



**SUBMISSION IN RESPONSE TO THE
RULES COMMITTEE'S
CONSULTATION PAPER,
*IMPROVING ACCESS TO CIVIL
JUSTICE***

1 September 2020

BELL GULLY

1. INTRODUCTION

- 1.1 Bell Gully welcomes the opportunity to provide our comments on the Rules Committee's initial consultation paper, *"Improving Access to Civil Justice"*.
- 1.2 Bell Gully supports the Rules Committee's project and the objectives of the consultation paper. Access to civil justice is critical to the rule of law, and a well-functioning society and economy in a liberal democracy. We agree that it is important to regularly assess whether the High Court Rules and District Court Rules can be improved. It is crucial that the Rules facilitate speedy and inexpensive determination of civil proceedings. It is also important that the Rules are just and perceived to be so by fair-minded parties and the community. The Rule Committee's work on these matters is timely and important.
- 1.3 We set out below our submissions on each of the Rules Committee's proposals. In summary, we consider that several of the possible reform options may improve access to justice and we support further consideration of these options. We have reservations, however, that some of options raised in the consultation paper might not achieve their objectives and would be likely to have adverse unintended consequences.
- 1.4 In making these submissions, we recognise that our experience and perspectives are that of a large commercial law firm, with a particular focus on complex commercial and regulatory disputes. We recognise that the Rules Committee will be concerned to formulate rules that address the needs of all court users. We nonetheless hope that our submissions may be useful in providing a perspective from one of New Zealand's largest commercial litigation practices.
- 1.5 We would be very pleased to provide any further feedback that might be useful.

2. INTRODUCING SHORT TRIAL PROCESSES

- 2.1 The consultation paper raises the possibility of introducing a short trial process, by introducing (1) the District Court short trial process format into the High Court Rules, (2) the English short cause procedure, or (3) the fast track procedure formerly in the High Court Rules between 2009 and 2017.
- 2.2 The objective with each of these options is facilitate the speedy hearing and determination of non-complex civil disputes. We agree with this objective. In particular, we agree with the proposed expectation that a short civil trial (four days or less) should be able to run to trial within 10 months of commencement.
- 2.3 In our view, the primary impediment to the speedy hearing of short civil disputes appears to be the availability of hearing time. While we agree that improvements to the Rules must also be considered, we consider that the critical constraints are principally resourcing constraints rather than the Rules.
- 2.4 We would also observe that, in our experience, the short form procedure in the District Court has had relatively modest benefits in bringing matters to a speedy trial. Although we have not analysed any empirical data, our experience in the District Court has been that:
 - The time period between the commencement of proceedings and the substantive hearing principally turns on the availability of hearing dates.
 - When hearing dates are available within a reasonable time period (eg within one year of commencement for a general commercial dispute), it is usually possible to timetable and resolve most procedural matters irrespective of the form of process used.
 - It is often difficult to secure timely hearing time for civil fixtures in the District Court, which limits the value of the short trial format.
- 2.5 In our view, the primary focus should be on best active case management under the existing Rules and recognition of the desirability of increased funding for the courts, rather than the addition of a further track. While resourcing is beyond the remit of the consultation process, we consider that the most important factor in improving access to justice would be more available judicial resources (and therefore

more Judges). We also consider that active case management by an assigned Judge has considerable benefits in most cases. We consider that there would be benefit in requiring parties to go further than they currently do in identifying the real issues in dispute and (where appropriate) directions through to a hearing at the first case management review stage.

2.6 In terms of a potential framework for a fast track procedure:

- We suggest that participation in the fast track procedure should require parties to “opt-in”, at least in the initial phase while it is bedded in. This would allow the procedures to be used where the parties consider it to be appropriate, and for the profession and the market to develop confidence in the procedure.
- We have reservations about possible restrictions on pleadings (page limits or otherwise). We do not consider that over-pleading is a material factor affecting access to justice. We therefore do not consider that there would be significant benefits in restricting or limiting the role of pleadings. There is also a risk of unintended consequences. For example, limits on pleadings might reduce the extent to which the parties are fairly on notice of the other’s cases and fairly pinned down to their own cases. Constraints on pleadings might therefore result in less efficient briefs or more interlocutories. This concern is addressed if the procedure is “opt-in” because the parties will have chosen to accept the relevant trade-offs.
- Similarly, we are concerned that page limits on evidence would be inconsistent with each party believing it has had the opportunity to say what it wants to say. This is a key element of delivery of civil justice. If the length of evidence were to be restricted, we would prefer that such limitations should only apply with consent of the parties.

