THE WOOLF RULES AND COMMERCIAL LITIGATION

By Sir Jonathan Mance

1. The Woolf Rules, in their official form, occupy three heavy loose-leafed volumes. Many had predicted an equally heavy burden of appellate litigation. So far this has been less obvious. Why may be too early to identify. We may be experiencing a calm before the storm. Practitioners have been engaged in digesting and keeping up with what remains a continuing process of revision. But, more fundamentally, I suggest as one reason that the rules have been designed to give greater management powers to first instance judges, and that the corollary is that procedural decisions are less open to review. The seriousness with which litigants will have to approach the preparation and presentation of such decisions in future is underlined by *Matthew v. Tarmac Brick & Tiles Ltd* (C.A., 14th June 1999).

2 In this short paper, I intend to focus on some aspects of the new rules which may prove particularly significant in insurance litigation - whether between insureds and insurers or involving third parties in liability or subrogation situations.

The Overriding Objective

3. The essential starting point for any understanding of the Woolf Rules is the overriding objective expressed in Part 1. The just handling of litigation now specifically includes not only ensuring that it is dealt with expeditiously and fairly, but saving expense, dealing with the case in ways proportionate to the amount involved, its importance and complexity and the financial positions of the parties, ensuring that parties are on an equal footing and allotting to the case an appropriate share of the court's resources, whilst taking into account the need to allot resources to other cases. These are matters which only the court can assess and decide. It is said, rightly, that the new rules aim at a change in culture. The overriding objective, and the court's duty and powers to give effect to it, are the keys to that change.

4. The overriding objective introduces at least three largely if not entirely novel concepts: proportionality in relation to the issues, practical parity between the parties and an appropriate allocation of resources between the parties and the court. The wheels of English justice should no longer resemble the mills of god - described by Goethe as grinding slowly but extremely fine. Costs, complexities and delays are no longer to be considerations or tools that powerful litigants - insurers included - may rely on or deploy to enforce their positions or to defeat claims which they believe ill-founded. Just as much to the point, the aim is to discourage and prevent the exhaustive conduct of English litigation. The risk of this occurring is often as much the responsibility of lawyers as their clients. Diligent professionals, left to themselves, sometimes generate a remarkable head of aggression. Experience shows that the over-competitive -

one may even say overly *macho* - conduct of litigation can lead to a flood of communications passing in each direction on single days. If and when the matter comes before a court, most of this commonly evaporates into insignificance. It is often - wisely - never even referred to. Discovery is one area where this phenomenon has in the past been particularly apparent. It is one of the many areas where the Woolf reforms intend a firm, court-imposed restraint.

5. In smaller cases, with limits on legal representation and/or recoverable costs and tight time limits, the aim of the reforms should to a considerable extent be self-policing. In larger cases, it must be for judges to grasp the issues, lay down timetables and assess likely costs at the outset. The rules and practice directions do not call for schedules of predicted costs to be prepared or presented, except in particular contexts. Where for example a summons lasts a day or less, the judge is normally expected to fix the costs payable by one party to another. But if the overriding objective is to achieve its full impact, it will be necessary for judges to seek such schedules at other and earlier stages. Commercial judges traditionally handle their own interlocutory work. They have always engaged in management of cases before them. But the new rules carry this beyond their not inconsiderable experience.

The prior rules

6. The common law has traditionally preferred a case by case approach to uncertain statements of general principle. Advocates working under the new rules may seek instinctive refuge in authorities under the old rules, and in the copious notes to the Supreme Court Practice 1999. The achievements of that work and its editors are not to be under-estimated. But it is generally unhelpful to resort to the old rules, notes, or authorities in situations where the new rules represent a new code. The new rules are intended as a new start. Where (as under Part 50 and schedule 1) they incorporate with minor modification former rules of the Supreme Court or County Court, the position is somewhat different. But it must still be remembered that the philosophy governing their application in particular situations has changed quite radically - since the overriding objective applies to all litigation from 26th April 1999 onwards (Part 51 practice direction paragraph 12).

