Woolf at the Door

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In April 1998 it was my honour to address the distinguished members of the Minji Tetsuzki Hou Hanrei Kenkyuukai on pleadings in the English legal system. At that time I was careful to caveat my every word by mentioning that when the reforms proposed by Lord Woolf in "Access to Justice" were implemented, the civil legal system in England and Wales would be fundamentally changed. That historic moment is now upon us. On 26 April 1999, the Woolf Reforms came into force and have changed the way in which civil justice is made available to litigants.

On 26 April 1999, the Rules of the Supreme Court (affectionately known as the "White Book" by practitioners) were replaced with a new set of rules called the Civil Procedure Rules or "CPR" for short. These new rules have been designed to make access to justice quicker, easier and cheaper than ever before.

The CPR will bring uniformity to proceedings in the County Courts and the High Court (although it should be noted that the Commercial Court will operate under a slightly different set of rules). I have focused here on non-commercial court actions. The new rules establish a three "track" system of justice which the courts will manage and operate. Broadly speaking the "track" to which the court allocates a case will be primarily dependent on the value of the claim. For claims for under £5,000, normally the court will allocate the case to the "small claims track", for claims worth between £5,000 and £15,000 to the "fast track" and claims worth over £15,000 to the "multi-track". Of course, the court will also take into consideration other factors when allocating a case to a particular track. These factors will include the complexity of the case, its importance to the parties and whether or not a Practice Direction or other court

guidance requires the case to be heard in a particular court or on a particular list of the High Court. The court will allocate each case to a particular track based on the party's answers to an "Allocation Questionnaire" which will be sent out when the Defence is filed with the court. This multi-level system for the dispensation of justice is a key feature of the new regime and it is by applying principles of proportionality to each track that it is hoped justice will be more readily available at a price and within timeframes proportionate to the value and importance of each claim.

In this article I will focus on two main areas in some detail. I will first look at pleadings, which are now to be called "Statements of Case" and later at the recovery of costs. Changes in these two areas are fundamental and it will be extremely interesting to see how law and practice develops in response to the new CPR.

Statements of Case

When I delivered my lecture to the distinguished members of the Minji Tetsuzki Hou Hanrei Kenkyuukai I focused on pleadings. Much of what I said at that time is superseded by the new rules in the CPR. One of the fundamental reforms is an attempt to make civil procedure more understandable to participants. Latin tags are no longer used, "plaintiffs" are now "claimants", "pleadings" have become "Statements of Case", "leave" has become "permission of the court" and "ex parte applications" have become "hearings without notice". Other changes are more substantial.

The old system of pleadings, about which I spoke last year, has been criticised as failing to set out the important facts sufficiently clearly, which may prevent the early identification of the real issues of the case. As I explained at that time, pleadings were technical documents which were often drafted to be as long and vague as possible to avoid committing the parties to any one claim or Defence. In addition, pleadings under the old system were frequently amended shortly

before or at trial. This was often because important facts were not identified until relatively late in the proceedings.

In his Interim Report dated June 1995, Lord Woolf set out that the role of pleadings was:

> "To set out the facts relied upon so that the court and the parties can ascertain what the dispute is about and the court can take appropriate decisions about its management."

Lord Woolf's Interim Report goes on to say that:

> "... pleadings should enable the court and the parties to identify and define the issues in dispute, in particular enabling the court to direct summary trial of specific issues and to limit the matters that will eventually need to be tried. They should also enable the court to make decisions about such matters as the appropriate case management track and venue."

The changes to the system of pleadings (now called Statements of Case) are discussed in detail below. In order to put into perspective the intended effect of the reforms, it is necessary to explain Lord Woolf's overriding objective. The new system of Statements of Case is central to the way in which Lord Woolf's overriding objective is to be achieved.

The Overriding Objective

Rule 1.1(1) of the CPR states that the CPR is:

> "a new procedural code with the overriding objective of enabling the court to deal with cases justly."

Rule 1.1(2) goes on to state that dealing with the case justly includes ensuring as far as possible that the parties are on an equal footing, expense is minimised, and that the procedure should deal with cases in ways proportionate to the value of claims, the importance of the case, the complexity of the issues and the financial position of the parties. The court should also ensure that the matter is dealt with expeditiously and fairly, allowing it an appropriate amount of court

time.

In order to meet the overriding objective, the court must actively manage cases (Rule 1.4). It seems that the court will do this by requiring the early identification of all major issues, encouraging the early use of alternative dispute resolution and the setting down of strict timetables and directions to allow justice to be provided speedily and efficiently. The parties to a case will be encouraged to conduct a cost/benefit analysis of each step in the case, make appropriate use of technology and to minimise court attendances dealing with interlocutory issues. However, when a court hearing is necessary, the court will want to deal with as many issues as possible.