3. INQUISITORIAL PROCESSES

- 3.1 The consultation paper discusses two processes that would involve a more inquisitorial approach than the current adversarial process: the process involving Sir Graham Panckhurst QC and a proposal by the Hon Justice Kós. We have focused our specific comments on the process involving Sir Graham because our experience in two dozen matters using that process may be of assistance. As discussed below, we are supportive of the Hon Justice Kós’ proposal.

Preliminary observations

- 3.2 The processes discussed in the consultation paper represent something of a hybrid between an adversarial process and an inquisitorial one. They are not truly inquisitorial processes in the sense that term is used in some other jurisdictions. We caution that a truly inquisitorial model would represent a serious departure from New Zealand’s legal traditions and would warrant careful consideration.
- 3.3 We note that the adversarial system of justice has served New Zealand and other Commonwealth countries well. The adversarial system and the key features of New Zealand’s civil justice model are well-tested and form part of a common law heritage that is rightly acknowledged as being just, impartial, and independent. The tradition of the rule of law, rights and freedoms in a liberal market democracy, and the just resolution of civil disputes are linked to our adversarial system of justice – that is, that a judge is an impartial decision-maker whose role is to adjudicate the controversy. Careful consideration would be required for any major departure from the adversarial framework.

The Earthquake Process

- 3.4 The consultation paper contemplates adopting a process similar to that adopted by an insurer and a group of insureds in settling Canterbury earthquake insurance claims. Sir Graham Panckhurst was appointed to be the judge for that process, although he did not design the process. The processes adopted by Greater Christchurch Claims Resolution Services (**GCCRS**) are in part based on the process involving Sir Graham.

- 3.5 Bell Gully has extensive experience as counsel in both forums. Bell Gully has acted in 24 claims using the process involving Sir Graham and several involving GCCRS and the Canterbury Earthquake Insurance Tribunal. Bell Gully attended facilitations and adjudications during the processes (though not yet a mediation under the Earthquake Insurance Tribunal process). In light of confidentiality, we cannot discuss the specifics of any of these claims, but discuss our experience with the process more generally. For the majority of the GCCRS matters that Bell Gully has been involved in, the matter commenced through proceedings in the High Court which have either been discontinued or stayed pending hearing in the GCCRS process.
- 3.6 We consider that it is important that the processes are voluntary and we do not consider that similar approaches ought to be imposed on parties without consent. We note that the processes in the Canterbury Earthquake Insurance Tribunal involve a much more vigorous approach where the parties could not consent to the approach.
- 3.7 At paragraph 32(c) of the consultation paper, the Committee proposes that, where there is no resolution at facilitation, the Judge will decide the next steps. The issue that we have experienced with this part of the process is the uncertainty that it creates for participants in the process. The process will change depending on the Judge. For example, some more traditional Judges with High Court backgrounds may wish to follow a process similar to a trial and require written statements from experts and submissions. Some other Judges may require nothing in writing, and treat the process as purely inquisitorial. This not only creates uncertainty for participants, but also makes it difficult for lawyers to advise clients in relation to next steps as well as anticipated costs for the process.
- 3.8 Accordingly, the outcome and processes of the adjudication process will depend heavily on the Judge involved in the matter. This creates an issue in terms of the transparency and consistency of the process which may result in undermined confidence in the system.
- 3.9 In our experience to date in GCCRS the decision makers have required something akin to formal briefs of evidence. This results in minimal savings for the parties in both expert and lawyers' fees for the costs and expenses required for briefs of evidence. Briefs of evidence are usually one of the most costly steps in this type of proceeding. In our experience in High Court earthquake list proceedings, matters more often than not are resolved prior to the exchange of briefs of evidence. Through GCCRS, briefs are often required at a relatively early stage in the matter which does not allow for early settlement discussions to occur and dispense with the need for producing briefs of evidence.
- 3.10 Typically the judgments received through the process involving Sir Graham are significantly shorter than a Court judgment. We understand that the reason for this is to keep the decision brief and allow a faster and more efficient resolution, which is a reasonable consideration. There is necessarily a risk that participants feel as though their arguments and evidence have not been fully heard and considered. There are also risks of reduced transparency in decision-making.
- 3.11 The process involving Sir Graham and the outcome of an adjudication in the GCCRS are confidential and binding on the parties, without any ability to appeal. This has the risk of placing a large amount of power in one decision maker (with the ability for the outcome to change depending on that decision maker) without any proper checks and balances in place in the form of public scrutiny or appeal rights.
- 3.12 In our experience, the process involving Sir Graham relied on a level of cooperation between the parties and counsel in order to take a collaborative and pragmatic approach to resolution of claims. This resulted in resolution of the majority of the claims in a streamlined manner. Had it not been for this level of cooperation between counsel on these matters, we anticipate that the process would not have been as effective.
- 3.13 We do not consider, however, that the same Judge who presides at the facilitation hearing (as a quasi-mediator) should also preside over the adjudication. In our view and experience, this has the risk of stifling without prejudice discussions. Parties are understandably more careful and cautious when negotiating in the presence of the Judge who will decide the case if the matter is not resolved by negotiation. Private mediation or judicial settlement conferences, by contrast, encourage both parties to