Duties of the parties

7. Part 1.3 provides: "The parties are required to help the court to further the overriding objective". Until now, clients have owed duties in specific areas, for example when making discovery or when giving evidence. Lawyers also owed positive duties to advise their clients in areas such as discovery. They have always been obliged not to mislead the court on law or fact. They could become obliged to cease to act if, for example, it became apparent that their clients were not complying with their duties. But the imposition of an express general duty

on parties themselves is quite new. Its general aim is plain. Litigation is, or is no longer, a battle or game. Transparency and frankness are the intended keynotes. The items with which I next deal are facets of this development.

Pre-action protocols

8. In the specific areas of personal injuries and clinical disputes, pre-action protocols and practice directions formalise the expected pre-litigation steps. Their aim is to resolve any dispute without proceedings where possible, and to facilitate the efficient management of proceedings where litigation cannot be avoided. They encourage the exchange of relevant information and documents prior to any proceedings, and the court may take into account any non-compliance with them when managing any subsequent proceedings, and when making orders for costs. The time limits under which defendants or their insurers may have to act under these protocols may well represent a shift in the balance of advantage in litigation, from defendants to claimants.

Pre-litigation conduct in other cases

9. The pre-action protocol practice direction, paragraph 4, also makes clear that the court will expect parties in all cases, in accordance with the overriding objective, to act reasonably in exchanging information and documents relevant to the claim and generally in trying to avoid the necessity for the start of proceedings. Part 31.16 provides a general power to order standard disclosure between likely parties to proceedings, before their commencement, where "desirable" to dispose fairly of the proceedings, or to assist the resolution of a dispute without proceedings, or to save costs. The resolution of a dispute without proceedings, logically, embraces not just revealing the hopelessness of either the claim or any defence, but also the successful pursuit of ADR.

10. What the rules do not explicitly address is the position of a defendant convinced that a claim is fraudulent, but still searching for the material to assert this. Under prior procedures, he would often have held his hand, while seeking to investigate and elicit as much information as possible. Positively misleading behaviour or tactics clearly cannot, on any view, be accepted. But it seems unlikely that the new rules require or oblige a party to raise on a tentative basis a case of fraud at an earlier stage than he could properly do so under the previous procedure. Courts are not unaware that some insurance claims take considerable time and effort to investigate. On the other hand, the new rules offer no scope for or encouragement to time-wasting.

Statements of truth

11. Statements of case (claims, defences and counterclaims), responses to orders to provide further information, amendments and witness statements must all be verified by a statement of truth (cf Part 22.1). The statement must made by the

party, his legal representative or the witness as the case may be. The making of such a statement carries the risk of proceedings for contempt if it involves a false statement made without an honest belief in its truth. The relevant practice directions speak of belief in the facts stated. This robust and blunt requirement will not usually create any problem. In complex situations - where a lawyer formerly would have comforted himself that a matter was sufficient pleadable - the requirement could pose problems of epistemology. What is truth, in circumstances where all that exists is circumstantial evidence and inferential conclusions? What degree of assurance is involved in belief? But courts are unlikely to expect either a lawyer or his client to engage in philosophical problems which have defied solution since Plato. If the factual case raised has a real prospect of success (see paragraph 12 below), it must with common sense be possible to formulate an appropriate pleading supported by a corresponding statement to enable its pursuit.

Summary dismissal or determination

12. Part 3.4 retains in familiar language powers to strike out a statement of case if it discloses no reasonable cause of action or is an abuse of the process. But Part 24 introduces a new and broader control over both claims and defences. Summary judgment may be given if the court considers that either the claimant has no real prospect of succeeding on, or the defendant has no real prospect of successfully defending, the claim or issue. "No real prospect" is a new formulation - on its face wider than any former power to dismiss for abuse or vexatiousness. Whether and how far the "reality" of any prospect may itself be sensitive to the amount at issue or the significance of the issues for the parties remains for argument. That the courts are generally being encouraged to take a more robust approach is clear.