Making a ClaimStatements of Case

The CPR will govern the procedure in all civil courts. Although less complex, less valuable claims will be heard in the County Court as under the old regime, the same procedural rules will be applied to both the High Court and County Court (although the Commercial Court will largely operate under its own set of rules).

(a) Pre-Action Protocols

Before commencing any litigation in a court, the parties will be expected to comply with newly introduced "Pre-Action Protocols". Eventually Pre-Action Protocols will cover most of the kinds of actions which will be brought before the courts. However, as at 26 April only Pre-Action Protocols dealing with personal injury and the resolution of clinical disputes were in force. Other Pre-Action Protocols are in the pipeline and will be issued in the future. The Practice Direction governing protocols sets out (at 1.3) that their aim is to outline the steps parties should take to seek information from and to provide information to each other about a prospective legal claim. The Practice Directions sets out, at 1.4 that the objectives of Pre-Action Protocols are:

"(1) to encourage the exchange of early and full information

about the prospective legal claim ;

(2) to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings ;

(3) to support the efficient management of proceedings where litigation cannot be avoided."

Under paragraph 2. 1 of the Practice Direction the court may take into account the degree of compliance with an applicable protocol when giving directions for the management of a case and when ordering costs. The general rule is that the court expects all parties to have complied with any applicable Pre-Action Protocols (paragraph 2. 2).

Paragraph 2. 3 of Practice Direction, provides that where the court decides that non-compliance has led to the commencement of proceedings unnecessarily or costs being incurred that might otherwise have been avoided, the court may make an order punishing the party at fault. The orders which the court may make include that the party at fault pay the costs of the proceedings (or part thereof), and this order may be on an indemnity basis if the court so decides. If the claimant is at fault, and the claimant ultimately succeeds, the court may order that no or a reduced amount of interest is payable on the sum awarded. Similarly, if the party at fault is a defendant, a penal rate of interest may be ordered by the court (which will not exceed 10% above base rate).

In the vast majority of cases as at 26 April, there will be no Pre-Action Protocol in force. Paragraph 4 of the Practice Direction states that :

> "In cases not covered by any approved protocol, the court will expect the parties, 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".

(b) The Claim Form

After complying with any applicable Pre-Action Protocol, proceedings are now commenced by the claimant having the court issue a Claim Form. Under rule 16.2, the Claim Form must concisely state the nature of the claim, specify the remedy sought and, where the claim is for money, contain a statement of value. The Claim Form must also contain a statement of truth which verifies that the facts contained in the Claim Form are true.

Claimants will have the choice whether or not to include full particulars of their claim on the Claim Form or not. If the Particulars of Claim are not set out on the Claim Form, the Claim Form must state they are to follow.

Generally, Claim Forms will only be issued in the High Court if the claimant expects to recover more than £15,000 (or £50,000 in personal injury cases) or where a particular enactment provides that the claim may only be brought in the High Court (or where the claim must be heard in a specialist High Court list).

The Practice Direction relating to Statements of Case indicates that the Particulars of Claim should, if practicable, be set out in the Claim Form. Whether the facts are set out in the Claim Form or in Particulars of Claim, they will need to be verified by a statement of truth. Rule 16.4 of the CPR requires the Particulars of Claim to include a concise statement of the facts on which the claimant relies, together with any claims for interest and details of any special damages sought. The Statements of Case Practice Direction (at section 10.3) will also require that copies of contracts under which claims are made be attached or served with the Particulars of Claim.

As under the old system, the CPR requires certain matters to be specifically pleaded if relevant. These include allegations of fraud, illegality, notice and any facts relating to mitigation of loss or damage. In addition, if misrepresentation, breach of trust or undue influence are alleged, full details must be set out in the Particulars of Claim.

Under the old regime it was not permissible to plead law in a statement of claim. That has been changed by the CPR. Paragraph 11.3 of the Statements of Case Practice Direction allows a claimant to refer to any point of law on which his claim is based, name any witness he proposes to call and to attach a copy of any document which he considers necessary to his claim, which can include an expert's report.

Rules 7.5 and 7.6 of the CPR relate to service of the Claim Form and Particulars of Claim. A Claim Form must be served within four months of the date of issue (or six months if it is to be served out of the jurisdiction). Generally the Claim Forms and Particulars of Claim will be served by the court, although the parties may choose to serve their Statements of Case themselves. Once Particulars of Claim are served rule 7.8 requires them to be accompanied by forms for defending, admitting and acknowledging service of the claim.

Acknowledgement of Service - Part 10

Under the old system, an acknowledgement of service was required to be served by the defendant in each defended case. Now, under the Woolf regime, part 10 of the CPR states that a defendant may acknowledge service if he is unable to file a Defence in time or if he contests the court's jurisdiction. Defendants have 14 days from service of the Claim Form (if it includes the Particulars of Claim) within which to acknowledge service should they so wish.