put forward their best offers on the basis that their concessions will not be used against them if the matter is not resolved.

- 3.14 We are also unsure what a facilitation meeting followed by an adjudication achieves that is different than a judicial settlement conference followed by a short trial.

Proposal by the Hon Justice Kós

- 3.15 We support the proposal by the Hon Justice Kós to deal with small claims in the order of \$100,000 or so, or claims involving lay litigants. We observe that lay litigants pose a huge time burden for Judges and are – rightly – the subject of consideration in this access to justice consultation.

4. REQUIREMENT THAT CIVIL CLAIMS BE COMMENCED WITH A PROCESS AKIN TO AN APPLICATION FOR SUMMARY JUDGMENT

- 4.1 The third proposal in the consultation paper is for civil proceedings to begin by way of something akin to an application for summary judgment.
- 4.2 In our view, the introduction of such a requirement would not be a helpful reform. Requiring all proceedings, regardless of the nature or complexity of the proceeding, to be commenced with an application akin to a summary judgment would front-load all proceedings with the cost and work involved with an interlocutory application including evidence and argument. This would add to the cost and difficulty in commencing proceedings – with the unintended consequence of creating a new hurdle to access to justice.
- 4.3 We consider that it is best left up to a party to determine whether, at the commencement of each proceeding, a summary judgment application is appropriate. This approach ensures that the time and costs involved in bringing a summary judgment application are only incurred where it is appropriate. This approach appears to be working well.
- 4.4 We also note that the existing rules facilitate the early identification of the issues between the parties, expert conferences and active case management to enable the real issues in dispute to be determined in a just, speedy and inexpensive way. The consultation paper notes that, if unsuccessful, the summary judgment procedure provides benefits including early clarification of the issues and identification of the best path to trial (paragraph 40). In our view, early case management reviews might be used to do more heavy lifting on these matters. That might be more efficient than funnelling cases into the summary judgment procedure.

5. STREAMLINING CURRENT TRIAL PROCESSES

- 5.1 The consultation paper also proposes reforming the existing High Court Rules in each of the following areas in an attempt to reduce the costs of accessing the legal system.

