JUMP STARTING CASES UNDER THE DRAFT CIVIL PROCEDURE RULES

By Carol Aina

1. INTRODUCTION

1.1. The proposed Civil Procedure Rules were drafted by Mr. Dick Greenslade, a former District Judge in England and a member of the Woolf Inquiry into Civil Justice. He had previously carried out a similar exercise in Trinidad & Tobago in 1998 and the Organisation of Eastern Caribbean States in 1999.

1.2. Our draft rules were posted on the Supreme Court's website in November 2000 and comments were invited.

1.3 A sub-committee of the Rules Committee was set up to review the draft and report to the Rules Committee. Mr. Michael Hylton, Q.C invited me to join the sub-committee, made up of himself and Mr. Charles Piper. The sub-committee has over the last year reviewed the draft rules with a view to ensuring that the particular needs of Jamaica are reflected.

1.4. In presenting this paper, I have selected those parts of the rules, which I believe will, if implemented, impact on litigation practice. I have cited some of the decisions made under the English Civil Procedure Rules of 1998.

1.5. I hope that you will see as I make the presentation, that the rules seek to create a new culture of litigation as well as to improve particular procedural arrangements.

2. THE RATIONALE FOR REFORM

2.1. We would, I think, all agree that our current civil justice system suffers from a number of defects. Some are:-

i) it is too slow;
ii) it is too complex;
iii) it is too uncertain, especially as to timetable and costs; and
iv) it is too expensive.

2.2. We would also agree that any reformed civil justice system should have the following features:-

i) be just in the results it delivers;

ii) be fair in the way it treats litigants;
iii) offer appropriate procedures at reasonable cost;
iv) deal with cases with reasonable speed;
v) be understandable to those who use it;
vi) be responsive to the needs of those who use it,
vii) provide as much certainty as the nature of the particular case allows;
viii) be effective, adequately resourced and organised.

3. THE OVERRIDING OBJECTIVE - PART 1

3.1 Part 1 of the rules introduces the overriding objective and states that: "These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly." The rules are born out of a defined objective (the overriding objective).

3.2 The rules outline the overriding objective to which the court should strive when it deals with procedural rules. The rules state that dealing with cases justly includes:-

(a) Ensuring that the parties are on an equal footing and not prejudiced by their financial position

Parties will now be required to conduct a case with a desire to limit expense as far as possible. There will be far less scope for a party who is stronger economically to use intimidatory tactics against a weaker parties. In Maletz v Lewis (1999) Times 4 May 1999, the Court held that the concept of dealing with cases on an equal footing did not extend to the court being able to prevent a party instructing the lawyer of its choice, even if the other party could not afford a lawyer of equal status.

(b) Saving expense

We currently have a system whereby a party can take advantage of a variety of measures to delay proceedings. A party can make their opponent's life difficult and costly by making numerous interlocutory applications, often secure in the knowledge that any cost sanction which the court might impose would be of little practical assistance, biting as it does usually at the end of the trial. Under the new rules, there are limitations on the parties' abilities to roam widely and without any consideration as to costs.

(c) Dealing with case in ways which are proportionate to:-

i) the amount of money involved;
ii) the importance of the case;
iii) the complexity of the issues
iv) the financial position of the parties.

Proportionality is a central theme under the new rules. It enables the court to scale down the directions which are to be given in a particular case, based on the factors against which proportionality is to be measured. In England, there is a tracking system. Cases are allocated to a particular track, based on complexity and amount. The Rules Committee have recommended that matters up to $2m (which involve money cases only) should be placed on a fast track. In those cases, standard directions would be given and the court would often dispense with a case management conference.

(d) Ensuring that it is dealt with expeditiously and fairly

In case management, the court must give effect to this procedural value. An example is the court's power to direct a separate trial of any issue.

In **GKR Karate (UK) Ltd v Yorkshire Post Newspapers Ltd. [2000] 2All ER 931**, the claimants brought libel proceedings against a newspaper, its journalist, and P, whose statements were quoted in the newspaper article. The newspaper defendants pleaded justification and fair comment on a matter of public interest published on an occasion of qualified privilege. At the pre-trial review, it was estimated that the privilege point would take three days to try, whereas a full trial including that issue and justification would take 4 to 6 weeks.

The judge therefore decided to try the question of privilege first, which involved only two questions:-
was the publication made on an occasion of qualified privilege?; and; were the newspaper defendants actuated by malice?
The order did not affect the case against P, which was to proceed normally. The claimants objected, arguing that this split would prevent them from showing that the publication was untrue and from cross examining P, both of which matters, they argued were relevant to the question of whether the article attracted privilege.

