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REFORMING JERSEY'S ROYAL COURT RULES: LESSONS FROM THE CPR

Timothy Hanson

In Jersey, there are currently two reviews being undertaken both with the expressed aim of improving access to justice. The first and most wide-ranging review is being undertaken by the Chief Minister and will look at the issue broadly, including potential reform of Jersey's legal aid system. The second review is being chaired by the Deputy Bailiff with specific regard to reform of the procedure of the Royal Court. Currently, this is a blend of rules taken from the (now revoked) Rules of the Supreme Court of England and Wales, with some later accretions, and local procedure that has evolved over many centuries. The intention of the author is to provoke initial discussion as to issues that might be highly relevant to this second procedural review and specifically which (if any) reforms in England & Wales might be worthy of implementation in Jersey.¹

Jersey overview

Procedural rules

1 Article 13(1) of the Royal Court (Jersey) Law 1948 provides that rules of court may be made by the Superior Number of the Royal Court, with the advice and assistance of the Rules Committee, for regulating and prescribing the procedure and practice to be followed in the Royal Court. By art 13(3), such rules may be amended or revoked by subsequent rules and must be laid before the States as soon as may be after they are made.

¹ A similar but far more extensive exercise has, for example, been undertaken in Hong Kong: see Civil Justice Reform, Final Report, 2004 <http://www.legco.gov.hk/yr0607/english/bc/bc57/papers/bc570611cb2-1960-e.pdf>

2 The Royal Court (General) Rules were first introduced in 1963 and came into force on 8 July 1963. These rules are accredited to the work of F. de Lisle Bois, Deputy Bailiff of Jersey.² Prior to this, Sir Peter Crill (formerly Bailiff of Jersey) recalls that other than one or two maxims, “there were no rules of court . . . In effect one went into Court with one’s documents and witnesses and hoped that these were stronger than those of one’s opponent. The result was that we spent endless time arguing about forms and whether the right action had been brought, and not getting on with what litigants wanted: a decision”.³ Until the 1963 Rules, pleadings had been in French but Rule 30 permitted the use of English generally. Sir Peter Crill refers to litigation at that time as having been “regarded as a second-class way of practice, and that the essential components of being a Jersey advocate was that one was competent mainly in conveyancing, the division of estates, wills and so on [sic]”. Since 1963, the Rules have been amended or replaced on a number of occasions, most notably in the form of the Royal Court Rules 1968, the Royal Court Rules 1992 and the Royal Court Rules 2004 (“RCR”).

3 Many other procedural rules have also been made pursuant to art 13 of the Royal Court (Jersey) Law 1948, including the Service of Process (Jersey) Rules 1994; the Judgments (Reciprocal Enforcement) Rules 1961 and Probate (General) Rules 1998.⁴

4 Procedure before the Royal Court has, of course, been further developed by a myriad of other enactments. Article 43 of the Matrimonial Causes (Jersey) Law 1949 has given rise in “matrimonial causes” to the Matrimonial Causes Rules 2005 (previously the Matrimonial Causes (General) (Jersey) Rules 1979) while the Children (Jersey) Law 2002 has introduced a number of separate rules of procedure in respect to children and, most notably, the Children Rules 2005. By art 2 of the Bankruptcy (Désastre) (Jersey) Law 1990, the Bankruptcy (Désastre) Rules 2006 (formerly 1991) supplement the procedure of the Royal Court in relation to bankruptcy. Certain other procedural rules apply by virtue of various other

² Crill, *A Little Brief Authority* (2005), at 108–109.

³ *Ibid.*

⁴ In these respects, see further the Service of Process and Taking of Evidence (Jersey) Law 1960; the Judgments (Reciprocal Enforcement) (Jersey) Law 1961 and the Probate (Jersey) Law 1998 respectively.

enactments including, by way of example only, the Code of 1771; *Loi (1835) sur la procédure devant la Cour Royale* and *Loi (1864) réglant la procédure criminelle*.

Basic structure

5 The Royal Court is divided into four divisions (Héritage, Family, Probate and Samedi⁵ divisions) and work divided according to the provisions of Part 3 of the RCR. The Royal Court itself consists of the Inferior Number (the Bailiff sitting alone—or his substitute—and, where required, two Jurats) or the Superior Number (the Bailiff—or his substitute—and at least five Jurats). Jurats are the judges of fact and assess damages (if any) and, in criminal or mixed causes, determine the sentence, fine or other sanction to be pronounced or imposed. The Bailiff, however, has a casting vote when they are divided.⁶ The Bailiff also enjoys limited ability to make findings of facts himself, see art 17(2) Royal Court (Jersey) Law 1948, and in respect of matters of procedure, such as facts relating to the admissibility of evidence.⁷ The Inferior Number has unlimited jurisdiction in civil cases but it can remit a civil case to the Superior Number whenever it thinks it proper to do so, in which case the Superior Number exercises original jurisdiction.⁸

Judicial review, appeals, precedent

6 Aside from its jurisdiction in respect of judicial review (Part 16) and appeals from administrative decisions (Part 15), the Royal Court is able to hear appeals from lower tribunals such as the Petty Debts Court with leave from the lower court or the Bailiff;⁹ from the Magistrate's Court against sentence and/or conviction or by way of case stated;¹⁰ from the Employment Tribunal, on a question of law, with leave of either the

⁵ So named because it used to sit on a Saturday, but no longer does so since the advent of the five-day week: Lemprière, *Customs, Ceremonies & Traditions of the Channel Islands* (1976 Hale).

⁶ Article 15(4) Royal Court (Jersey) Law 1948.

⁷ *Lundy v Att Gen* 1996 JLR 193.

⁸ Article 18 Royal Court (Jersey) Law 1948.

⁹ Article 3 of the Petty Debts Court (Miscellaneous Provisions) (Jersey) Law 2000 and Rule 2 of the Royal Court (Appeals from Petty Debts Court) Rules 2004.

¹⁰ Articles 17 and 21 of the Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949.

Employment Tribunal or the Royal Court.¹¹ Appeals also lie from the Greffier of the Royal Court to the Bailiff or his substitute (Part 20/2.) In criminal cases, an appeal against sentence imposed by the Inferior Number of the Royal Court lies to the Superior Number. Otherwise, all appeals from the Royal Court are to the Court of Appeal of Jersey pursuant to Part 2 of the Court of Appeal Jersey Law 1961.¹² The Privy Council provides the final tier of domestic appeal, with leave to appeal being required.¹³

7 While the doctrine of *stare decisis* or binding force of precedent as expounded in England and Wales does not apply in Jersey, the Royal Court is generally bound by decisions of the Court of Appeal and Privy Council (sitting on appeal from a Jersey court) unless such earlier decision has been invalidated by subsequent legislation or some compelling change in circumstances.¹⁴ Decisions of the Privy Council in relation to another jurisdiction or by the UK Supreme Court (formerly the House of Lords) are persuasive only, the degree of persuasiveness depending upon a number of considerations including the similarity between the law of Jersey and that other jurisdiction.¹⁵ However in respect of the tort of negligence where Jersey law follows English common law unless a local exception is already established, a decision of the UK Supreme Court has been described as binding if directly on point, as presumably would a decision of the Court of Appeal in England that determined English law on the issue in question.¹⁶ The view that Jersey courts could be “bound,” as opposed to very strongly influenced by such English authority, is controversial¹⁷ and might, in itself, restrict access to justice.¹⁸ One respected local

¹¹ Article 94 of the Employment (Jersey) Law 2003.

¹² Article 13 prescribes the situations in which leave to bring an appeal is required.

¹³ Article 14 of the Court of Appeal (Jersey) Law 1961.

¹⁴ *State of Qatar v Al Thani* 1999 JLR 118.

¹⁵ *Hall v Att Gen* 1996 JLR 129.

¹⁶ See the majority decision in *TA Picot (CI) Ltd v Crills* 1995 JLR 33.

¹⁷ See, for example, Dawes “Citation from other Legal Systems: a Reply” (2004) JL Review 71, at para 6; Bailhache *A Celebration of Autonomy* (2055 Jersey Law Review Ltd) *per* Southwell at 33, where Blom-Cooper, JA is preferred.

