IS THERE A "WOOLF" IN JERSEY?

Matthew Thompson

This article is based on a speech given by the author to the Law Society of Jersey concerning the rationale for and possible effect of Amendment No 20 to the Royal Court Rules 2004 which introduced an overriding objective and other significant procedural changes relevant to the conduct of civil disputes before the Royal Court. The article explores the intended effect of the principal changes either in the Rules themselves or in related Practice Directions and their impact for clients and advisers for future disputes before the Royal Court.

Introduction

1 Since 1962, when Jersey's civil procedure rules were first introduced, the rules and practice of the Royal Court in general terms have followed the approach taken by the courts in England and Wales set out in what was commonly known as the White Book.[1] The English rules however were fundamentally altered in 1999 following a detailed review led by Lord Woolf, MR.[2] Some of those changes have now found their way into the Royal Court Rules through Amendment No 20. This article sets out the background to the changes that came into force on 1 June 2017, what led to those changes, and how civil procedure might develop in the future.

2 As with all articles from a member of the judiciary, this article simply contains the author's personal views at the time of writing to assist those who come before the courts in the future. However, these views may not necessarily translate into legal decisions or practice following contested argument whether before the author as Master of the Royal Court or judges of the Royal Court.

3 The changes came about following Sir Michael Birt, as Bailiff, establishing a group known as the Royal Court Rules Review Group to review the Royal Court Civil Procedure Rules and Practices.

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[1] The Supreme Court Practice published by Sweet and Maxwell annually until 1999.

[2] Access to Justice Report 1996.

4 In a consultation paper issued in October 2014,[3] the Review Group described its remit as (a) improving access to justice, and (b) reducing the risks of costs associated with litigation.

5 The Group also made it clear that its focus was on how disputes might be adjudicated in a manner which was both proportionate to what was at stake and was cost effective. The Group was particularly concerned about issues affecting ordinary individuals resident in Jersey who might be deterred from bringing or defending claims before the Royal Court.

6 In looking at the current Royal Court Rules, the Group was of the view that the criticisms made by Lord Woolf about the system in England prior to the introduction of its current civil procedure rules in 1999 were relevant to an assessment of the current litigation process in Jersey. What Lord Woolf stated was that the English procedure was—

(a) too expensive and costs would frequently exceed the value of the claim;

(b) too slow;

(c) too unequal with a lack of equality between the powerful and wealthy litigant and the under resourced litigant;

(d) uncertain in terms of what litigation might cost and how long it might last;

(e) difficult to follow from a litigant's perspective; and

(f) too adversarial.

7 The Group considered that, to a greater or lesser degree, the criticisms made in England prior to 1999 applied to the civil procedure system in Jersey. Amendment No 20 and the related Practice Directions were therefore one step to try to address some of these criticisms.

8 The changes, however, should not be seen as a marked departure or abandonment of practice. Rather they are an evolution of what has gone before. In particular a number of court judgments had already set out how the court expected cases to be conducted. The changes introduced follow on from these decisions. The most well-known and oft-cited remarks are those of the Court of Appeal in the *In re Esteem Settlement* which famously as long ago as 2000 stated—

[3] Access to Justice Consultation Paper No 1.

> "The objective of all involved in civil proceedings is to progress to trial in accordance with an agreed or ordered timetable, at a reasonable level of cost and within a reasonably short time."[4]

9 Despite the best efforts of the courts since 2000 it cannot be said in every case that this objective has always been met. At present this statement in part still remains an aspiration. It is also only in more recent years that the court has started to manage cases actively rather than leaving compliance with the *Esteem* guidance largely in the hands of the parties.

10 The current changes are therefore intended to be the evolution of the approach set out in *Esteem* and to build on previous decisions of the Royal Court so that the *Esteem* observations become the norm.

11 What is not happening, however, is a simple adoption of relevant parts of the English Civil Procedure Rules. The Group recognised that reforms in England had not been wholly successful. While it appears that changes across the water since 1999 led to many cases settling either without proceedings or at an earlier stage, a cursory review of almost any English legal publication shows that debates still rage about the changes to the English system. The changes have therefore been drafted to try to take account of some of these criticisms, with particular regard being paid to avoiding undue complexity or increasing cost in manner that might be said to be unnecessary.