The Court of Appeal dismissed the claimants' appeal. May LJ explained that whereas in the past libel cases tended to be long drawn out expensive affairs, they would now be tried more economically and expeditiously. Here the issue of privilege required a determination of whether the journalist believed in the truth of the article when it was

written. This had to be determined on the basis of the circumstances existing at the time of the publication. Accordingly, the court held, trying first the question of the journalist's state of mind and motivation at the time of publication was a fair and expeditious way of disposing of the privilege point.

(e) Allotting to each case an appropriate share of the court's resources

The use of the court's resources will now be considered as a part of substantial justice. Dealing with cases justly includes not only the issues concerning the parties, but also management issues. In SBJ **Stephenson Ltd v Mandy [1999] NLD 30 June CA**- the Court held that a party which has interlocutory injunctions granted against it does not have an unqualified right to have them set aside a few weeks before trial of the substantive action, where there is no evidence of additional damage that could occur in the interim. Additionally, cross undertaking in damages was in existence having regard to the overriding objectives, the court declined to go into the merits of the appeal. The facts were that the defendant had appealed against an order restraining him from breaching a restrictive covenant in his contract of employment. The appeal came before the Court on the 30th June and the trial had been fixed for 20th July. Given the short time to trial, hearing the appeal would not be a good use of the court's resources.

In Adoko v Jemal (The Times 8 July 1999) a defamation action brought by the claimant was struck out by Master Eyre on the ground that the publication had been an occasion of absolute privilege. The claimant's appeal to Mr. Justice Curtis for an extension of time to appeal was dismissed. The notice of appeal before the court related to the decision of Master Eyre, although leave to appeal had been given against the decision of Mr. Justice Curtis. Counsel for the defendant had drawn the matter to the claimant's attention two weeks previously but nothing had been done. Counsel for the claimant now sought leave to amend the notice of appeal. The Court of Appeal took the view that the matter had come before it in total disarray. The claimant had completely failed to supply a bundle of the relevant material in chronological order as had been specifically required when leave to appeal was granted. The time of three Lords Justices had been wasted for an hour and a quarter to sort out the mess. This was not a proper use of the court's time. It was neither appropriate nor just that any further share of the court's resources should be allocated to a case conducted in that way. The appeal was dismissed.

4. How to Commence Proceedings - Part 8

4.1 The confusion which can exist in knowing which of the four (writ, originating summons, originating motion and petition) current types of originating process to use is evidenced by cases such as **Eldemire -v Eldemire (1990) 38 WIR 234** and **Melville v Melville (1996) 52 WR 335**.

4.2 The current methods all have their roots in an English history which was (and is) lacking in any coherence or purposive structure and which can only be justified by historic origin.

4.3 The draft rules have the overriding objective to inform its structure, purpose interpretation and goal. They are drafted in plain language and limit intellectual pretensions.

4.4 To achieve simplicity and clarity, the draft rules introduce a single form of originating process, called the Claim Form.

4.5 Proceedings are commenced by a Claimant (formerly a Plaintiff). The claim form is used in two situations. Form 1 is broadly similar to a writ and an acknowledgment of service (instead of an appearance) is required and to which a defence is filed. Failure to file a defence leads to judgment in default.

4.6 Form 2 is a fixed date claim form, where the claim which is made is unlikely to involve a substantial dispute as to fact, or where formerly an Originating summons or motion would be used. When it is issued a date will be fixed for hearing and it will generally be supported by an affidavit. An acknowledgment of service is required, but no judgment in default is available.

The validity of the claim form/ extension and service

4.7 A claim form for service within the jurisdiction will be valid for 4 months. If it is for service outside of the jurisdiction or an admiralty claim in rem, it is valid for 12 months.

4.8 The claimant is allowed one extension unless the defendant is deliberately avoiding service or there is some other compelling reason.

4.9 The general rule is still that the claim form should be served personally, however if, personal service proves difficult a party may choose an alternative mode of service instead of personal service. No order is necessary from the Court to take this step. However if the Court is asked to take any step on the basis that the claim form is served (for e.g. to enter a judgment in default) an affidavit of service must be filed, which will be

referred to a Judge, who must consider and endorse on the affidavit whether the affidavit satisfactorily proves service. If the court is not so satisfied a date must be fixed for an application for service by a specified method. An application for permission to serve by a specified method is the same as our current application for leave to serve by substituted service.

4.10 The claim form must be served with :-

a) a form of acknowledgment of service;
b) a defence form;
c) prescribed notes for the defendant;
d) a copy of any order giving permission to serve the claim form without the particulars of claim (see below); and
e) if the claim is for money and the defendant is an individual, an application to pay by installments.

