ACCESS TO JUSTICE

Final Consultation Paper

issued by

The Royal Court Rules Review Group

Dated 5th October 2015

FINAL CONSULTATION PAPER

The Royal Court Rules Review Group ("the Group") invites comments on this final consultation paper. The purpose of this paper is to set out the Group's recommendations on what changes might be made to the Royal Court Rules 2004 ("the Rules") and related practice directions to improve access to justice and reduce the risks of and costs associated with litigation.

The specific questions where the Group seeks responses are set out in Appendix Three

All responses should be sent to:-

Mrs Jane Rueb, Bailiff Chambers, Royal House, St Helier, JE1 1BA or by email to j.rueb@gov.je by Friday 14th November 2015

It is the policy of the Group to make the content of all responses available for public inspection unless specifically requested otherwise.

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A. The Royal Court Rules Review Group ("The Group")

Membership

The membership of the Royal Court Rules Review Group is as follows:-

1. Mr William Bailhache – Bailiff
2. Mr Malcolm Ferey – Chief Executive Citizens Advice Bureau
3. Advocate Steven Pallot – Law Officers' Department
4. Advocate Anthony Robinson - Partner Bedell Cristin
5. President of The Law Society of Jersey - Advocate Timothy Hanson/Advocate Jonathan Speck
6. Mr Matthew Thompson – Master of the Royal Court

Remit of the Group

1. The remit of the Group is to review the Rules to improve access to justice to reduce the risks of and costs associated with litigation. Its focus is on how disputes may be adjudicated in a manner, which is both proportionate to what is at stake and is cost effective.

2. The Group remains particularly concerned about claims affecting ordinary individuals who may be deterred from litigation by the Rules and/or the practices of the Royal Court. The Group in its deliberations has therefore considered whether any changes should apply to all potential users of the Royal Court or whether there should be reforms only for certain categories of claims.

3. The Group has continued to co-ordinate with the access to justice review set up by the States of Jersey under the chairmanship of Senator Paul Routier. While the Group has considered whether changes can be made to the Rules in relation to what orders the Court may make about one party recovering the costs of litigation from another, issues concerning the scope of legal aid and amounts charged by the legal profession to their own clients involved in disputes generally remain matters for Senator Routier's access to justice review.

B. Introduction

This paper sets out the Group's conclusions on what changes might be made to the Rules and related practice directions to improve access to justice to reduce the risks of and costs associated with litigation. It is issued in response to the replies received to consultation paper no 1 issued on 14th November 2014.

In consultation paper no 1 the Review Group concluded there was a need for reform so that the Royal Court's procedure should:-

a. lead to justice in the result that is delivered;
b. be fair in the way it treats litigants;
c. offer appropriate procedures at reasonable cost;
d. deal with cases with reasonable speed;
e. be understandable to those who use it;
f. be responsive to the needs of those who use it; and
g. provide as much as certainty in terms of timescale and costs as the nature of a particular case allows.

The Review Group, in looking at possible reforms considered it appropriate to review how far such reforms have been successful elsewhere. In particular the Group was conscious of reforms in England because of the closeness of that jurisdiction to Jersey and because the current rules in Jersey are based on those that used to apply in England. The Group was aware from various commentaries on the changes in England, there appeared to be more robust case management by English judges. More cases also seemed to settle there, either before proceedings were commenced, or relatively early in the litigation process. There were, however, criticisms that steps required to be taken prior to the commencement of litigation had led to an undue front loading of costs and were disproportionate. The amount of guidance issued by the High Court in relation to the conduct of litigation remained as substantial as it had ever been and costs had not decreased.

Consultation paper no.1 therefore asked respondents to complete a questionnaire inviting responses on possible areas for reform. The paper and questionnaire were sent to the individuals and organisations listed in Appendix One. Consultation paper no.1 was also published on the States of Jersey website and was reported in the Jersey media following a press release.

Fourteen questionnaires were received in response together with a written submission from the Chancery Bar Association and materials from First Deemster Doyle, Chief Justice of the Isle of Man enclosing their civil procedure rules and detailed notes on the Isle of Man's civil procedure jurisprudence. These were a helpful source material. The Master also visited Guernsey to obtain a better understanding of the approach taken by Guernsey's Royal Court to the handling of civil cases.

Of the questionnaires received, seven were received from the five largest law firms, one medium size law firm and one from an individual lawyer. One Commissioner of the Royal Court responded. A second commissioner felt unable to comment. Eleven of the twelve Jurats replied in a composite document, albeit they did not all necessarily agree on every issue. One Jurat replied separately.

Three individuals who had been involved in disputes before the Royal Court also replied. However it is right to observe that these individuals all demonstrated varying degrees of reluctance to express their views (including not always providing contact details) because of their experiences of the civil procedure rules and fears of the consequences of criticising the present system. The Group wishes to reassure all respondents that no consequences will arise for anyone who responds to this paper, that the Group will consider fairly any responses and that we encourage all respondents to engage with us.

The Group also wishes to thank all those who took the time and trouble to respond. The feedback received was useful in helping the Group formulate the final recommendations contained in this paper.

For each of the detailed proposals or issues identified in consultation paper no.1 in Part E (Procedural Reforms), Part F (Costs) and Part G (Understanding the Rules) and the questionnaire attached (which used the same headings), the Group has considered and analysed the responses to see what trends emerged. Attached at Appendix Two is the questionnaire showing the number of responses received for each question. Where a particular grouping, e.g. the legal profession, as distinct from the overall number of respondents, disagreed with the majority on a particular issue, this is referred to in the commentary below on the responses received for that issue.

This paper also records particular comments received, which it felt were worthy of consideration as part of the Group's deliberations. The comments received are anonymous

and may not necessarily be consistent with each other. They are set out for each issue using the heading "**comments received**".

Finally the Group's own conclusions and recommendations are set out in the "**recommendations"** section for each issue where it sought consultation.

C. Executive Summary

The Group continues to recommend reform of the Rules and its practices. Such reform is necessary to improve access to justice, in particular for ordinary litigants who find themselves involved in civil disputes before the Royal Court. The Group therefore recommends the following changes:-

1. **Introduction of an overriding objective based on the overriding objective currently in force in England and Wales;**

2. **A requirement for a pre-action communication prior to issue of proceedings, with potential costs or other sanctions for non-compliance without justification. Guidance on the content will be set out in a practice direction;**

3. **Increasing the Petty Debts Court jurisdiction to £30,000, with a review after 2 years, and simplifying and updating its procedures to create a small claims court for Jersey;**

4. **Amendments to the Rules concerning a party's written case to give the Royal Court power to require:-**
    a. **a party to summarise its claim or defence, including the legal basis relied on;**
    b. **a plaintiff to set out as far as possible the damages claimed by the time of the first hearing for directions; and**
    c. **a party to clarify or provide information about its case to replace existing more limited powers.**

5. **Any adjournment of more than four weeks beyond service of a claim should be subject to Court approval;**

6. **Amendment of the summary judgment procedure to:-**
    a. **introduce a no real prospect of success test; and**
    b. **permit a defendant to seek summary judgment against a plaintiff.**

7. **Provision for a summons for directions to take place automatically after the normal periods of time allowed for pleadings;**

8. **Permitting the Court, including the Master, to require the parties to attend for directions at any time;**

9. **Amending the Rules to provide that the contents of a summons for directions, will be defined by a practice direction;**

10. **Permitting the Court, of its own motion, to strike out cases for a material failure to adhere to directions given.**

11. **Issue of a practice direction to require mediation to be explored at the first directions hearing before the Court;**

12. **Amendment to the Rules to grant the Royal Court power to limit discovery and the issue of a practice direction setting out how electronic discovery is to be produced; and**

13. **Introduction of a Practice Direction limiting the number of experts in any case to a maximum of two disciplines, unless additional experts can be justified.**

14. **In relation to litigation costs:-**
    a. **an unsuccessful plaintiff shall only be liable for a successful defendant's costs beyond any damages recovered in certain types of claims, where a plaintiff has acted unreasonably or dishonestly;**
    b. **the types of claims where the rule in paragraph (a) above will apply are claims for personal injury, breaches of health and safety laws, medical negligence, negligent advice in relation to the sale or purchase of the family home and negligent advice in relation to wills, with actions in respect of a will being limited to claims below £250,000;**
    c. **hearings before the Master, other than a summons for directions, will continue to be subject to a summary assessment of costs, unless the Master decides otherwise. Summary assessment will now take place after the Master makes a costs order rather than at the hearing itself;**
    d. **the form of bill required for taxation will be reviewed to reflect that most firms now operate on the basis of electronic billing systems;**
    e. **the Rules will expressly recognise the power of the Royal Court to take into account offers of settlement when the Court is dealing with the costs of proceedings;**

f. **litigation funding agreements will be subject to the approval of the Royal Court;**

g. **A no win no fee agreements will not require approval of the Royal Court unless it forms part of a litigation funding agreement;**

h. **hourly or other charge out rates of legal advisers in respect of no win no fee agreements shall be no greater than rates ordinarily charged to paying clients;**

i. **after the event insurance premiums shall remain irrecoverable from the other party to the dispute;**

j. **costs for undisputed debt claims before the Royal Court should continue to be limited to fixed costs only; and**

k. **compulsory production and exchange of cost budgets will be introduced for all claims up to £250,000.**

l. **when awarding or assessing costs claimed the Court will have regard to the proportionality of the costs claimed compared to the value of the dispute**

15. These changes shall be introduced by a combination of amendments to the current procedural rules of the Royal Court and the issue of relevant practice directions.