12 The proposed changes are also only part of the story. There is a clear recognition of a need for guidance for litigants in person as to the practical steps that need to be taken for each stage of a dispute. The States are also being asked to increase the Petty Debts Court jurisdiction to £30,000 later this year which will require a review of the practices of that court.

13 Nevertheless what is proposed is designed to have a significant effect on the conduct of civil disputes before the Royal Court. So what is that effect?

The overriding objective

14 The starting point for the changes is the introduction of an overriding objective by a new rule, r 1/6. This rule requires disputes to be conducted justly and at a proportionate cost. It also expressly requires active case management by the courts. This has not been

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[4] 2000 JLR *N*–41b, *per* Southwell, JA; see also Practice Direction (Court of Appeal: Consolidated Direction) (2000/1) issued by Sir Philip Bailhache, Bailiff and President of Court of Appeal, 2000 JLR *N*–39.

stated by the Rules before although the change clearly follows from the observations of the Court of Appeal in *Esteem*.

15 This objective is extremely broad. While it will not apply to criminal proceedings, it will otherwise underpin all other types of dispute that come before the Royal Court unless there is a specific provision to the contrary.

16 However, the overriding objective is not just a question of requiring the judiciary to play an active role in terms of case management. It goes much further. At its heart is the fact that any client who becomes involved in a dispute ultimately has a choice of attempting to resolve that dispute in private or having the court adjudicate upon it in a timely and proportionate fashion. It does not matter what method a client seeks to use. What is key is that, from the outset, a client needs to consider whether he, she or it wishes to reach a solution through any other means available rather than proceed to engage in a dispute before the courts.

17 What is necessary to achieve resolution will clearly depend on the type of case. The court, at each stage that it is involved, will be focusing on what orders are required to meet the overriding objective. Judges will expressly explore whether an opportunity to try to resolve a dispute should be inserted into any timetable before significant costs are incurred.

18 The overriding objective may well have the consequence that more analysis will need to be carried out in respect of a client's case at an earlier stage than has sometimes been the practice to date. In other words the key issues will have to be ascertained and evaluated sooner rather than later. It is suggested ultimately that this will serve a client well and in particular allows a client to make an informed decision about how to approach a claim.

19 However, these changes are not designed to go as far as those in England where criticism has been made that the CPR required too much cost to be incurred at too early a stage. The changes introduced for the Royal Court are therefore simpler in scope and involve amendments to existing practice rather than starting again with entirely different rules.

20 The hope is that earlier analysis will first lead to clear decisions being made about resolution of claims and will encourage more parties to seek to resolve their differences either before litigation has begun or at an early stage. Secondly, if resolution is not possible, there will be a clear focus on what issues the court needs to decide and so what evidence needs to be produced by the parties involved.

21 From one perspective, this approach requires no more than the obligation on an adviser to discharge the duty of care owed to a client. The proposed changes should therefore be seen as being consistent with good practice. The flipside however is that, if it were not the case before, procedure is now only a means to an end—the end being a settlement or a trial. This goes beyond procedural game playing being unacceptable, which was also spelt out by *Esteem* 17 years ago. I suggest it also involves a modification of the adversarial approach.

22 It is certainly clear from English and Isle of Man jurisprudence, the latter of which is particularly interesting as a jurisdiction of comparative size and with similar challenges to those we face, that the overriding objective requires there to be more co-operation and less confrontation between litigants and their advocates.

23 Parties and advocates should therefore give positive assistance to each other in the setting of timetables, they should limit the opportunity for delay between each stage in the process and should cooperate with each other where possible.

24 Of course, there will be procedural disputes which require adjudication. Those should be disputes where there are genuine differences on what is necessary for a trial to take place. These should be contrasted with tactical applications designed to put pressure on an opposing party. The latter will not find favour and are likely to have adverse consequences for a party and/or possibly its advisers.[5]

25 Parties and their advisers should therefore focus on what is necessary in respect of the dispute between them. They should cooperate in narrowing the main areas of dispute, and procedural disputes should be a last resort.