Acknowledgment of Service And Notice of Intention to Defend - Part 9

4.11 The filing of an acknowledgment of service is to be treated as the entry of an appearance for the purpose of any enactment referring to the entry of such an appearance.

4.12 An acknowledgement of service is not a waiver by a defendant of the irregularities affecting the jurisdiction. A defendant who wishes to dispute the jurisdiction of the court by reason of an irregularity must acknowledge service and then make an application to the court within the time period for filing a defence.

4.13 The general period for acknowledging service is still 14 days after service of the claim form. However if the defendant files and serves a defence within the 14-day period he need not file an acknowledgment of service form.

5. STATEMENTS OF CASE- PART 8 & PART 10

5.1. The formal documents in which the parties set out their respective cases are no longer to be described as "pleadings", but as "statements of case".

5.2. Statements of case are to be a brief but a complete statement of the facts on which the claim or defence is based and the remedy sought. This does not limit the power of the court to grant any other remedy or relief which is justified on the facts found by the court.

5.3. Facts it would seem equate to the concept of material particulars and it is not to be read that statements of case should contain evidence. There is however no direct rule to the effect that evidence should not be contained in the statements of case.

5.4. The Rules Committee has recommended that the term particulars of claim should be used instead of statement of claim.

5.5. The particulars of claim must be served with the claim form, unless:-

a) the details are included in the claim form; or
b) the court gives permission (replaces leave).

5.6. In a case of emergency when it is not practicable to obtain the permission of the court, the claimant may issue and serve the claim form without the particulars of claim provided that the claimant:-

a) certifies in writing that the issue and service of the claim form is a matter of emergency, stating why; and
b) serves a copy of the certificate and application for permission with the claim form.

5.7. Where the claim form is issued and served as above, no further steps can be taken until permission is given .The court will give permission if :-

a) the claim form must be issued as a matter of urgency and it is not practicable to prepare a particulars of claim (or affidavit in the case of fixed date claim forms);
b) or a relevant limitation period is about to expire and the claimant obtained legal advice relating to the claim for the first time within the 28 days prior to the date that the claimant wishes to file the claim.

5.8 In personal injury cases the claimant must state the date of birth or age of the claimant and attach to the claim form or particulars of claim any medical evidence on which the claimant intends to rely at trial. This does not restrict the right of the claimant to call other or additional evidence at the trial of the claim.

5.9 A defendant can no longer confine himself to admitting, not admitting or denying. The defendant must state:-

a) which (if any) allegations in the claim form or particulars of claim are admitted;
b) which (if any) are denied; and

c) which (if any) are neither admitted nor denied, because the defendant does not know whether they are true, but which the defendant wishes the claimant to prove.

5.10. A defendant must give his reasons for denying any of the allegations and if he intends to prove a different version of events he must set out his own version of events. If he fails to do either of the above, the defendant must state a reason for resisting the allegation.

5.11. A defendant may not rely on any allegation or factual argument not mentioned in the defence unless the court gives permission.

5.12. In personal injury cases where the claimant has attached the medical report, the defendant must state in the defence whether all or any part of the medical report is disputed and if there is a dispute, the nature of the dispute. Additionally, where the defendant intends to rely on a medical report to dispute any part of the claimant's claim for personal injuries and the defendant has obtained such a report he must attach the report to the defence.

5.13. A defendant who wishes to admit liability but wishes to be heard on the issue of quantum **must** file and serve a defence dealing with that issue.

5.14. The time proposed for filing a defence is currently 28 days. The Rules Committee is in fact considering whether this time should be increased to 42 days.

5.15. The parties may extend the time for filing a defence, but may not make more than two agreements with a maximum total extension time of 56 days.

5.16. All statements of case must contain a certificate by the party as to the truth of the facts set out. Parties must therefore approve the factual elements of their case. Since they will need to verify the statement of case, it follows that statements of case must be drafted in a manner that they can understand.

6. DEFAULT JUDGMENTS- PART 12

6.1. For the purposes of requesting a default judgment a claim for:-

a) the cost of repairs executed to a vehicle;
b) the cost of repairs executed to any property in or abutting a road; or
c) any other actual financial loss other than loss of wages or other income;

claimed as a result of damage which it is alleged to have been caused in an accident as a result of negligence is to be treated as a claim for a specified sum of money (i.e. liquidated). The claimant must however attach to the claim form copies of all bills relied on to substantiate the claim.

6.2. There is the obvious risk of the claimant overstating the cost of repairs. However, a defendant who doubts the amount of the damages claimed, should defend and state his reasons for challenging the amount.