¹⁸ See the judgment of Blom-Cooper, JA in *TA Picot (CI) Ltd v Crills* 1995 JLR 33 at 63. Notwithstanding, the justice of any case, an appeal would

author has instead chosen to record the principle as “virtually binding” but this is more the author’s own gloss.¹⁹ In any event, upon a closer examination of the decision in question it becomes clear that such a view was *obiter dicta* only²⁰ and, therefore, open to subsequent reconsideration by the Royal Court. As to the Inferior Number of the Royal Court, this is not bound by its own decisions, but will not depart from an earlier decision unless persuaded that the earlier decision was wrongly decided or the cause of practical injustice.²¹ Since the Superior Number of the Royal Court and the Inferior Number of the Royal Court differ only in the number of Jurats that sit, it is unlikely that a decision on a pure point of law (that would in either case be determined by the Bailiff or his substitute²²) would now be treated as more authoritative than the other merely by virtue of such fact.

Interpretation

8 As far as the interpretation of the Royal Court Rules is concerned, the Royal Court Rules constitute an enactment as defined by art 1 of the Interpretation (Jersey) Law 1954 and consequently the 1954 Law will apply. Similarly, by art 4 of the Human Rights (Jersey) Law 2002 (which came into force on 10 December, 2006) the Rules must be read and given effect in a way which is compatible with Convention rights.

necessarily have to go to the Privy Council but the appellant would first have to have the funds to get there.

¹⁹ Nicolle *The Origin and Development of Jersey Law* (2009 Jersey & Guernsey Law Review Ltd), at 20.7.

²⁰*TA Picot (CI) Ltd v Crills* 1995 JLR 33. Le Quesne, JA (with whom Frossard, JA agreed) decided the appeal at p.40 on the appellant’s second submission that even were English law applied as set out by the House of Lords, the claim was arguable and could not properly be struck out at an interlocutory stage. Blom-Cooper, JA agreed with Le Quesne, JA in this respect, at 47–48. All other discussion as to the binding nature or otherwise of English case law in this area was, therefore, *obiter dictum* and still permits legitimate reconsideration by the Royal Court *i.e.* beyond the limits permitted by *State of Qatar v Al Thani* 1999 JLR 118 in respect of the *ratio decidendi* of a case.

²¹ See for example *Att Gen v Hall* 1995 JLR 102; *In re Barker* 1985–86 JLR 186.

²² Since the 1948 Law came into force. Before this, Jurats were judges of both law and fact.

9 Jersey's customary law now has only a limited application in respect of matters of procedure but there remain some areas where reference to Jersey customary law commentators in particular may be required and where procedures peculiar to Jersey have been retained such as the injunction arising from the Clameur de Haro touched upon in RCR 5/5 (service) and 10/4 (fines and *causes de brièveté*.) In such areas, the court has resorted to consulting writers or commentators such as Hemery & Dumaresq, *A Statement of the Mode of Proceeding and of Going to Trial in the Royal Court of Jersey* (1789); Le Geyt, *Privilèges, Loix et Coustumes de L'Isle de Jersey* (1953); Le Gros, *Droit Coutumier de Jersey* (1943); and Pissard, *La Clameur de Haro dans Le Droit Normand* (1911).²³ Other examples as to where customary law may be relevant include the enforcement order by a creditor of Vicomte *chargé d'écrire* (RCR 11/1), division of estates and dower (Part 13)²⁴ or Vues (Part 14) which permit the identification of boundaries in neighbour disputes.

10 English practice may also be relevant (but persuasive only) to the extent that the Royal Court has declared that Jersey and English procedure is the same on any given point, or where there is no significant difference between the procedural rules in both jurisdictions. The same observation applies in respect of the relevance of Guernsey practice. Otherwise the procedure in other jurisdictions is relevant only for comparative purposes.²⁵

11 The Rules of the Supreme Court as they stood at 1999 before being replaced by the Civil Procedure Rules are still consulted by Jersey practitioners given the similarity between certain parts of such rules with the Royal Court Rules and Jersey procedure generally. Nevertheless, with the advent of the Human Rights (Jersey) Law 2000 and further legal developments, such reliance is subject to increased caution. The Jersey courts have also been prepared to quote elements of the Civil Procedure Rules and associated cases where relevant to the particular issues at hand. Such a process is inevitable where, for example, Jersey procedure evolves so as to absorb directly parts of the CPR as it has, for example, in replicating the "overriding objective" from CPR Part 1 into our

²³ See further *Att Gen v De Carteret* 1987–88 JLR 626.

²⁴ Note that art 2 of the Probate (Jersey) Law 1998 expressly preserves the procedure before such Law where no other provision has been made.

²⁵ *Cooper v. Resch* 1987–88 JLR at 432.

Children Rules 2005 (r.4) Matrimonial Causes Rules 2005 (r. 47) and Civil Partners Causes Rules 2012 (r.53.)

12 Jersey and Guernsey have separate systems of case reporting, being the *Jersey Law Reports* (“JLR”) and the *Guernsey Law Reports* (“GLR”) respectively, although in both jurisdictions formal law reporting of judgments given locally came fairly late. In Jersey, a subject index of decided cases was recorded in the *Tables des Décisions de la Cour Royale de Jersey* from 1885 but it was not until 1950 that the *Jersey Judgments* series published an entire judgment, developing then into the *Jersey Law Reports* from 1984. Judgments recording reasons as a brief digest accordingly to the French style were mainly responsible for the lack of law reporting prior to 1950²⁶ when the common law style of judgments was subsequently adopted. In Guernsey, the *Guernsey Law Journal* published significant cases, either as a summary or the entire judgment, from 1985 to 2002 but there was often a significant delay in cases being published, and a formal law reporting series commenced in 2003 with the *Guernsey Law Reports*. Such developments, together with law firms developing cross-Island businesses, and the Bailiwicks sharing the same judges for their respective Courts of Appeal, have helped the cross-fertilization of legal ideas.²⁷ However, the law and practice in each jurisdiction can be markedly different and the rapid evolution in law and practice has given rise to specific issues relating to access to justice, not least with English becoming the dominant language rather than French.²⁸

General observations upon Jersey Procedure

13 The blend of procedural practice in Jersey of rules drawn from England and Wales (moreover at different points in its own evolution) with that which can be traced back many centuries locally, clearly can give rise to a tension (if not a direct conflict) in procedural values. Notions of an “overriding objective” of saving costs and proportionality that have become more evident in recent years sit very uneasily with particular Jersey practices

²⁶ A change introduced by Charles Thomas Le Quesne, KC who had returned from practice at the English bar and been appointed Lieutenant Bailiff.

²⁷ Since 2007 this journal has become a review of both Bailiwicks and aims to encourage such sharing of knowledge.

²⁸ Compare the observations made in *Re a debtor, ex p Viscount of Jersey* [1981] Ch 384 with the current position of an Institute of Law; the Jerseylaw.je website and a myriad of other initiatives that have made Jersey law more accessible.

such as the *Vue de Vicomte* in Part 14 where six conveyancers are summonsed from local lawyers to participate in dealing with a boundary dispute. On appeal, a *Vue de Justice* takes place with twelve conveyancers being selected with the first six remaining on the panel.²⁹ Aside from it being questionable on ECHR grounds whether or not lawyers can be co-opted into participating in such a dispute, or as to an appellate process containing the same persons from the first process, the use of so many experts neither saves costs nor is it proportionate.³⁰ Moreover, procedural enactments in French (when the dominant language in the Island is now English) sit at odds with ensuring access to justice, although more recently steps have been taken to create translations into English but this will take some time to achieve.³¹

14 The use of the venerable Clameur de Haro to effect an injunction without any application to the court or initial court determination having in fact been reached, similarly calls for an understanding of Jersey procedure that the RSC or CPR (despite all its various procedural guides) simply cannot help us with.

15 Similarly, the need to appear before the Royal Court on a Friday afternoon for the purpose of *une passation* or a passing of contracts to buy or sell land, as well as other particular property transactions,³² is a practice that has evolved over many centuries in Jersey³³ and may prompt some surprise from an English lawyer, for instance. The need to attend before the Royal Court to transact such matters can be an inconvenience and certainly can increase costs.³⁴ Indeed, because the passing of contracts comes before the rest of the court business on a Friday (known as the *Table*) which involves multiple parties and

²⁹ RCR 14/2(2).