26 These observations do not just apply to procedural steps. They apply to the conduct of the trial itself. While the adversarial approach will apply in relation to how substantive matters in dispute are dealt with, this is subject to the proviso that the case has been dealt with by the parties and their advisers fairly, expeditiously and economically as a whole.

27 A recent illustration of the modification of the adversarial approach is *Aukland v Minister of H&SS*[6] where I drew a distinction between the approach to be taken in relation to exchange of experts' reports where there was an argument on liability and the approach to be taken where what was in dispute was the extent of a plaintiff's

[5] See *Smith v SWM* [2017] JRC 175 as a recent illustration.
[6] [2017] JRC 136.

injuries. In the former case, because the adversarial approach ultimately remains the way disputes are resolved, simultaneous exchange of expert evidence was ordered and will be the norm. In disputes where there is disagreement about the extent of injuries that has been suffered, sequential exchange will be the norm, still applying the approach taken in *Ure v Minister of Economic Development*.[7]

Delay

28 One of the major criticisms of Jersey's Civil Procedure System concerned that the fact that it took too long to resolve disputes and there were too many delays. The introduction of Amendment No 20 and the related Practice Directions makes it clear that generally delay will be unacceptable. This will reflect itself in a number of different ways.

29 First, indefinite adjournments will be the exception and will have to be specifically justified. The question will be posed why an adjournment for a fixed period cannot be agreed, assuming a good reason for an adjournment exists.

30 Secondly, apart from one initial period of four weeks following a matter first coming to court, any other adjournment will have to be justified.

31 Thirdly, if timetables are breached and adjournments of trials are sought as a consequence, the overriding objective strengthens the ability of the court to refuse an adjournment if it concludes that to grant the adjournment would be contrary to the overriding objective.

32 Fourthly, delay that cannot be justified will lead to sanctions. This may include sanctions against advisers. It is more often than not the adviser who manages the process of getting the case to trial. If the timetable is not met, the question will be asked whether the adviser has managed the process properly. Adverse cost consequences may fall on the adviser.

33 This possibility has prompted advisers to question whether the threat of adverse costs orders might interfere with the lawyer/client relationship. Ultimately, if an adviser refuses to answer a question as to why a timetable set by the court has not been met on the grounds of privilege, the court may be left with the option of having to make an adverse costs order against the client only. However, in doing so the court is likely to make it clear publicly that it could not determine whether the client or the adviser was at fault because of a claim to

[7] [2015] JRC 256.

privilege. This will have the effect of leaving the client and the adviser to resolve any issues to where an adverse costs liability might fall. The author suggests that if this causes difficulties, it is either because the approach required by the court has not been made clear to a client, or the requirements of the rules have been deliberately ignored.

Pre-action communications

34 The overriding objective also leads directly to the practice direction on Pre-Action Communications. The rationale of this practice direction is to enable parties to set out their claim or defence, as the case may be, to allow the parties to make the choice I have described, namely, whether they wish to explore settlement or whether proceedings are required. It is not based on any particular practice direction in force in England and Wales or any other part of the United Kingdom, but rather is one produced for the full range of disputes that take place before the Royal Court.

35 The key requirement is for a party to set out that it has a claim or a defence and the essential events or legal issues relied upon. It does not require evidence to be produced. That will be a choice for the parties if they decide to engage in some form of dialogue to try to resolve their dispute.

36 This practice direction should not become a battleground as to whether or not its requirements have been met. Rather, any consequence of non-compliance will most likely arise at the conclusion of any trial. In particular non-compliance may arise at an application for costs where a party's case turns out to be materially different without justification from that set out in the claim letter or response to the claim letter. It may also arise on procedural applications, again where a material change of case occurs. Any material change of position will therefore have to be explained.

Clarity of pleadings

37 The underlining philosophy in terms of the practice direction on claims letters also underpins the introduction of a general power to require a party to make its case clear which is found in a new rule, r 6/15.

