Procedural Rules as a Facilitator and not a Hindrance to Justice

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1. In March 1994, the English Lord Chancellor appointed Lord Woolf to review the rules and procedures of the civil courts in England and Wales. The purposes of the review included improving access to justice by reducing the cost of litigation and the complexity of the rules, and modernizing terminology.

2. This enquiry led to the Woolf Report which set out extensive recommendations for the modernization of the rules that govern civil practice and procedure in that jurisdiction.

3. By the end of the century, many Caribbean jurisdictions embarked upon a similar exercise and for the same purposes. The Trinidad & Tobago Rules Committee promulgated the Civil Proceedings Rules in 1998 (although they did not come into force until 2005), the Eastern Caribbean Supreme Court implemented new Civil Procedure Rules on the last day of the millennium, December 31, 2000 and the Rules Committee of the Jamaican Supreme Court implemented its Civil Procedure Rules 2002, effective January 1, 2003.

4. Other countries in the region implemented similar rules in the years that followed.

5. Although all these rules were obviously influenced by the Woolf Report and the amendments in England and Wales that were based on the report, they were different in various respects. However, they all had the same overriding objective: to enable the court to deal with cases justly by
among other things, saving expense, ensuring that cases are dealt with expeditiously and allotting to each case an appropriate share of the court’s resources.

6. In his preface to the Jamaican CPR, Hon. Lensley Wolfe who was then Chief Justice and Chairman of the Rules Committee, pointed out that “the rules will require some fundamental changes in the way in which civil proceedings ... are pursued”. He added “we hope however, that these rules will represent a big step forward in the administration of justice in Jamaica”.

7. Trinidad and Tobago Chief Justice Sharma went even further. In a foreword that the Privy Council quoted at length in a judgment they delivered in July of this year¹, the Chief Justice lamented the fact that the civil justice system under the previous rules was fraught with barriers to access to justice and conspicuously failed to meet the needs and expectations of litigants. (Interestingly, Chief Justice Sharma’s account of the state of the previous system is one of the factors that influenced the Privy Council’s decision in that case).

8. Justice Sharma predicted that the CPR would bring a new litigation culture and address those ills.

9. While some lawyers in these jurisdictions consider that the new rules have largely achieved their objectives, others question whether they have. In fact, many lawyers feel that the rules have been a hindrance to justice and not a facilitator.

10. One often repeated complaint is that the rules have resulted in an increase in cost and delays, not a reduction. This criticism may have

¹ Super Industrial Services Limited v National Gas Company of Trinidad and Tobago Limited, [2018] UKPC 17
some merit but, on balance, their ‘pros’ substantially outweigh their ‘cons’.

11. The CPR requires much more pretrial work and therefore more costs are incurred at earlier stages in the proceedings. On the other hand, this has resulted in a reduction in the number of matters that go to trial and shorter trials for those that do.

12. Having said that however, the rules have probably not achieved all the objectives Lord Woolf and Chief Justices Wolfe and Sharma hoped they would.

13. In our view, there are two primary reasons for this:
   a. The first is that judges and lawyers have not fully appreciated and taken advantage of the case management powers created by the CPR; and
   b. The second is underutilization of the special regimes created by the CPR.

Case Management Powers

14. In a very recent judgment (Super Industrial Services Limited v National Gas Company of Trinidad and Tobago Limited\(^2\)), the Privy Council observed that the introduction of the CPR in Trinidad and Tobago brought about a “revolution in civil procedure”\(^3\) and that the case management conference is “at the heart of the new procedural code and of the system whereby the court takes over from the parties...the active management of cases for the furtherance of the overriding objective”\(^4\).

\(^2\) [2018] UKPC 17, delivered July 16, 2018
\(^3\) Paragraph 1
\(^4\) In paragraph 23
15. The case management powers that judges can exercise both at the case management conference and generally throughout the proceedings are wide-ranging but many are rarely invoked. For example, the power to direct that some issues should be tried as preliminary issues is very useful.

16. The Privy Council decided two important appeals from Jamaica in 2017, *Grace Kennedy Remittance Services Limited v Paymaster*\(^5\) and *The Fair Trading Commission v Digicel*.\(^6\) They were very different cases, but they had one thing in common: in both, the first instance judge had made an order for the preliminary trial of an issue.

17. *Grace Kennedy* involved multiple causes of action, including alleged breach of copyright, breach of confidence, passing off and interference with contractual relations. There were difficult and fairly novel legal issues and extensive factual disputes. The assessment of the damages claim would have been particularly challenging.