6.3. The rationale is that if the defendant has failed to acknowledge service and or filed a defence there is little point in requiring such damages to be assessed, where they were specified in the claim form or particulars of claim and the defendant failed to dispute them. The claimant should be entitled to final judgment.

6.4. As indicated above (5.13), when the defendant admits liability but wishes to dispute quantum, he must file a defence on quantum. If he fails to file a defence, the entry of a default judgment debars the defendant from being heard except as to:

Payment of debt
Costs
Application to set aside.

6.5. The test for setting aside or varying a default judgment is set out in the rules (Part 13). The defendant must show he has a real prospect of successfully defending the claim. Additionally, the defendant must apply to the court as soon as reasonably practicable after finding out that judgment had been entered and must give a good explanation for the failure to file an acknowledgment of service or defence.

7. APPLICATIONS RELATING TO PENDING PROCEEDINGS- PART 11

7.1. All applications relating to pending proceedings must so far as practicable be listed for hearing at a case management conference or at the pretrial review. When an application is made which could have been dealt with at a case management conference or pretrial review the court must order the applicant to pay the costs of the application unless there are special circumstances.

7.2. All applications are now to be made on the application form. The party who is making the application is known as the applicant and the person against whom the order is sought is known as the respondent.

7.3. Unless the rules relating to a particular type of application specify another time limit the application together with a draft order must be filed and served at least 3 days before the application.

8. SUMMARY JUDGMENT- PART 15

8.1. Summary judgment is now a two way process, either the claimant or the defendant can apply.

8.2. The test is that there is no real prospect of succeeding on the claim or issue, or no real prospect of successfully defending the claim or the issue.

8.3. In **Swain v Hilmark [1999] CPLR 779**-Lord Woolf said that the words did not need explanation. Real is directed at realistic as opposed to fanciful prospect of success.

8.4. Summary judgment applies to the whole of an action or defence or any issue raised in it.

8.5. Summary judgment is available even where judgment on one or more issues will not determine the case.

8.6. The following are exempted from summary judgment:-

a) proceedings for redress under the Constitution;
b) proceedings against the Crown;
c) proceedings by way of fixed date claim forms;
d) proceedings for-
   i) false imprisonment
   ii) malicious prosecution; and
   iii) defamation;
   iv) admiralty proceedings in rem; and
   v) probate proceedings.

8.7. The claimant may not apply for summary judgment until the defendant has filed an acknowledgment of service form.

8.8. Notice of an application for summary judgment must be supported by affidavit evidence and served not less than 14 days before the date fixed for hearing the application. A respondent who wishes to rely on evidence must file an affidavit and serve copies not less than 7 days before the summary judgment hearing.

8.9. When proceedings are not brought to an end, the court must treat the hearing as a case management conference.

9. CASE MANAGEMENT- THE OBJECTIVE- PART 25

9.1 The overriding objective is furthered by a system of case management. Case Management in its wider sense means a change from the traditional position under which, the progress of cases was largely in the hands of the parties, to management by the courts. The Court will determine how each case should progress by making appropriate directions, setting strict timetables and ensuring that the parties comply with them, backed up by a system of sanctions. The court has the duty to manage cases and therefore to determine the pace of the litigation.

9.2 Part 27 of the rules sets out the Case Management Procedure. The general rule is that the Registry must fix a case management conference immediately upon the filing of a defence to a claim other than a fixed date claim. The case management conference must take place not less than 4 weeks or more than 8 weeks after the defence is filed. A party may apply to the court to fix a case management conference before a defence is filed.

9.3 Where the claim has been referred to mediation, the case management conference is fixed after the mediator has reported.

9.4 Part 25 sets out the objectives of the case management conference and states that the court must further the overriding objective by actively managing cases.

9.5 Active case management includes:-

a) encouraging the parties to cooperate with each other in the conduct of proceedings;
b) identifying the issues at an early state;
c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of all others;
d) deciding the order in which issues are to be resolved;
e) encouraging the parties to use any appropriate form of dispute resolution including, in particular, mediation, if the court considers it appropriate and facilitating the use of such procedures;
f) actively encouraging and assisting parties to settle the whole or part of their case on terms that are fair to each party;
g) fixing timetables or otherwise controlling the progress of the case;
h) considering whether the likely benefits of taking a particular step will justify the cost of taking it;
i) dealing with as many aspects of the case as is practicable on the same occasion;
j) dealing with the case or any aspect of it, where it appears appropriate to do so, without requiring the parties to attend court;
k) making appropriate use of technology;

l) giving directions to ensure that the trial of the case proceeds quickly and efficiently; and

m) ensuring that no party gains an unfair advantage by reason of that party's failure to give full disclosure of all relevant facts prior to the trial or the hearing of any application.