D. Specific Recommendations

D.1 An overriding objective (questions 1 to 3)

1. As noted in Part C of consultation paper no.1, there is no statement of principle defining any approach pursuant to which the Royal Court might approve its own procedural rules. This contrasts with the position in England, Guernsey and the Isle of Man. The overriding objective of the rules in these jurisdictions is to enable the courts there to deal with cases justly. Dealing with cases justly is defined in both jurisdictions as including so far as it is practicable:-

    a. Ensuring that the parties are on an equal footing;
    b. Saving expense;
    c. Dealing with the case in ways which are proportionate.
        i. to the amount of money involved;
        ii. the importance of the case;
        iii. the complexity of the issues;
        iv. the financial position of each party;
    d. Ensuring that the case is dealt with expeditiously and fairly;
    e. Allotting an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and
    f. Enforcing compliance with rules, practice directions and orders.

2. Where the rules of a court are subject to an overriding objective, such an objective both underpins the basis upon which rules are formulated and also places an obligation on a court to give effect to the overriding objective when exercising any power given to it by any procedural rules or interpreting any rule. The parties are also required to help the relevant court to further the overriding objective. These are important principles in improving access to justice.

3. An overriding objective is already applied in Jersey in the Children's Rules 2005, the Matrimonial Causes Rules 2005 and the Civil Partners Causes Rules 2012.

4. The Group therefore consulted on whether the procedural rules of the Royal Court should be subject to an overriding objective; if so, should the overriding objective

follow a definition used in other jurisdictions or should the objective be developed further to address questions of costs with the addition of a further factor as follows:-

"keeping the expenses to which the parties are exposed by the litigation to the minimum which is commensurately and proportionately advancing each party's case."

5. All but one respondent agreed or strongly agreed that the procedural rules of the Royal Court should be subject to an overriding objective. One respondent responded did not feel one was particularly necessary to deliver justice but if one was introduced then it should follow the approach used elsewhere.

6. In terms of whether the overriding objective should follow the approach used elsewhere, all responses from individuals or lawyers were in favour of this approach. However, the Jurats were divided. Ultimately they felt the overriding objective should be developed further to address questions of costs.

7. By contrast a majority of lawyer respondents were against developing the overriding objective further than other jurisdictions, arguing that the English overriding objective was sufficient to address costs because of the requirement of proportionality.

Comments received

1. In 2012 the overriding objective in England was amended requiring the Court to manage cases *"at proportionate cost"* so that England is now different from Guernsey or the Isle of Man. The Chancery Bar Association noted that this change had produced considerable satellite litigation. The Chancery Bar Association also expressed concern that in some respects reforms in England had served to increase costs rather than minimise them by requiring a front loaded approach to preparation of documentation at an early stage.

2. It was also observed in relation to the overriding objective that the overriding objective should not be a freestanding requirement; rather the overriding objective should inform the conduct of the parties in the course of the litigation.

(This was made clear in the consultation paper at paragraph E to page 13 which stated as follows:-

"The overriding objective underpins the basis upon which rules are formulated and also places an obligation on the Court to give effect to the overriding objective when exercising any power given to it by any procedural rules that are interpreting any rule. The parties also are required to help the Court further the overriding objective".)

3. If the Court was required to address questions of costs as an additional factor, as raised at paragraph E4 of the consultation paper, it was suggested this would create a burdensome policing role on the Court. What appears to be meant by this is that ultimately the Court would be deciding what a party might choose to spend on litigation.

Recommendation

4. The Group notes the concerns about the Court adjudicating on what a party might spend on litigation if it were to seek to introduce a requirement to keep costs and expenses to a minimum.

5. However, the Group is clear that an overriding objective must be introduced into the Rules. The Group further notes that the current overriding objective in England enables the English courts *"to deal with cases justly and at proportionate cost"*. The requirement of proportionate cost is a recent modification to the overriding objective as originally introduced in England, Guernsey and the Isle of Man. The Group concludes that this modification is an appropriate development for Jersey to try to address the concerns about access to justice in Jersey and should be introduced as part of the overriding objective.

6. The objective will be introduced by a change to the Royal Court Rules, which would then apply to all other parts of the Rules. Consequential changes to other procedural rules in Jersey in areas of family and children's law, which already use an overriding objective without referring to proportionate cost, would also have to be effected.

7. As to what is at proportionate cost, the Royal Court will develop guidance on a case-by-case basis, having regard to the legal and factual issues at stake, the amount of any claim and the remedies sought. While the Court will have to make some judgments on the steps required, and what costs are justified, this will be in the context of the Court's existing knowledge of disputes and what is needed to adjudicate or resolve

such disputes. The Group considers this approach avoids the subjective policy criticisms of looking to keep expenses to a minimum and the concerns identified in the feedback received.

8. Following the current English objective will also allow the Court to have regard to current English jurisprudence on what is a proportionate cost and to apply such jurisprudence to the circumstances of the Royal Court. The current English position is set out in Denton v TH White Limited [2014] 1 WLR 3926, where the English Court of Appeal defined the approach that should be taken on case management issues and costs sanctions for a failure to comply with previous orders.

9. **The Group therefore recommends introduction to the Rules of the overriding objective currently in force in England and Wales.**

D.2 Pre-action communications (questions 4 to 9)

1. In England and Wales, before the commencement of litigation, a party is generally required to write in advance to the person or entity they wish to sue, to set out details of the claim. Anyone receiving such a letter is required to respond. The steps to be taken are quite detailed and have been said to contribute to an unnecessary front-loading of costs. Against that the requirement appears to have led to some cases being settled at an earlier stage and before proceedings have been issued.

2. If a party does not comply with a pre-action protocol, a case may be stayed. A party may also be punished by not being allowed to recover all the costs it would otherwise be entitled to recover or by the court reducing or disallowing the amount of interest otherwise payable to a party.

3. The Group therefore consulted on the following:-

    a. Whether litigants should adhere to some form of requirement to notify a potential defendant with details of its claim and for the defendant to be required to respond before issuing proceedings, and if so, what exceptions might apply to such a general requirement.

    b. What sanctions should be imposed on a party who does not adhere to any requirement to set out its claim or answer in advance of proceedings. In particular, should the Royal Court have power to stay proceedings and vary rates of interest in addition to sanctioning a party by making some form of costs order against the defaulting party?

    c. How far the Court should prescribe, whether by rule or practice direction, what is expected in terms of a pre-action communications or whether how to meet any requirement should be left to the parties. The Group consider, if the latter approach is taken, it is inevitable that ultimately some form of guidance will be given in individual cases before the Royal Court.

4. The majority of respondents agreed that there should be some form of requirement on a plaintiff to notify a potential defendant a reasonable time in advance of issuing

proceedings of details of the claim other than for trust applications or where some kind of injunction is sought.

5. The majority also agreed that a defendant should be required to respond to a potential plaintiff within a reasonable time. However the majority of lawyers were against imposing such an obligation.

6. The principal sanction for failing to adhere should be a costs sanction.

7. The majority felt that the Royal Court should prescribe in some manner what is expected in terms of pre-action communications rather than leaving it to the parties.

Comments received

1. A number of observations were made that any obligation in respect of a pre-action communication should not be as prescriptive as the approach in England and should be more general in nature.

2. Some concern was raised that for a defendant to be required to respond could cause delay.

3. Concerns were also expressed that compulsory pre-action communications added to costs.

4. One respondent raised how a defendant should respond to a claim that it considered could not be brought, as the plaintiff had waited too long before threatening proceedings.

Recommendation

1. The Group is clear on the need to introduce a general obligation on a plaintiff to send a pre-action communication before issuing proceedings. Generally a defendant should also be required to respond within a reasonable period.

2. The obligation is to be contained in guidance issued by the Royal Court by way of a practice direction, rather than a change to the Rules. The guidance will contain general statements of principle on the approach to be followed.

3. The purpose of such guidance is for both parties to a dispute to be aware of the possibility of proceedings, the broad nature of the claim or the defence and any alternative suggestions to try to resolve the dispute rather than issuing proceedings.

