Bahamas CPR Training 2002 Overriding Objective — Pre-action Protocols — ADR — Issue Identification and Treatment Transforming Legal Cultures

Session Two: 2nd March 2022

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The Overriding Objective

Getting to the Heart of the Matter

Part 1 CPR, 2002



At the end of this session participants will:

Become aware of and knowledgeable about the (i) interpretative and (ii) executory mandates of the CPR overriding objective in the context of:

- (a) Substantive and procedural justice;
- (b) Dealing justly with cases;
- (c) Principles of proportionality; equal footing; expedition; fairness; saving expense; enforcing compliance; and appropriate use of court resources.

Our Judicial Oath of Office: Who & What We Are

Official Oaths Act, Ch 31 – 1, Section 5, First Schedule (4), Laws of Bahamas



Establishing Some Overarching Context - 1

Constitution

S 2 – The Constitution is the Supreme Law

S 15 (a) – The Right to Protection of the Law

S 20 – The Right to be afforded a Fair Hearing within a Reasonable Time

(though specifically directed to criminal matters in s 20 the fair hearing principle is a general constitutional standard covered by the core preambular value of the rule of law and protection of the law)

Bangalore Principles of Judicial Conduct

Competence and Diligence – includes preparation, expedition, and efficiency in the performance of judicial functions including the delivery of reserved judgments

Establishing Some Overarching Context - 2

Competence: acting on the latest legal developments and performing duties and responsibilities relevant to the judicial function and the court's operations with excellence, including the just and fair management of cases, litigants, attorneys, Judiciary staff and the public.

Efficiency: managing cases in a timely and expeditious fashion and within established performance standards; maximizing the economic use of available court resources.

Effectiveness: managing cases in ways that are proportionate to the matters in issue and time and resources devoted to the case;

making decisions that are clear, coherent and enforceable and that further the objectives of the CPR, including the overriding objective of dealing with cases justly;

making decisions that reflect the fact that the Administration of Justice involves real people involved in real-life situations.

Impartiality/Fairness: At all times and at all stages matters must be conducted fairly and impartially, in relation to all court users - parties, witnesses, and attorneys.



Part 1 – The Overriding Objective

CPR 1.1

- 1.1 The Overriding Objective
- (1) The overriding objective of these Rules is to enable the court to deal with cases justly and at proportionate cost.
- (2) Dealing justly with a case includes, so far as 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 to
- (i) the amount of money involved;
- (ii) the importance of the case;
- (iii) the complexity of the issues; and
- (iv) the financial position of each party;
- (d) ensuring that it is dealt with expeditiously and fairly;
- (e) allotting to it 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.

Part 1 – The Overriding Objective

CPR 1.2

1.2 Application of overriding objective by the court

- (1) The court must seek to give effect to the overriding objective when –
- (a) exercising any powers under these Rules;
- (b) exercising any discretion given to it by the Rules; or
- (c) **interpreting** these Rules.
- (2) These Rules shall be liberally construed to give effect to the overriding objective and, in particular, to secure the just, most expeditious and least expensive determination of every cause or matter on its merits.

CPR 1.3

1.3 Duty of parties

It is the duty of the parties to help the court to further the overriding objective. In applying the Rules to give effect to the overriding objective the Court may take into account a party's failure to help in this respect.

[Part 25 deals with the court's duty to forward the overriding objective by active case management.]

The (i) Interpretative and (ii) Executory mandates of the CPR Overriding Objective

1.2 Application of overriding objective by the court

- (1) The court **must seek** to give effect to the overriding objective when –
- (a) exercising any powers under these Rules;
- (b) exercising any discretion given to it by the Rules; or
- (c) interpreting these Rules.
- (2) These Rules shall be **liberally construed to give effect to** the overriding objective and, in particular, **to secure** the **just**, **most expeditious** and **least expensive** determination of every cause or matter on its merits.



JUST DETERMINATION:



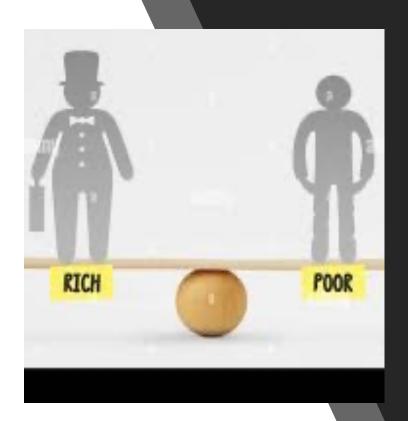
Dealing justly with cases:

CPR 1.1

- 1.1 The Overriding Objective
- (1) The overriding objective of these Rules is to enable the court to deal with cases justly and at proportionate cost.

