OF THE ROLLS

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THE FUTURE OF THE CPR

DESIGNATED CIVIL JUDGES' CONFERENCE 2009

SCARMAN HOUSE

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Introduction

1. Good morning. I thought that I would take this my last opportunity in my present capacity to say a word about the future of the CPR. In thinking about what the future might hold in store for it, it struck me that F. Scott Fitzgerald held the answer. An unusual choice of seer you might think. But perhaps not so unusual when the final lines of *The Great Gatsby* are recalled.

> "*Gatsby believed in the green light, the orgastic future that year by year recedes before us. It eluded us then, but that's no matter – tomorrow we will run faster, stretch out our arms further . . . And one fine morning –*
>
> *So we beat on, boats against the current, borne back ceaselessly into the past.*"

2. The green light is, as we all know, an allusion to the American Dream; a dream that for Fitzgerald was one that was ever elusive, ever sought after with increasing commitment and the hope that one day it will be firmly within our grasp, even if while we seek it, we slip further away from its attainment. Fitzgerald's green light perhaps stands for the various dreams we try to capture and turn into concrete reality.

3. For Justinian, the green light would no doubt have been the constant and perpetual wish to render everyone his due: it would have been the search for justice. For Woolf, the green light would also have been justice, but for proportionate justice as he described it in his two Access to Justice Reports and in the overriding objective, which is of course now ten years old. We can ask ourselves ten years on from the CPR's introduction, where is proportionate justice now? Does it still elude us? And if it does, what must we do in the coming years to ensure that we run faster, stretch out our arms further and, at least try to ensure, that we are more than boats beating on against the current, forever being borne back ceaselessly away from Harry's proportionate justice?

4. It is perhaps too much to ask anyone to provide answers to these questions; although you should feel free to ask my successor as Master of the Rolls these very questions at your conference next year, just as long as you don't say I put you up to it. But in the few minutes at my disposal I thought I would offer a view of the future – a view of the green light; of the Woolfian dream which I am sure we all seek to attain.

5. The obvious starting point is costs. Now we've heard a lot about costs today and I don't intend to go over the same ground. You can have too much of a good thing; and the high costs of litigation do not even have the virtue of being a good thing. For too long costs have been too high. They have placed litigation out of reach of the vast majority of those who need

to have recourse to the courts. They certainly put it out of reach of everyone in this room. Woolf tried to remedy these problems. He was not the first to try and, as he readily acknowledged, he would not be the last. The costs remedies he proposed have not had the same success as other aspects of his reforms have had. It was perhaps optimistic to think that they would; not least when the CPR was introduced in a changing climate that saw the introduction and expansion of CFAs and the concomitant reduction in legal aid: see the views of Anthony May passim.

6. Woolf's reforms have however had a lasting positive effect on the costs landscape for the future. That effect is embodied in the review that as you all know Rupert Jackson, in his inimitable and indefatigable way, is currently undertaking. It is acknowledged at the outset of Rupert Jackson's Preliminary Report. He put it this way:

> "*I am asked to review the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost. The terms of reference are set out in chapter 1 and they include a requirement to "consider whether changes in process and/or procedure could bring about more proportionate costs". This requirement has necessitated a review of civil procedure stretching far beyond the costs rules.*"[1]

7. Rupert Jackson is engaged in an enterprise, the aim of which is to realise the Woolfian dream insofar as costs are concerned. Its aim is to reduce costs as Woolf intended; but more than that it aims at ensuring that litigation costs are proportionate costs. This may well see the introduction of costs management, which is at present being piloted in Birmingham as part of the Jackson Review. I hope that it will soon also be piloted in defamation cases. The review might see the realisation of Woolf's proposal's regarding fixed costs, it might see more radical steps such as the abolition or relaxation of the indemnity rule, although this may be moribund already. It might see the partial removal of the costs shifting rule. Who knows? I certainly do not. We must await December to see what proposals are finally made.

[1] Jackson, Preliminary Report, (2009) at (v).

What we can say now with some confidence is that, it is likely that, whatever proposals are made they will be entirely consistent with the Woolfian commitment to proportionality. The central guiding principle of the Woolf Reforms will, I am sure, shape Rupert Jackson's proposals, and will, I hope, shape their implementation and operation over the coming years. Insofar as costs are concerned, we must do all we can to secure this aspect of the Woolfian dream and not be borne back ceaselessly into the past. Perhaps I might express the hope in passing that we should get rid of the over-elaborate approach to proportionality of costs in *Lownds v Home Office*. It is surely time for a more robust approach to the question whether the overall bill of recoverable costs is proportionate. What about a cheap look at the ceiling approach?

8. This leads me to another area where much has been done, but care must be taken not to slip back into old habits. The introduction of active (and hopefully robust) case management was to my mind the most significant cultural change inaugurated by the Woolf Reforms. Recently, it has been suggested, in strong terms, that we should abandon active case management and return to party-control of cases. Lawrence West QC, in an article in *The Times* identified it, along with the front-loading of costs, introduced in the CPR, as the main cause of what he described as the '*erosion of civil justice*'; and erosion which he sees as rendering rights illusory.[2]

9. It seems to me that to go back to the future would be anything but a good idea. To return to the days when parties and their lawyers could adopt a practice where the rules of court become optional guidelines rather than the means by which claims can be properly guided towards adjudication in reasonable time and at reasonable cost is simply untenable. It is

[2] West, *Have the Woolf Reforms Worked?*, The Times, 09 April 2009 (http://business.timesonline.co.uk/tol/business/law/article6060325.ece).

untenable because a laissez-faire attitude on the part of the judiciary and the courts cannot deliver procedural justice; which we all know was for Woolf to be as important as substantive justice under the CPR.[3] The side-effects of unrestricted party-control, cannot be underestimated: they result in delay; unnecessary applications for relief from sanctions, often contested, and equally, unnecessary, disproportionate court-time on applications arising from such unmeritorious, satellite litigation.