4. A pre-action communication should contain a summary of the plaintiff's claim setting out why it is said the defendant is liable and what is claimed. It should not have to attach evidence or contain the same level of detail as a pleading. That might follow if the parties engage in dialogue but it should not be a pre-requisite. The letter should also indicate any basis upon which a plaintiff is willing to explore settlement, including any form of alternative dispute resolution. A response from a defendant should contain the same level of detail.

5. The guidance should not be so prescriptive, either to lead to significant costs being incurred to notify the other party of the claim or the defence or to produce technical argument about whether the precise requirements have been met or not.

6. The risk of a pre-action communication causing delay and leading to some cost being incurred in the Group's view is outweighed by the purpose of pre-action communications, which is to create an opportunity for parties to see if they wish to talk to each other to resolve their dispute or at least to narrow the issues between them.

7. Concerns about tactical game playing by a defendant can be addressed by requiring a defendant to respond within a reasonable period and, if that defendant says it is not able to do so, by requiring a defendant to indicate when it can respond and the reasons for any delay.

8. If a claim is about to become time barred unless proceedings were issued, that might be a justification for not adhering to a pre-action communication requirement; however, leaving a claim to the last minute so that there was no time for a pre-action letter could be a factor to be taken into account in an adjudication on costs following resolution or determination of a claim.

9. The risk of a claim being brought too late does not justify not having a general requirement for a pre-action communications to occur. If a claim is too late, that might be the response received from a defendant. If such a response was later found to be clearly wrong, again costs sanctions might follow.

10. Any costs sanctions will generally for the trial judge to apply. The Court may impose other sanctions, such as a stay, as part of its case management functions.

11. **The recommendation is therefore to introduce a requirement for a pre-action communication prior to issuing proceedings by a practice direction with potential costs or other sanctions for non-compliance without justification.**

D.3 The Petty Debts Court (questions 10 to 13)

1. The Petty Debts Court generally hears claims below £10,000.

2. This limit was set in 2000 and came into force on 1 June 2004. The Group consulted on whether this limit should be increased.

3. The Group also asked whether the procedures of the Petty Debts Court should be made simpler to reflect the small claims approach adopted in England since 2000. At present the Petty Debts Court Rules 2004 broadly track the Royal Court Rules although there is discretion to adopt a simpler approach.

4. A significant majority felt that the current limit should be increased.

5. The ranges suggested were between £15,000 and £50,000 with a majority suggesting £20,000.

6. A significant majority were in favour of simplifying procedures and looking to amend the procedures to reflect the small claims approach adopted in England.

Comments received

1. One comment was made suggesting ultimately it was for the Petty Debts Court to determine its own threshold by reference to a further analysis of the sort of claims that come before it.

2. It was also suggested it might change its name to the Small Claims Court.

Recommendation

1. In reaching its recommendation, the Group has reminded itself that its focus is on how disputes may be adjudicated in a manner, which is both proportionate to what is at stake, and is cost effective. The Group considers that simply to increase limits to £15,000 or £20,000 would achieve no more than to restore the Petty Debts Court jurisdiction to the equivalent level to the current limit when it was fixed in 2000 (although not brought into force until 2004). Such a change therefore only updates the jurisdiction to keep pace with inflation.

2. The Group has therefore concluded that more significant change is required to deal with disputes of a level that quickly become uneconomic when conducted before the Royal Court. Such disputes are also more likely to be disputes affecting island residents such as less severe injuries from road traffic accidents, incidents in the work place or relating to negligent medical treatment. They might also cover neighbour disputes, negligent advice from a lawyer or smaller commercial disagreements in particular between business partners. All of these types of claim require early resolution, whether by a court or by a settlement facilitated in some manner. Generally they are not of a magnitude that required the formality of the Royal Court. Although the Group does not possess statistical evidence of the value of claims heard by the Royal Court, the combined experience of the Group means that it is unanimous in its view that a change needs to occur to deal with these types of claims.

3. The Group's conclusions lead to a recommendation to increase the jurisdiction of the Petty Debts Court to £30,000 and, after two years, based on an analysis of the effect of this increase on claims made in the Petty Debts Court and the Royal Court including types and values of claim, to evaluate whether the jurisdiction of the Petty Debts Court should increase further to £50,000.

4. This proposal will require the States of Jersey to pass Regulations to increase the jurisdiction limits of the Petty Debts Court.

5. The Group considers that additional resources for the Petty Debts Court may well be required to cope with an increase in its jurisdiction to address the increased number of claims, additional trials and to meet the mediation service currently offered by the Petty Debts Court.

6. The Group also considers in principle that the procedures of the Petty Debts Court should be simplified, rather than follow the Royal Court Rules, on the assumption that most litigants in the Petty Debts Court will represent themselves. The Petty Debts Court, having regard to approaches taken in small claims courts in other jurisdictions, including England and Wales, should develop these changes.

7. The description "Petty Debts" in this day and age has become something of a misnomer, given the range and value of matters the Petty Debts Court will consider if the recommendations are accepted. The Group therefore invites suggestions on a new name for the Petty Debts Court to reflect the changes proposed. Any name change will require legislation to be approved by the States.

8. Recovery of costs should also be simplified to encourage greater use of fixed costs and or a combination of fixed costs and capping costs to a % of amounts awarded or claimed. The suggested figure is 10%.

9. **The Group therefore recommends**
    a. **increasing the Petty Debts Court jurisdiction to £30,000, with a review after 2 years;**
    b. **simplifying and updating its procedures; and**
    c. **renaming the Petty Debts Court to reflect that it is a small claims court for Jersey.**

D.4 Pleadings (questions 14 to 20)

1. The Review Group consulted on whether:-

   a) in respect of a claim, a party should summarise its case including setting out relevant legal principles on which it relies;

   b) a plaintiff, as far as possible, should be required to state the amount of money being claimed;

   c) a defendant should be required to set out a concise summary of why it disputes a plaintiff's claim;

   d) the Royal Court should have the power to distil a party's pleading so as to identify the essential issues, such that, subject to appeal, the party would be bound by it.

2. The Review Group further consulted on whether the current power to require a party to provide further and better particulars of its pleading should be extended to require any party to provide clarification of any matter in dispute in the proceedings or to give additional information in relation to such matter.

3. All bar two respondents accepted that a party should summarise its case including setting out relevant grounds upon which it relied upon, as well as all material facts.

4. All agreed that, as far as possible, a plaintiff should state the amount of money claimed save for general damages in personal injury or medical negligence cases.

5. To the extent a plaintiff could not state the amount of money being claimed, a plaintiff should at least indicate the types of loss being sought and provide details sooner rather than later.

6. Likewise all bar two respondents agreed that a defendant should be required to set out a summary of why it disputes a plaintiff's claim.

7. The respondents were split on whether the Court should have the power to require parties to clarify their case. A concern against was that such a requirement would proliferate paperwork.

8. More than half the respondents were not in favour of the Royal Court having power to define legal and factual issues in dispute between the parties.

Comments received

1. The obligation on a party to summarise its case should be just that.

2. Pleadings should not require parties to set out in detail every legal authority on which a party might rely.

3. A case could be clarified by better use of interrogatories as an alternative to giving the Court greater powers.

Recommendation

1. The Group's view is that there is significant benefit for the Royal Court to be able to require a party to summarise its written case i.e. its claim or defence including the essential legal principles on which it relies as well as the key material facts. This can only improve access to justice because the other party will then know the case it has to meet. A better understanding of the case a party has to meet can also assist settlement.

2. Clearer pleadings further allow for more effective case management as the Court will know what the real issues are between the parties rather than having to ascertain issues. Although the change is slightly more time consuming, at present pleadings do not always make it what is in dispute and it is only later in the process that the key issues of a case are clearly understood.

3. In respect of damages, a plaintiff should set out, as far as it can, what money it is claiming together with an obligation to provide details in a schedule by the time of the first hearing for directions.

4. A simple power based on Civil Procedure Rule 18 used in England to permit the Court to require a party to either to clarify any matter in dispute in the proceedings or to give additional information or to allow a Court to order a party to provide further information should replace requests for further and better particulars, a statement of case and interrogatories (which are rarely used and not understood).

5. The Group therefore recommends amendments to the Rules to :-

a. require a party to summarise its claim or defence, including the legal basis relied on;

b. require a plaintiff to set out as far as possible the damages claimed by the time of the first hearing for directions; and

c. grant the Royal Court a general power to require a party to clarify or provide information about its case to replace existing more limited powers.

D.5 Adjournments (questions 19 to 20)

1. The Group also considered whether the power to adjourn cases indefinitely should continue and how far parties should inform the Court of the reasons why a matter needed to be adjourned.

2. Respondents were divided on whether or not to allow parties to adjourn cases indefinitely. However, a clear majority were in agreement that any adjournment should require Court approval.

Comments received

1. A particular suggestion was made that the obligation to obtain Court approval should only be for adjournments of four weeks or more.

2. In England cases are only adjourned for a defined period.

Recommendation

1. The parties should be free to adjourn a case when it first comes before the Court for up to four weeks simply by agreement.