Dealing justly with a case is not limited to the explicit statement as to what that includes, as set out in CPR 1.1(2).

Dealing justly with a case is ultimately a matter of judicial discretion and can be one of the most challenging tasks that the CPR Judge has to perform.



Principles of proportionality; equal footing; expedition; fairness; saving expense; enforcing compliance; and appropriate use of court resources

CPR 1.1

- **1.1 The Overriding Objective**
- (2) **Dealing justly with a case includes**, so far as is practicable:
- (a) ensuring that the parties are on an equal footing;
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- (i) the amount of money involved;
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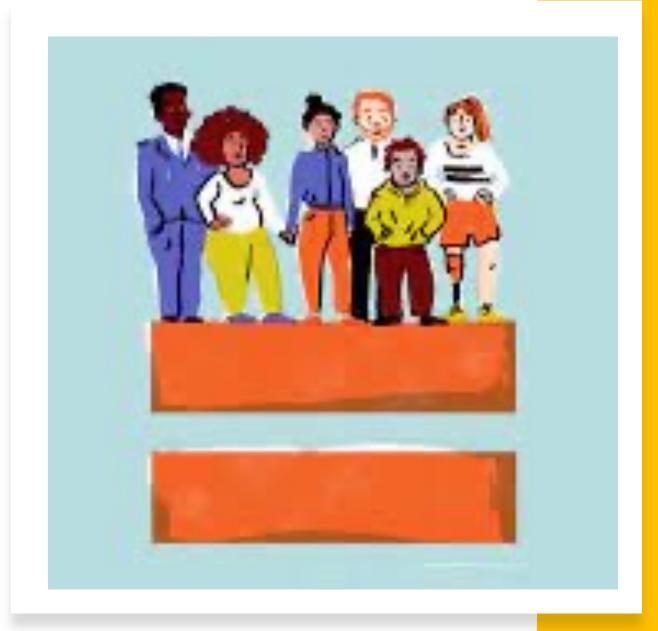
7 Key Principles

CPR 1.1

- 1.1 The Overriding Objective
- (2) **Dealing justly with a case includes**, so far as is practicable:

7 Key Principles:

- proportionality;
- equal footing;
- expedition;
- fairness;
- saving expense;
- enforcing compliance; and
- appropriate use of court resources



Substantive and Procedural Justice

The function of SUBSTANTIVE LAW is to define, create or confer substantive legal rights or legal status or to impose and define the nature and extent of legal duties.

On the other hand, rules of court are a source of PROCEDURAL LAW the function of which is to prescribe and regulate the machinery or manner in which legal rights or status and legal duties may be enforced or recognized by a court of law.

The two branches are complementary and interdependent, and the interplay between them often conceals what is substantive and what is procedural. It is by procedure that the law is put into motion, and it is procedural law which puts life into the substantive law, gives it its effectiveness and brings it into being.

Rules of court, therefore, are of fundamental importance to the good administration of justice ...

Neutrality

decisions are unbiased and guided by transparent reasoning



PROCEDURAL JUSTICE

Voice

all are given a chance to tell their side of the story





Respect

respect and dignity



Trustworthiness

trustworthy motives about those impacted by their

Substantive and Procedural Justice



... under the CPR ... it is no longer right to say that the court's function is to do substantive justice on the merits and no more.

The overriding objective adds the imperatives of deciding cases expeditiously and using no more than proportionate resources.

- Charmaine Bernard v Ramesh Seebalack [2010] UKPC 15 [23]

Substantive and Procedural Justice

The Court of Appeal of Trinidad and Tobago has unanimously observed that:

'Under the CPR, justice, therefore, is not distinct or superior to the overriding objective. Doing justice under the CPR is to enable a case to be dealt with justly in accordance with the overriding objective ...'.

- Charmaine Bernard v Ramesh Seebalack

With the CPR, there is **only just dealing**, and this happens when there is **the fair and just application of both the procedural and substantive law**, culminating in just disposition.

The New Role of the CPR Judge:

A fundamental ideological shift from a "lawyer-driven court" to a "Judge-controlled court".