18. The first instance court ordered a preliminary trial on the issue of liability, so that the court would only consider damages if the claimant succeeded on the liability issue. In our experience, such orders are rarely made in commercial claims.

19. In the *Fair Trading Commission* case the statutory regulator and a competitor challenged the merger of two telecommunications providers on the basis that the merger agreement breached the Fair Competition Act and would likely have certain adverse effects on competition in the relevant market.

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\(^5\) [2017] UKPC 40
\(^6\) [2017] UKPC 28
20. The trial judge ordered that the court should first try two preliminary issues: whether the Fair Competition Act applied to the transaction and whether the regulator had jurisdiction over the transaction. The issue as to the likely effect on the market (which would have involved a major sub-issue as to what was the relevant market, and required expert evidence) was deferred pending the decision on the preliminary issues.

21. In both cases, the decisions on those preliminary issues went all the way to the Privy Council. The most important questions were determined without the need to explore the other issues that had been raised on the claims and that would have required far more time both at trial and on appeal.

22. Lawyers and the courts have not invoked other powers as rigorously as they should. At every level of our courts (except the Caribbean Court of Justice/Privy Council) hearings take far too long.

23. To a large extent this is because of the time spent making oral submissions. The courts can and in our view, should insist on more written submissions and less oral submissions, perhaps using rules 26.2(p) and 39.4.

**Special Regimes**

24. The CPR creates a number of discrete regimes, especially to facilitate commercial matters. For example, Part 66 deals specifically with mortgage claims, Part 67 with administration claims and Part 70 with admiralty claims.

25. But there are two regimes in particular, that have been implemented in some jurisdictions in the region but not in others, which the jurisdictions who have not implemented them may wish to consider.
26. **The Commercial Division:** One of the great successes in the post-CPR era in Jamaica has been the Commercial Division. Commercial matters tend to have far more documents and legal issues and take up significantly more of the court’s time and resources. They are more time sensitive and they often require more specialized expertise.

27. The Commercial Division has allowed specialist judges, a separate list and expedited hearings. In addition, judges in that division are making much better use of their case management powers.

28. When the division was being debated, there was a fair amount of resistance from both judges and lawyers, but most agree that it has been a success and that it has reduced the burden on other divisions of the court.

29. **Pre-Action Protocol Letters:** The other regime to which I want to draw attention is pre-action protocol letters. This has been in place in the UK and in some jurisdictions in the region but not for example, in Jamaica.

30. In 2005 the Chief Justice of Trinidad and Tobago issued a practice direction that established certain pre-action protocols. Effectively, for most types of claims, the protocols require the parties to exchange correspondence before filing proceedings.

31. The requirements are fairly specific and are similar to the requirements of statements of case. Among other things, the claimant’s letter must give enough details to enable the defendant to understand and investigate the claim. It must enclose copies of the documents on which the claimant relies. It must request any documents the claimant does not have and wishes to see. And, of course, it must indicate whether and when the claimant intends to file suit.
32. If the defendant does not accept liability for the claim the response must give detailed reasons why the claim is not accepted, indicate which contentions are accepted and which are contested, and enclose copies of the documents on which the defendant relies.

33. A claimant will not have to comply with the protocols if a limitation period is about to expire or if there is some “other good and sufficient reason”, but in that event the statement of case must set out the reasons for non-compliance.

34. Finally, the practice direction provides that if there is non-compliance the court can order the defaulting party to pay all or part of the costs of the proceedings and to do so on an indemnity basis.

35. Like mandatory mediation the pre-action protocol regime has created an additional layer of costs, but it should pay for itself. Firstly, costs are reduced if the matter does proceed since the pre-action protocol letters can form the basis for the statements of case. Secondly, and more importantly, in many cases pre-action protocol correspondence has resulted in matters being settled at that stage and no claims have actually been filed.

36. We discussed the pre-action protocol regime with 6 lawyers in Trinidad and Tobago, and 4 lawyers in the UK. In both cases, we included advocates and instructing attorneys. Without exception, they regarded it as a major enhancement of the litigation process in their respective jurisdictions.

37. We recommend that the Rules Committee and the Chief Justice consider introducing similar protocols in Jamaica.
Specific ways in which the procedural rules facilitate justice

38. So it is we’ve seen some of the ways the region’s civil procedure rules assist both the litigant and the court. As the number of civil cases increases over time the role of the rules in allotting an appropriate share of the court’s resources to each case while taking into account the need to allot resources to other cases\(^7\) becomes ever more important. The rules provide the wherewithal for facilitating the progress of cases through the system and for separating the wheat from the chaff.