Case Management- The Court's Powers- Part 26

9.6 In its narrower sense, case management means the exercise by the court of the powers it has to enable it, and not the parties, to dictate the progress of litigation at the pre-trial stage.

9.7 Part 26 contains a non-exclusive list of the court's general powers of management, which include:-

a) the power to transfer proceedings to Family Court or a Resident Magistrates Court;

b) the power to consolidate proceedings,

c) the power to require any party or a party's attorney –at-law to attend the court;

d) the power to dismiss or give judgment on a claim after a decision on a preliminary issue;

e) the power to hold a hearing and receive evidence by telephone or other method of direct oral communication;

f) the power to direct that any evidence may be given in written form;

g) the power to exclude an issue from determination if it can do substantive justice between the parties on the other issues and determining it would serve no worthwhile purpose

9.8 Active case management begins at the case management conference. All the stakeholders must attend. Clients are expected to be there.

9.9 The rules provide that where a party is represented by an attorney-at-law, that attorney-at-law or another who is fully authorised to negotiate on behalf of the client and competent to deal with the case must attend the case management conference and any pretrial review. The consequences of failing to send a properly prepared legal representative to a directions hearing was considered by the Court of Appeal in Baron v Lovell (1999) The Times, 14 September.

9.10 Where the inadequacy of the person attending or his instructions leads to an adjournment of the conference, the court will usually make a wasted costs order against the attorney-at-law personally.

9.11 The parties must focus on the key issues, they must be in a position to identify and reduce the issues if appropriate as a basis for appropriate case preparation.

9.12 The court must consider whether to give directions for service of witness statements, expert reports and whether or not there should be an agreed statement of facts or issues.

9.13 The court will encourage and assist the parties to settle cases, and will also divert cases to ADR. The recommendation from The Rules Committee is that personal injury cases and family property cases must go to mediation.

9.14 The court must consider whether to give directions for standard or specific disclosure.

9.15 The court may decide to summarily dispose of weak or hopeless cases.

9.16 The court may not adjourn a case management conference without fixing a new date time and place for the adjourned case management.

9.17 At the conference the Judge will have the claim form, particulars of claim and the defence and will ensure that the parties have succinctly set out all but only the facts which are relevant. He will explore whether any amendments are necessary, whether any parties need to be joined and whether or not there can be sequential trial of issues.

9.18 The court may make any order subject to conditions and specify the consequences of failure to comply with the order or conditions. Such conditions can include a requirement to pay a sum of money into court.

9.19 The court can normally exercise any of its case management powers on its own initiative. However before doing so, it must give any person likely to be affected a reasonable opportunity to make representations, orally, in writing, telephonically or by such other means as the court considers reasonable.

9.20 Parties cannot between themselves agree to the variation of the time fixed for the following:-

a) the case management conference;
b) a party to do something where the order specifies the consequences of failure to comply;
c) a pre-trial review
d) the return of a listing questionnaire;
e) the trial date or trial period.

No date set by the court or the rules for doing any act may be varied by the parties if the variation would make it necessary to vary any of the dates above. Other dates may be varied by agreement.

9.21 If the dates are varied, the parties must file a consent application for an order to that effect and certify on the application that the variation will not affect the date fixed for the trial or, if no date has been fixed, the period in which the trial is to commence.

Striking Out

9.22 CPR 26.3 gives the court a specific power to strike out all or part of a statement of case. The court can exercise this power if it appears to the court:-

a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;
b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;
c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or
d) that the statement of claim does not comply with the requirements of Part 8 or 10.

9.23 The above rule covers the cases in our current practice where the abuse lies in the statement of case. It also now includes what can be said to be the most extreme case management sanction. The court can now strike out because of the way in which the claim or the defence has been conducted.

9.24 In **Habib Bank Ltd –v- Jaffer (2000)** The Times, 5 April, the Court of Appeal struck out a claimant's statement of case for persistent disregard of the rules of court. The Court of Appeal placed special emphasis on the fact that the claimant had disregarded advice from their solicitor about the need to make full disclosure and to deal with witness statements in deciding that it was appropriate to strike out the claim.

9.25 The Court of Appeal in **Arrow Nominees Inc v Blackledge (1999)** The Times, 8 December observed that striking out a case purely on the basis of the rules or an order of the court may infringe Article 6.1. of the European Convention on Human rights unless the breach of the Rule itself indicates that it may no longer be possible to have a fair trial.