³⁰ See Hanson “No legal system is an Island entire of itself” (2004) JL Rev 209.

³¹ See also Hanson “The language of the law: The importance of French” (2005) JL Rev 238.

³² For example, leases in excess of nine years constitute *héritage* and can only be created by means of a contract passed before the Royal Court: *Brown v Alexandre* (1891) 214 Ex 349.

³³ Contracts used to be passed in the Church porch à *ouïe de paroisse*.

³⁴ A party can dispense with attending personally and often appoints their lawyer in their place but stamp duty is payable for such appointment. The lawyer’s time is also an expense to the client in some shape or form.

their lawyers in the early stages of litigation, those parties and their lawyers will have to sit through the passing of such contracts with their client normally paying for the privilege. While only normally a delay of 30 minutes or so each week, this could amount to collective costs wasted each year in excess of £100,000. In addition, the judge and Jurats sitting will have wasted each year approximately four court days of time that could otherwise have been spent dealing with contested matters, for example. Despite a recommendation for such property matters to be removed from the court by the Judicial and Legal Services Review Committee in 1990³⁵ (headed by Sir Godfray Le Quesne, QC), the failure to follow such a recommendation evidences a reluctance to alter such hallowed Jersey practices, notwithstanding the existence of more pragmatic arguments based upon access to justice.

16 As may have been surmised, the pluralistic character of Jersey procedural rules (similar in fact to the character of its substantive law as a mixed jurisdiction) has the risk of generating uncertainty and therefore satellite litigation (and thus increased cost and delay) as such rules can be interpreted against different yardsticks. For example, rules drawn from the RSC (or cases decided under such rules before being replaced by the CPR) can be interpreted differently through the prism of the ECHR or indeed through a shift in procedural values contained in the later CPR. As a practitioner, Jersey law and procedure can appear to be an exciting art simply because of the increased breadth of arguments that appear available. Further, local judges can become known for particular procedural inclinations, with some preferring to “mine the rich lodes of our ancient French Law”³⁶ for example, and not necessarily too receptive to quotations from procedural books applicable on a given point in England and Wales. Others appear slightly more receptive to such practice. Interestingly, in the Court of Appeal of Jersey mainly QCs or retired judges from England sit, although there have also been several important Scottish members in recent years, somewhat cherished perhaps for their different backgrounds and perceived sympathetic outlook to Jersey’s different legal heritage.

17 The general observations above illustrate that Jersey’s procedural rules cannot stay still and have to be the subject of

³⁵ RC 24/90 at 6.34–6.35.

³⁶ *La Motte Garages Ltd v Morgan* 1989 JLR 312, *per* Hamon, Commr.

reform under any “access to justice” review. Indeed, there are a variety of tensions, conflicts and differing approaches which have the potential to cause inconsistency, delay and increased cost.³⁷ On 18 October 2012, Lord Dyson, Master of the Rolls, addressed the Law Society of England and Wales and remarked upon such factors as impeding access to justice—

“One of the problems which I remember from my time as deputy Head of Civil Justice which bedevilled the effective implementation of the Woolf reforms was the degree to which they gave rise to satellite litigation. I can well recall some of the criticisms which were made of those reforms, and which were strongly articulated at the time of the tenth anniversary of their introduction. Satellite litigation concerning the proper application of the rules is a real bane in any civil justice system. It is time-consuming and costly. It has a negative impact on the immediate litigants involved in the litigation. It has a negative impact on the courts and their scarce resources. It has a negative impact on the ability of other court users to obtain timely access to the courts.”

18 Clearly, therefore, reform of the Royal Court Rules (which currently is in its infancy and a large task if to be done properly) should aim to provide clarity, aided as it should be by a coherent set of procedural values as opposed to the current “patch-work quilt.” Above all, however, the courts must provide consistent guidance for, as Lord Dyson remarks, “a lack of clarity and consistency . . . will only generate confusion . . . and ultimately it will undermine the aims of [any] reforms.”

The birth of the Civil Procedure Rules in England & Wales³⁸

19 On 26 April 1999, the new Civil Procedure Rules (“CPR”) and accompanying Practice Directions came into force, constituting the most fundamental reform of the civil justice system in England and Wales of the 20th century. In this article, it is considered whether or not Jersey could benefit from

³⁷ The adoption or continuation by the Jersey Court of Appeal of an outdated test for leave to appeal from the RSC of 1988 in a case heard 14 years later in *Glazebrook v Housing Cttee* 2002 JLR 43, despite such test having long been replaced in that jurisdiction, took until *Crociani v Crociani* [2014] JCA 089 to be rectified.

³⁸ I am grateful to Jami-Lee Morgan of Hanson Renouf for her research on this topic.

emulating some of these procedural reforms, although any such discussion has to be cursory given the enormous ambit of the subject. To this end, it is first necessary to consider what the CPR sought to achieve and how well it has fared in doing so.

20 The CPR took effect on the basis of the recommendations made by Lord Woolf in his June 1995 Interim Report and his July 1996 Final Report, both entitled "Access to Justice". Lord Woolf identified a number of defects with the previous system of the RSC. He found that it was—

- too expensive, in that the costs often exceeded the value of the claim;
- too slow in bringing a case to a conclusion;
- too unequal, with a lack of equality between the powerful, wealthy litigant and the under resourced litigant;
- too uncertain: the difficulty of forecasting what litigation will cost and how long it will last induces the fear of the unknown;
- incomprehensible to many litigants;
- too fragmented in the way it is organised since there is no one with clear overall responsibility for the administration of the civil justice; and
- too adversarial, as cases are run by the parties not by the courts, and the rules of court, all too often, are ignored by the parties and not enforced by the court.

21 Lord Woolf argued for a system (that most would find it difficult to disagree with) which would:

- be just in the results it delivers;
- be fair in the way that it treats litigants;
- offer appropriate procedures at reasonable cost;
- deal with cases with reasonable speed;
- be understandable to those who use it;
- be responsive to the needs of those who use it;
- provide as much certainty as the nature of the particular case allows; and
- be effective, being adequately resourced and organised.

22 The whole ethos of the Woolf Reforms centred on avoiding litigation and promoting settlement between the parties in

dispute. The proposals set out in Lord Woolf's Final Report in 1996 resulted in the Civil Procedure Act 1997 and the Civil Procedure Rules 1998 (CPR 1998). Lord Woolf identified that without effective judicial control, the adversarial process of the civil courts was "likely to degenerate into an environment in which the litigation process is too often seen as a battlefield where no rules apply." Thus, taking these problems into consideration, Lord Woolf envisaged a "new landscape for the civil justice system" which would include the following features:

- litigation would be avoided where possible;
- the timescale of litigation would be shorter and more certain;
- litigation would be less complex;
- the cost of litigation would be more affordable, more predictable and more proportionate to the value and complexity of each individual case;
- litigation would be less adversarial and more cooperative;
- parties of limited financial means would be able to conduct litigation on a more equal footing;
- there would be clear lines of judicial and administrative responsibility for the civil justice system;
- judges would be deployed effectively so that they can manage litigation in accordance with the new rules and protocols; and
- the civil justice system would be responsive to the needs of the litigants.

23 Various means were adopted with the intention of addressing the defects in the previous RSC system and in an attempt to engineer this "new landscape." Most notably for the purpose of this article, they included the development of procedural rules which contained the following key features:

- the use of plain English;
- a statement of key principles in the form of the "overriding objective";
- case management powers, including case allocation and rules as to the use of experts;
- pre-action protocols;
- Part 36 Offers;

- the use of Alternative Dispute Resolution; and
- revised rules as to costs.

I deal with each of these topics below, considering in the process whether or not such reforms should be replicated in Jersey.

Language in the CPR 1998

24 When drafting the CPR, it was decided that the style of language used for the rules should be plain, ordinary English and that complicated legalese should be left behind. The decision to abandon the complicated and often antiquated legal terminology was upon the basis that the use of such language alienated the layperson coming to the law as they simply could not understand the procedures and the complicated terminology used. Lord Woolf commented on the use of simpler and clearer language and the rationale behind introducing this by stating—

“I said in the interim report that one of my aims was to modernise terminology. I have not approached this dogmatically but on the basis that terminology should be changed where it is useful to do so. I have sought to remove expressions which are meaningless or confusing to non-lawyers (such as ‘relief’ when used to mean a remedy) or where a different expression would more adequately convey what is involved (such as ‘disclosure’ of documents instead of the archaic ‘discovery’). The various terms for methods of starting a case, such as writ, summons, origination application, will all be replaced by ‘claim’. The word ‘plaintiff’ will be replaced by ‘claimant’.

