Procedural reforms in Jersey: A wolf in sheep's clothing?

June 2017

A number of significant changes to Jersey's civil procedure rules came into force on 1st June 2017.

The Royal Court (Amendment No.20) Rules 2017 and the associated practice directions (eleven in total) are intended to reduce delays and the cost of litigation and to improve access to justice, particularly for ordinary Jersey resident individuals.

This is all underpinned by the most important aspect of the changes, being the formal introduction of the overriding objective policy, something which was introduced in England and Wales by the Woolf reforms over 15 years ago.

The reforms were presented to the Jersey Law Society by the Master of the Royal Court, Advocate Matthew Thompson, in May. He has played a significant role in the drafting of the rule changes and guidance, hence some in the profession already referring to them as the *'Thompson Reforms'*.

Advocate Thompson explained that those responsible for the introduction of the rule changes had looked carefully at the Civil Procedure Rules (CPR) in the UK and that there was no intention to replicate them in Jersey. Having looked at reforms that have worked well and those which have not, he emphasised that these are *'drafted in Jersey, for Jersey'.*

As he said, the reforms are not a *'radical departure'* from the current procedural regime but an *'evolution'* and a *'step in the right direction'.* In some areas, the rules simply formalise current practices and approaches.

So what do the changes mean?

There will be more consideration of cases by the Court (and so attention required by parties and their lawyers) at an earlier stage than has previously been the case, for example in relation to discovery (disclosure). The Master will be managing cases very proactively. Concern has been raised by some that this will result in the *'front loading'* of costs, which then makes settlement of disputes more difficult. Time will tell.

The Court also expects a modification of the adversarial approach to litigation, with the parties and their lawyers being expected to be more co-operative and less confrontational both in relation to procedural matters and at trial. The Master commented that *'procedural disputes should be the last resort'* and that these reforms signal the end of *'game playing*' by parties and their lawyers.

One thing that is clear from the rules and guidance - and the potential sanctions available to the Court - is that a heavy burden is now placed on legal advisers with conduct of litigation to ensure that the overriding objective is complied with. Proceedings are to be conducted fairly and expeditiously. The Court has a range of sanctions available to it in the event of non-compliance, ranging from costs penalties to debarring evidence to striking out.

In response to some consternation from practitioners, the Master said that, from the Court's perspective, responsibility rests with advisers because it is they who are in a position to control and manage the litigation process on behalf of their clients. The Court expects lawyers involved in the litigation process to act as an *'honest guide'*.

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The key changes are:

- The formal introduction of the **overriding objective** of the Court to deal with cases *'justly and at proportionate cost'*. This expressly does not apply to criminal or quasi-criminal proceedings. Delays in the progress of actions will be reduced by rules limiting the ability of parties to agree adjournments and by the introduction of directions hearings (case management conferences) taking place earlier.

- **Requests for further information** (RFI) have replaced the more limited powers to request further and better particulars of a party's pleading / case or information by way of interrogatories. RFIs must be concise, necessary and proportionate in nature.

- Practice Directions have been issued providing guidance in relation to **discovery** and **electronic discovery**. The Court now has the power to dispose of the need for discovery in a case or to limit its scope to what it considers to be reasonable and proportionate.

- **Summary judgment** can now be applied for by a defendant (previously a defendant's only means of having a claim disposed of pre-trial was by way of a strike out application). The test applied by the Court has been altered so as to lower the threshold (*'no real prospect'* of succeeding on or defending a claim), bringing it in line with that applied in the UK, Guernsey and the Isle of Man. The rationale is for the Court to deal with cases that are not deemed fit for trial at an early stage.

- A Practice Direction has been introduced setting out what will be considered to be standard practice in relation to **pre-action communications** in all disputes (with a few exceptions). The purpose of this is to encourage the exchange of information between the parties and to allow the opportunity for the parties to settle a claim before proceedings are issued. Any non-compliance with the Practice Direction by a party will likely be taken into account by the Court when determining costs, either during the course of the proceedings or after trial.

- In claims of a value of less than £500,000, **costs budgets** must be exchanged by the parties prior to the first directions hearing. The Court when awarding costs will not permit a party to depart materially from the costs budget it has provided unless satisfied there is a good reason to do so.

- Leave (permission) of the Court is now required to pursue proceedings brought by way of **derivative action** and a new procedure has been introduced in relation to **unfair prejudice** proceedings.

- The power of the Court to order a party to make an **interim payment** on account of a **costs order** is now explicit in the rules.

- Detailed rules have been introduced in relation to the enforcement of **costs orders** against plaintiffs (claimants) in **injuries cases** (aimed at addressing concerns at the costs risks for individual plaintiffs in bringing claims) and in relation to **appeals** to the Royal Court from decisions of the **Employment and Discrimination Tribunal.**

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