An update of the Royal Court of Guernsey's rules on Civil Procedure

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On 1 December 2011, Ogier published a brief summary of the 2007 rules of civil procedure (**the Rules**) which were intended to simplify, clarify and streamline Guernsey's civil procedure and to give litigants and judges more modern tools to enable the court to deal with cases justly.

The Rules have now been in force for some 8 years and have made a significant difference to the way civil cases are fought and progressed.

Mathew Newman, a partner in Ogier's dispute resolution team, describes below some of the main changes the Rules have made.

The Court's Case Management Powers

Prior to 2007, the Court had limited specific powers for case management. Since the introduction of specific case management powers, the Court has been subject to the overriding objective. Essentially, the Court must manage cases justly, proportionately, fairly and expeditiously and must give effect to rule 1 when it interprets any rule or exercises any power given to it by them.

There has been an increase in the number of interlocutory applications, most specifically strike out and summary judgment applications. This has enabled the Court to dispose of inherently “bad” or very weak claims at an early stage of proceedings, or alternatively, subject to the issue of prescription, highlighted the need for a party to amend its pleadings to ensure the issues are properly clarified, thus saving time and costs.

In addition, the mandatory requirement to apply for a case management conference within 14 days of the pleadings closing has resulted in parties having to think carefully about the time required to

complete the tasks of disclosure, witness statements and the attainment of any expert evidence. Due to such timetables, whether by consent or ordered by the Court, parties are getting to grips with the true issues in the case much earlier, which allows a more focused approach and an earlier resolution of key issues.

The requirement for a Pre-trial memorandum and list of issues can be helpful for the parties and the Court in distilling the issues. However, as the parties are required to seek to agree the contents of the same, and file separate memorandums if they cannot do so, it can sometimes complicate matters further.

The imposition of a pre-trial review hearing (if considered required) has also been beneficial, allowing the parties and Court to agree how the time allocated for trial can best be utilised, and dealing with any last minute logistical or procedural issues regarding the availability of witnesses, preparation of chronologies or the requirement for a video link to allow witnesses to give evidence remotely.

Who decides the case at trial

The Rules introduced the requirement to direct whether the case is to be heard by a single judge sitting alone or by a judge sitting with Jurats. There is now therefore a need for more "tactical thinking" by the parties and their lawyers as to the true issues in the case and by which method of trial they may best be served.

Offers to Settle

The Rules introduced for the first time, provisions regarding offers to settle and payments into Court. They are not anywhere near as prescriptive as those set out in the English Civil Procedure Rules, but state that where a payment or offer has been made, the Court shall take the fact, date and acceptance or non-acceptance into account when considering the question of costs. Hence parties now need to be more aware of the consequences of failing to make or accept an offer to settle.

An offer to settle does not have to be monetary to sway the Court as to who gets their costs and on what basis. Before proceedings had commenced in Romain Zaleski v GM Trustees Limited, the Defendant made an offer to assign to the Plaintiff any claims it had as trustee so that he could pursue them at his own cost. This was rejected by the Plaintiff. The Jurats found the terms of the offer were reasonable. As a result, the Court held that this was an aspect of the case which should not have been pursued because the Plaintiff should have realised that what he was being offered was the best outcome he could hope to achieve. The Court held this part of the litigation was needless and unreasonable such that it was a paradigm case for some indemnity costs.

Further, even offers to settle which are not made pursuant to the relevant rule are being taken into account by the Court. In Kevin Michael Bickley v Ronez Limited, the Defendant had made several offers to settle, though not pursuant to the provisions of rule 62. The Plaintiff therefore argued that such offers should not confer any benefit upon the Defendant. The Court held that although such

"Calderbank" or "Without Prejudice save as to costs" offers do not carry with them the full consequences of an offer to settle under rule 62, they are nevertheless an important consideration in the exercise of its discretion and is a question of how much weight to attach.

There has also been an increasing trend in England & Wales of the Court examining who is truly "successful" when the issue of costs arises. The Royal Court of Guernsey appears to be wise to this trend, even if not always strictly following it.

In Jefcoate v Spread Trustee Company Limited & Ors, the First Defendant had been ordered to restore the sum of £55,000 to the Lesterps Settlement, of which the Plaintiff was one of the discretionary beneficiaries. Who was the "successful party" was said to be a matter of common sense rather than being judged on technicality. Thus, a small recovery out of a large claim may produce the result that the "successful party" is seen as being the Defendant rather than the Plaintiff. The Judge declined to decide who was the "successful" party but said if a finding had to be made, it would be the Defendants on a common sense view because the Plaintiff (i) recovered only £55,000 out of a claim of £1.9 million and was always in excess of £6.7 million until shortly before trial, (ii) failed on the conspiracy claim and (iii) was found to have joined the Second to Fifth Defendants into the action on a misconceived basis.