The Defence

Part 15 of the CPR requires a defendant to file a Defence within 14 days of service of the Particulars of Claim, or within 28 days if the defendant has served an acknowledgement of service. One major change is that the parties may only agree one extension of time for service of a Defence of up to 28 days. Any further extensions must be

sought before the court.

The Defence must state which allegations made in the Particulars of Claim are denied, which are admitted and which are neither admitted nor denied but which have to be proved by the claimant. As with the Claim Form, the Defence must be verified by a statement of truth. Under the pre-Woolf system it was not necessary for a party to give reasons for the denial of an allegation in a Defence. However, under the CPR, the defendant must give reasons for any denial, stating his own version of the facts where possible.

As with claims, there are certain matters which should be specifically included in a Defence if they are alleged. For example, a Defence must give details of the expiry of any limitation period the defendant relies on. It remains open for the defendant to bring a counterclaim or seek a contribution or indemnity from a third party under Part 20 of the CPR.

Whilst it is not required, it would be prudent for defendants to answer each and every allegation made against them. If an allegation is not dealt with specifically, the defendant will be taken to admit that allegation unless he has set out elsewhere in his Defence the nature of his case in relation to that allegation, in which case the court will take it that the allegation is to be proved.

The Reply and Allocation Questionnaire

Where a claim is defended, on receipt of a Defence the court will (normally) serve each party with an Allocation Questionnaire. The questionnaire asks questions to assist the court to allocate the case to one of the small claims track (usually claims under £5, 000), the fast track (usually claims between £5, 000 to £15, 000) or the multi-track (usually claims exceeding £15, 000).

If the claimant so wishes he may serve a Reply at the same time he sends in his "Allocation Questionnaire". The Reply must respond to any matters in the Defence not dealt with in the Particulars of Claim

and, once again, must contain a statement of truth. If a claimant does not serve a Reply there will be an implied joinder of issues between the parties and it will not be assumed that the claimant admits all or any part of the Defence. In order to serve any subsequent Statements of Case, permission of the court is required.

Part 20 Claims

Part 20 of the CPR governs what were formerly called counterclaims and third party proceedings. I will not go into great detail in relation to Part 20 Claims generally. However, a few points may be simply made about counterclaims under the new regime. A defendant will be able to counterclaim by filing particulars of the counterclaim with his Defence. The defendant to the counterclaim must file his Defence when he files his Allocation Questionnaire. If a Part 20 counterclaimant does not include the particulars of his counterclaim in his Defence, he will need the permission of the court to bring a counterclaim at a later stage.

In general, Part 20 claims will progress with the main claim as part of a united court-managed case.

Amending Statements of Case

Part 17 of the CPR governs the steps that need to be taken to amend a Statement of Case. In general, a party may amend his Statement of Case at any time before it has been served. However, in that case, the other party has fourteen days after service within which to make an application to have the amendments to the Statement of Case disallowed.

After a party has served his Statement of Case, it can only be amended with the written consent on all other parties or with the permission of the court. Amended Statements of Case must be re-verified by a Statement of Truth unless the court orders otherwise

(Rule 22.1(2) of the CPR and Section 15.4 of the Amendments Practice Direction)

In some situations it will be possible to amend the Statement of Case outside the limitation period. If the amendment adds or substitutes a new claim it must arise out of the same facts or substantially the same facts as a claim in respect of which the applicant has already claimed a remedy in the proceedings. In addition, the court will generally allow amendments that correct a mistake as to the name of a party where the mistake is genuine and one which would not have caused reasonable doubt as to the identity of the party in question. Similarly, if the amendment alters the capacity in which the party brings his claim the new capacity must be one which that party had when the proceedings commenced or acquired subsequently.

Conclusion

The new rules on statements of case should force litigants to clearly state their positions at an earlier stage than was previously the case. In turn this should allow the court to efficiently manage the progress of the case to trial. The way in which statements of case are drafted will be a key factor in the court meeting Lord Woolf's overriding objective. Inevitably, this will lead to more work being done at the beginning of a case (indeed it might be said that a well-prepared plaintiff will have an enormous advantage under the new regime, although the new Pre-Action Protocols (which are still awaited) may redress the balance in favour of a defendant).

No doubt practitioners will be keenly watching for any guidance the courts will give on how they expect statements of case to be drafted in the future.

Pay as you go Litigation - The New Rules on Costs

It is a long established feature of the English legal system that the

loser will pay the reasonable legal expenses of the winner. That principle remains under the Woolf reforms. However, the courts will take a much more active approach towards costs during the proceedings themselves, rather than waiting until the end as under the pre-Woolf regime. It is expected that the court will assess the level of recoverable costs each time the matter goes before a Judge or Master in the court. Where one party is awarded costs "in any event", that party will normally be entitled to receive payment of those costs (the amount of which will be summarily assessed by the Judge or Master) within 14 days. This is in effect a new feature, although under the pre-Woolf regime Judges and Masters had the power to summarily assess costs, but that power was rarely used.