38 This power is identical to its English equivalent. It replaces requests for further and better particulars, interrogatories and requests for a further and better statement of case.

39 The intended effect is that each party is required to make its case clear if its pleading does not do so. This can include being required to do so by the court. A reasonably robust approach has already occurred

in requiring a party to make its case clear *e.g. Campbell v Campbell*.[8] This will be more likely in the future.

40 However this rule should not open the floodgates to numerous or lengthy requests. The court has already made it clear that requests for further and better particulars amounting to requests for evidence are not an appropriate way to proceed (*e.g. Crociani v Crociani*[9]). Nor are swathes of requests that go significantly beyond understanding a case (see *Booth v Collas Crill*[10]). The same approach is likely to be applied to requests for information. The touchstone is whether a party's pleading is understandable or not.

41 Where a request for information is broader in scope, then the present rule is that a party may be required to set out the particular legal principle it is relying upon where this is not clear from its pleaded case. An illustration of this approach is *Nautilus Trustee Ltd v Zedra Trustees (Jersey) Ltd*.[11] This is so that the other side can understand the claim or defence it is facing. This is not to turn pleadings into skeleton arguments or statements of evidence; rather a party may be required to identify the legal label relied upon.

42 What is at an end from a defendant's perspective (and to be fair it does not happen often) is for a pleading simply to be a series of admissions, non-admissions or denials. A party should therefore only be put to proof of some event or fact that is at the heart of a dispute and not for the sake of making that party's life difficult.

43 Likewise a statement that a particular element of the other side's case is denied, *i.e.* the facts are disputed, should be accompanied by a statement of the rival version of events. If a pleading does not do so, at a directions hearing a party may be asked why and required to explain why a case is not admitted or denied.

Directions hearings

44 The next significant change concerns directions hearings. If no directions hearing has been fixed by any party within three months of the matter being placed on the pending list, a date for a hearing will be fixed by the court itself.

45 The reason for this change is that the pleadings phase is often where cases drift or become bogged down in pleading debates. I

[8] [2015] JRC 249, at para 100.
[9] [2015] JRC 177.
[10] [2017] JRC 038.
[11] [2016] JRC 223, at para 105.

accept that ultimately the court has power to strike out cases where no summons for directions has been fixed. However to strike out a case is a remedy of last resort because dismissing the claim must not be disproportionate to the breach involved (see *Mayhew Ltd v Bois Bois*[12]).

46 In most cases, therefore, not having a summons for directions fixed automatically after a period for pleadings just leads to unjustified and, therefore, unacceptable delay.

47 When looking to give or approve directions, the court's approach is summarised in paragraph 16 of practice direction RC17/05 as follows—

> "the Court will order directions appropriate to the needs of the case, the steps the parties have taken at the time directions are given and the overriding objective. In particular, the Court will wish to ensure the issues between the parties are identified and that the necessary evidence to resolve those issues is prepared and disclosed within an appropriate timeframe and in a proportionate manner."

48 To the extent parties wish to explore some form of settlement, the court at a directions hearing will have sufficient powers to make orders to enable parties to do so. What orders are made will be determined on a case-by-case basis. It may involve discovery, some expert evidence or some factual evidence.

49 Otherwise at the first hearing, unless directions are focused on some form of negotiation or mediation, directions are likely to be given in relation to discovery and exchange of witness statements. Directions may also be given for expert evidence and fixing of trial dates; it may, however, be seen as appropriate to do that at a later date, *i.e.* depending on compliance with orders for discovery and witness evidence, or after expiry of a stay for mediation or settlement discussions.

50 The background to any directions will be the pleaded cases of both sides, subject to any clarification being required. Generally directions hearings will be more informal and discursive than a summary judgment or strike-out application. They will only be truly adversarial if there is a point that requires judicial determination.

51 In one way, the guidance on directions hearings simply reflects the court's current practice. However I consider the new practice direction gives the court greater flexibility in terms of what directions are

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[12] [2016] JRC 024.

ordered and for what purpose. Underpinning this is the overriding objective and the obligation on the court to engage in active case management. The days of leaving directions to the parties alone are therefore at an end.