Facilitators

39. **Dispensing with oral examination in chief:** The replacement of oral examination in chief with witness statements tendered in evidence, by itself, reduces the trial time for each matter by at least one-third. As these witness statements need to be exchanged well before the trial date, the preparation of them forces the advocate to craft the presentation of his client’s case in advance of the trial. This significantly reduces time wasting during the trial. The rules stipulate that where a witness is called to give oral evidence his witness statement shall stand as evidence in chief unless the court orders otherwise\(^8\).

40. Under the old rules it was not uncommon for the examination in chief of a witness in a complex commercial case to take days. Now, the first order of business following the swearing of the witness is usually his cross-examination. The exchange of witness statements before trial also has the effect of streamlining cross-examination which, utilizing the other side’s witness statements, can be prepared and honed in advance of the commencement of the trial.

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\(^7\) CPR 1.1 (2) (e)
\(^8\) CPR 29.8(2) and CPR 29.9 (1)
41. **Dispensing with the presence of the expert at trial while retaining his testimony:** The procedural rules facilitate expeditious trials by giving the court absolute control over whether an expert witness can be called\(^9\) and by expressly restricting expert evidence to that which is reasonably required to resolve the proceedings justly\(^{10}\). Furthermore by:
   a. imposing a general requirement for expert evidence to be given in a written report unless the court directs otherwise\(^{11}\); and
   b. providing for written questions to be put to an expert instructed by another party or jointly about his report\(^{12}\) and for his answers to form part of his report;\(^{13}\)
the procedural rules allow for expedition and economy in the presentation of this evidence by the admission into evidence of the expert report without need for the expert to attend the trial at all\(^{14}\).

42. The rules do provide for expert witnesses to give oral evidence and to be cross-examined but the scheme of the rules presents these as supplementary powers to be used if needed by the court. Generally in Jamaica our experience is that adducing expert evidence orally is still regarded as necessary\(^{15}\). The underutilization of the facility provided by the rules to receive this evidence in chief and cross-examination in writing adversely affects the overall efficiency of the trial process, and may be considered an area requiring some judicial tightening in the quest to improve service delivery.

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\(^9\) CPR 32.6(1)  
\(^{10}\) CPR 32.2  
\(^{11}\) CPR 32.7(1)  
\(^{12}\) CPR 32.8 (1) and (2)  
\(^{13}\) CPR 32.8(3)  
\(^{14}\) It is to be noted, however, that this interpretation of the rules is controversial in Jamaica where some Supreme Court judges maintain that the expert is, nevertheless, obliged to attend the trial. The Court of Appeal is yet to pronounce on the issue.  
\(^{15}\) CPR 32.7 and 32.18
43. Unlike evidence of witnesses of fact who must be called at the trial and made available for cross-examination as a pre-requisite to their witness statements being admitted in evidence\(^\text{16}\), the only pre-requisite for the written report of an expert to be adduced in evidence is its prior service on the other side\(^\text{17}\).

**Hindrance?**

44. This statement is likely to be controversial: One way in which the procedural rules hinder the optimal delivery of justice is the imposition of mandatory mediation for the vast majority of civil cases.

45. **Mandatory mediation:** Mediation was not mandatory when the current procedural rules were introduced in Jamaica on January 1, 2003, but was made so\(^\text{18}\) four years later when introduced as part of our Civil Procedure Rules\(^\text{19}\). The unattainable (in hindsight) objective stated in the rules is for mediation to be completed within 90 days of the date of referral, with provision for the parties by agreement to extend the period by an additional 30 days\(^\text{20}\). Rarely, if ever, does the mediation occur within 120 days of the date of referral. We believe it fair to say a 6-month time period is commonplace.

46. The delayed introduction in Jamaica of mandatory mediation allows for an empirical assessment of its effect on the length of time a trial matter takes from the filing of the originating document to the receipt of judgment. In the four years prior to the introduction of mandatory

\(^{16}\) CPR 28.9 (1) (b)
\(^{17}\) CPR 32.6(4).
\(^{18}\) For all matters save those commenced by FDCF; Administrative Law proceedings, Habeous Corpus & Bail applications; Non-contentious Probate proceedings and Admiralty proceedings – CPR 74.3(1)
\(^{19}\) Part 74 – Incorporated into the Jamaican CPR on 18 September, 2006.
\(^{20}\) CPR 74.8 (1)
mediation this was reduced from a 4-5 year average under the old rules to an average of 1½-2 years. Civil litigation in modern Jamaica then enjoyed its greatest period of efficiency. In the immediate aftermath of the introduction of the CPR the gain in the timeliness of the delivery of justice from our civil courts was instantaneous and noticeable.