9.26 In **Buguzzi v Rank Leisure plc [1999]1 WLR 1926**- the plaintiff sued the defendants in respect of injuries sustained while employed by the latter. A trial date was fixed for 1996,but the plaintiff was not ready.

The defendants agreed that the case be taken out of the list. The court adjourned the case and ordered that the parties file certificates of readiness by 19th March 1997. The parties failed to comply and of course under the old rules the court was not in a position to monitor the proceedings, nor was it open to the court to bring the parties back if they did not comply with that part of the order.

The court notified the parties that the matter would be heard during February to May 1999. That was followed by the defendant's application to strike out. The district judge applied the old rules and concluded that there had been wholesale disregard of the rules. The plaintiff had failed to give discovery on time, to prepare trial bundles, to set the case down for trial in accordance with a previous court order and to prepare a calculation of special damages. The district judge held these breaches amounted to abuse of process and he struck out the claim.

On the claimant's appeal, which was heard shortly after the commencement of the CPR 1998, the judge held that both parties had failed to comply with the rules which had previously applied. That there was nothing unfair in letting the case go to trial and that, since so much delay had occurred, it should be heard promptly. He allowed the appeal

The defendant's' appealed to the Court of Appeal. Lord Woolf MR stated that where the CPR applied, earlier authorities on matters of procedure were no longer generally of any relevance. Lord Woolf said that a judge facing a question such as the present should take into account that the parties had been operating under a different regime. However the judge would not be bound to arrive at the same decision as would have been made before the CPR came into effect. It would on occasions be appropriate, to deal with a party's failure to comply with time limits by striking out their statement of case and entering a judgment for their opponent. However the court said, there were less dramatic ways of dealing with the default. It might require the party in default to pay the other party's costs occasioned by the delay on an indemnity basis. The court could make a summary assessment of those costs at the time of the hearing arising from the default and the solicitor handing the case would then have to explain to the client why the money to pay those costs were needed. Alternatively the court could make orders affecting the interest payable on any damages subsequently awarded to the claimant. If the claimant was at fault, the court could reduce the amount of interest payable on their damages. If the defendant was in default the interest payable on the claimant's damages could be increased.

9.27 An application to strike out a statement of case if it discloses no reasonable grounds for bringing or defendant the claim potentially overlaps with applications for summary judgment. In appropriate cases an

application to strike out can be made alternatively with an application for summary judgment.

9.28 The court may make such an order of its own volition or alternatively a party may make an application to court for an order. The application can be made without notice, but must be supported by affidavit evidence. The registry must refer any such application immediately to a judge, master or registrar who may-

a) grant the application;
b) seek the views of the other party; or
c) direct that an appointment be fixed to consider the application and that the registry give to all parties notice of the date and time.

9.29 Many of the provisions in the rules impose sanctions automatically in default of due compliance. For example if a party fails to serve a witness statement when ordered to do so, that party will not be able to rely on that evidence, unless relief from sanction has been obtained. Similarly if a party fails to disclose a document as part of disclosure, that party cannot rely on it at trial unless the party obtained relief from sanctions. Automatic sanctions save the innocent party the trouble of enforcing the order. It is the defaulting party who must seek relief from sanction.

Relief from Sanctions

9.30 A party's ability to obtain relief from sanctions imposed for failure to comply with any rule, order or direction must be-

a) made promptly; and
b) supported by evidence on affidavit.

The court may only grant relief if the threshold test is satisfied:-

a) that the failure to comply was not intentional
b) there is a good explanation for the failure; and
c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.

Once the threshold test is made out the court in exercising its discretion must consider:-

a) the interests of the administration of justice;
b) whether the failure to comply was due to the party or that party's attorney-at-law;
c) whether the failure to comply has been or can be remedied within a reasonable time;

d) whether the trial or any likely trial date can be met if relief is granted;

e) the effect which the granting of relief or not would have on each party.

The party seeking relief from sanction must pay the costs of the application unless exceptional circumstances are shown.

Unless Orders

9.31 If the court did not impose a sanction for non-compliance when the order or direction was given, then upon the application of the other party, the court can make an unless order against a party, for the failure of that party, to comply with any of the rules or any court order.

Judgment without trial after striking out

9.32 If a party does not comply with an unless order, the other party may ask for judgment to be entered. An application can be made to set aside such judgment. If the judgment had been entered incorrectly, for example prematurely then the court must set aside the judgment. However if the judgment was entered correctly then the provisions relating to relief from sanctions apply. An application to set aside the judgment must be made not more than 14 days after the judgment has been served on the party making the application.