52 The other key aspect to this practice direction is that the court expects parties to comply with the timetables set. At present, there are still too many occasions where timetables are agreed and are then ignored. In future parties and advisers will be asked to explain why a timetable has not been met; the more matters have been left to the last minute or orders ignored, the more likely it is that sanctions could follow. Parties and advisers should therefore, in advance of the directions hearing, make sufficient enquiries to ensure that any timetable they are agreeing to or which is set, can in fact be met.

53 In particular, where directions in respect of expert evidence are to be given, a party's adviser, in agreeing to a timetable, should be satisfied that the expert can meet the relevant deadline. If there are difficulties in finding the expert because only very few specialists exist, this should be raised at the first summons for directions.

54 Despite what has been said already, it is not the court's intention to impose unrealistic timetables or ones that are unfair. A timetable is only a means to an end. What is required is for the parties and their advisers, absent unforeseen and unforeseeable events, to attempt to get the timetable right first time.

55 It is accepted that circumstances will arise where a timetable cannot be met. I suggest, however, that an inability to comply will usually be known to both parties and advisers some time before the relevant deadline expires. Accordingly, parties and advisers will be expected in the ordinary course to seek to agree a variation (subject always to court approval) before a deadline expires. If parties/advisors cannot agree, then the parties should return to court as soon as possible. Only dealing with variations just before a deadline expires will not be acceptable and is a scenario where sanctions are likely to be imposed. It is key for parties and advisers to understand ensure deadlines are met.

56 The range of likely sanctions for my part includes adverse costs orders, unless orders, depriving a party of interest for a period, or possibly orders debarring evidence from a particular witness or striking out an issue.

Budgets

57 The other significant change relevant to directions hearings concerns budgets which are now required for all disputes worth less than £500,000. The rationale for this requirement is that such cases are

those most likely to affect Island residents so that they will know the costs involved in going to trial.

58 The budget produced is one that should be a party's best estimate of the costs to take a matter to trial. By this stage the parties should have complied with the Pre-Action Communications practice direction and should have made their case clear in pleadings including any applications for requests for information about a party's pleaded case. The parties and their advisers will therefore have had around six months to understand the case. This is more than adequate time to produce a realistic budget and to assess what costs are estimated to be incurred to take the matter to a trial.

59 In producing this practice direction, I was specifically asked whether the parties could revise budgets at a later date. The answer to that question was "no" for the reasons I have already given, *i.e.* the party and their adviser should have enough information to set out the likely costs to be incurred. This has led parties to take an unduly cautious approach to preparing budgets which was not acceptable (see *Horne v Equity Trust (Jersey) Ltd*[13]).

60 Budgets are important even though their production will involve some extra work because for a claim worth less than £500,000, the risk of a claim becoming uneconomic or being pursued to recover costs is high. The likely costs are therefore significant factors to be weighed in the balance as to whether or not a party wishes to settle its differences or take a case to trial. Having an accurate budget is key to all parties having the information to decide how they wish to proceed and outweighs the extra work involved.

61 Budgets will also be relevant in relation to what other directions are made depending on the objective of the parties at that stage. If a budget produced in a case indicates that a particular step will lead to significant costs being incurred, this will form part of the information taken into account by the court in deciding when such a step might be required to take place. In particular, the court can consider whether the parties should explore settlement before certain costs are incurred. Such a direction does not mean that some costs will not have to be incurred before settlement can be considered. In appropriate cases, orders for exchange of discovery (either on a general or limited basis) may be required so that parties can evaluate further the merits of their claim or defence. In other cases disclosure of some expert evidence might be required.

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[13] [2017] JRC 115.

62 An assessment of the budget itself will however not take place at the directions hearing. This was a deliberate decision to avoid disputes over budgets. Rather the powers are limited to either a failure to provide a budget or where a budget lacks sufficient detail. What I cannot rule out is judicial comment if a budget looks disproportionate (see *Pearce v Treasurer of the States*[14]).