I have suggested that the word ‘pleading’ should be replaced by ‘statement of case’. Although it is a very familiar expression to lawyers and in some respects a convenient one, the word has become too much identified with a process which the legal profession itself readily acknowledges has to change. This is an instance where change of language will, I believe, help to underpin a change of attitude and a real change of practice to more open and straightforward method of stating a claim or defence.

I recognise that changes of terminology are discomforting and temporarily inconvenient for those who are very familiar with the existing expressions. But, as I made clear in the interim report, the system of civil justice and the rules which govern it must be broadly comprehensible not only to

an inner circle of initiates but to non-professional advisers and, so far as possible, to ordinary people of average ability who are likely to have more than a single encounter with the system.”

25 The department responsible for the CPR 1998 at the time of their inception was The Home Office, which was subsequently awarded the gold level “Crystal Mark” by the Plain English Campaign.

26 As was expected, problems in respect of interpretation still occurred but Lord Woolf envisaged that the courts might look to the overriding objective as a “compass to guide them on the right course”. Limits naturally had to be set as to how far this practice was appropriate and over time the Court of Appeal added guidance as to the way in which the CPR 1998 should be interpreted so as to prevent the overriding objective from being resorted to when the rules were actually clear as to their meaning, but the court simply felt a different result should prevail.³⁹

27 In Jersey, as has been remarked upon, a certain amount of the procedural rules are enacted entirely in French although a process of translation is now underway. Nonetheless, if access to justice is to be taken seriously, Jersey not only has to incorporate changes to language that have occurred under the CPR – for example putting into plain English phrases such as “ex parte,” “inter partes,” or “plaintiff” – but all that multitude of French legal terms that are a peculiarity of Jersey procedural law. There will be a significant group of legal practitioners and probably local judges who will balk at such a change, being of the view that this would be to lose part of the “identity” of Jersey law. It may, further, be argued that it would be a time-consuming task or that lay people would still struggle even were the rules to be expressed in plain English. Nonetheless, the requirement in the last decade that conveyances should be passed in the English language rather than formulaic and archaic French, has already occurred without any noticeable difficulty; the glossary of terms and their official translation demonstrating that it can be done.⁴⁰ Indeed, looking back upon

³⁹ See *eg* *Vinos v Marks & Spencer* [2001] 3 All ER 784.

⁴⁰ See Trotter “Commentary on a Jersey Conveyance” (2005) *JL Review* 253 and Hanson “The Language of the Law: A Postscript” (2006) *JL Review* 91.

such “old” practices now, makes one wonder how it took so long to make such change.⁴¹

28 However, it is important not to elevate the use of plain English as some panacea for all to understand the complexities of a legal system. The use of plain English is but one ingredient on that journey and it is doubtful if Lord Woolf has actually succeeded in his broader aims—

“Lord Woolf wanted the system to be simpler and easier to navigate. Peter Thompson QC paints the true picture: ‘In 1998, before the new rules came into force, the rules of procedure took up 391 pages of the County Court Practice . . . we now have three sets of rules which, together with practice directions and protocols, cover 2,301 pages of volume 1 of the Civil Court Practice, a 550% increase!’ (see NLJ, 27 February 2009, p 293). Moreover, the system changes all the time. In the 10 years of the CPR there have been no fewer than 49 updates.”⁴²

29 Looking back at the first published CPR,⁴³ it does appear to be a far more accessible piece of work than the larger beast that it now appears to have become: there are obvious lessons to be drawn from this from a Jersey perspective.⁴⁴

The overriding objective (Part 1 CPR 1998)

30 The key principles that the court should apply “as far is practicable” when exercising its powers under the CPR are stated as follows—

- ensuring that the parties are on an equal footing;
- saving expense;
- dealing with the case in ways which are proportionate:
 - (i) to the amount of money involved;
 - (ii) to the importance of the case;

⁴¹ Comparable to the ban on smoking in public places that Jersey was the first to implement in the British Isles.

⁴² See Professor Zander, QC, NLJ, 13 March, 2009.

⁴³ <http://www.legislation.gov.uk/ukxi/1998/3132/contents/made>

⁴⁴ For a similar reaction see also Civil Justice Reform, Final Report, 2004 Hong Kong http://www.legco.gov.hk/yr06-07/english/bc/bc57/papers/bc_570611cb_2-1960-e.pdf

- (iii) to the complexity of the issues; and
- (iv) to the financial position of each party.
- ensuring that it is dealt with expeditiously and fairly;
- allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and
- enforcing compliance with rules, practice directions and orders.

31 Importantly, the CPR acknowledges the importance of the parties (and by extension their legal advisors) in the equation in that it requires the parties to “help the Court to further the overriding objective.”

32 As indicated above, we already find “the overriding objective” expressed in these terms in various procedural rules applicable to the Royal Court. Although comparable (but not identical) ideas have been expressed as being applicable in all civil cases⁴⁵ it is striking that they have yet to make their way expressly into the Royal Court Rules. In Guernsey, for example, it is noteworthy that the overriding objective has been taken from the CPR and grafted onto the procedural rules there.⁴⁶

33 Criticism has been made of the overriding objective, however, by writers such as Professor Michael Zander, QC who, in the *New Law Journal*, 13 March 2009, stated—

“The rules, starting with the ‘overriding objective’ with its multiple and potentially conflicting considerations, give the judges virtual carte blanche to decide in whatever way they think right. Judges notoriously vary in their approach to procedural issues, including whether a breach of the rules should result in sanctions.

Moreover, this new scope for the exercise of judicial discretion is largely uncontrolled and uncontrollable. The Court of Appeal has made it clear that normally it will not interfere.”

34 This last observation seems difficult to see as a legitimate criticism because the exercise of judicial discretion (whatever

⁴⁵ See for example, *In re Esteem* 2000 JLR N-41, *Luce v Manning* 2004 JLR 64.

⁴⁶ See Royal Court Civil Rules 2007, r.1.

the principles applicable) is always a slightly uphill task to challenge and particularly in respect of case management decisions.⁴⁷

35 As to the suggestion that there is something wrong, in effect, in ensuring the court is guided by a checklist of key principles, it is difficult to understand why this would lead to mischief as opposed to better decisions being reached. Indeed, in matrimonial or children law, there is a long tradition of the court being required, *inter alia*, to have regard to specific key questions in the exercise of its discretion and it has not been suggested that the system is flawed as a result. Indeed, it is likely to lead to more inconsistency and the wrong result if specific key principles are not considered as a matter of course. The observations of Lord Dyson that have already been cited above, are significant in this regard.

36 It is further important to note the requirement in the parties being enjoined to further the overriding objective and, indeed, to co-operate with each other with a view to changing the previous litigation culture, or at least its excesses. This is an entirely positive requirement which Professor Zander does go on to acknowledge. In the 2005 report of Peysner and Seneviratne (commissioned by the Department for Constitutional Affairs)⁴⁸—

“The research found that the overall view was that the culture of litigation had changed for the better, and that the reforms had achieved this objective. Co-operation between the parties, and between the parties and the courts, had improved.”

37 While there may still be arguments as to the extent to which opponents embroiled in litigation do now co-operate with each other when compared with the days of the RSC, the requirement remains significant if only to provide a hook to sanction the more objectionable types of behaviour that can occur in bitterly contested litigation. However, the effect of a costs order, even against a party, can be more subtle in making the lawyers take particular note. As Peysner and Seneviratne record—

“The ultimate penalty for professional non compliance is a ‘wasted costs order’ but these are hedged about with such

⁴⁷ See for example a decision of the Court of Appeal of Jersey to this effect in *Alhamrani v Alhamrani* 2009 JLR N [50].

⁴⁸ “The management of civil cases: the courts and post-Woolf landscape.”

complexities that we found that judges tend to shy away from them. In any event if the fault lies with the lawyer then it was thought by some judges that in most cases a cost order against an innocent party will end up being settled by the lawyer and indeed firms sometimes acknowledge their fault and undertake to pay any costs order made against their client.”

