

Litigation reform in Jersey – what the new Practice Directions mean in... practice

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Reform of Jersey's litigation rules came into force on 1 June with the aim of improving the speed and reducing the cost of disputes, while at the same time encouraging the resolution of cases without the need for court proceedings.

The reforms take the form of a set of amendments to Royal Court Rules and 11 new and amended Practice Directions.

What are the practical implications of this development?

The new and amended Practice Directions that came into force on 1 June 2017 were designed to improve access to justice and reduce the risks and costs associated with litigation, as they provide for disputes to be adjudicated in a manner which is both proportionate to what is at stake and cost effective.

Individually and collectively, they effect changes to improve the effectiveness of the court process for litigants.

They also enable the Royal Court to deal with cases justly and help streamline the civil justice process further by encouraging the resolution of as many cases as possible without resorting to court proceedings.

What issues do they raise?

There are a combination of eleven new and amended practice directions now in force which cover a variety of practices:-

1. Pre-action communication: The new practice direction applies to the majority of claims. It's purpose is to encourage exchange of material information about a legal action being

considered by a potential plaintiff and allow the parties an opportunity to settle the claim prior to commencement of proceedings. Non-compliance may result in an adverse costs order;

2. Placing cases on the pending list and adjournment by consent prior to pleadings: This repeals a previous practice direction. In brief summary, the new section relates to adjournments and provides for parties to agree to a matter, that has already been *tabled*, to be adjournment for a period up to four weeks without leave of the Court. If a longer period is needed the parties are required to file an agreed written statement justifying the time period required.
3. Application for Summary Judgment: The new practice direction broadens the summary judgment power in Jersey.
4. Requests for information: The new practice direction provides guidance to Royal Court Rule 6/15. The current power has been extended to require any party to provide clarification of any matter in dispute in the proceedings, or give additional information in relation to such matter, that is reasonably necessary and proportionate for a requesting party to prepare its own case, or to understand the case it has to meet. Such a request should be served on the other party prior to making any application to the Court and any response must be served on the other party and filed with the Judicial Greffe.
5. Directions Hearings: The current approach of the Royal Court Rules is for the Royal Court to give directions for a matter to go to trial once the pleadings have closed and for the parties to fix a date for the directions hearing. This can contribute significantly to periods of delay. The new amended direction now provides the court with the power to automatically fix a summons for directions within a defined period after pleadings have closed. It also provides guidance to parties on how to approach a direction hearings before the Master and the Royal Court. i.e. It is the duty of the parties to consider what directions are required and endeavour to agree those directions prior to submitting them to the judge for approval. If any direction cannot be agreed, the party seeking that direction is required to file a written summary of why that direction is required together with supporting material.
6. Budgets: One of the largest areas of contention in litigation is the costs, be it hourly rates, the threat of significant adverse cost orders or lack of appreciation of how much litigation might cost. The new direction applies to any case where the value of the claim including any counterclaim is reasonably estimated to be less than £500K, or where it is disputed by one of the parties on bona fide grounds that the value pf the claim is less than £500K. The budget must be filed no later than 7 days prior to the first summons for directions hearing. The Court will have regard to any budget filed by any party and the costs involved for each procedural step.
7. Discovery: In Jersey, the starting point is that the discovery obligation is absolute and extends to all 'relevant' documents. However, the new practice direction provides the Royal

Court with the power to limit the obligations of a party to reduce their impact; the scope of any discovery is limited by the application of the overriding objective in particular, so that discovery is reasonable and proportionate.