63 Where a budget may be taken into account is on any assessment of costs, whether following a trial or a procedural application, if the amount of costs claimed departs materially from that set out in a budget, without appropriate justification. A party is therefore expected to get budgets right pretty much the first time.

Discovery

64 In producing a practice direction on discovery, subject to one point, the test as to what is a discoverable document has not changed. What is different however is the following.

65 First, once a dispute is contemplated, *i.e.* when a claim letter is being considered or a response to a claim letter is being prepared, a client must ensure that potentially discoverable documents are preserved. In particular, any normal destruction policies of a client should not apply to documents where a dispute is contemplated. Legal advisers are therefore under a specific obligation to inform a client of a need to preserve such documents and all reasonable steps should be taken to prevent destruction.

66 Secondly, where the obligation to provide discovery may alter is not because the test of relevance has changed but is in relation to the extent of the enquiries to be carried out. The practice direction makes it clear that what is reasonable will be determined having regard to (a) the overriding objective; (b) the number of documents involved; (c) the nature and complexity of the proceedings; (d) the ease of retrieving of any particular document; and (e) the significance of any document which may be located during the search and therefore the likely expense of carrying out any search.

67 These factors will also apply in relation to whether or not discovery should be limited. While the power to limit discovery exists, it is envisaged that a greater use of this power will be made than to date because of the overriding objective.

68 The factors I have just described may also be relevant to any application for specific discovery. Parties should therefore be prepared

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[14] 2014 JLR 435.

to address these factors at the directions hearing where any order is sought other than a general discovery order and to focus on what is key or necessary to resolve the claim.

69 This paper does not go into the detail of the format of a list of documents which is set out in the practice direction and which has been updated. What should be noted however is that any claim for privilege must be spelt out. It is not enough to say simply that a document is privileged without saying why (see *Smith v SWM Ltd*[15]).

Documents stored electronically

70 As far as electronic discovery is concerned, the guidance issued by the Royal Court applies to any case involving significant quantities of electronically stored material.

71 First, electronic discovery is an area where the parties should not be taking an adversarial approach and instead should be cooperating with each other to explain how documents have been preserved, the processes they have followed to search for documents, the proposed process for listing documents so that a document that has been disclosed can easily be identified, and arranging workable methods for electronic inspection.[16]

72 Secondly, in large cases, technology should be used, because the use of technology is generally a more cost efficient and accurate method of gathering relevant documents than a manual process. In particular, using artificial intelligence systems to identify relevant documents does not cause any issue of principle. Indeed, if parties attempt solely to provide discovery in cases where there are mainly documents in electronic form using exclusively or extensive manual processes, such a methodology would be disproportionate and a waste of client money.

73 These observations do not mean that lawyers do not have a role to play in discovery. Far from it, lawyers will have a key role in identifying the issues in the case which underpins what documents are discoverable. What technology allows is for the lawyer to focus on an analysis of key documents and to do so more quickly. The lawyer will also advise on any uncertainty about whether a document produced as a result of technology is relevant.

74 The benefit of technology is to take away or reduce the laborious process of listing and instead allows advisers to use their skills of

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[15] [2017] JRC 026, at paras 42–49.
[16] See *Crociani v Crociani* [2015] JRC 103; 2015 (1) JLR *N* [29].

analysis and evaluation. Technology is therefore a tool to enable the best use of an adviser's time as well as being much more cost efficient.

75 Thirdly, the discovery process adopted must ultimately be set out in the affidavit of discovery. The person who should provide the explanation is the person best placed to do so. It may be an expert, it may be an advisor with specific responsibilities for managing the discovery process or it may be the client. What must be described is the process that has been followed.

76 This requirement leads to an issue which applies to both discovery and electronic discovery and concerns the obligation of a Jersey lawyer to endorse the affidavit of discovery, unless the lawyer swears the affidavit personally. The obligation is that the advocate or lawyer concerned must be satisfied that the client's discovery obligations have been met. This is a reflection of *Hanby v Olliver*[17] where the court stated—

> "the advocate owes a duty to the court carefully to go through the documents disclosed by his client to make sure, so far as is possible, that no relevant document has been withheld from disclosure. The existence of this duty on the advocate enables and indeed requires the court to proceed on the basis that a list of documents which appears to have been prepared with the assistance of the parties' advocate and is verified by affidavit ought to be regarded as conclusive save in exceptional circumstances."