Rule 44.7 of the CPR sets out the procedure for assessing costs. Under the new regime, where the court orders a party to pay costs to another party the court may either make a "summary assessment" of the costs or order a "detailed assessment" of the costs by a costs officer unless any rule, Practice Direction or other enactment provides otherwise. Summary assessment of costs will generally take place on each occasion the case comes before the court. A detailed assessment of costs will not normally take place until after trial. I have focused here mainly on the summary assessment process. The Lord Chancellor's Department has issued a Practice Direction governing the procedure for assessing costs under the CPR.

Under the Practice Direction, (paragraph 2.3) the court may make an order about costs at any stage in a case, but in particular it may do so when it deals with any application, makes any order or holds any hearing (where the costs order may relate to that application order or hearing).

Under paragraph 4.3 of the Practice Direction, whenever a court makes an order about costs (but not where fixed costs are ordered) the court must consider whether to make a summary assessment of costs. Paragraph 4.4 states the general rule that the court will make a summary assessment in two cases (unless there is a good reason not

to do so):

(a) after the trial of a fast track case (where the order will deal with the costs of the whole claim); and

(b) at the conclusion of any other hearing lasting less than one day where the order will deal with the costs of the application or matter to which the hearing related.

To allow the courts to make summary assessments, each party must file at the court and serve on the other party not less than 24 hours before a hearing, an estimate of their costs for that application. The estimate of costs must set out in detail all of the work done in relation to that application, the level of solicitor doing the work, the hourly charge out rate (and the time spent), disbursements (including Counsel's fees) and any applicable VAT.

The parties will be held by the court to the estimates of costs provided at any hearing. Accordingly, it will be very difficult to persuade a court to allow an amount in respect of costs which is greater than the estimate provided to the court at the end of an interlocutory hearing.

Where a court summarily assesses costs to be paid by one party to the other, the losing party has 14 days within which to pay the winning party the amount of costs summarily assessed by the court. Of course, it will not always be the case that clients attend interlocutory hearings. The CPR will redress this by placing the legal adviser to a party under a duty to inform his client of any adverse costs orders against it within seven days of the solicitor finding out about the costs order. (The solicitors duty to notify his client is found in rule 44.2 of the CPR).

Accordingly, litigants will have to face an element of "pay as you go" in respect of applications to the court. Of course, generally speaking clients will be used to paying their solicitors on a monthly or quarterly basis (unless they are on legal aid or have agreed a conditional fee arrangement with their advisers). The difference is that the unsuccessful party in any application is likely to have to make payments

to the successful party in an application as the proceedings take place. Previously, it was uncommon for an interim costs order to be made during litigation. I suspect that the pay as you go system will give paying parties the impression that their case is likely to fail and may promote settlement - especially as other changes to the civil procedure rules under the CPR lead to more costs being incurred by plaintiffs and defendants at the beginning of proceedings. Therefore it will generally be in the interests of organised and well prepared litigants to make applications before the court as soon as possible in the hope of obtaining favourable costs awards against the other side. Inevitably, that would force the other side to assess carefully the merits of their Statement of Case.

Under CPR rule 44. 3(4), the court must, when deciding what order to make about costs, consider all the circumstances including the conduct of the parties, whether a party has succeeded on part of its case (even if he has not been wholly successful) and any payment into court or an admissible offer to settle.

There are two bases on which the court may assess the amount of costs payable. In the absence of any other order, costs will be assessed on the standard basis (see CPR 44. 4(4)). In some cases the court may assess costs on the indemnity basis. Where costs are assessed on the standard basis the court will only allow costs which are proportionate to the matters in issue (CPR 44. 4(2)(a)) and where there is doubt as to whether costs were reasonably incurred or reasonable and proportionate in amount, that doubt will be resolved in favour of the paying party.

When applying the test of proportionality to costs incurred, the relationship between the costs incurred and the value of the claim may not be a reliable guide. This is recognised by the Practice Direction at paragraph 3. 1. Paragraph 3. 2 makes it clear that solicitors are not required to conduct litigation at rates which are uneconomic. As part of the case management regime by the courts, the parties will be encouraged to undertake a cost/benefit analysis of

each stage in the proceedings.

Whatever else may be the case, the front loading of costs in civil litigation and the possibility of obtaining interim payments of costs from parties will promote tactical thinking within the legal profession. The effect may be that parties will bring any strong applications they may have as quickly as possible to increase pressure on the other side. Equally, the new rules may reduce the number of "ambitious or speculative" applications, claims or defences.