47. The introduction of compulsory mediation at the end of 2006 contributed to the undoing of that gain. Once again it takes four years for the average civil trial matter to progress through the system if not resolved at mediation.

48. To reclaim that former efficiency mediation may need to be made optional (i.e. litigants who want it must opt-in *via* an application in lieu of the current position under the rules of having to apply to opt-out if they do not\(^\text{21}\)). In all cases the default position for Supreme Court litigants would then be the avoidance of mediation. Litigation is, after all, a thing of last resort. Assuming that to be true some kind of conciliation process is likely to have been unsuccessfully attempted by the parties prior to suit being filed. Viewed from this perspective it is logical that mediation be optional instead of compulsory. This change, by itself, could do much to recapture the timeliness of justice delivery experienced in Jamaica in the immediate aftermath of the implementation of the CPR.

\(^{21}\) CPR 74.4
Non trial pathways to judgment

49. Civil litigation is all about money claims and commerce. The importance to men and women of commerce of the resolution of their disputes speedily cannot be overstated. “Time is money!” All efficient dispute-resolution systems recognize this. In Jamaica the mission statement of our Supreme Court and Court of Appeal is “timely delivery of a high standard of justice for all”. The word that comes first in that mission statement (and without which the ability to achieve of the remainder of the objective is questionable) is perceived by many to be our greatest challenge. “Justice delayed” is indeed “justice denied” more often than not.

50. In recognition of this fact, the civil procedure rules provide a litigant with numerous non-trial pathways to judgment. All of them are to be used, in appropriate circumstances, to achieve the overriding objective of dealing justly with a case. We mention some of them below.

51. Striking out statements of case: Tools are provided for weeding out spurious and vexatious claims in advance of trial via the issuance of judgment consequent on a striking out of a party’s statement of case because it:

   a. is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;
   b. discloses no reasonable ground for bringing or defending the claim;
   or
   c. is prolix.

\[^{22}\text{CPR 26.4}\]
\[^{23}\text{CPR 26.4 (1) (b) (c) & (d)}\]
52. **Judgment on Admissions:** Where one party admits the whole or a part of the other party’s case (be it in an acknowledgment of service, statement of case or by letter) before or after the issue of proceedings, the rules allow the other party to apply for judgment on the admission\(^{24}\). Obviously the admission needs to be of a fact in relation to which judgment (in whole or in part) can issue. A detailed scrutiny of the Acknowledgment of Service or the documents disclosed may produce one or more such nuggets which can be used to elicit judgment without proceeding to trial. The absence of such a nugget does not mean that the matter must proceed to trial. Judgment on admissions is but one arrow in the CPR’s quiver.

53. **Summary Judgment:** The rules provide a procedure whereby the court may decide a claim or a particular issue without a trial if it considers that:

   a. The claimant has no real prospect of succeeding on the claim or issue; or
   
   b. The defendant has no real prospect of successfully defending the claim or issue\(^{25}\).

54. Once the material before the court suggests an inevitable outcome, a trial of the issues becomes a waste of time and resources, and an application for summary judgment is the appropriate course. The court cannot give summary judgment in\(^{26}\):

   a. Proceedings for redress under the Constitution;
   
   b. Proceedings against the Crown;
   
   c. Proceedings by way of fixed date claim;

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\(^{24}\) Part 14 of the CPR  
\(^{25}\) CPR 15.1 and 15.2  
\(^{26}\) CPR 15.3
d. Proceedings for:
   i. False imprisonment;
   ii. Malicious prosecution; and
   iii. Defamation;

   e. Admiralty proceedings in rem; and

   f. Most probate proceedings.

55. Ordinarily, none of the above applies to contentious, commercial disputes. This area, more than any other, spawns summary judgment applications whenever the circumstances suggest an inevitable outcome one way or the other. Voluminous documents and the facade of complexity do not rule out an application for summary judgment. The judge dealing with a summary judgment application in such instances should look beneath the facade and focus on whether or not the outcome seems inevitable. If so, he should grant summary judgment.

56. **Security for Costs:** Whenever the court orders a claimant to put up security for the defendant’s costs\(^{27}\) it must also order that “if security is not provided in accordance with the terms of the order by a specified date, the claim is struck out”\(^{28}\). The circumstances in which the court will order security for costs include (but are not limited to) where the claimant:

   a. is ordinarily resident or incorporated outside of the jurisdiction, or
   b. has taken steps with a view to placing his assets beyond the jurisdiction of the court;

and it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order.