77 The practice direction on discovery at para 20 quite deliberately does not set out any particular indorsement that is required. Much will depend on the extent of the task and whether discovery covers mainly manual or electronic documents or both. However, more is required than just advising the client of the test on discovery and leaving it to the client to carry out the entire process.

Expert evidence

78 This article has already touched upon experts in the context of preparing for a directions hearing. However, there are other points concerning expert evidence which are addressed briefly.

79 First, there is still no power to appoint single experts unless the parties agree. The position was not altered because, the more the issue is debated, the more complex it becomes. The practice direction is therefore limited to inviting parties to agree the use of single experts.

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[17] 1990 JLR 337, at 347, line 40.

In particular, this is envisaged where the expert evidence is part of but not central to the dispute, *e.g.* in personal injury cases. For key issues, each party will retain separate experts.[18]

80 Secondly, in claims other than personal injury cases, the starting point is that no more than two experts from different disciplines should be required. This is to encourage parties and advisers to reflect on what experts are necessary for the court to adjudicate. A request for more than two experts will have to be justified as being necessary to resolve the dispute.

81 Thirdly, when directions are given in respect of expert evidence the parties are likely to be directed to name their experts within a defined period. This is to prevent expert shopping. It also further underlines the importance of making enquiries of potential experts before the directions hearing dealing with expert evidence. Underpinning this, ultimately, is the desire to avoid unnecessary delay because all too often the search for relevant experts starts only when the obligation to produce expert evidence is looming. This is too late to achieve a resolution of a dispute in an appropriate time frame.

82 Finally, in relation to expert evidence, in *Neal v Hawksford Trustees (Jersey) Ltd*,[19] I reached the conclusion that the overriding objective permitted me to determine the scope of any expert evidence as part of deciding whether or not to give permission to adduce expert evidence. In other words, the court can restrict the category of expert evidence to be adduced to that which is reasonably required to resolve the proceedings.[20]

Summary judgment

83 The changes to the summary judgment rules involve a complete replacement of Part 7 of the Rules with a new Part 7 largely based on the equivalent English Rules.

84 The purpose of the revised summary judgment rule is still to deal with cases or issues that are not fit for trial at all. However, the application can now be brought by either party in respect of all or part of a case.

85 The threshold to grant summary judgment has also changed. It is now a "no real prospect of success" test. This is the identical test to that applied in England and Wales, Guernsey and the Isle of Man, and

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[18] *Aukland v Minister for H&SS* [2017] JRC 136.
[19] [2017] JRC 083.
[20] *cf* Rule 35.1 of the Civil Procedure Rules 1998.

is a lower threshold for the applicant than the test under the former r 7.[21] The introduction of the rule requires the court to consider whether the claim or the issue it is considering has a realistic as opposed to a fanciful prospect of success.

86 In evaluating assertions made, the courts will carefully scrutinise affidavits by reference to contemporaneous documents, and evidence that might reasonably be expected to be available to test whether there is substance to any factual assertions being made. Some cases will involve analysis of what points may be in issue, including points of law. Simply because affidavits may be lengthy does not mean that, following analysis, there is an issue to be tried. A case should also not be allowed to go to trial simply because something might turn up which would have a bearing on the issue. Ultimately, the test will involve the judge making an assessment of the arguments and evidence before the court to decide if the case requires a trial.

87 If a pleading is not one that has a real prospect of success, if it were to be amended by reference to evidence or other material before the court to meet the required threshold, then it is likely that the court's approach would be to grant leave to amend, as it does at present with strike out cases.

88 Despite the change to Part 7, the power to strike out remains. It may be that the more common application in future will be for summary judgment but there will be some cases where one or more of the grounds available to strike out a case are relied upon. The introduction of a new summary judgment test did not therefore lead to the conclusion that the power to strike out was no longer needed or should be removed.

