

CPR: acme of the pointless

A number of aspects of the civil procedure regime should be reviewed—they generate undue cost for little benefit, says **Richard Harrison**

- the CPR vision—wrong end of the judicial telescope
- why on earth?—specific aspects ripe for reform

The civil procedure regime as it has evolved has flaws at a general and a specific level. Generally, the following stand out. The rules encourage an unhealthy focus on posturing and perceived behaviour. They require costs and effort to be incurred at an earlier stage than proportionality might otherwise suggest. 'Judicial case management' is, in many cases an oxymoron to rank with 'reality television', 'network security' and 'litigation friend'. There is no docket system and the computer infrastructure which would support one is unlikely to be funded by the Treasury in the near future. The regime was established from the point of view of a judge hearing appeals rather than that of a project planner. The vision was from the wrong end of the judicial telescope: a top down, not a bottom up approach.

These are matters of general policy and reforms could be debated at length. What sometimes causes practitioners greater frustration are the specific aspects which might have seemed a good idea at the time but which now appear ripe for reform. Anyone confronting them at the sharp end of case management is simply driven to ask "why on earth...?"

I have already dealt with bundling requirements in this context (see 155 NLJ 7191, p 1323), but the following areas cause a particular frowning of the brow.

Certificate of service

Why not only where necessary?

In cases which are going to go anywhere, there will have been pre-action correspondence and the claimant will know that the defendant is going to respond. In other cases, the claimant will need to apply for judgment in default, but may not know for certain whether this will be the case until the defendant's time for acknowledging service has passed. Yet in all cases, CPR 6.14(2)(a) provides that the claimant who served the claim form himself must file a certificate of service within seven days. The court will do nothing with this piece of paper, other than clutter the file. If the defendant acknowledges service, it is otiose. If the claimant needs to enter judgment in default, then the certificate can be filed with the application. Courts must receive a lot of letters saying "please forgive the late filing of the certificate of service". This really should be avoided; reform would be appreciated.

Agreements to extend time

Why is the court interested?

CPR 15.5(2) provides that where the defendant and the claimant agree to extend period of

services of a defence—by the randomly restrictive period of 28 days—the defendant must notify the court in writing. But why should the court care at this stage?

The reason for the rule given in the commentary is that it prevents the claimant entering judgment in default. Yet the claimant has already agreed not to do so. Should judgment in default be entered, any such claimant will be penalised in costs on the set aside application. A defendant who distrusts his opponent may choose to notify the court. But the mandatory rule is simply tiresome. Who is actually going to read such letters? We should concentrate on the real business of case management.

Allocation questionnaires

Why is such detail required?

The process of allocation is often seen as the fulcrum of case management. From a practitioner's perspective, the questionnaire system is an obstacle with little to recommend it. The principal absurdity is the concept that each party fills in a lengthy form at the same time and provides slightly differing information. A judge is then required to consider both documents, and then make a determination, either on paper or at a conference, attended by the parties, about how the case will be managed and what directions will be needed. The delusion that this constitutes active case management is exposed by the usual accompanying local or court specific practice directions under which additional documents are sent requiring the parties to agree one set of directions.

The form does not lend itself to being taken seriously, from the offer of a stay for the purpose of alternative dispute resolution to the question that always makes me smile wryly: "witness as to which facts?" To which the answer is invariably something along the lines of "the facts dealt with by their witness statement".

It would be interesting to know whether any readers who happen to be district judges actually find the simultaneous allocation questionnaire system of any use. A much more constructive system might involve the

claimant stating proposals for case management and the defendant commenting on that sequentially.

The reply

Why make it so difficult?

Often the fundamental issues in litigation of any complexity are most effectively identified by the claimant's reply to a defence. The contents of this statement of case might well give guidance about the sort of case management which is required. Yet CPR 15.8(a) says that the reply must be filed with the allocation questionnaire. So the defendant, awaiting a reply, may be forced to file his own allocation questionnaire without access to its contents. And a claimant needing extra time to file a reply is forced to make a wasteful application to extend the time for filing allocation questionnaires.

Grumpy old litigators?

Television's *Grumpy Old...* franchise has become popular recently. Everyone likes a good whinge. It may be that the above comments could be fitted into a 'grumpy old litigators' programme and go no further. But it may also be that readers have other thoughts on pointless, counterproductive aspects of the Civil Procedure Rules and if any feedback is received, I shall be pleased to add them to a lobby for constructive reform.

Richard Harrison is a partner in the dispute resolution team at Laytons. E-mail: richard.harrison@laytons.com

Key questions

- Why do certificates of service need to be filed if default judgment is not going to be sought?
- Why is the court interested in agreements to extend time for filing defences?
- Why do allocation questionnaires require witness availability to be stated?
- Why are the parties required to file simultaneous allocation questionnaires?
- Why is the filing of a reply tied in with the allocation questionnaire?