The Court of Appeal of Trinidad and Tobago has also observed that:

[30] While it is accepted that in adversarial litigation judges must be cautious to always preserve the core judicial values of independence and impartiality, it is equally clear that the role of the judge under the Civil Proceedings Rules, 1998 is significantly different from what previously obtained. This is apparent from the overriding objective and the provisions of the CPR itself...

[32] The CPR, 1998 have brought about a seismic shift in the roles, responsibilities and powers of the court to manage and shape litigation, and to control its unfolding in terms of issues and timing.

- Her Worship Magistrate Marcia Ayers-Caesar and Another v BS, TT Civ App No 252 of 2015, [31]



Duty of Attorneys and Parties: To Render Assistance in Furthering the Overriding Objective

CPR 1.3

1.3 Duty of parties

It is the duty of the parties to help the court to further the overriding objective. In applying the Rules to give effect to the overriding objective the Court may take into account a party's failure to help in this respect.

A Segue into Case Management and Related Areas – Pre-Action Protocols & ADR

[Part 25 deals with the court's duty to forward the overriding objective by active case management.]

Pre-Action Protocols and ADR

Bahamas – Possibilities and Potential



At the end of this session participants will:

Become aware and knowledgeable about the utility and value of pre-action protocols and ADR, and in particular:

- (a) Be exposed to discrete measures/tools that animate the overriding objective and the transformational culture infused in the rules by promoting and facilitating settlements;
- (b) Be able to describe the enabling framework required for implementation of these measures;
- (c) Be able to demonstrate why adoption of these measures is critical
- (d) Be aware of the impact of the forgoing on the overriding objective on the Overriding Objective

Pre-Action Protocols (PP)

- Introduced in Trinidad and Tobago by a Practice Direction.
- The concept of PPs is to enable parties to seek information from and to provide information to each other about a prospective legal claim. The objectives are threefold:
- a) To encourage the exchange of early and full information about the prospective claim;
- b) To enable parties to avoid litigation by possible settlement;
- c) To support the efficient management of proceedings.



Pre-Action Protocols

- Compliance with PPs is obviously not required in urgent matters or where a period of limitation is about to expire. Where not urgent, however, compliance should be the norm and if not adhered to should be taken into account when the court decides to exercise a power under Part 26 (General Powers of the Court) or under Part 71 (Costs).
- Parties are expected to act reasonably and promptly in exchanging information and documents and in trying to avoid litigation.

Pre-Action Protocols

Contents of the Claimant's PP letter

- i) Concise details of the Claim;
- ii) Enclose copies of essential document relied on;
- iii) Ask for prompt acknowledgment of the letter;
- iv) Identify and ask for copies of any essential documents the defendant may have;
- v) Advert to possibility of mediation
- vi) Draw attention to the court's powers to impose sanctions for failure to comply with the practice direction



Pre-Action Protocols

Defendant's Response to the claimant's PP letter

The Defendant may:

- a) Accept the claim in whole or in part and make proposals for settlement, or
- b) State that the claim is not accepted

If the claim is not accepted, the response should:

- a) Give detailed reasons why it is not accepted,
- b) identifying which of the claimant's contentions are in dispute.
- c) Enclose copies of documents asked for by the claimant or explain why they are not enclosed.
- d) Identify and ask for copies of any further documents which the defendant wishes to see.
- e) State whether the defendant is prepared to enter into mediation.



Forms/ Templates



The TnT Practice Direction sets out PP Templates for a claimant's pre-action protocol letter for and the defendant's response to claims in relation to:

- i. a specified sum of money
- i. road traffic accident and personal injury claim
- i. Defamation
- i. an administrative order under your Part 54 i.e. judicial review

Alternative Dispute Resolution (ADR)

WHY ADR

- Some cases are better resolved via some form of ADR;
- Some litigants merely want to be heard



The Authority for ADR

The legislative authority for appropriate dispute resolution is grounded in Part 25.1(i).