89 Finally, in respect of summary judgment, the power is also important because it is a counterbalance to the cost protection afforded to litigants in personal injury claims. The new summary judgment process allows the court to deal with speculative claims brought in the hope of putting pressure on a defendant in particular one that is insured in the hope of extracting some form of payment. Ultimately what any defendant chooses to do in response to any claim is a matter for that defendant but it was an important part of introducing cost protection for a plaintiff in personal injury cases to give a defendant in such a case the ability to challenge a claim of no real merit.

Cost protection for plaintiffs in personal injury matters

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[21] See *Holmes v Lingard* [2017] JRC 113 and *MacFirbisigh v CI Executors* [2017] JRC 130A which apply these principles following English authorities.

90 Amendment No 20 also introduced a new Part 12A to the Royal Court Rules. This new rule was created to address the very real concern expressed by individuals who had suffered personal injury that they were deterred from bringing claims because of the fear of adverse costs orders should their claim prove unsuccessful. This led to an inequality of arms because a plaintiff could not afford to lose. For a plaintiff whose only asset was the family home, such an individual was often not prepared to run the risk of losing it if a claim proved unsuccessful. After-the-event insurance was not seen as an answer because of the high levels of premium and because such premiums are not recoverable as part of the costs of litigation.[22]

91 This change is based on the English rules known as qualified one-way costs shifting.[23] What the new change introduces is that costs orders against a plaintiff in personal injury cases may only be enforced at the end of a matter and are limited to the amount of damages recovered by a plaintiff unless—

(a) there were no reasonable grounds for bring the proceedings;

(b) proceedings were an abuse of the court's process; or

(c) the conduct of the plaintiff or his adviser was likely to obstruct the just disposal of the proceedings.

92 One of the issues this change may give rise to is the interrelationship between r 12A and payments into court or offers made on a without prejudice save as to costs basis. Clearly this is an issue which will need determination. If a plaintiff fails to beat at trial a payment into court or a without prejudice save as to costs offer, this is likely to lead to some form of costs order in a defendant's favour applying the usual principles on an exercise of a discretion as to costs. However it is suggested that something more is required to remove the protection contained in r 12A(1). In other words, a defendant would have to show that a plaintiff, by refusing to accept a payment into court or an offer, has acted unreasonably, has abused the court's process or has obstructed the just disposal of the proceedings. To take a different approach to otherwise allows a payment into court or an offer to override the protection afforded by r 12A. This would effectively allow the intention behind r 12A to be undermined.

93 Any argument that the protection should be lifted will have to be determined on a case-by-case basis. It may depend on the findings of

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[22] See *Riley v Pickersgill & Le Cornu* 2002 JLR 116.
[23] Civil Procedure Rules 44.13–44.16.

the trial court or may also lead to further argument before the trial judge or both.

Miscellaneous

94 There are a few other changes to note as follows.

95 First, if a party is required to apply to fix a day for a trial or a hearing of an action this obligation is only satisfied by the date fix appointment itself taking place before expiry of the relevant time limit. It is not therefore enough simply to ring up the court on the last day to ask for a date fix appointment.

96 Secondly, the time limit by which actions adjourned *sine die* are automatically struck out has been reduced to three years. This applies to all actions past and future. Automatic strike out does not however apply to any adjournment for a fixed period.

97 Thirdly, interim payments under r 8 can now be sought before the Judicial Greffier as well as before the Royal Court.

Conclusion

98 These changes are designed to improve the process for those who come before the Jersey courts in civil disputes. Some have a particular focus on individual litigants; some are technical changes for particular types of claims; and some are general in nature. All arise from the goal of the Royal Court to be more accessible, and to ensure that disputes are resolved in a timely and effective manner, focusing on the key issues at stake. They are neither the beginning nor the end of a journey, but simply a step in a process in ensuring that the focus of all involved in a dispute, whether the parties, advisers or the courts, is on what is necessary to determine the dispute.

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