10. My favourite classic example of this is the decision of the CA in *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229 to allow defendants to let sleeping dogs lie. Result: very sleepy dogs slept; when they woke up, an application was made to strike the claim out; the action was struck out on the basis that a fair trial was not possible and the plaintiff started again against his solicitors and the court had to decide what the prospects of success at a trial which the court had already held could not fairly be held would have been. Daft.

11. Party-control of litigation was rightly identified by Woolf as a key source of the erosion of justice. It erodes justice not only for the individual litigant, whose claim is not progressed properly by, for instance, his representative leaving it to the last minute to issue proceedings, or comply with a process time limit, because it engenders unnecessary delay and cost in their case. It erodes it in the case of the other party to the litigation, as their right to receive justice in a reasonable time and at reasonable cost is denuded of value. It, and here is the key point, it erodes justice for the many as by taking up a disproportionate amount of court resources, it reduces those that ought properly and reasonably be available to all other litigants.

12. To my mind the introduction of robust active case-management is the best approach to managing litigation. It is the only sensible way in which the courts can ensure that they fulfil

[3] Woolf (1995).

their obligation to ensure that justice can be done for all. It has largely worked. There have been many successes. For example the approach to experts and the requirement that experts meet has been a great step forward. Perhaps hot-tubbing, where you have all the experts in the same discipline together in the witness box at the same time will perhaps be next.

13. Also the obligation to co-operate is surely a great step forward. No longer will solicitors write the letter I saw dated 30 April 1992 tenth letter ....

14. However, let us not be complacent. Improvements can of course be made. It will be in those improvements, which must again be constructed and carried out consistently with the aim of ensuring proportionate justice for all, that I hope the civil courts will pursue Woolf's green light vigorously in the years to come. One of the tasks that falls to you (and to my successor) will be to consider what improvements are necessary; how best they can be implemented; and then it will be your task to implement them properly. It is a challenge that I am sure you will all rise to. It is one that may, for instance, require consideration of and answers to many questions. For example: what role do pre-action protocols play? Do they excessively front load the costs? Do they give rise to a replication of costs pre- and post-issue and if so how can the courts manage cases to ensure that that does not occur? How the disclosure process can be best managed? Should we change the current disclosure obligation, so as to ensure, in an ever-increasing electronic age, that it is only ever carried out proportionately?

15. Before concluding, there is one further aspect of the Woolfian dream that I should touch upon. You've already heard about mediation today, but I thought I would just add a few comments. There has recently been considerable interest, some critical, of the role that mediation in general, and ADR in particular, has played since the CPR began. Those of you

who read *The Times* will know that Frances Gibb put it in a fricative moment, '*(f)ury and feathers flying in the genteel world of academe*'.[4] The feather's flying were those of Dame Professor Hazel Genn and Lord Woolf, over, amongst other things, the proper place of mediation in our civil justice system. This debate arose (as we all know) from Professor Genn's Hamlyn lectures. It seems to me that as debates go it contains one truth that all parties agree with: that mediation is an important supplement to formal adjudication. That was clearly Woolf's intention and the CPR contains mainly express provisions which encourage the use of ADR as an important part of the civil process. It is encouraged for two reasons. First, and most obviously, because in many cases consensual settlement is something that the parties are, with guidance, happy to embrace, whether it is settlement pre-action, through formal negotiation during the pre-trial stage or, as we all know, at the door of the court. After all, only a fool does not want to settle. The CPR simply provide a formal means by which the court as part of its case management role can encourage and facilitate proper settlement. Secondly, by encouraging the greater use of ADR court resources are released to other cases. It increases access to justice for those whose cases cannot settle through assisting those who wish to settle to do so. In this it is entirely consistent with the aim of achieving proportionate justice for all. It is not, nor was it intended to be, a substitute for formal adjudication. Its success, and successful encouragement of its use, in fact depends on their being an effective accessible justice system.

16. To my mind, properly understood, the current debate is one that focuses on a proper recognition by Professor Genn that our civil justice system is one that cannot be allowed to wither through lack of investment. It stems from a fear that it (i.e., you and I as judges) will in future come to be seen as an optional extra, ADR's poor relation, and one which can be

[4] Gibb, *Woolf v Genn: the decline of civil justice*, The Times, 23 June 2009.

dispensed with by the State. If that were the case then we would truly be left with no more than a dream of justice. But it seems to me that one of the likely trends in the future is that there will be seen to be a continuing need for an effective civil justice system. ADR will play its proper part in that, as the CPR and its overriding objective require and as proportionate justice requires. It would be foolish at best to suppose, or seek to reform civil justice, on the basis that mediation, private dispute resolution, could replace public justice and satisfy our commitment to the rule of law.

17. What then do I see for the CPR's future? They are a considerable improvement on the RSC, even if the White Book is a big as ever. They are only ten years old. It seems to me that the framework provided by the Woolf Reforms and the commitment to proportionate justice which they articulated and the CPR and its overriding objective embody, provide us with the best available means to shape civil justice so that effective access to justice is, in the coming years, available to all. This does not mean, as Woolf rightly acknowledged as long ago as 1996, that we can solve all the problems now. What we have is the means to tackle those problems and framework to guide us. Just as Woolf's commitment to proportionate justice guides Rupert Jackson now, it will continue to guide the civil justice system's operation and reform in the future. In that it provides us with the best means to ensure that the green light, the orgastic future, does not continue to elude us and those who have cause to seek effective access to justice. All power to the Jackson elbow – please help him as much as possible by making constructive suggestions and by supporting any sensible proposals he makes.