2. Any further adjournments or adjournments for a longer period or for an indefinite period should require Court approval. This is to address the mischief of cases being adjourned for years where little or no progress a dispute to resolution occurs and there is no justification for such a lengthy adjournment.

3. The Court's approach on further adjournments is to be dealt with by a Practice Direction, setting out what information is required by the Court in order to grant approval for an adjournment.

4. **The Group therefore recommends that any adjournment of more than four weeks beyond service of a claim should be subject to Court approval.**

D.6 Summary Judgment – (question 21)

1. The Rules currently allow a plaintiff to apply for summary judgment on the basis there is no defence to a claim. A defendant who has made a counterclaim may also apply for summary judgment on the counterclaim.

2. The summary judgment power in England has been extended to allow the English Court to give summary judgment against a plaintiff or a defendant on the whole of a claim or on a particular issue if it considers:-
    a. the plaintiff has no real prospects of succeeding on the claim or issue; or
    b. the defendant has no real prospect of successfully defending the claim or issue.

3. The approach is also used in the Isle of Man.

4. The Group consulted on whether this approach should be introduced in Jersey.

5. Other than the Jurats who neither agreed nor disagreed with the proposal, all of the respondents were in favour of allowing defendants to apply for summary judgment and introducing a real prospect of success test.

Recommendation

1. The Group recommends adoption of this approach to aim to increase the number of cases that are resolved sooner rather than later. This is because access to justice as much involves dealing with claims that have no real merit as with ensuring that matters that require the rigours of a full trial also proceed to adjudication in a prompt and proportionate manner.

2. The test means that a claim must carry some degree of conviction. This means that the claim or defence must be more than merely arguable. The burden on a party resisting a summary judgment application is therefore higher than at present. This might be said to have the effect that some be denied their day in Court. However its focus is to deal with cases that are not fit for trial and to avoid requiring parties and

the Court to incur time and cost in dealing with cases that have little merit or prospect of success.

3. **The Group therefore recommends revising the Rules to amend the summary judgment procedure to:-**

    a. **introduce a no real prospect of success test, and**
    b. **to permit a defendant to seek summary judgment against a plaintiff.**

D.7 Directions (questions 22 to 23)

1. The Group consulted on whether the Court should automatically fix a summons for directions within a defined period of when pleadings should be finalised.

2. The Group also wished to ascertain whether the Court through the Master should have power to require parties to attend before the Court for directions at any stage of an action if the Master considers it appropriate to do so.

3. All bar two respondents were in favour of a Court having power to fix automatically a summons for directions within a defined period of pleadings having closed.

4. All respondents felt that the Master should have express power to require parties to attend before him.

Comments received

1. The observation was made that requiring parties to attend should be on reasonable notice.

2. One law firm also suggested that the position of the Master should be clarified so that parties in particular, litigants in person knew who they were dealing with.

Recommendation

1. The Group agrees with the responses received and recommends these proposals since, as some of respondents remarked, they reflect current practice, at least in terms of requiring parties to attend before the Master.

2. To progress a claim to a trial or any other conclusion in an appropriate time frame, it is essential that once pleadings should be concluded, a directions hearing occurs to allow a matter to progress including how the Court might exercise the more flexible powers this paper recommends.

3. The Group recognises that it is important for parties, as distinct from lawyers, to understand which decisions are made by different members of the Royal Court, and the legal basis of their authority. Specifically, the position of Master, as a delegate of

the Judicial Greffier, can be dealt with as part of improved Court Guidance for litigants in person. The Master is already described as a member of the judiciary on JLIB.

4. The matters to be addressed by the summons for directions will be set out in a Practice Direction and will no longer form part of the Rules.

5. A failure to adhere to directions given will, in future, allow the Court, of its own motion to strike out a case for material non-compliance.

6. **The Group therefore recommends revising the Rules to**:-

    a. **provide for a summons for directions to take place automatically after the normal time period for completion of pleadings;**
    b. **permit the Court, including the Master, to require the parties to attend for directions at any time;**
    c. **amend the contents of the summons for directions, which will be defined by a practice direction; and**
    d. **permit the Court, <u>of its own motion</u>, to strike out cases for a material failure to adhere to directions given.**

D.8 Mediation (questions 24 to 28)

1. The Royal Court Rules, at Rule 6/28, permit the Royal Court to stay proceedings for alternative dispute resolution. This can either be done on the application of any party or of the Court's own motion.

2. In the Petty Debts Court, the current practice is for all disputed matters to be referred to mediation, before any further steps are taken in the proceedings, unless there is no point in doing so. The vast majority of cases are referred. The mediation process in the Petty Debts Court has been running for a number of years and has a high rate of success in resolving disputed debts.

3. The Group therefore consulted on whether a similar process should be extended to the Royal Court, either by way of alterations to the Rules or a practice direction. The Group also sought feedback as to whether any such power should be for certain types of disputes only or for disputes below a specified value.

4. In the responses received a clear majority were in favour of the status quo and were against any form of automatic stay whether general or for certain types or value of disputes.

5. The exception to this came from the three individual respondents who all thought that all disputes should be stayed before any steps were taken in the proceedings.

6. The remaining respondents felt that it would be inappropriate to compel parties to mediate who did not want to do so.

Comments received

1. The feedback from the Chancery Bar Association some of whose members had been or were involved with litigation before the Royal Court included the observation that the Royal Court tended to take a less active approach to encourage mediation or other forms of alternative dispute resolution than the English Court.

2. One respondent suggested that any power to mediate should not apply to trust cases.

Recommendation

1. The Court's experience of mediation in the Petty Debts Court is that the process does work because it compels the parties to face up to the reality of their dispute. In the Royal Court, the Group accepts that the position is more complex and may depend on a number of factors, including the nature of the dispute, the issues between the parties and how much is at stake. These factors currently affect the timing of when mediation or other forms of settlement are explored and when the Royal Court might stay proceedings to allow parties to consider settlement.

2. In addition, the Group has taken into account its own recommendation set out above to increase the jurisdiction of the Petty Debts Court to £30,000. If this is adopted, the need for the Royal Court to follow the current Petty Debts Court practice of immediately referring claims to mediation is reduced. Such claims will be dealt with under the current Petty Debts Court procedure. This will benefit many island residents and the usual types of dispute they might face.

3. However the Group does consider that, in disputes before the Royal Court, a greater emphasis should be placed on the parties to consider the various means available of resolving their dispute at an early stage in the court process. This is consistent with the introduction of an overriding objective.

4. The recommendation as to mediation therefore is that it is an issue that should be expressly raised at the summons for directions by use of a practice direction and amendment to the form of a summons for directions requiring the parties to have considered whether the dispute is suitable for mediation or other forms of alternative dispute resolution and if not why not. This is likely to follow on from what has been said in any pre-action communication.

5. The obligation to consider mediation should apply to any kind of case and should not exclude certain types of disputes. There is no reason in principle why mediation cannot apply to trust disputes as much as any other kind of dispute. Indeed, if the trust dispute involves a divided family, mediation is often entirely appropriate for such a dispute.

6. Otherwise the Royal Court already has the power to stay cases to enable parties to either negotiate or mediate in Rule 6/28 of the Rules. This can be used on a case-by-case basis whenever the Court thinks fit. Beyond raising the issue at the stage of a summons for directions, the scope of this power does not need modification.

7. **The Group therefore recommends issue of a practice direction and amendment to the form of the summons for directions to require mediation to be explored at the first directions hearing.**

D.9 Discovery

1. The Group consulted on whether the Royal Court should have power to limit discovery i.e. the process by which each party exchanges relevant documents with the other party or parties. The reason for the consultation is that discovery has become one of the most time consuming and expensive aspects of litigation. The obligations on parties and their advisers to produce all relevant documents are extensive.

2. In England the Court has 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 so that discovery is proportionate.

3. The Group is also aware that in recent years, there have been particular difficulties with the extent of the discovery obligation because of the proliferation of communication via electronic means.

4. The Group therefore also invited suggestions on how parties should approach issues of electronic discovery.

5. All bar two respondents agreed there should be a power to limit discovery.

Comments received

1. English Law practice provides useful guidance and should be followed.

2. The key to discovery should be proportionality.

3. The current Jersey Law test for specific discovery based on Hanby v Oliver should be modified so that only relevant documents have to be produced based on carrying out a reasonable search.

4. The parties should look to agree search terms.

5. A practice direction should be produced having regard to English Practice Direction 31B.

6. Greater use should be made of the power contained in Rule 6/17 to order discovery on a limited basis.

7. The parties should meet in advance of the first hearing for directions and should explain to the Court at the first directions' hearing the process they intend to adopt in particular where there is electronic disclosure.