10. CASE MANAGEMENT - ENSURING READINESS FOR TRIAL

10.1. One of the main aims behind the case management conference is that there should either be a fixed trial date or a likely period in which trial will be fixed. The parties should be working towards this date and there should be very little chance of the date being adjourned. This is achieved by the listing questionnaire and the pre-trial-review.

Listing Questionnaire

10.2 At the case management conference a date will be fixed when the parties must file a listing questionnaire. This is a form designed to assist the court to ascertain whether or not directions and orders have been complied with and to obtain information as to the likely time estimate and dates to avoid for trial.

Pre- trial Review

10.3 The court must also fix a date for a pre-trial review unless it is satisfied that having regard to the value, importance and complexity of the case, it may be dealt with justly without a pre-trial review.

10.4 The purpose of the pretrial review is to ensure compliance with all previous directions as to the steps to be taken before trial. This includes the filing of trial bundles, chronologies and skeleton arguments. The pre-trial review also provides an excellent opportunity for a settlement conference.

11. Disclosure – Part 28

11.1 The term disclosure replaces discovery.

11.2 Standard disclosure will usually be ordered.

11.3 Disclosure will be ordered of documents which are directly relevant to the matters in question in the proceeding and so does not include "the train of inquiry documents".

11.4 During standard disclosure a party has a duty to make a reasonable search for all documents.

11.5 If a party has not searched for certain documents on the grounds of unreasonableness, he must state this in his disclosure statement.

11.6 The procedure is now by a list of documents which must include a disclosure statement from the party disclosing documents, stating that he or she understands the duty of disclosure and to the best of the maker's knowledge the duty has been carried out.

11.7 If a party is dissatisfied with standard disclosure and believes it is inadequate, then he may make an application for an order for specific disclosure.

11.8 An order for specific disclosure will require a party to:-

i) disclose specified documents or classes of documents

ii) carry out a search as specified by the order and disclose any documents located as a result of the search.

11.9 The concept of proportionality is applied to an order for specific disclosure. The court is to have regard to the financial resources of the party against whom the order is made and to ensure that they are in a position to comply with any such order. Where the court having regard to finances

would refuse to make an order for specific disclosure, it may make such an order on terms that the party seeking the order must pay the other party's costs of such disclosure in any event.

11.10 Failure to disclose a document means that a party cannot rely on it at trial.

12. EVIDENCE & WITNESS STATEMENTS- PART 29

12.1 The rules do not change the law on the admissibility of evidence, however the court has extensive powers to manage cases and a general power to control the evidence.

12.2 The court can direct that in preparing for the determination of a particular issue, it requires evidence on certain issues only and not on others.

12.3 Evidence may consist not only of oral testimony but also of witness statements and affidavits.

12.4 The court can also allow evidence through video linking or other means.

12.5 The rules provide that the court may order the parties to serve witness statements of the oral evidence which the party intends to rely on in relation to any issues of facts to be decided at the trial.

12.6 These directions are expected to become routine, with exchange being ordered on a mutual basis, to be done simultaneously. However the court can give directions as to the order in which the statements are to be filed and served.

12.7 If a witness statement is served then at trial a witness will be called to give oral evidence unless the court orders otherwise or the party uses the statement as hearsay evidence.

12.8 The witness statement will generally stand as the evidence in chief. The witness will be called, will take the oath and asked for name, address and occupation. They will then be required to turn to their statement in the bundle and asked whether the document they have been shown is their statement, signed by them and to confirm that it is true. They will then be subject to cross- examination.

12.9 The statement should represent the witness' evidence in chief. It must not contain any inadmissible evidence. Any documents referred to must be sufficiently identified.

12.10 A witness may be able to amplify the evidence in the witness statement at the trial with the permission of the court. The court will give permission

only if there is good reason not to confine the evidence of the witness to the contents of the witness statement.

12.11 The witness statement must contain a declaration of truth and must be signed by the witness.

12.12 The sanction for failure to comply with an order to file a witness statement is that the witness may not be called to give evidence, unless the court permits, and the court may not give permission at the trial unless the party seeking permission has a good reason for not previously seeking relief from sanction.

12.13 If a witness statement is made by a person and the party who took the statement serves it but decides not to call the maker of the statement at the trial or to put the statement in as hearsay evidence, the other party may put the witness statement in as hearsay evidence.

12.14 The rules provide that a party who is required to serve but unable to obtain a witness statement may serve a witness summary instead. A witness summary identifies the witness and indicates the issues with which his evidence will deal. If the evidence is not known, then the matters about which the party serving the witness summary proposes to question the witness.