Costs

The wording of rules 82 and 83 did not change from that set out in the 1989 civil procedure rules. The Court is simply required to make any order it considers "just". However, the Court's approach to the issue of costs has changed significantly since the introduction of the Rules, largely because of the overriding objective in rule 1. Given the increasing costs of litigation, the issue of who recovers their costs of the action, is becoming almost as important financially as who is successful in the case. This is particularly so because there is a large gap between what are known as "recoverable costs" and "indemnity costs".

For many years, the usual order was that the successful party would have their recoverable costs paid by the unsuccessful party (the standard basis). However, where recoverable costs are ordered, there is a cap on the hourly rate which can be recovered. In modern times, this can be significantly lower than the hourly rate the successful party has been paying their own lawyer.

The gap becomes even wider where lawyers in multiple jurisdictions (or “external lawyers”) are involved. Oftentimes, English solicitors, either with an existing relationship with a client, or appointed by insurers as “panel solicitors” play a significant role in the preparation of a case. Successful parties will seek to recover those costs in addition to their Guernsey advocates’ costs. There has been a mixed approach to such recovery but the leading authority remains the 2008 decision in Ladbrokes Plc –v- Galaxy international Limited which has been applied on several occasions.

In this case, almost half of the fees and disbursements claimed as costs were those of external lawyers. Therefore, the Court considered the principles to be applied when considering whether such

costs should be recoverable. It held that the starting point must be with the public interest of Guernsey, which lay in the existence of a well qualified, trained and experienced body of Advocates, capable themselves of handling the great majority of legal proceedings. Furthermore, the people of Guernsey were entitled to expect that

The Court identified examples of what might be considered appropriate and exceptional cases as follows:

The Royal Court applied the Ladbrokes principles recently in Raymond Anthony Dobson Broadhead – v- Spread Trustee Company Limited & Ors. There, the defendants sought the costs of instructing an English QC on the basis this was a factually complex claim and interpretation of section 76(2) of the Trusts (Guernsey) Law 2009 (the "Trusts Law") was required for the first time, such that knowledge and understanding of the English law on similar concepts was central. This argument was rejected. The Court held this was "a totally Guernsey case". It was litigated between Guernsey residents about Guernsey Trusts, with Guernsey trustees, and applying Guernsey trust law and legislation. Further, the only point of any novelty was the application of section 76(2) of the Trusts Law, which was a purely Guernsey point and fell to be interpreted in the context of the Guernsey law of prescription, which was different from the English law of limitation. It was said that the appropriate research into English law was well within the capabilities of a competent Guernsey lawyer.

The Court held that the test for allowing external lawyers' fees was not whether their work contributed to the ideas, cogency or elegance of the arguments put forward by the party seeking those costs but whether it was necessary for them to instruct lawyers outside Guernsey for the purpose of conducting the case with proper professional competence, having regard to its nature, content and all the circumstances,

In the event the fees of external lawyers are permitted, it is unlikely they will be permitted at rates higher than those allowed for Guernsey Advocates and their employees, except in the relatively rare cases where it can clearly be seen to be reasonable.

However, even in the event the Court is minded, as a matter of principle, to permit the recovery of external lawyers costs (which has been seen in some recent decisions), in practice, a bright light is shined on such costs in any taxation hearing, usually resulting in them being discounted heavily.

Since the introduction of the Rules, there has been an increasing trend of successful parties applying for and obtaining costs on the indemnity basis, even if only partially. As above, this appears to be because the Court is undertaking a much closer examination of the way in which actions are being conducted to ensure that justice prevails.

Particularly noticeable is the Court seeking to strike a balance between the prima facie rule that costs "follow the event" and an "issue based" approach, whereby the Court has regard to relative success on individual issues or aspects of the individual case. This often results in a percentage of costs being awarded as opposed to 100%.

In Shaham v Lloyds TSB Offshore Treasury Limited, it was held that an issue-based approach to costs was appropriate because the intervenor had not succeeded on all the points pleaded but time had been spent preparing to deal with them. The Court concluded that the Plaintiff should pay 80% of the intervenor's costs on the recoverable basis.

Conclusion

Parties are required to help the Court further the overriding objective. As can be seen from the above, it is now more important than ever to consider carefully how to conduct litigation, whether to make or accept an offer to settle and the consequences both may have upon the increasingly important issue of costs.

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Meet the Author

Mathew Newman

Partner

Guernsey

E: mathew.newman@ogier.com

T: +44 1481 752253

Key Contacts

Simon Davies

Partner

Guernsey

E: simon.davies@ogier.com

T: +44 1481 737175

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