38 It is suggested, therefore, that the process of incorporation of the CPR overriding objective should extend to the RCR and would be beneficial. Any temptation of including a local variant to that stated in the CPR and which has already taken root in both Guernsey and Jersey should be avoided for fear of causing uncertainty and conflict between the various enactments that already exist. Further, as Lord Dyson has remarked, even with the incorporation of the overriding objective, there needs to be consistency as far as possible in the approach of the courts in their application, which in turn requires proper preparation by both the judiciary and the legal profession and consistent Court of Appeal guidance where necessary.

Case management powers

39 Under Part 3 of the CPR, the courts have been granted and are enjoined to use extensive case management powers so that the overriding objective is adhered to. It is intended that the court manages the progression of each individual case. For example, under r 3.3, the court does not have to wait for a party to a case to raise a specific issue before making an order and can make such an order on its own initiative. Further, r 1.4(2)(g) requires the court to fix an appropriate timetable for the case and to control the overall progression of the case in a bid to deal with cases expeditiously and justly. Cases are therefore allocated to one of three specific tracks depending upon what is involved: small claims; fast-track and multi-track.

40 It is clear that the introduction of case management powers available to the court has helped to alleviate a number of problems in the civil justice system that had earlier been identified by Lord Woolf. However, there were case management powers that existed under the RSC; it is arguable that it was just that the culture of the court in managing cases was different, and the same remains true in Jersey where particular personalities can make such a noticeable difference.

41 Peysner and Seneviratne summarise their findings on case management as follows—

“Case management conferences were felt to be one of the major successes of the CPR. There was widespread use of case management conferences being conducted by telephone, which was rapidly becoming the norm. One major disadvantage for District Judges of this trend was that their job had become even more isolated. In practice clients rarely attend case conferences and are rarely ordered to do so. There is a much more uniform approach across the country in relation to procedure, although there was some concern about inconsistency between courts in some large trial centres, and the fact that courts varied considerably in the time taken to list short appointments. The new experts’ regime was working well, and was supported by both judges and practitioners. The changes reflected trends that were occurring anyway in relation to experts. Although some practitioners delay in issuing proceedings until the end of the limitation period, so that they can fully prepare before issue, nevertheless, nationally set targets for cases to be listed for trial are often met or bettered. Generally, solicitors felt that timetabling was a good thing, but that the timetables had to be realistic. Some practitioners thought that the overriding objective gave too much discretion to the court, although there were others who found the CPR liberating. There were few appeals from allocation decisions or case management decisions.”

42 As to experts, the CPR introduced a number of new initiatives as Lord Woolf identified expert evidence as a major generator of unnecessary costs. Problems included the inappropriate and excessive use of experts; their expense; availability for trial, and a perception that they were not always independent of those instructing them. Whilst under the pre-CPR rules the court had considerable potential control, this was not usually exercised. The Civil Procedure Rules therefore included a variety of reforms designed to emphasise the expert’s duty to help the court impartially and to encourage a more focused use of experts, for instance by the appointment of a single, jointly instructed expert, which I further note is acknowledged by Professor Zander, QC as a positive development. Moreover, rules and protocols as to the use of experts varied according to the track that a case was allocated, ensuring a degree of proportionality with the value and issues at stake.

43 In Jersey, our summons for directions procedure in RCR 6/26 provides a means for case management, including the

instruction of experts, and is further bolstered by Practice Directions such as PD RC 05/31 “Case Management”.⁴⁹ Unfortunately, there is a lack of guidance in the Royal Court Rules, Practice Directions or local case law as to the instruction of experts or the use of expert evidence generally⁵⁰ and this is an area that could certainly benefit from further development.

44 As to telephone or video case conferences, these tend not to be necessary in a small Island but are used where the assigned judge happens to be out of the jurisdiction. However, as already indicated, case management requires the allocation of appropriate judicial resources (including IT support) to ensure its optimum effect. As Peysner and Seneviratne reported on the CPR—

“The case management machinery introduced under the CPR has been successful in reducing delays, making the process more predictable and certain and shifting control from the parties to the court. However, the use of IT by the courts was variable, and it was acknowledged that the systems used in the courts were primitive compared with those used by practitioners. In addition, many practitioners were critical of court administration. This criticism was not directed at court staff and judges themselves, but it was felt that they were not sufficiently resourced.”

45 Adopting in Jersey the broad thrust of the case management powers expressed in the CPR would legitimize and support a proactive approach to case management, even though it is not necessarily the case that the Royal Court lacks the power to act in such a way should it choose to do so. Further, in making this public commitment, it would be anticipated that resources would have to be made available. More detailed consideration would need to be given to setting specific tracks for categories of cases; there already existing some differences in procedure between debts or liquidated claims with claims seeking damages for example.⁵¹

⁴⁹ All parties and their advisers should seek to have actions disposed of within 12 months of their commencement wherever that is possible. In addition periodic case reviews are conducted and steps taken to deal with dormant actions.

⁵⁰ RCR 6/20 (2)(d) gives the court power to control the number of experts.

⁵¹ The former is less onerous, commenced by Summons (RCR 6/2) with ordinary service (RCR 5/6) and particulars of claim required only if defended (RCR 6/6 (31)).

Pre-action protocols

46 In his review of the Civil Justice System, Lord Woolf developed the concept of “pre-action protocols” in an attempt to resolve disputes without any recourse to the court, or (if proceedings were implemented) at an early stage in proceedings. Pre-action protocols were designed as an aid to ensuring that the overriding objective was achieved. In his Final Report, Lord Woolf comments that the pre-action protocols would help to “build on and increase the benefits of early but well-informed settlements which genuinely satisfy both parties to a dispute”. A party that fails to comply with the pre-action protocols might be subject to sanctions from the court.

47 There are 13 pre-action protocols, to date—

- construction and engineering disputes;
- defamation;
- personal injury;
- clinical disputes;
- professional negligence;
- judicial review;
- disease and illness;
- housing disrepair;
- possession claims based on rent arrears;
- possession claims based on mortgage or Home Purchase Plan arrears in respect of residential property;
- low value personal injury claims in road traffic accidents;
- dilapidations; and
- low value personal injury (employers liability and public liability.)

48 The objectives of the pre-action protocols are—

- to achieve more pre-action contact between the parties;
- to assist in the better and earlier exchange of information;
- to better pre-action investigation by both sides;
- to put the parties in a position where they may be able to settle cases fairly and early without litigation;

- to enable proceedings to run to the court's timetable and efficiently if litigation does become necessary; and
- to promote the provision of medical or rehabilitation treatment to address the needs of the claimant.

49 Goriely, Moorhead & Abrams⁵² reported in 2002 that “most practitioners regarded the Woolf reforms as a success. The reforms were liked for providing a clearer structure, greater openness and making settlements easier to achieve”. However, the pre-action protocols were the subject of some criticism. “The new approach, however, did lead to some “front-loading”, in which more work was carried out in the early stages of a case.”

50 Peysner and Seneviratne similarly reported—

“There is a very high settlement rate, which was often more than 60%, and in some courts it was 80%. Hardly any multi-track cases were going to trial. The high settlement rate was felt to be a result of the CPR. The majority of cases were being settled pre-issue.

Costs were felt to have increased overall as a result of the CPR, and in particular costs are now ‘front-loaded’. Also the cost per case is higher than pre-CPR. Judges felt that costs, particularly in the Fast Track, were disproportionate. In areas outside personal injury work or simple money claims, it was accepted that the demands of the CPR required substantial work.”

51 In various Jersey cases, normally dealing with costs, the Royal Court has given a very limited amount of guidance on what potential plaintiffs are expected to do before initiating proceedings, and in particular the need to send a letter before action unless the matter is clearly urgent.⁵³ It is clear that a more developed system of pre-action protocols would be desirable in Jersey but this is an area that might benefit from a less exacting approach than that under the CPR and which has been accused of actually leading to increased costs.

⁵² “More civil justice? The impact of the Woolf reforms on pre-action behaviour” (Commissioned by The Law Society and Civil Justice Council 2002, Research Study 43).