8. Discovery of documents held in electronic form: The Royal Court Rules do not currently distinguish between documents stored electronically and documents produced manually. The obligation is the same. The new practice direction provides guidance to parties on how to make discovery of electronic documents in a proportionate and cost effective manner. It applies to all cases where discovery to be provided is or is likely to consist substantially of electronic documents.
9. Expert evidence: At present the Royal Court has no power to require one party to accept an expert instructed by the other party or by the Court. The new practice direction offers guidance to parties on how to approach applications to adduce expert evidence; limits the number of experts; and provides for parties to explore whether any area of expert evidence can be provided by a single joint expert.
10. Offers to settle: The new practice direction contains express provision to permit any party to put forward a proposal to settle a matter which, if not accepted, can be taken into account when the Royal Court deals with the costs of proceedings.
11. Summary assessment of costs: This practice direction has been amended. At any interlocutory hearing other than a summons for directions before the Judicial Greffier, including any delegate (the **Greffier**), which has lasted not more than one day, the Greffier, after making an award of costs of the application or matter to which the hearing related to any party, shall tax the costs so ordered by way of summary assessment unless the Judicial Greffier in all the circumstances considers it inappropriate to proceed by way of summary assessment. The party in whose favour a cost order has been made must file and serve its statement of costs within 7 days (or such other period as the Greffier may order) after the hearing (rather than 24 hours prior to the hearing as per RC 15/03 which will be repealed when this new direction comes into effect). The opposing party will have 7 days thereafter to file a response. On receipt of the response or in the absence of any response, the Greffier will then proceed to summarily assess the costs.

To what extent are the directions helpful in clarifying the law or improving procedures?

The litigation process in Jersey remains essentially adversarial and is therefore, at times, criticised as being too expensive, too slow, uncertain in terms of forecasting the costs, uneconomical, difficult to follow for many litigants.

The new and amended practice directions provide certainty in terms of timescale and costs as the nature of a particular case will allow. Further, they provide more robust case management

and will ensure cases are dealt with proportionately, expeditiously and fairly.

The Royal Court has made it clear it will be enforcing compliance with the rules, practice directions and orders going forward and there may be sanctions for those who fail to comply without reasonable excuse.

When deciding on costs, the directions also provide that the Royal Court will take into account the efforts made, if any, before and during the proceedings in order to try to resolve the dispute.

What are the implications for practitioners? What will they need to be mindful of when working in this area? Any best practice tips?

The new and amended practice directions give rise to a number of implications for practitioners. A few suggested tips would be to:

- Carefully read and understand the new and amended practice directions to ensure absolute compliance otherwise there is a potential risk of adverse cost orders being made.
- Avoid undue front loading of costs when complying with the pre-action communication direction as this may lead to disproportionality.
- Seriously consider and encourage, if appropriate, ADR/settlement prior to issuing any proceedings. Be able to demonstrate that you have endeavoured to reach settlement before going to court.
- Have a full and frank discussion with your client regarding their duty of disclosure, consider the steps needed to be taken, the scope, cost implications, use of experts and proportionality issues prior to issuing proceedings.
- Ensure any 'budget' is carefully prepared and calculated properly. Forecast for the unknown!
- When considering what future directions are required, ensure they are necessary, appropriate and realistic in timescale to avoid further possible court hearings.

Are there still any grey areas/unresolved issues practitioners will need to watch out for? If so, how can they avoid any possible problems/pitfalls?

No court has a 'perfect' set of rule and practices - they are only ever in force from time to time and will change when issues arise which call for improvements in procedure.

The new and amended practice directions are however a huge step to improving the effectiveness of the court process for all potential users of the Royal Court and will aid in the application of specific provisions.

In relation to any 'grey' areas, for a practitioner, one of the concerns for me relates to the new disclosure practice direction.

There is now a requirement where the person swearing the affidavit is not the advocate with overall responsibility for the case or for the discovery process, the affidavit must contain a written endorsement from the advocate with overall responsibility for either the case or the discovery process, that the advocate concerned is satisfied that his or her client's discovery obligations have been met.

In my view, this endorsement can only be given if the client has allowed the advocate full access to his/her files and allowed the advocate to review the discovery. In practice, this does not always happen. Occasionally clients will undertake the disclosure exercise internally due to cost implications/concerns or they will only provide the advocate with the files they 'believe' are relevant. Advocates will therefore need to carefully consider their position when these situations arise and ensure they have thoroughly advised the client (in writing) of their duty of disclosure and reached an appropriate resolution with the client whereby the advocate is comfortable to provide the written endorsement required.

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