8. Inspection should take place by electronic means.

9. Reasonable searches should be permitted by use of electronic search tools including searching using predictive codes.

10. The parties should be permitted to remove privileged or other irrelevant attachments to disclosable emails.

Recommendation

1. The Group remained of the view that discovery is frequently one of the most significant cost factors for a party, and needs to be controlled. The Group in its deliberations has explored a number of different options including restricting what documents have to be produced. However the Group concludes that, to limit the current test as to what had to be produced but to require parties to carry out a reasonable search for such documents, ran the risk of the approach to discovery in practice remaining the same.

2. The Group therefore concludes that what is required is a power to limit discovery on the basis of the overriding objective and in particular power to require discovery to be proportionate to the legal and factual issues at stake. The categories of documents parties might be limited to are:-

    a. documents on which they rely;
    b. documents which affect their case adversely to a material extent;
    c. Relevant documents by reference to the pleadings but not within a or b above; and
    d. documents in possession of <u>any</u> party which may lead to a train of enquiry which will allow <u>that party</u> <u>or any other party</u> to advance their case or damage the case against them.

3. The normal order for discovery, as at present, will cover all categories listed in paragraph 2 above unless the Court makes an order limiting what has to be produced.

It will also apply to documents held in electronic as well as paper form. The power to limit discovery will be introduced by an amendment to the Rule 6/17 of the Rules.

4. Where electronic disclosure is required, the parties are to meet in advance of the first summons for directions, to exchange information about the processes they intend to follow and to look to agree these processes as far as possible. The requirements for such a meeting will be set out in a practice direction, having regard to experience of the approach of electronic disclosure to date before the Royal Court and other jurisdictions

5. Any list of documents will still be verified by affidavit. Where limited discovery is ordered or there is electronic documentation produced, the affidavit must explain the searches carried out by the party providing discovery and how these have been effected.

6. **The Group therefore recommends an amendment to the Rules to grant the Royal Court power to limit discovery and issue of a practice direction setting out how electronic discovery is to be produced.**

a. _____

D.10 Expert Evidence

1. The Review Group consulted on whether is should have power to limit expert evidence to a single expert? This was because, 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 (see X Children v Minister Health and Social Services [2012] JRC 068).

2. The Group further enquired that, if the Royal Court should power to limit expert evidence, when should the Court exercise a power to require a single expert and how the questions to such an expert should be put.

3. The majority agreed that the Court should have power to limit expert evidence to a single expert for any case.

4. Only a minority thought this power should be limited to cases below a certain value.

5. The basis upon which a Court should exercise such a power whether it should be proportionate to do so should be a matter of discretion.

6. A majority thought that they should still be able to retain their own expert for issues at the heart of the litigation where a joint expert is appointed.

7. For issues that were relatively ancillary a majority felt that the Court should be able to limit expert evidence to a single expert.

Comments received

1. One party wanted to preserve in every case the right to comment on a joint expert report where one was appointed.

2. Any limitation of expert evidence to a joint expert should be on a case-by-case basis.

Recommendation

1. The Group in its deliberations has reached the view that approaching the question of limiting experts to a single expert was complex. In particular, it is difficult, in an

adversarial system of resolving disputes, to restrict a litigant's right (even if at its own expense) to challenge the view of a single expert on particular topic. To amend the Rules to create a system of single experts, also effectively ran the risk of disputes being decided on the view of a single expert rather than by the Court. The Group is not prepared to go down this path.

2. However the Group remains concerned about cases where parties wanted to call a plethora of experts where the amount at stake was relatively modest.

3. To address this issue, the Group has concluded that, when the Court is considering whether expert evidence should be permitted, (usually at the first directions hearing), if a party wishes to adduce evidence from more than two categories of expert, it should justify why additional experts were required by reference to the overriding objective. This will include consideration of the extent to which parties have sought to agree particular topics and the relevance of the proposed evidence to issues in the dispute. Guidance for such justification will be set out in a Practice Direction. It will also be developed in future decisions of the Royal Court.

4. **The Group therefore recommends introduction of a Practice Direction limiting the number of experts in any case to a maximum of two disciplines unless additional experts can be justified while having regard to the overriding objective.**

E. COSTS

E.1 The Costs of Litigation

1. One of the areas of complaint received by the Group was the cost of litigation. These complaints manifested themselves in a number of different ways but were summarised in consultation paper no 1 as follows:-

    a. the hourly charge out rates of lawyers;
    b. the threat of significant adverse costs orders operating as a deterrent; and.
    c. the lack of appreciation of how much litigation might cost;

2. As set out out in consultation paper no 1, the Group's focus continues to be on the second and third of these issues in looking at potential changes to the costs regime that operates for litigation before the Royal Court. The issue of amounts charged to litigants by the legal profession therefore generally remains outside the scope of this review and is a matter for the Access to Justice Review established by the States of Jersey and chaired by Senator Routier. However the Group has not disregarded the first issue entirely because it is essential background for assessing the appropriate procedural changes needed to improve access to justice. Hourly rates are also relevant to any assessment of what costs might be incurred or recovered both before and during any dispute.

3. The current practice in relation to costs is that, in the case of applications made prior to trial, costs are generally dealt with at the conclusion of the relevant application. In the case of a trial, costs are dealt with after judgment has been given. In deciding what costs orders to make the Court possesses a broad discretion but with the starting point that the loser pays.

4. Costs are awarded on either the standard or the indemnity basis unless the matter concerns the costs of a trustee on an application for directions, where a different approach is adopted.

5. Unless the Court hearing a matter carries out a summary assessment of costs, an Assistant Judicial Greffier, based within the Judicial Greffe and specialising in this area, carries out an assessment of costs ordered to be paid by the Royal Court. A summary assessment of costs is a power that is relatively rarely used. A party, which

has been awarded its costs, may also seek a payment on account. Fixed costs are only awarded in respect of actions to recover debts unless the Court orders otherwise.

6. The Royal Court does not assess the fees charged by an Advocate to his or her own client absent a claim or defence under Article 30 of the Supply of Goods and Services (Jersey) Law 2009.

7. The Group sought feedback as to whether the costs regime applicable in Jersey should be modified to address the concerns previously expressed to the Group or individual members.

8. In respect of costs the Jurats did not generally express views, so the responses received were those of the other respondents.

9. A small majority were in favour of fixed costs extending beyond actions to recover money. Those against were all law firms.

10. There was no agreement on whether there should be fixed costs on all claims up to a certain value. All the individual respondents were in favour of this. Five law firm respondents were against.

11. If fixed costs were to apply to all claims up to a certain value, there was no agreement on the figures proposed. The three suggestions were £20,000, £25,000 and 100,000.

12. Other than for debt claims, there was no agreement on what type of actions any fixed costs regime might apply to.

13. A majority were in favour of summary assessment of all interlocutory applications lasting one day or less. The law firms were divided on this issue.

14. A clear majority were against limiting enforcement of costs orders against the plaintiff in personal injury matters to the amount of any damages awarded absent unreasonable or dishonest behaviour.

15. All agreed that the process of settlement offers made on a without prejudice basis to save costs should be recognised and taken into account when the Court was dealing with awarding costs of proceedings.

16. A clear majority, including a majority of law firm respondents, were against uplifting normal charge out rates if law firms acted on a no win, no fee basis.

17. A majority were in favour of any form of no win no fee agreement being subject to the approval of the Royal Court.

18. A small majority were against after the event insurance premiums being recoverable from an unsuccessful party. After the event insurance is insurance obtained after the facts giving rise to a dispute have taken place which provides insurance cover to meet the costs of the losing party to the dispute where proceedings are brought or defended. A majority of individuals wanted to be able to recover such premiums.

Comments received

1. Fixed costs should be awarded for certain procedural steps unless the matter was certified by the Court as being above a certain level complexity.

2. There is a backlog on taxation matters.

3. The form of the bill required for taxation should be modified given that most firms have electronic billing systems.

4. A summary assessment is too rough and ready.

5. The Supreme Court in Coventry v Lawrence, reported at [2014] UKSC 46, is going to consider whether the English system in force at the time the claims were made and which allowed recoverability of after the event premiums and success fees as long as they were reasonable was contrary to the convention on Human Rights Article 6.

6. The effect of the civil procedure rules introduced in England and Wales in 1998 was to increase not reduce costs.

7. The Chancery Bar Association observed that it remains to be seen the extent to which the Jackson Reforms will reduce the costs of civil litigation. However, the Chancery Bar observed that in some respect the Jackson Reforms themselves might increase costs by requiring the preparation of costs documentation.

Discussion and Recommendations

1. The overall thrust of the majority of the responses received was that the system should not change significantly. However, differences did emerge between the views expressed by law firm respondents, or a majority of them, and individual respondents.