⁵³ *STM Fiduciaire Ltd v Bay Isles Ltd* 2011 JRC 212, at para 28 where indemnity costs were awarded against the plaintiff. See also *In re C* 2011 JLR N [41]—letter to be sent before applying for judicial review.

“On costs, as Professor Peysner said, there is universal agreement. They have gone up which is obviously not what was intended. As Judge Michael Cook, author of *Cook on Costs*, put it: ‘The idea of the Civil Procedure Rules . . . was to cut the costs of civil litigation. But the scheme has been spectacularly unsuccessful in achieving its aims of bringing control, certainty and transparency.’

The fact that costs have gone up is partly the entirely predictable result of one of the central features of the Woolf reforms—early preparation of cases, early exchange of information between the parties, more cards on the table at an earlier stage. The result? Front-loading of costs.

Pre-CPR, the preparation of the average case that went to trial would tend to take place at a late stage, which Lord Woolf thought was a problem. The trouble is that the front-loading of costs applies not just to the tiny minority of cases that go to trial but equally to the overwhelming majority—well over 90%—that have always settled. In my view this obvious point was never properly grasped by Lord Woolf and, insofar as it was recognised, it was brushed aside with the assertion that in cases that settled, the settlement would be based on a fuller appreciation of the facts.

This may be true—but no one can say what difference that fuller appreciation of the facts makes to the terms of the settlement—in the sense of giving the claimant a better or worse result and at what cost to the paying party. ‘Early better appreciation of the facts’ is of little value if it adds significantly to the costs and makes little or no difference to the terms of settlement. Even if it affects the outcome, it may do so at a disproportionate cost.”⁵⁴

52 In Lord Justice Jackson’s Review of Civil Litigation Costs (which led to a final report in 2009) the view of the Civil Committee of the Council of Her Majesty’s Circuit Judges is quoted⁵⁵ as follows—

“The Woolf reforms aimed to achieve three things: greater speed, greater simplicity, and lower cost. The first of these has been achieved. The second two plainly have not, and are interconnected. The more work the rules require to be done, the more it will cost. There is now much more work

⁵⁴ Professor Michael Zander, QC.

⁵⁵ Para 3.2.

to be done, especially before proceedings are started, as the Report has analysed. The reticulation of protocols (which are ever being increased and never simplified) mean that even in cases which are going quickly to settle much more work will be done than it was pre CPR. The more sophistication is introduced into the Rules (notable examples of this are the costs rules themselves), the more work will be involved, the more time will be taken, and the more satellite litigation will increase. Since the CPR were introduced the size of the White Book has grown considerably and inexorably. There has manifestly not been the simplification which Lord Woolf called for, whereby the rules should be comprehensible to ordinary litigants. Quite the reverse in some cases. This, in part, is responsible for the unacceptable increases in costs which have taken place. There needs to be a very determined drive for simplification.”

53 The message from the experience of the CPR is, therefore, that multiple pre-action protocols might have unintended effects in driving up costs and that Jersey might benefit from a less exacting and simplified approach.

Part 36 Offers; ADR etc

54 The use of the “payment in” procedure under the RSC permitted defendants a useful weapon in obtaining costs were the plaintiff to decline to accept the payment in within a prescribed period but then fail to beat it. Case law further suggested that a payment in was to be accorded greater significance than a mere offer to settle when the funds might not in fact even be available to make any payment.⁵⁶ However, no effective system existed for plaintiffs other than to make an offer⁵⁷ with costs consequences being variable and therefore unpredictable. One method available to encourage both parties to achieve early settlement is now to be found in the use of CPR Part 36 offers. The offer can be made by a claimant or a defendant by way of a simple letter to the other side but must comply with the requirements laid down by the rule. Once made, it cannot be withdrawn or amended until the expiration of 21 days from the date on which the offer is made. Once the 21 days have expired, the offeror can remove the offer from the

⁵⁶ *Singh v Parkfield Group Plc*, *The Times*, 20 March, 1996.

⁵⁷ RSC O 22, r 14.

table, proceed to trial or make a further, often less favourable, offer to the claimant. The offer is kept secret until it becomes clear whether or not it has been beaten. For successful claimants, Part 36 went on to specify that the court may award costs assessed on the more generous indemnity basis, or order the defendant to pay an interest penalty on the damages, or interest on the costs. The Part 36 system has been described by most authors as a great success. Unlike the RSC, the provisions even extend to offers made before proceedings have commenced.⁵⁸

55 The RSC payment in procedure exists in Jersey but, for defendants, our “Calderbank letter” system of making an offer in writing has also become equated with the payment in procedure, albeit by dint of contrary English authority not having been cited.⁵⁹ However, our system remains deficient in the same ways that the RSC was deficient. By ensuring offers are open for a minimum period of time and ensuring risks and benefits for both sides in making offers to settle, there is clearly more likelihood of settlement occurring. Accordingly, the Part 36 system should be embraced in Jersey and appropriate reforms made to the RCR without undue delay.

56 As far as Alternative Dispute Resolution is concerned in Jersey, there is already a strong culture of mediation of disputes with the summons for directions procedure often incorporating an opportunity for ADR to be explored. In family cases, recent initiatives for ADR have also been introduced with funding provided by the States of Jersey. In the Petty Debts Court, a court led mediation process takes place and has been in operation for some considerable time. Any reform of the Royal Court Rules will, inevitably, have to explore how ADR can be improved and developed, but at present it is not an area lacking in vigour.

Costs

57 One of the major objectives of the reform process was to reduce the costs of litigation. Lord Woolf further wanted the courts to exercise their powers over costs to encourage cooperative conduct on the part of the litigants and to discourage unreasonable conduct. Parts 44–48 provided rules

⁵⁸ CPR, r 36.3(2)(a).

⁵⁹ Compare *Sim v Thomas*, unreported 9 October 2001 with *Cole v Chief Officer of the States* 2008 JLR N [47].

on costs under the CPR with a number of special rules, including fixed fees in certain categories of cases, or the use of conditional fee agreements (“CFAs”) which are discussed in further detail below. As has already been touched upon above, significant problems have arisen with the CPR and specifically in relation to increased costs. A more recent round of major reforms, therefore, took place following Lord Justice Jackson’s Review of Civil Litigation Costs that led to a final report in 2009. It is highly unlikely, therefore, that Jersey would now embark upon emulating reforms that are known to have failed or about which question marks still remain. The characteristic approach of a small jurisdiction (such as Jersey) will be to wait and see how the “Jackson” reforms fare. It is obviously far beyond the scope of this modest article to examine the enormous amount of work that has led to these more recent reforms, but it is hoped that the limited observations made below might prove helpful in provoking further discussion.

Summary assessment of costs

58 The summary assessment of costs introduced as part of the Woolf reforms under CPR 44.7 was one measure aimed at curbing unnecessary or improper applications and bringing home to parties the increasing cost of proceedings. This principle has been described as “pay as you go” but has fallen subject to some practical concerns including inconsistency between orders made by different judges; the lack of familiarity with assessing costs by judges and courtroom advocates; and assessments being rather too rough and ready.

59 In Jersey, there is the power to summarily tax costs before the Greffier⁶⁰ in cases that have not lasted longer than one day. However, such practice appears rarely to happen and potentially could lead to delays in the court system as more time is spent dealing with costs when they might otherwise be agreed in any event. It is suggested that further evaluation of this power and practice in Jersey needs to occur before considering its expansion. In the event of expansion, both lawyers and judges may require more training on costs so as to ensure the process works efficiently and there may also be resource implications for the court as a result.

Conditional fee agreements

⁶⁰ Practice Direction RC 09/03.

60 Turning to the notable feature of CFAs, these actually were introduced before the CPR and pursuant to s 58 of the Courts and Legal Services Act 1990 and led to the Conditional Fee Agreements Regulations 1995 which applied to certain categories of cases only. They were extended to all civil proceedings in 1998 save family and criminal cases. CFAs were first dealt with in the CPR at 48.9 and have been the subject of evolution ever since, including in 2000 when additional liabilities became recoverable between the parties. They are a type of “no win no fee” agreement under which lawyers do not receive a fee from their client if they lose a case, but can charge an uplift (a “success fee”) on top of their base costs if they win. Prior to the Jackson Reforms that took effect in April 2013, the position could be summarised as follows. When the lawyer won a case, these costs including the success fee were recoverable from the losing party. ATE (after the event) insurance could also be taken out by the parties in a CFA funded case to insure against the risk of having to pay their opponent’s costs and their own disbursements if they lose. If successful, the premium could similarly be recovered from the defendant.⁶¹ The Ministry of Justice’s website summarises that “this [meant] that defendants can be liable for almost twice the costs they would normally have to pay if the case was not on a CFA”.