Disclosure

13. Too often - as I have indicated - automatic disclosure of documents under the old rules proceeded in a manner reflecting the fullest conceivable width of the principles in *Peruvian Guano* (1882) 11 QBD 55. These included not merely documents of direct relevance to a party's case, but those which might fairly lead to a train of enquiry which might enable a party to promote his own or damage his adversary's case. Even under the old rules, Colman J's valuable decision in *O. Co v. M. Co* [1996] 2 LlR 347 drew attention to the need for realism and restraint, particularly under modern conditions, in the application of those principles, as well as to the considerable powers possessed by the court in that connection even under those rules. Under those rules, however, matters involving disclosure often only reached the court too late - after parties had already incurred very substantial costs pursuing each other for remote discovery. Under the new rules, disclosure will in the first instance be limited to standard disclosure. This means generally, under Part 31.6, documents on

which the party relies, or which adversely affect his or another party's case, or support another party's case. A party who wishes a further order will have to justify its appropriateness under Part 31.5 and 31.12. One may argue about the precise verbal effect of the new formulation. But the intended and practical effect is certainly to curb the costs and excesses which have marked disclosure of documents in the past.

14. I do not wish to be thought to be undermining or underestimating the significance of disclosure for the just resolution of disputes. Particularly in heavy commercial litigation - as much insurance litigation is - the key to factual issues, and to successful cross-examination to expose unsound oral evidence, often lies in disclosure. The tool which English law offers in this regard may be one reason why parties are prepared, voluntarily, to select this jurisdiction for litigation and arbitration. English law stands between the exuberance of an American approach of oral "discovery" allowing sometimes seemingly endless questioning by lawyers of and inconclusive answering by witnesses in the absence of the judge, and a civil law approach restricting disclosure to those documents which a party chooses to produce or can be shown to possess. Any English advocate and judge will have cases in mind where a particular point has only been exposed, and a particular result only reached, through disclosure. That makes it the more important that the institution should not be discredited by misuse or abuse. The aim of the new rules is to prevent this - to reinforce and secure a valuable tool, not to remove it.

Experts

15. The problems perceived in this area include the wasteful and unnecessary incurring of costs through the engagement of experts on each side - to undertake a task and enable conclusions which a single expert could have achieved. But they also include a different problem - one, once again, the product of the adversarial nature of English litigation. Experts were enlisted as members of a team, and became, only too often and whether consciously or sub-consciously, associated with the pursuit, for better or for worse, of the particular case of the party engaging them. As a matter of principle, this was never permissible under the old rules: see eg., *Whitehouse v. Jordan* [1981] 1 WLR 245, 256 per Lord Wilberforce and *The Ikarian Reefer* [1993] 2 LIR 68, 81- 82 per Cresswell J - authorities where the requirement for independence, objectivity and frankness were squarely emphasised. But there can be no doubt that further steps were necessary to enforce these principles. The area is however quite intractable, and will require careful monitoring, lest litigation ingenuity threatens to subvert the intended simplicity, cost-saving and transparency of the Woolf reforms.

16. The new rules start by stating that the duty of an expert to help the court on matters within his expertise overrides any obligation to the person instructing

him (Part 35.3). This links with a new power for an expert - without giving notice to any party - to request directions from the court to assist him in the manner in which he carries out his functions (Part 35.14). A party whose expert changes his view and concludes that the other side's case is correct may find that this is revealed before the party can think of dismissing the expert or seeking alternative assistance. In the same vein, any expert's report must contain statements designed to bring home to the expert the need for independence, objectivity and openness, and must state the substance of the expert's instructions. Part 35.10(4) provides that such instructions are not privileged, although the court will not order disclosure of specific documents or allow cross-examination without reasonable grounds for suspecting that the expert's own statement of his instructions is inaccurate or incomplete. The removal of privilege in this area is a matter which may itself generate future disputes. (Compare *General Mediterranean Holdings S.A. v. Patel* (Commercial Court, Toulson J., 19/7/99).

17. Above, all, it is a constant theme of the new rules that the court should consider whether party-appointed experts should be replaced on all or any particular issue(s) by a single expert. The Commercial Court Guide (in its fifth edition introduced by paragraph 9 of the Commercial Court practice direction in Part 49D to the new rules) suggests that in many commercial cases, a single expert will not be appropriate. Clearly, the court will not accept this proposition in any particular case without close examination. Obvious cases where numerous experts could be appropriate are where there are different schools of thought in a particular area of expertise, or room for different analyses of the relevant facts. How far parties - in any case where a single expert is appointed, or indeed in cases where party-appointed experts are put forward - will instruct yet further experts behind the scenes, in order to obtain unrestricted access to expert advice without risk of its exposure to public scrutiny, remains to be seen.