2. In reaching a recommendation, the Group's starting point is the position of a plaintiff who has a claim that merits a trial before the Royal Court, if not resolved but whose means take such a plaintiff outside the legal aid scheme. At present, unless such a plaintiff has significant income or savings, such a plaintiff's ability to pursue a claim is restricted in practice. It can enter into a no win, no fee agreement where lawyer is willing to do so. To guard against the risk of an adverse costs order and losing property as a result, usually the family home, a plaintiff, if he/she can afford to do so, may also obtain after the event insurance cover. However, the cost of such insurance is not recoverable and therefore comes out of damages if the claim is successful. A plaintiff can also enter into a third party funding agreement, the costs of which also come out of any damages recoverable. Based on agreements seen to date by individual members of the Group (which are relatively few in number) such agreements can lead to payment to the funder of up to 50% of damages recovered. A successful plaintiff may not therefore recover much once these other costs are met out of damages awarded.

3. Yet without after the event insurance, individual litigants who are not eligible for legal aid (where the income threshold has remained at £40,000 and the capital threshold at £100,000 for a number of years) for the types of claims that will most likely affect Island residents, face serious adverse consequences if they bring an arguable claim which fails. Not every law firm operates on a no-win no fee basis; if anything it is only a minority, (whom the Group commends), who chose to do so.

4. In practical terms the Group is concerned that potential plaintiffs with justifiable claims whose only real asset of value is the family home may be deterred because of the risk of losing the family home, if they lose their claim. By contrast those with few or no assets of value who receive legal aid can bring such claims because there are no real consequences to losing an arguable claim if a plaintiff has no assets. It is the position of the silent majority, who fall between the legal aid scheme and those relatively few litigants who can afford legal representation on a private basis and the risk of large adverse costs orders, whose position needs to be addressed. This concern is not

hypothetical in that it has been expressed to or observed by different members of the Group although there is no statistical information to measure accurately the scale of the problem and what claims are being deterred or settled on unduly unfavourable terms. The Group's recommendation is intended to redress this inequality of bargaining power.

5. By contrast, a defendant under the current system only has to pay costs if a plaintiff is successful. The existence of after the event insurance does not affect a defendant. Moreover, for the types of claims that most island residents wish to bring, a defendant may well be insured. Such a defendant does not therefore face the same issues about funding, because their position is often dealt with through an insurance company. The defendant (or their insurer) is still entitled to pursue a plaintiff for recovery of its assets where a claim fails. Any after the event insurance is simply another asset, which might meet a costs order in favour of a defendant. It is fair to observe, however, that the involvement of a funder may encourage a defendant to settle sooner rather than later if it feels the overall costs being claimed and might increase which makes a settlement worthwhile. This is a commercial matter for a defendant.

6. In England, there has been a change of position. As observed in Coventry v Lawrence, the Woolf Reforms originally sought to address the balance between plaintiff and defendant by allowing a plaintiff to recover an uplift on no win, no fee cases and after the event insurance premiums paid. This had unintended consequences because, while costs could be disallowed if they were not proportionate, success fees or after the event insurance premiums were only disallowed if they were unreasonable. The problems were summarised at paragraph 37 of Coventry v Lawrence as follows:-

   a. First, claimants had no interest whatever in the level of base costs, success fee or ATE premium which they agreed with their lawyers, as, if they lost they had to pay nothing, and if they won the costs would all be paid by the defendants, who, on the other hand, had no say about the costs (other than retrospectively on an assessment).
   b. Secondly, in many cases, unsuccessful defendants found themselves paying, in addition to the whole of their own costs, three times the claimants' "real" costs.
   c. Thirdly, while proportionality had a part to play when assessing the recoverability of base costs, it was excluded from consideration in relation to the recovery of success fee or ATE premium (which were simply required to be reasonable).
   d. Fourthly, the stronger the defendant's case, the greater the liability for costs would be if they lost, as the size of the success fee and the ATE premium should have reflected the claimants' prospects of success.

7. It was because of these difficulties that the system in England was modified so that success fees and after the event premiums were no longer recoverable from a defendant. Instead a plaintiff was given protection in certain types of actions against adverse costs orders in terms of personal injury cases as long as a plaintiff acted reasonably and honestly. The effect of this change was that any costs order was limited to any damages recovered. This altered the balance of risk so that a plaintiff would not necessarily have to take out after the event insurance or pay a litigation funder and therefore had a greater chance of recovering damages actually awarded rather than those damages being paid to someone else. A defendant also gained in the sense of no longer being liable for all success fees or after the event insurance premiums, but instead faced the risk of not being able to recover its costs as long as plaintiff acted reasonably in bringing its claim.

8. The group's **first recommendation in respect of costs** is that the current English approach set out in paragraph 7 above is an approach that should be introduced in Jersey.

9. The type of actions that the Group considers this approach should apply to are personal injury claims, health and safety claims and claims for medical negligence, negligent advice in relation to the sale or purchase of the family home and negligent advice in relation to wills , the latter with a limit of £250,000. In almost all such cases a defendant is usually backed by an insurance company with significant assets. The current system, if not altered in the manner recommended, will continue to produce an inequality of bargaining power and therefore affect access to justice.

10. While the majority of respondents were against such a proposal, it was the law firm respondents who influenced this result significantly. However, the issue is that individuals are deterred from bringing claims because of the risk of losing an arguable claim. Coupled with the other changes referred to in terms of an overriding objective, a proportionate approach, more active case management, the potential to limit discovery and expert evidence, a lower threshold for summary judgment, and costs budgets (see below) the objection to this change that a plaintiff might try to hold a defendant (or its insurers) in the types of cases identified to some form of ransom can be controlled.

11. This change means that a plaintiff can still face an adverse costs order beyond any damages awarded, if acting unreasonably or dishonestly. However where a plaintiff loses a claim, for example because a defendant's expert evidence is preferred, without something more, such an outcome should not lead to a costs order in a defendant's favour. At present, if a plaintiff's claim fails in such a scenario, the plaintiff is more

likely than not to have to pay the defendant's costs, despite having a reasonable argument and claim.

12. The Group's **second recommendation** relates to changes to the current costs rules. Subject to the Petty Debts Court jurisdiction being increased to £30,000, and its costs regime being modified as recommend above to limit the recovery of costs, the costs regime for the Royal Court should be modified as follows :-

    a. hearings before the Master, other than a summons for directions, would continue to be subject to a summary assessment of costs, unless the Master decides otherwise. Summary assessment will take place after the Master makes a costs order rather than at the hearing itself;

    b. the form of bill required for taxation should be reviewed to reflect that firms now operate on the basis of electronic billing systems;

    c. there should be express recognition in the Rules of settlement offers made to save costs offers being taken into account when the Court is dealing with ordering costs of proceedings; and

    d. litigation funding agreements should be subject to the approval of the Royal Court.

13. The Group's **third recommendation** is to amend the rules on awarding costs to provide that recoverable costs will be reduced where the Court is satisfied that the costs incurred are disproportionate to the value of the claim. This power may be exercised either when the Court is awarding costs or on any subsequent assessment.

14. The Group does not recommend any changes in relation to:-

    a. no win, no fee agreements, unless forming part of or relating to a litigation funding agreement. Charge out rates for such agreements, as at present, should be not be uplifted where firms act on a no win, no fee basis. The Group is aware of sufficient law firms who act on this basis. The Group does not consider it necessary to alter this system which benefits the public and which is a credit to those firms who act on such a basis;

    b. after the event insurance premiums which should continue not to be recoverable from an unsuccessful party. It is hoped that an unsuccessful plaintiff may not need such

insurance if they will only face adverse cost orders for acting unreasonably in certain categories of claim; and

c. to introduce additional categories of claims where fixed costs only are recovered. The Group concluded that for the larger types of claims the Royal Court was intended to deal with in the future the current costs regime was otherwise appropriate apart from the changes recommended above.

Conclusion on Costs

The Group therefore recommends:-

a. an unsuccessful plaintiff shall only be liable for a successful defendant's costs beyond any damages recovered in certain types of claims where that plaintiff has acted unreasonably or dishonestly;

b. the types of claims where the rule in paragraph (a) above will apply are claims for personal injury, breaches of health and safety laws, medical negligence, negligent advice in relation to the sale or purchase of the family home and negligent advice in relation to wills , with actions in respect of a will being limited to claims below £250,000;

c. hearings before the Master, other than a summons for directions, will continue to be subject to a summary assessment of costs, unless the Master decides otherwise. Summary assessment will now take place after the Master makes a costs order rather than at the hearing itself;

d. the form of bill required for taxation will be reviewed to reflect that firms now operate on the basis of electronic billing systems;

e. there will be express recognition in the Rules to take into account offers of settlement intended to save costs when the Court is dealing with the costs of proceedings;

f. litigation funding agreements will be subject to the approval of the Royal Court;

g. only no win no fee agreements which form part of a litigation funding agreement will require the approval of the Royal Court;

h. hourly or other charge out rates of legal advisers in respect of no win no fee agreements shall be no greater than rates ordinarily charged to paying clients;

i. after the event insurance premiums will remain irrecoverable from the other party to the dispute;

j. cost for undisputed debt claims before the Royal Court will continue to be limited to fixed costs only; and

k. the amount of recoverable costs will be reduced where the fees recoverable are disproportionate to the value of the claim.