12.15 The rules strengthen the case law that the expert evidence should be independent and uninfluenced by the form, content or exigencies of litigation.

12.16 The report must be addressed to the court and is the courts and not the party who pays the expert.

12.17 All written and oral instructions are to be disclosed.

12.18 **Stevens v Gullis (Pile, third party) [2000] 1 All ER 257** illustrates the extent to which the courts now have power to control both proceedings and evidence. The defendant instructed an expert to act for him in litigation arising from a building dispute. As a result the court ordered the expert to confirm that he understood his duties in accordance with Practice Directions under the rule. When the expert failed to provide the required confirmation, the judge made an order debarring the expert from acting as an expert in the proceedings.

In the Court of Appeal Lord Woolf MR agreed the expert had demonstrated such lack of understanding of his duties that the court had no alternative but to bar him, even if this brought to an end the defendant's third party proceedings. Although the parties subsequently agreed that

the expert could be head nevertheless, Lord Woolf thought that it would be wrong to accede to such a agreement. He said it would be wholly wrong where a judge has appropriately exercised his discretion in relation to that matter, for the parties to override that discretion merely because the parties are content to allow the matter to be dealt with otherwise. He said that the order of the Judge in the proceedings should stand, and the expert should not be allowed to give expert evidence.

13. SETTLEMENT- PART 35

13.1. A claimant as well as a defendant can make an offer in writing to settle his claim. It can be made without prejudice but on the basis that the contents will be drawn to the court once the court decides on the damages.

13.2. Offers should be open for acceptance for at least 21 days. To accept an offer a party serves written notice of acceptance.

13.3. A defendant's offer can be supported by a payment in, but he is not obliged to make a payment in to support an offer.

13.4. Where the defendant refuses the claimant offer, the sanction is that the Court is empowered to direct a higher rate of interest on the sum awarded and costs. The original draft rules had provided a tapering scale starting at 15% on damages not exceeding $100,000, and tapering down to 8% as the size of the damages increased in excess of $800,000.00. The sub-committee recommended that there should be a 15% award across the board.

13.5. Under the current rules if a plaintiff fails to beat a payment of money into court, the consequence is that the plaintiff has to pay the defendant's costs from the date of the payment in. The draft rules contain a greater discretion to award costs where the court's award to the claimant is within 15% of the defendant's payment in.

14. WASTED COSTS ORDERS- PART 64

14.1 The draft rules provide that in any proceedings the court may by order direct the attorney to pay the whole or part of any wasted costs.

14.2 Wasted costs are defined as costs incurred by a party:-

a) as a result of any improper, unreasonable, or negligent act or omission on the part of the attorney or any employee of such attorney; or

b) which, in the light of any act or omission occurring after they were incurred, the court considers it unreasonable to expect the party to pay.

14.3 Specific procedural rules for these applications are included in CPR 64.9.

14.4 Wasted costs orders can be made on an application by a party or by the court on its own initiative.

14.5 An application by a party must be on notice to the attorney, supported by evidence on affidavit setting out the grounds on which the order is sought.

14.6 If the court is considering making such an order the court must give the attorney notice of the fact that it is minded to make such an order, the notice must state the grounds on which the court is minded to make the order.

14.7 The attorney must be given 7 days notice of the hearing.

14.8 The provisions have existed in England by virtue of Statute-The Supreme Court Act 1981 S. 51 (5) and had also existed in the previous rules(Ord 62r.7).

14.9 Detailed guidance on such applications was given in **Ridehalgh v Horsefield [1994] CH 205**. They were to be conducted in a summary manner and were to be made after the end of the proceedings. One of the drawbacks of the procedure is that the lawyers involved, were often unable to make use of documents protected by legal professional privilege to justify their actions.

15. CONCLUSION

15.1. There is no doubt that a shift to early court intervention will result in the front loading of attorney's work. An attorney, will need to be fully appraised of the facts to prepare for a case management conference. He will have to prepare witness statements and be fully appraised of the evidence. This process is called litigation planning. The proposed rules make litigation planning mandatory.

15.2. The trade off should be lighter case- loads and the early settlement of cases. The new rules seek to ensure that an attorney will only be able to take on as many matters as he can efficiently handle and to assist him to reach an early conclusion of the case.

15.3. There are many factors that need to be in place in order that the rules achieve their overriding objective.

15.4. There must be strong judicial leadership and commitment to active case management.

15.5. The registry must be efficient, well resourced and there must be good monitoring information system.

15.6. The rules are not perfect and if they are implemented there will be issues to be addressed that cannot be foreseen now. However they are rules, which are drafted with an overriding objective of efficiency, justice and fairness.

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