61 The Ministry of Justice further observes that “The initial introduction of CFAs was intended to plug the access to justice gap for those who did not qualify for legal aid but had insufficient funds to afford to pay for legal services”. Unfortunately, this was a reform that went on to be utilized extensively (even by the very wealthy who had little difficulty accessing justice) and has since suffered major surgery because of its cost—

“Its undoubted benefits have been achieved at massive cost, especially in cases which are fully contested. That cost is borne by taxpayers, council tax payers, insurance premium payers and by those defendants who have the misfortune to be neither insured nor a large and well resourced organisation.”⁶²

⁶¹ A practice not currently possible in Jersey: *Riley v Pickersgill & Le Cornu* 2002 JLR 196.

⁶² Lord Justice Jackson, Review of Civil Litigation Costs: Final Report, December, 2009.

62 Following Lord Justice Jackson's recommendations, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 was passed thereby preventing a party from recovering a success fee or ATE insurance premium from a losing party, save in respect of specific exceptions, and making other provisions as to how it might otherwise be recovered.

63 Interestingly, Jersey's legal aid system is a form of conditional fee agreement but without any uplifts or insurance premiums and which would fall within the type of agreement that Lord Justice Jackson approved of in his Final Report. In large part, it works on the basis that lawyers are allocated cases that qualify for legal aid on a rota system and no payment is made to that lawyer unless he or she secures an order for costs for that client, or in other words "wins". (Disbursements or expenses for experts, for example, are met out of public funds and court fees waived for a legally aided party.) There are some exceptions about lawyers receiving payment even if they lose on a legally aided case,⁶³ but in general the legal aid system represents a "no win, no fee" arrangement in practice.

64 There is, it is suggested, nothing preventing Jersey lawyers entering into such an arrangement in any particular case (outside legal aid) but there would not be much appetite for doing so unless, perhaps, the case might otherwise go to another law firm and the prospects of success looked extremely likely. Even then, disbursements for experts or court fees would most likely have to be met by the client.

65 In Jersey, a former President of The Law Society of Jersey issued guidance to the profession on 13 July 2000 following dialogue with the Greffier Substitute who was then charged with conducting taxations. That guidance was to the effect that it was not permissible to share in the damages secured by a client but that it was permissible to enter into conditional fee agreements where no more than the normal hourly rates might be charged. A more recent Royal Court decision, however, in *Re Valetta Trust*⁶⁴ appears to state the opposite—

"Although there has been a minor relaxation in England as a result of the statute which permits conditional fee

⁶³ For example, criminal appeals; cases where lawyers are assigned to act for children in public law children cases; cases assigned or taken "off rota" or particularly onerous legal aid cases.

⁶⁴ 2012 JLR 1, at para 37.

agreements, the requirement of public policy that officers of the court should be inhibited from putting themselves in a position where their own interests could conflict with their duties to the court remains otherwise in force. In Jersey, no statutory relaxation of this principle has been introduced and in our judgment it remains in full vigour.”

66 The two statements probably can be reconciled and there may be a confusion in terminology, namely, that the mischief spoken about *In re Valetta Trust* is the CFA entitling lawyers to charge an enhancement above their normal rates, or a perception that the fruits of litigation were to be shared between client and lawyer. It is perhaps this form of profiteering over and above recouping a lawyer’s conventional hourly rates that *In re Valetta Trust* deprecates. This seems to be supported by the later case of *Barclays Wealth Trustees (Jersey) Ltd v Equity Trust (Jersey) Ltd*⁶⁵ where the Bailiff revisits the issue of maintenance and champerty and states—

“For example, the lawyer acting for a plaintiff could agree to share the proceeds of the litigation. As the Court said at para 37 of *Valetta*, referring in turn to the English case of *Morris v Southwark London Borough Council (Law Society intervening)* [2011] 2 All ER 240, this would clearly be capable of affecting the purity of justice.”

67 In this latter respect, the Royal Court has yet to consider such principles in respect of the practice of debt collection companies who regularly appear in Jersey’s courts (who often take a fictional assignment of an action from a litigant) but charge a commission based upon monies recouped from the litigation; a practice that would not appear possible for Jersey lawyers (despite being subject to regulation, unlike debt collection companies.)

68 The interpretation that *In re Valetta Trust* was not outlawing CFAs that did not exceed normal charge out rates (and therefore did not share in the client’s damages) is further consistent with the underlying philosophy of our current legal aid scheme, endorsed as it has been by a number of court decisions over the years. The Bailiff in *In re Valetta Trust* (it is submitted) could not have been suggesting that our legal aid system was fundamentally flawed in this respect and, therefore, could not have been suggesting a more restrictive approach in

⁶⁵ [2013] JRC 094.

privately funded cases. The historical position in England and Wales which was against “speccing” (as it was called), however, is not entirely consistent with this interpretation but certainly by the 1990s the prohibition against such conduct in that jurisdiction had lost much of its force and was not always followed.⁶⁶ It is difficult to see why a Jersey court would see merit in resurrecting such a prohibition now. Success fees or sharing a part of a client’s damages (that are possible in England and Wales following the Jackson Reforms) are, however, steps probably considered too far for Jersey at this stage and pending further assessment as to how such reforms fare across the water.

Third party litigation funding

69 As with CFAs, the genesis for litigation funding did not come about by virtue of the Woolf Reforms but it is touched on here because it does feature in Lord Justice Jackson’s Review and is an obvious issue in relation to access to justice. Lord Justice Jackson examined third party litigation funding, whereby the costs of litigation are met by a third party in return for a

⁶⁶ Lord Justice Jackson refers to the position in England at 94 and 95 of his Final Report which might merit further examination—

“Until 1995, it was widely accepted that, at common law, barristers and solicitors could not agree to conduct litigation on the basis that they would only be paid if the action was successful. The common law position in respect of solicitors was reinforced by the Solicitors’ Practice Rules 1990, the effect of which was that a solicitor was not permitted to agree to receive remuneration which was related to the outcome of an action. This rule became increasingly detached from the general perception of what was ethically acceptable. A number of solicitors have told me that they turned a blind eye to this rule and engaged in ‘speccing’ . . . Until 4th July 1998, the Bar’s Code of Conduct prohibited barristers from conducting litigation on the basis that they would only be paid if the action was successful.

‘Speccing’ was generally not possible, because the Bar’s Code of Conduct required counsel’s brief fee to be agreed in advance. This had the consequence that if (out of concern for the client) counsel intended to charge either no brief fee or a much reduced fee in the event of defeat, counsel’s clerk had to agree a nil brief fee or a much reduced brief fee at the outset. This state of affairs inured to the benefit of the other side and served no obvious social purpose.”

percentage of the monies secured as a result. In his Final Report⁶⁷ he observed—

“Although third party funding is beneficial, in that it promotes access to justice for certain litigants, its limitations must also be recognised. Third party funding is not usually feasible where non-monetary relief, such as an injunction or declaration, is the main remedy sought. Third party funding is most readily obtained for high value cases with good prospects of success.”

70 *Re Valetta Trust* was the first case approving the principle of third party litigation funding in Jersey which has since been developed in subsequent case law. As the Bailiff recorded in the later case of *Barclays Wealth Trustees (Jersey) Ltd v Equity Trust (Jersey) Ltd*⁶⁸—

“There is an important public interest in facilitating access to the courts and third party funding agreements can make a material contribution in this respect. What may have been regarded as contrary to public policy in times past will no longer necessarily remain so in today’s conditions.”

71 However, the full implications of third party funding have yet to be examined and issues remain, for example as identified by Lord Justice Jackson, as to whether statutory regulation of third party funders will be required and what measures should be undertaken to ensure their capital adequacy. At present, Jersey appears to be benefiting from steps taken outside the Island to tighten up regulation in this area,⁶⁹ but as with any perceived profitable area, the boundaries are likely to be tested as more funders enter this market.