Case management conferences

18. These conferences will be the occasion for procedural decisions on the topics already covered. I wish also to emphasise the scope given by the new rules for directing the separate trial of particular issues. The Commercial Court has for years - in particular since Saville J was judge in charge of the list - pioneered the idea that particular issues may prove determinative in commercial reality, even if not in law. Their resolution may assist the parties to see more clearly where they stand and to settle other issues. Orders for the separate hearing of particular issues do however require great care in their making. Simple splits of "liability and quantum" can leave unsatisfactory uncertainty about sometimes critical matters like causation. The need for a full grasp of the issues is nowhere more relevant than in the exercise of the powers of management afforded in this respect, under Parts 1 and 3 of the new rules.

19. Other matters which merit brief reference include the court's express duty and power in Part 1.4(f) to help the parties "to settle the whole or part of the case". This links with what I have said in paragraph 17. It also leads directly to the subject of alternatively dispute resolution ("ADR"), encouraged for some time by the Commercial Court and referred to in Part G of the current Commercial Court Guide. Compulsion to mediate is ultimately a contradiction in terms, apart from any difficulty in reconciling it with article 6 of the Convention on Human Rights. But there is also no doubt that parties are on occasion their own worse enemies. Fearing to appear weak, they take no step towards what may at any early stage be quite feasible accommodation. The court's suggestion can come as a positive relief. A tough mediator can also work wonders in the right case. In insurance litigation, the resolution of legal issues (eg., non-disclosure) can present a black or white outcome in circumstances where a broader, commercial view may be more nuanced. It is an area where ADR can be particularly suitable.

20. I should also touch on the court's powers to control evidence by giving directions as to the issues on which the court requires evidence, the nature of the evidence which it requires on those issues and the way in which it is to be placed before the court, and to limit cross-examination (Part 32.1). These are broadly expressed powers and a novelty so far as they permit a civil court to exclude otherwise relevant evidence (eg., because its prejudicial effect outweighs its probative value: see *Grobbelar v. Sun Newspaper Ltd* (C.A., The Times 12.8.99). Their exercise again requires a clear grasp of the issues backed by good sense and fairness.

Conclusion

21. The hall-marks of the new rules are speed, cost-efficiency and transparency. I have little doubt that some insurance litigation has in the past been conducted with the aim of promoting or defeating a claim not on the merits, but by virtue of factors such as cost or delay, or even if where this has not been expressly intended in a way likely to lead to that consequence. "Cards on the table" has not been the governing principle of insurance litigation - despite the insurance world's emphasis, in contexts other than litigation, on "*uberrima fides*". Insurance litigants on both sides must now accept a new world in which court control will or should enforce mutual openness. Defendants will no longer be able to sit back, to wait for the case against them to unfold or to strike if it is not pursued. If they are not quick and focused in their reaction to and handling of claims, they may find that the balance of advantage has shifted to claimants. Claimants will have had to prepare their case before they start, and they can then expect defendants to disclose their position at an early stage - although of course one purpose of the procedure for pre-action protocols is to prevent claimants seeking tactical advantages in this way. There will be tighter court control of

unmeritorious litigation (claims or defences). The requirements on parties regarding statements of case (Part 22.1), lists of documents (Part 31.10(6)) and, if ordered, attendance at court at any hearing (Part 3.1(2)(c) and see Part 29 practice direction, paragraph 5.6(2)) all connote much closer personal responsibility on litigant's part. The court's aim will be to ensure that the substance of the real issues is identified and disclosed with a view to as early resolution of the dispute as possible. ADR will, in suitable cases, be a valuable supplement. The lessons of all this are insurance litigants will have to give genuine, closer and more personal attention to litigation in which they are involved, and would be unwise to view it as the tactical affair which past litigants on both sides have sometimes seen it as.

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