\(^{27}\) Part 24 of the CPR
\(^{28}\) CPR 24.4 (b)
57. There is every reason for this procedure in jurisdictions like ours where the general rule is that an award of costs follows the outcome of the case. Claimants who fall into either of the above categories will be out of reach of the successful Defendant seeking to execute against them the order for costs made in his favour.

58. The mandatory imposition of the striking out consequence that follows a Claimant’s failure to put up security for the Defendant’s costs when ordered do to do, operates to excise opportunistic litigation from the court list well in advance of trial.

59. Opportunistic claimants are those who seek a hefty payday by way of initiating suit while taking steps to insulate themselves from the costs consequences of losing. In this jurisdiction it has, in recent times, become noticeably more difficult to obtain an order for security for costs as many judges go no further than considering it a possible fetter on a person’s right to pursue his action. We encourage them to revert to considering all the pertinent factors (of which that is just one) in determining whether it is just that an order for security for costs be made. There is a need to sufficiently appreciate the significance of the inclusion in our rules of an entire part devoted to applications for such orders, and of the role such orders play in de-clogging the court’s list.

60. A defendant does not choose to be a litigant. If he’s to avoid default judgment, he has no choice but to defend himself. This is costly and a defendant who prevails at trial ought not to then be confronted with difficulty in executing the costs order made in his favour because the unsuccessful claimant has squirreled his assets out of reach.
61. **Offers to Settle:** Settlement of a matter removes it from the court’s list. Encouragement of settlement is a recurrent theme in the region’s procedural rules. The part of the rules devoted exclusively to offers to settle illustrates this, yet this facilitator of justice is much underutilized.

62. Underpinning the procedural rules applicable to offers to settle is the threat of financial consequences being visited upon litigants who obstinately refuse reasonable settlement offers. The rules set out the means by which either party can make an offer to settle which, if not accepted, attracts the consequences of:
   a. An abnormally high interest rate of 20\% per annum being allowed on damages awarded to a successful claimant who obtains judgment for a sum equal to, or greater than, that which he offered to accept in settlement of the matter\(^29\).
   b. The post-offer costs (inclusive of the trial costs) being awarded to an unsuccessful defendant whose offer to settle the claim exceeded the damages ultimately awarded by the court\(^30\).

63. Bear in mind that interest on an award of damages rarely exceeds 6\% per annum. Against that background it is readily apparent that the penalty rate of 20\% imposed by the rules is designed to encourage acceptance by defendants of claimants’ offers to settle that are reasonable.

64. Similarly the threshold of 85\% of the judgment sum which triggers the costs of the trial being awarded to an unsuccessful defendant even though he has lost the case, promotes the making of reasonable settlement offers by defendants. It’s no longer enough for an unsuccessful defendant’s settlement offer to merely match the sum awarded to the claimant as damages in order for him to be awarded the

\(^{29}\) CPR 35.15 (2)  
\(^{30}\) CPR 35.15 (1) (a)
post-offer costs (inclusive of the costs of trial). A defendant’s offer, to now be considered reasonable, must exceed the damages ultimately awarded to the claimant. Such offers encourage reasonable defendants’ offers thereby, in turn, increasing the likelihood of acceptance.

65. Reasonable offers to settle court actions or appeals are rejected at the litigant’s peril. By actively promoting the acceptance of reasonable offers the rules facilitate justice and clear the decks for trial of only those matters that ought to proceed to trial.

66. If offers to settle are to work in the way our procedural rules intend, all our judges need to hand down their final decisions in draft (exclusive of costs and interest) and then invite submissions from counsel on those items. Only a few do so now. This is because neither the fact nor the amount of an offer to settle is to be communicated to the court before all questions of liability and the amount of money to be awarded have been decided\(^\text{31}\). The judges of the Supreme Court and Court of Appeal ought always to contemplate the possibility that an offer to settle the matter may have been made which, if unreasonably refused, ought to affect their award of costs or interest.

67. As an added bonus and encouragement for making reasonable offers to settle, our procedural rules no longer require such offers to be secured with payments into court\(^\text{32}\). This is particularly beneficial to defendants whose ability to make reasonable offers to settle would otherwise have been restricted by their unwillingness or inability to tie up their cash resources while awaiting the trial of the action.

\(^{31}\) CPR 35.5(3) and CAR 1.1 (10) (j).
\(^{32}\) CPR 36.1 (2)
68. So it is that, in these and very many other ways, our rules of procedure aim to facilitate the delivery of justice not only at trial but, in appropriate cases, by avoiding trial altogether.