E. 2 Budgets

1. One of the significant of areas of complaint the Review Group received was that parties were unaware of what litigation would cost. To date, the cost of an action has been seen generally as a matter between a litigant and lawyer and did not concern the Court, absent allegations of negligence or a claim for unpaid fees. Whether or not a litigant had received an estimate of costs was also a matter of professional conduct with the Court only becoming involved as a last resort.

2. However, in view of concerns expressed about parties not knowing what a dispute might cost as well as the impact of the other party's costs if a claim or defence was unsuccessful, the Group consulted on whether the Rules should require parties to provide budgets to each other as to the likely cost of proceedings.

3. The Group further wished to understand whether any exchange of budgets should occur in all actions or only certain types of actions.

4. The Group further invited responses as to whether the Court should review budgets at the time they were exchanged or whether they should only be reviewed in any taxation process. The Group was concerned about balancing the need generally to control unnecessary or disproportionate costs against costs increasing if parties had to produce budgets and the Court being required to review budgets at the time they are exchanged. The Group therefore invited comments as to where the balance should be struck.

5. A majority of respondents were in favour of an exchange of budgets but a majority of law firm respondents were against.

6. A majority agreed this should occur in all actions; again a majority of law firms were against.

7. If budgets were exchanged, a majority agreed that the Court should have power to review budgets.

Comments received

1. There is a risk of satellite litigation about budgets.

Recommendations

1. Our deliberations on this topic indicated that this is a complex issue where ultimately a balance has to be struck between the competing concerns expressed in the responses received, the experiences of individual Group members about resolution of claims before the Royal Court and the overall aims of the Group to improve access to justice.

2. The strongest point in favour of an exchange of budgets in every case is that for Jersey to continue to be an effective jurisdiction for the handling all kinds of disputes it is difficult to see why an exchange of cost budgets should not occur. Ultimately, all parties in litigation are or are likely to become concerned about costs, not just those who struggle with access to the Court.

3. Exchange of budgets might also be said to be part of a process of a party assessing the costs and benefits of litigation and therefore whether they wish to settle. In other words, it is a tool to assist and encourage the settlement process.

4. The benefit to each party of understanding what it might cost to take a case to trial has to be balanced against the additional work required to produce a costs budget and the costs of potential arguments about budgets. In many cases lawyers are already producing budgets for their clients. What production of budget involves is an exchange of that information.

5. The logical place when a review of budgets to occur is at the first summons for directions.

6. The responses received did not address the basis upon which the Court would review budgets. Currently, the Court assesses the reasonableness of a defendant's costs on a security for costs application, and a successful party's costs when assessing costs summarily or ordering an interim payment on account of costs. It is difficult to see why a review of budgets is different from the approach taken on these other types of applications, which both parties and their advisers and the Court are used to dealing with. A budget review should not therefore be unduly complex.

7. In a small jurisdiction the Court also has some understanding about the lawyers and the firms appearing before it and the rates charged which will assist the Court in assessing the reasonableness of budgets put forward. The Court's familiarity of those appearing before it will therefore reduce the risk of oppressive budgets being sought.

8. The Group accepts on the other hand that there is a danger that producing costs budgets might lead to a party setting a budget at an unrealistic or unreasonably high levels to put pressure on the other party to settle. While such attempts can be controlled by the Court given its experience, the Group has taken note of some of the difficulties in England that have been produced by the requirement to produce budgets and the satellite litigation this has created.

9. In arriving at a recommendation, the Court ultimately has returned to its remit namely how disputes may be adjudicated in a manner which is both proportionate to what is at stake and is cost effective, in particular for claims affecting individuals who may be deterred from litigation by the Rules in their current form, the practices of the Royal Court and the costs of disputes.

10. The Group has therefore concluded that production and exchange of budgets should apply to all claims with a value of up to £250,000. This limit will catch the majority of claims affecting most island residents. This recommendation is intended to balance the concerns expressed about creating satellite litigation with the Group's objective of improving access to justice. Ordinarily such budgets will be considered at the first directions hearing. This consideration will include budgets being consistent with the overriding objective.

11. For other claims the Court will retain a discretion to require a cost budget to be produced or exchanged.

12. The requirement to produce and exchange budgets for larger claims over £250,000 will also be reviewed after two years.

13. **The Group therefore recommends compulsory production and exchange of cost budgets for all claims up to £250,000 at the first summons for directions.**

E.3 Lawyer/Client Costs

1. The Group consulted on whether the Court should have compulsory power to determine a bill as between a Jersey advocate or Solicitor and a client in contentious matters before the Royal Court. The Group consulted on this issue because the cost of litigation was a consistent complaint and was one of the main issues which led to the creation of the Group.

2. A majority, including all the Jurats, were not in favour of the Royal Court having power to determine a bill of costs between a Jersey lawyer and his client in contentious matters.

Comment

1. This should be left to the Law Society who should have compulsory power to adjudicate on cost disputes between a lawyer and client.

Recommendation

1. At present there is no straightforward mechanism to address complaints about lawyers' cost being excessive. The possibility raised in Cunningham v Sinels 2011 JLR 54 at paragraph 18 of a breach of an implied term has not been developed and may be seen as unduly complex, and has not been raised by a paying client in any other case.

2. The Law Society of Jersey also cannot require a lawyer or law firm to submit to a binding assessment of the costs claimed by that lawyer. Many firms also have internal procedures to deal with complaints including complaints about fees. These procedures are welcome but will not resolve every dispute. Likewise adjudication by the Law Society because it is a review by another lawyer is not accepted in every case as being sufficiently independent to produce an assessment that is accepted by the dissatisfied client as being fair. This is because of the perception that one lawyer will not unduly criticise another lawyer's fees because it is not in the other lawyer's interest ultimately to do so. Whether that perception is right or wrong does not matter. Also, although many firms do accept such a determination some do not and this can cause further friction.

3. These are strong points in favour of someone being granted the power, as the Royal Court used to possess, to adjudicate on a costs dispute between a Jersey lawyer and client in contentious matters. The Royal Court is one such body because of its experience.

4. However, in light of:

    a. the other recommendations contained in this report designed to improve access to justice;
    b. the risk of a power to adjudicate by the Royal Court being turned into a lever to negotiate fees due to the Royal Court's power to make findings of negligence; and
    c. the ongoing work of Senator Routier's Access to Justice Review.

    the Group concluded that the creation of a compulsory mechanism to review a lawyer's costs required more than amendments to the Rules and related practice directions. The Group did consider however that the effect of the changes recommended, if introduced, should be kept under review, including their effect on complaints about lawyers' charges.

F. Miscellaneous Comments

The following suggestions were also received as part of the feedback:-

1. Simplify language by removal of jargon and reduce the use of French.
2. Give the Master a summary trial jurisdiction if the parties agree.
3. Allow for directions to be given by phone rather than by face to face hearings.
4. Dispense with the need for bundles at directions hearings.
5. Allow for oral examination of debtors.
6. Create power for the issue of a sub-poena at a directions hearing.

Observations

In relation to the miscellaneous comments received the Group was grateful for the additional suggestions made. Its conclusion on these, using the same numbering as the suggestions set out above, is as follows:-

1. A glossary of terms coupled with a guide for litigants in person should be produced which will help address this concern.
2. The intention behind this proposal seems to be to allow simpler disputes to be resolved more quickly. This is intended to be addressed by increasing the Petty Debts Court jurisdiction and amending the summary judgment process as recommended.
3. Directions can already be given by phone but the Group agree this should be recognised as part of court practice. This can been achieved by a Practice Direction although the presumption should still be that personal appearance is required.
4. A working bundle can be agreed between the parties, which can be updated for use at subsequent direction hearings or other interlocutory applications.
5. This is a helpful suggestion and while beyond the remit of the Group will be considered.
6. The Royal Court can only grant subpoenas at present; there is also limited guidance on when a subpoena may be ordered. The Group agrees that Rules should expressly recognise such a power and for it to be exercised at a directions hearing, supported by a Practice Direction.

G. Conclusion

The outcome of the work carried out by the Group has led to the clear conclusion that the Rules and practice of the Royal Court need to be amended so that the Court has power to deal with claims in a more proportionate manner having regard to the nature and scale of the legal and factual issues between parties to a dispute.

The key to the recommended changes is the introduction of an overriding objective which will affect how all current and future Rules are applied. This will require all disputes to be conducted by the parties justly and at a proportionate cost.

For certain types of claims, most likely to affect island residents, a plaintiff who loses a case will also only have to pay a defendant's costs where that plaintiff has acted unreasonably.