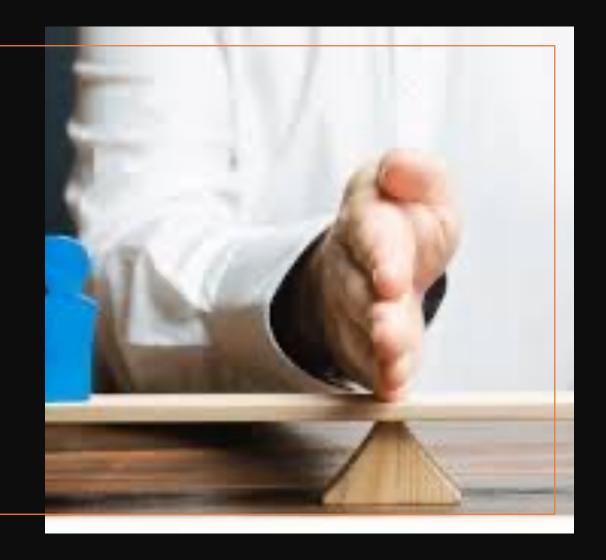
The rule states that the court must further the overriding objective by, among other things:

- encouraging the parties to use any appropriate form of ADR procedure including, in particular, mediation, if the court considers it appropriate; and
- *facilitating* the use of such procedures.



Some disputes are tailor made for arbitration

Where the subject matter involves great technical factual disputes e.g. complex building contracts



Arbitration

Encouraging referral to arbitration in no way undermines the judicial function. If anything it shows a measure of sophistication in your management skills that a judge should have the perspicacity and confidence to refer all or part of a matter to arbitration.



Arbitration

Referral to arbitration with the agreement of the parties can:

- · lighten court dockets;
- address knotty factual issues that call for specialised knowledge.

Some disputes are tailor made for mediation

- Landlord/Tenant disputes
- Motor vehicle claims especially where there is no counterclaim

• Some breaches of contract.



Alternative Dispute Resolution (ADR)

Difference between satisfying interests and determining rights



Mediation

There is a need for training among both Bench and Bar. -

- How does a mediator's role differ from a judge's role in encouraging a settlement?
- What is counsel's role in a mediation?
- Under what circumstances should a judge refer or not refer a matter to mediation?
- What are the benefits of mediation?





The Mediation Settlement Rate

The ECSC has had excellent results with mediation. It is particularly robust in Grenada and Saint Lucia. The international settlement rate of matters referred to mediation is approximately 40% - 50%. In the ECSC in the first year or so we had a settlement rate of close to 70% because at the outset we cherry picked what to refer. Later, as we became more aggressive the settlement rate fell to about 50%.

Early Neutral Evaluation What is it?

ENV does not depend upon but is aided by a docket system. This means that a case is assigned to a judge from the time it is filed and it remains with that judge until it is finally disposed of.

ENV allows the assigned judge to assess when after a Defence has been filed, a case is ripe for ENV. If the assigned judge makes that determination, they can then send the case to another judge who can frankly and fully discuss with the parties the chances of success of the claim and or the defence. The ENV judge is not constrained because they will not be hearing the case.



Early Neutral Evaluation

ENV is specifically referenced in the Rules at Part 26.1(1)(v) where the court is empowered to take any other step, give any other direction, or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation, or directing that such a hearing take place before a court appointed neutral third party, with the aim of helping the parties settle the case.



Why the emphasis on Settlements?

From a resource standpoint it is impossible to dispose of every filed case by a trial. No court anywhere in the world resolves all its trial work via litigation ending in a trial.





Narrowing the issues for Bahamas CPR training

Bahamas - A Key that Unlocks the CPR



At the end of this session participants will:

Become aware and knowledgeable about the critical importance of early identification, analysis, and treatment (prioritization) of issues, and in particular:

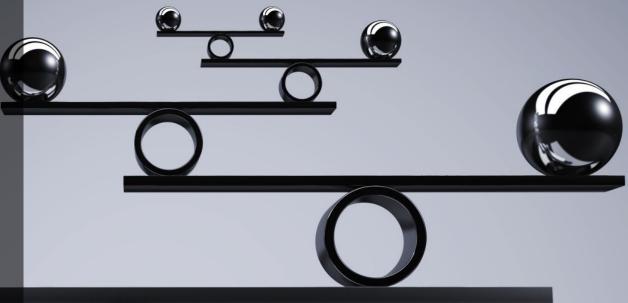
- (a) Understand the importance of narrowing the issues to be resolved.
- (b) Be exposed to techniques for narrowing the issues.
- (c) Be aware of the impact of narrowing issues on the Overriding Objective.