Briefs of evidence and mode of giving evidence

- 5.2 We consider that the current regime for written briefs is generally working well. We do not consider that the regime has problems that require fundamental changes.
- 5.3 The starting point, in our view, is that there are real benefits to the written brief regime. Written briefs ensure that the parties give one another fair notice of their case. This in turn helps to ensure that the parties' cases meet one another, and it contributes to efficiency at trial.
- 5.4 Those benefits are particularly significant in the context of complex civil litigation. Cases involving large numbers of witnesses, significant volumes of documents, and complex expert evidence are best dealt with through the written briefs regime (supplemented as necessary by case and trial management practices such as expert conferences and hot tubs).
- 5.5 We are concerned that those benefits would be lost or reduced if written briefs were dispensed with. The proposal to replace briefs of evidence with will-say statements has the potential to lengthen trials,

increase the potential for ambush, and disadvantage parties who are less articulate or whose first language is not English.

- 5.6 We also note that replacing the regime for written briefs with will-say statements would create the possibility that will-say statements will develop into briefs of evidence by another name. If so, that would not solve the perceived issue that drives the proposed reform.
- 5.7 We would therefore not support dispensing with written briefs.
- 5.8 We do not consider that it is necessary to fundamentally reform the current rules requiring witness briefs to be read aloud. In our experience, Judges and counsel deal pragmatically with such matters in the context of significant trials – for example, agreeing to dispense with the reading of some briefs, or reading aloud only the contentious parts of briefs. If there is any perceived gap in those powers, we would see the merit in further express provision for the assigned Judge to tailor the mode of evidence to the type of case at hand. In some cases, the evidence can and should be in the form of affidavits and read. In others, briefs may be limited to experts and will-say statements could be appropriate for fact witnesses.

Discovery

- 5.9 In our view, the current discovery rules are working well on the whole. In most cases the parties are able to resolve discovery matters efficiently and informally under the framework provided in the current High Court Rules.
- 5.10 Our assessment is that parties and lawyers are becoming more efficient in managing the volumes of documents associated with electronic communications and storage. Modern software products and IT consultants can achieve significant efficiencies. While we have not done the empirical analysis, we assess that discovery costs as a proportion of overall trial costs are now lower than they were, say, a decade ago. We therefore do not consider that changes to the discovery rules should be driven by the perceived expense of completing discovery – or, at least not without empirical analysis to assess whether that is the case.
- 5.11 We therefore do not consider that it is necessary to fundamentally change the discovery model and we would be cautious about possible reforms.
- 5.12 Absent a strong reason for reform, we respectfully submit that it is preferable to maintain the modern discovery arrangements. Discovery is a critically important step in the just determination of disputes. Proper discovery of documents can often be vital in getting to the truth of a matter and any general departure from the essential requirement to give discovery of any documents that are relevant to the matters at issue risks a process that does not get to the truth, and consequently risks sacrificing justice in order to save cost. Caution is therefore warranted when limiting or changing the discovery process.

Greater judicial control of hearings

- 5.13 We consider that the Judges are appropriately managing trials through the effective administration of the High Court Rules. The combination of judicial involvement under the current High Court Rules and responsible counsel usually results in trials moving relatively smoothly. We see that the ways to decrease the time and costs involved in civil litigation are the early identification of the key issues in dispute, constructive collaboration between counsel, embracing modern technology and commitment to efficiency from responsible counsel.
- 5.14 An exception to these observations concerns litigants in person. We observe that the Rules work generally well in hearings and proceedings where the parties are represented by competent counsel, but things are not always so smooth with hearings and proceedings involving litigants in person. Litigants in person sometimes do not understand or comply with the requirements of the Rules, make inappropriate interlocutory applications, pursue unfounded claims, and extend hearing times. We are therefore pleased to see the Hon Justice Kós' proposal, which we support.

- 5.15 We recognise that, balancing the considerations of justice, it may be appropriate to allow lay litigants to have their say and have repeated opportunities to comply with the Rules. While that is fair and appropriate to a degree, the other parties are entitled to access to justice too, and proceedings involving litigants in person are generally more expensive, slow and difficult for the other parties. The Hon Justice Kós' proposal represents a promising way forward in our view.

6. CONCLUDING REMARKS

- 6.1 We thank the Rules Committee for the opportunity to make submissions on the Consultation Paper. We would be pleased to answer any questions arising or provide any further information that might be useful for the Committee's work.

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