Costs budgeting

72 This is one of the recent Jackson Reforms that requires the parties (except litigants in person) to file and exchange budgets when filing Allocation Questionnaires pursuant to CPR, r 26.3(1), or, if no date is specified for filing the questionnaire, at least seven days before the first Case Management Conference (CPR, r 3.13). In basic terms, if a budget is not filed, it is deemed just to be in respect of the court fee, and any budget

⁶⁷ Page 118.

⁶⁸ [2013] JRC 094, at para 57.

⁶⁹ For instance, in 2011 a voluntary code was introduced for litigation funders in the UK.

that is agreed or approved will be akin to a prospective detailed assessment on the standard basis, or at least a *prima facie* limit to recoverable costs. The intention is to keep control of litigation costs and ensure that clients are aware as to how much their case is likely to cost, thereby also encouraging settlement.

73 In Jersey, such a reform would likely cause an administrative burden on the Royal Court and, in particular, the Master and call for more resources (including personnel) to be deployed. In default of such resources, this reform would likely cause considerable delay in court lists. However, the idea of costs budgets being exchanged by parties remains a sound reform. Jersey lawyers are already expected to give clients an estimate of costs (and update such estimate from time to time) in accordance with case law⁷⁰ and specifically in legal aid cases under existing guidelines. In addition, in matrimonial cases, details of costs are exchanged as being material to the discretion in ancillary relief applications. Accordingly, a requirement, at least, for exchange of costs budgets at the summons for directions stage would seem a modest but useful reform, and likely to make some progress towards the original aims of Lord Justice Jackson. While such budgets would not require approval from the court, the court would be free to express comment when managing the case.

Conclusion

74 Professor Zander, QC was critical of the Woolf reforms in appearing simply to blame lawyers for delay and costs and some of his concerns have been shown to have had substance. Whether or not the initial version of the CPR suffered from exactly the same vices as its subsequent versions, it is clear that it has grown into a disconcerting mass of materials that is frequently added to and modified, and that would put off most but the determined lay person. Lord Justice Jackson even refers in his Final Report to the temptation simply to “take an axe to it.” Work under the CPR (whether pursuant to pre-action protocols or as part of the litigation process) and, therefore, costs also appear to have increased. That said, it would be unfair to place the problem of increased costs engendered by CFAs at Lord Woolf’s door, as the genesis for that development came from a government anxious to curb legal aid funding. Instead, other harmful consequences ensued. It is also fair to expect any new

⁷⁰ *Shakespeares v Reddish* [2000 JLR N-3](#).

system to take time to be worked through and for there to develop a consensus of approach, particularly from the courts, albeit with the regrettable fact that it would be clients having to pay for that privilege through satellite litigation. Nonetheless, even the criticisms that have been made of the CPR are instructive for other jurisdictions who have to grapple with reform.

75 Looking at the positives from the CPR, however, it would seem sensible and compatible with Jersey procedure for the CPR to be followed or replicated in a number of respects without any undue delay. The following reforms would be recommended for consideration—

- simplifying the language of the RCR including replacing legal jargon and technical terms where possible;
- providing (limited) guidance on appropriate pre-action conduct or protocols but without descending to the detail of the CPR;
- introducing the overriding objective (that is already present in other local procedural rules). Embracing such values would further mean rejecting current court practices that did not fit such values. For example, passing contracts *devant Justice* would no longer be acceptable, at least in its current form;
- setting out and clarifying the Royal Court's case management powers, including sanctions, and provision of appropriate IT support and resources to assist that task;
- providing a Practice Direction and specific rules as to the instruction of experts and the use of expert evidence, including encouraging the use of the single, jointly instructed expert particularly in lower value or more straightforward actions. The *Vue* procedure would, as a result, either simply fall away or be significantly amended as a result of the adoption of this reform;
- adopting Part 36 offers;
- requiring costs budgets to be filed and served by parties at the summons for directions stage (but without the need for court approval).

76 In arriving at the above suggestions, it is important to acknowledge that local statistics are not currently available for the purpose of reform of the Royal Court Rules. The above suggestions appear sensible on the basis of the experience and

data available from England and Wales and from my own experience of practice in the Island and discussions with colleagues. Wider and more controversial reforms, however, may well founder without the relevant data being collated and made available. For example, it is one thing to give anecdotal accounts of litigants not being able to access justice, but it is important to discern the number of such litigants; the categories of cases; the nature of the claim and the specific problems involved. For example, such information might be highly relevant in creating any particular tracks for categories of cases or extending fixed costs⁷¹ to designated proceedings. Alternatively, it might be felt to be appropriate in Jersey to provide claimants with costs protection in certain categories of case or “qualified one way costs shifting” that has recently been introduced as part of the Jackson Reforms. While such data and information is essential for wider reforms, it would be unfortunate however if the “low hanging fruit” in the recommendations contained in this article could not be examined and implemented without any significant delay. To delay such reforms pending more controversial debates would be to deprive litigants of benefits that they could reasonably receive without having to wait several years.

77 It is also important to bear in mind that while the current reviews as to access to justice are presently in a process of public consultation and also have various stakeholders on their respective panels, neither review has the benefit of an external expert (whether an academic or a leading practitioner) that is familiar with the process undertaken as part of the Woolf and (more recent) Jackson Reforms. This is a curious lacuna and something that should be rectified as soon as possible so as to ensure that significant effort is not squandered in the meantime or, worse still, that the CPR experience is not properly taken on board at all.

78 It is further necessary to make an observation as to the current reviews in Jersey being highly important to each other. The CPR with its clear desire to curb costs, and traps for the unwary (allied with certain other developments) appears to have had an interesting effect on practitioners seeking to specialize in England and Wales. An extract from the 2002 report of Goriely, Moorhead & Abrams makes interesting reading—

⁷¹ Fixed costs do apply to undefended liquidated claims: RCR 12/2.

“Several general themes emerge from the study. The first relates to greater specialisation. In all three markets, claimant work was now concentrated in fewer, more specialist solicitor firms. For housing and clinical negligence work, this was mainly the result of Legal Services Commission policy, which has restricted legal aid funding to those firms which are able to demonstrate specialist expertise. For personal injury work, ‘dabblers’ were being discouraged by the pressures of the market. Defendant work was also more concentrated as insurers merged and as they and the National Health Service Litigation Authority reduced their own panels of solicitors. Greater specialisation has been accompanied by greater particularisation, with different areas of work following different procedures . . .”⁷²

79 Clearly, specialism should mean that practitioners are more likely to know the law of their subject which should mean greater efficiency and lower costs. It should also mean that the court is more likely to reach the right result because appropriate evidence and legal materials are placed before it. For Jersey, the trouble is that our legal aid system works on a rota of practitioners under 15 years of call and where professional embarrassment at being assigned a case outside one’s normal competence is only very rarely acceded to. The general expectation is that the practitioner must pay from his or her own funds for another lawyer to attend to the allocated case in such an event, which inevitably may mean that some lawyers turn a blind eye to their limitations given the alternative of bankrolling a client’s case. While it is true that larger firms have developed groups that deal with typical legal aid cases or simply outsource such work, the fact remains that the Jersey legal aid system does not sit easily with specialism.

80 The significance in this lies in a further observation by Goriely, Moorhead & Abrams—

“The next theme is the importance of context. Procedural rules rarely change cultures on their own. The possibilities for cultural change are greatest when reforms work with other structural and economic transformations. The court reforms have been most successful where they have worked alongside legal aid and managerial changes which

⁷² Executive Summary.

also emphasise early focus and a pragmatic approach to settlement.”

81 While, therefore, there are two reviews as to access to justice being conducted in Jersey where one will examine legal aid (amongst other issues) and the other procedural reform of the RCR, the fact remains that their success in promoting access to justice and changing cultures will be interdependent. As a Jersey practitioner, conscious of the need to please my client with favourable outcomes but at little cost as possible, it would help to be supported by a legal aid system that did not mandate work, often at short notice upon allocation of a certificate, and in areas in which I regard myself as competent but not necessarily a specialist. In seeking to keep costs down and increase efficiency in any procedural review, one must not be naive in thinking that the operation of the legal aid system does not need an allied, radical overhaul.

Timothy Hanson is an English barrister and Jersey advocate. He is a partner of Hanson Renouf and former President of The Law Society of Jersey.