Narrowing the Issues, a Team Sport to improve justice delivery

- Access to justice is threatened: more cases without proportionate increase of judges; Substantial backlogs and delays; Increased cost of legal services; Imbalance in resources of litigants with vulnerability to endless procedural skirmishes and technicalities; reduced public confidence in judicial system
- Overriding Objective introduces Cultural Change to improve quality of justice remembering that objective justice involves pursuit of truth
- Culture of lawyers must change; reduce emphasis on the traditional adversarial system; no longer be just the mouthpiece of clients; exercise active duty to pursue just resolution of disputes. Duty to court and justice takes precedence over duty to clients. Must minimize use of court resources; narrow issues with duties of disclosure; not abuse the process of the courts; comply with rules and orders of the court and conduct cases efficiently and expeditiously; confer with other side to reach settlement, or narrow issues for trial.
- Culture of the judges must change too; Must be more proactive; encourage settlements and conferring between parties; actively manage and take responsibility for the timely and fair disposition of cases; identify and narrow issues for determination; confine trials, where necessary, to real issues of significance

Narrowing the Issues

Creating a New Court Culture



Narrowing the issues to be resolved will expedite fair disposition of cases and save expense.



Narrowing the Issues

• CPR 1.1(1) The overriding objective of these Rules is to enable the court to deal with cases justly and at proportionate cost.

[NOTE: CPR 1.1(2)]

- CPR 1.3 It is the duty of the parties to help the court further the overriding objective.
- CPR 25.1 The court must further the overriding objective by actively managing cases. This may include:
 - (a) identifying the issues at an early stage



The issues are narrowed when:

All issues that are irrelevant to the resolution of the main issue in dispute are eliminated.

Parties are not required to prove facts on which they agree.

There is agreement on all or some of the legal principles relevant to the adjudication of the dispute.

When an issue which could determine the outcome of the case is resolved.

Can you add something more?

Identification and Narrowing of Issues



Issues can be identified and narrowed at various stages of proceedings: e.g. after filing of defence: or after discovery of documents or filing of witness statements



Issues cannot be easily identified and narrowed if the applicable legal standards are unclear: imposes duty on the formulation of claims and defences.



Issues cannot be easily identified and narrowed if uncertainty about facts causes generalized rather than specific pleadings. Appropriate protocols before action could assist in reducing incidence of this.



Issue identification is crucial to discovery:



Standard Disclosure CPR 28.4 – must disclose documents which are directly relevant to the matters in question in the proceedings



Specific Disclosure CPR 28.5 (5) an order may require disclosure only of documents which are directly relevant to one or more matters in issue in the proceedings: CPR 28.6(1) Court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or save costs.



Issue identification assists court in applying the principle that evidence must be relevant facilitating the making of orders to admit or exclude

Early Identification of Issues



Issues define legal and factual contentions of parties and focus the court on the areas of dispute and indicate the areas of agreement.



Clearly defined issues guide the court in ruling on ancillary questions such as scope of discovery.



By clarifying areas of agreement and disagreement the parties may be better able to assess their positions and promote rapid settlement and adjudication.



Issues must be defined before they can be narrowed or refined.



Uncertainty of the facts and applicable law are prime sources of difficulty in defining issues. A limited knowledge of the facts may contribute to poorly defined issues at the commencement of an action.

Duty to narrow issues in pleadings

CPR 1.3 – court may take into account parties failure to help in applying the overriding objective. CPR 71.5(3) and (4) in deciding costs order court may take conduct of party into account

CPR 8.7:CPR 10.5: CPR 28.4 – Parties must clarify and narrow issues in their pleadings by stating, admitting or denying relevant facts, and identifying or annexing necessary supporting documents.

CPR 26.2(1):Court has power to strike out pleadings that are prolixity and irrelevant on own initiative or CPR 26.3(1)which do not have value in developing the case

CPR 28.4: Parties have duty to make standard disclosure CPR 28.5 and 6.6 Court has power to compel specific disclosure .:

Techniques of Narrowing the Issues

The Court may

- Require lawyers to narrow issues by filing at CMC
 - Agreed statements on facts and law not in dispute
 - Agreed statements on matters which might otherwise require interlocutory proceedings
 - Agreed statements of opposing experts witness to confer to narrow issues in dispute
 - Agreed statements on issues remaining for trial if any
- Prioritize and dispose of issue which could resolve liability of whole or part of matter
- Enter judgment on whole or part of claim
 - If statement of case for claimant or defendant fails to state a claim or defence for whole or part of claim
 - If no material facts need to be resolved for whole or part of claim: base judgment as a matter of law; without or without oral hearing
 - If evidence is excluded leaving party unable to prove essential fact e.g.
 - Negligence case: court can evidence of damages if claimant did not introduce evidence of foreseeability or causation
- If matter has to go to trial limit:
 - number of witnesses to be called
 - issues for cross examination
 - points of law to address

Court can order parties (inter alia) to file agreed statements, or separate statements if agreement cannot be reached before 1st CMC to facilitate orders narrowing issues

- (4)Parties to file agreed Statement of (narrowed) issues or separate statements if agreement not reached:
- (1) Parties to file agreed statement of admissions or separate statements if no agreement reached
- (5) Parties to file agreed notice of any issue(s) which if determined could resolve the whole or substantial part of dispute, or separate notices if no agreement reached
- (2) Parties to file agreed statement showing facts agreed and those remaining in issue, if any, or separate statements if no agreement reached
- (3) Parties to file agreed statement of legal principles on which trial is conducted or separate statements if agreement not reached.
- (6) In appropriate case: Parties to file submissions on whether judgment can be entered on the pleadings, to be adjudicated with or without oral hearing, as the case may be

Mechanisms

• 1st CMC must take place not more than 12 weeks after defence. (CPR 27.3(3)) Defence must be filed not later than 56 days after service - see excel sheet



- Court must pay attention to timetabling
- Judicial preparation by analysis of pleadings and evidentiary material on the record
- Send checklist to require specified filings and before CMC.





The Fish Farm Dispute – A Case Study

- Can the issue of liability be isolated and resolved as a discreet issue?
- What is the impact of this on the time to disposition?

AGREED FACTS 1. The Claimant

- The Defendent countries a count moderation and/or rose distillery at Arelaton Fatals
 - The Claimant and the Defendant utilize water from the Black River in their respective
- The Defendant is permitted by virtue of the Natural Resources Conservation Authority / to operate a wastewater treatment plant and discharge trade efficient into the Black Rive
- 5. On February 27, 2015, the Defendant discharged trade efficient into the Black Riverment to its Environmental Remot
- On February 28, 2015, Attorneys-at-law for the Claimant emailed the Defendant.
- Siloah, St. Elizabeth where water samples were taken for testing.
- On Narch 26, 2013, the Determinal discharged time extinent and the back solver under Environmental Pennit.
- That based on NEPA's report attached as "D" to the Particulars of Claim, the findings that the efficient by the Defendant, exceeded the standards established by

DISPUTED FACTS 1. The Claimant's fish farm is not located alongside the b

- The test results of the water quality sampled at the Defendant's discharge poi that the trade effluent discharged did not meet NEPA's standards.
- The Defendant discharged trade efficient into the Marrory River on February 27, 2015.
- The discharge of trade effluent into the Black River by the Defendant on February 2 2015, released contaminants which flowed into and alonguide the Claimant's facility and/operation disruttine in business and causion the Claimant's miller losses.
- The discharge of trade efficient by the Defendant on March 28, 2015, into the Black Rive resulted in the contemination of water which flowed to the Chimant's flutneeds and kille-



Having reviewed the synopsis of the Fish Farm Dispute can a court narrow the issues without further information?



What is most effective measure for narrowing issues:

- a. Eliminating issues that are irrelevant to main issue in dispute or
- b. Identifying facts that parties are not required to prove
- c. Identifying issue which could determine outcome of case if resolved
- d. Identifying legal principle relevant to adjudication of dispute on which parties agree



Can you identify an issue which could determine outcome of the case if resolved?

- a. There are no such issues
- b. Whether the Black River is diverted before the fish farm
- c. Whether the toxicity of the effluent was in breach of statutory levels
- d. Whether the defendant was notified of the damage to the fish farm on the day it occured



Having identified that issue what action would you select?

- a. Wait for regular CMC and discuss steps to be taken...
- b. After defence is analysed by court, it issues directions on own initiative for parties to make submissions on issue...
- c. As soon as defence is analysed Fix date and make directions for hearing of issue
- d. As soon as defence is analysed make order resolving issue



Method of Narrowing

• Study of pleadings to determine how issues can be narrowed

 Communication with counsel before CMC – including narrowing issues in check list