At this stage the Group considers that the changes it is proposing are best introduced by way of amendment to existing Rules and practice. Concerns expressed about the complexity of Royal Court procedures can be addressed by appropriate handbooks and guidance being produced, in particular for individuals or organisations that represent themselves.

The Group also recommends that the jurisdiction of the Petty Debts Court is increased by the States to £30,000 and that the Petty Debts Court becomes Jersey's small claims court.

For the future, the effect of these changes will need to be monitored by on-going statistical analysis of the number of proceedings issued, how many cases reach trial and when and how cases are resolved by earlier court decisions or through a settlement process.

Consideration will also need to be given to introduction of these changes and the principles underlying them to family and children law cases where many of the same concerns expressed to the Group also apply.

Ultimately the objective of these changes is to seek to deal with cases in an appropriate time frame, in a proportionate manner, that the Royal Court's procedural rules are sufficiently flexible for this to occur, and that parties do not face the risk of an unfair costs burden. This is intended to be for the benefit of all those, in particular Island residents, who have occasion to find themselves before the Royal Court.

Appendix One

List of Organisations Consulted on Consultation Paper No.1

Judges of the Royal Court
The Jurats of the Royal Court
Attorney General
Solicitor General
Judicial Greffier
Deputy Greffier
Viscount

Senator I Gorst
Senator P Routier, MBE
Senator A Maclean
T Walker, Director of International Affairs
The First Deemster of the Isle of Man
The Deputy Bailiff of Guernsey

The Institute of Law
The Law Society of Jersey
Jersey law firms
The Jersey Association of Trust Companies
Jersey Bankers Association
Jersey Finance
Jersey Financial Services Commission
Chamber of Commerce
Citizens Advice Bureau
STEP

Appendix Two

Preferences expressed in response to Consultation No.1

An overriding objective

1. Whether the procedural rules of the Royal Court should be subject to an overriding objective?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
6	16	1		

2. Should the overriding objective follow the English and Guernsey definition of an overriding objective?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
5	9	4	5	

3. Should the overriding objective be developed further to address question of costs?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
16	1	1	3	2

Pre- action communications

4. Whether a litigant should adhere to some form of requirement to notify a potential defendant in advance of details of a claim (other than in trust applications and where interim relief is sought)?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
15	6	1		1

5. Whether a defendant should be required to respond to a potential plaintiff before issuing proceedings?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
13	6		3	1

6. What sanction should be imposed on a party that does not adhere to any pre-action communication, obligation?

7. Should the Royal Court exercise power to stay proceedings or vary rates of interest in addition to sanctioning a party in costs who does not adhere to any pre-action communication obligation?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
2	4	3	2	1

8. Should the Royal Court prescribe whether by rule or practice direction what is expected in terms of pre-action communications?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
3	18		1	1

9. Should how to meet any requirement of a pre-action communication be left to the parties?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
1	3	2	16	1

Jurisdiction of the Royal Court

10. Should the maximum jurisdiction of the Petty Debts Court of £10,000 be increased?

Yes	NO
20	2

11. If the limit should be increased, what should the maximum jurisdiction of the Petty Debts Court:

The Petty Debts Court

12. Should procedure of the Petty Debts Court be made simpler:

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
4	16	2		

13. Should the Petty Debts Court Rules 2004 be amended to reflect the small claims approach adopted in England since 2000?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
4	4	2		

Pleadings

14. In relation to a claim should a party summarise its case including setting out relevant legal grounds upon which it relies as well as setting out all material facts on which it relies

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
6	15		2	

15. Should a plaintiff as far as possible be required to state the amount of money being claimed?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
7	16			

16. Should a defendant be required to set out a summary of why it disputes a plaintiff's claim?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
7	14		2	

17. Should the current power to require a party to provide further and better particulars of its pleading be extended to require any party to provide clarification of any matter in dispute, or give additional information in relation to such matter, whether a matter of law or of fact?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
7	5		11	

18 Should the Royal Court have power to define the legal and factual issues in dispute between the parties?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
4	3		14	

Power to adjourn sine die

19. Should the power to adjourn cases indefinitely be one that should continue?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
2	5	13	1	1

20. Should any adjournment require approval of the Royal Court following the parties providing information to the court as to the length of the period of an adjournment required and the reasons why the matter is to be adjourned?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
2	15	1	3	

Summary Judgment

21. Should the current power to grant summary judgment be extended to:

    a. allow applications to be made by a defendant.

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
8	3	11		

    b. to introduce a real prospect of success test.

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
6	5	11		

Directions

22. Should the court automatically fix a summons for directions within a defined period of the pleadings closing?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
4	15	1	1	

23. Should the Royal Court Rules make express provision for the Master to have power to require parties to attend before the Master or the Royal Court for directions at any stage of an action, if the Master considers it appropriate to do so?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
6	16			

Mediation

24. Should all disputes commenced before the Royal Court be automatically stayed for mediation before any further steps are taken in the proceedings?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
2	1	3	13	4

25. Alternatively, should the power to stay be exercised for certain types of disputes only?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
	2	4	14	3

26. If you consider that disputes should only be stayed for certain types of disputes only, please set out what types of disputes a stay should apply to.

27. Alternatively, should claims below a certain value be referred to mediation, unless there is no point in doing so?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
	4	1	14	2

28. If you consider that all claims below a certain value should be referred to mediation, please set out the maximum appropriate figure:

Discovery

29. Should the Royal Court have power to limit discovery?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
3	8		1	1

30. If you consider the Royal Court should have power to limit discovery, on what basis should such a power be exercised?

31. In relation to electronic disclosure should the protocols in England be adopted?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
1	8	3		

32. Please also set out any specific comments you have on issues faced in relation to electronic discovery and all suggestions as to how electronic discovery should be tackled:

Expert evidence

33. Should the Royal Court have power to limit expert evidence to a single party?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
2	17		4	

34. Should any power to limit expert evidence to a single party only apply to cases below a certain value?

Yes	No
4	18

35. Please state the value of cases below which the Court may limit expert evidence to single experts?

36. Please set out when the court should exercise such a power to require a single expert:

37. Should each party still be entitled to retain their own expert for issues at the heart of the litigation?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
5	16	2		

38. For issues that are relatively ancillary should the Royal Court be able to limit expert evidence to a single expert?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
2	6	2	1	

Costs

39. Should the rules for recovery of fixed costs be extended beyond actions to recover money?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
	6	1	2	2

40. Should there be fixed costs for all claims up to a certain value?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
	5		2	2

41. If a fixed costs regime is to apply to all claims up to a certain value, what is the appropriate level for a fixed cost regime:

42. If you consider that a fixed cost regime should only apply to certain types of actions, please identify what type of actions should a fixed costs regime apply to?

43. Should the power to summarily assess costs apply automatically to all interlocutory applications lasting one day or less?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
2	5		1	3

44. Should the ability to enforce costs orders against a plaintiff in personal injury matters be limited to the amount of any damages awarded absent unreasonable or dishonest behaviour?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
1	1	2	4	2

45. Should any party be allowed to put forward a proposal to settle a matter which, if not accepted, can be taken into account, when the court deals with the costs of proceedings?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
8	3			

46. Should lawyers be permitted to uplift normal charge out rates if they act on a no win no fee basis?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
	2	1	4	4

47. Should any no win no fee or conditional fee agreement be subject to approval of the Royal Court?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
1	5	2		1

48. Should after the event insurance premiums be recoverable from an unsuccessful party?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
1	3	1	5	1

Budgets

49. Should parties be obliged to provide budgets be required to each other as to the likely cost of proceedings?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
6	9	1	4	2

50. Should any exchange of budgets occur in all actions?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
2	12	2	4	2

51. If you consider that an exchange of budget should only occur in certain types of actions, in what type of actions and at what stage should an exchange of budgets occur?

52. Should the Royal Court review such budgets at the time they are exchanged?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
2	13	2	2	1

Lawyer/ client costs

53. Should the Royal Court have power to determine a bill of costs between advocate or ecrivain and a client in contentious matters?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree
1	4	2	14	1

54. When should the Royal Court be able to exercise such a power?

General

55. Should any changes arising out of this consultation be introduced a) by amendment to the rules, b) by the production of new rules, or c) a combination of both?

56. The Review Group also invites you to set out any comments you may wish to make in relation to what is proposed or any other proposals you may wish the Review Group to consider before it makes its final recommendations:

Appendix Three

Final Questions for Consultation

1. In relation to recommendations 1 to 13 of the executive summary, whether you agree or disagree with these recommendations.

Agree	Disagree

2. If you do disagree with any of the recommendations please identify which recommendation you disagree with and set out briefly the reasons why.

3. In relation to recommendations 14 of the executive summary, whether you agree or disagree with these recommendations.

Agree	Disagree

4. If you do disagree with any of the recommendations please identify which recommendation you disagree with and set out briefly the reasons why.

5. The Group also invite you to set out any other comments you may wish to make in relation to the recommendations contained in the executive summary and the work of the Group.