

11 September 2020

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Clerk to the Rules Committee
c/o Auckland High Court
Auckland

Dear Mr Hartley

Improving Access to Civil Justice - Submission


1. This letter responds to the Committee's invitation for submissions and comments on the options for reform canvassed in the Discussion Paper dated 16 December 2019. We appreciate the opportunity to comment and the assistance we have gained from your research papers in reflecting upon the proposed reforms.
2. We start by outlining our experience of the civil justice system as practitioners and commenting on the need for reform (including reform of civil litigation culture) before addressing the Committee's four proposals. Finally, we outline some further suggestions that we invite the Committee to consider.

Our experience as practitioners

3. Gilbert Walker practises mainly in High Court and appellate civil and commercial litigation. We frequently act for major corporates and for insured firms and individuals, but we also act for plaintiffs and defendants for whom the time and cost of civil litigation is a severe burden. We act in public interest litigation and for individuals under alternative fee arrangements and pro bono.
4. We have acted in many proceedings in the High Court Earthquake List and, more recently, in the Canterbury Earthquakes Insurance Tribunal (for an insurer). Our submission is strongly informed by our experience of case management in the Earthquake List and our observations of the experiences of parties in those cases.


The need for reform: proportionality should become a governing principle

5. The case for improving access to justice has been well and truly made. While greater use of the flexibility within existing rules and more consistent enforcement would undoubtedly help, we agree that procedural reform is also necessary to reduce costs.

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6. In our view a major source of the problem is not practices that are per se inappropriate, but practices that are disproportionate to what is at stake in a particular case. Lawyers taking the same ‘no stone unturned approach’ to every case may be welcomed by some clients and appropriate in some disputes, but should not be the default where it is disproportionate.
 7. To this end, all courts should have greater flexibility to manage and adjudicate cases proportionately. Proportionality should be an express objective of civil justice. Rule 1.2 is not generally considered to have this effect. A clear statement of the objective should identify the factors against which proportionality is to be measured.
 8. While introducing a new general objective would not be enough to spur major reform, it would set a benchmark for applying the detailed rules. Judges and parties should be able to invoke a general objective to curb disproportionate conduct including exploiting the letter of specific rules in a way that violates the objective. To be effective, practitioners and judges would have to invoke the overriding objective more effectively than the current rule 1.2.
 9. We support the Committee’s willingness to consider significant reform, but it is important not to lose sight of the costs that can be imposed by well-intentioned but misconceived reform. The 2009 District Court reforms caused chaos and confusion before they were abandoned. Our sense is that the reputation of that Court as a forum for adjudication of civil disputes has never fully recovered, even though many of the 2014 reforms were (and are) a significant improvement. The fact that appointments of lawyers with civil litigation experience to that Court seem to have diminished does not help either. Reviving the District Court as a place where civil disputes can be resolved will be essential to the success of the Committee’s project.
 10. Although major reform is not without risk, if one accepts that costs are disproportionately high and a barrier to access to many, then the rules should at least create the opportunity for parties to access the system at a lower cost. We can be cautious, even sceptical, of some proposals, but we accept that it is not good enough to shrug one’s shoulders and say there is nothing to be done.


The importance of changing culture and practices in improving access to justice


11. New rules will not be sufficient. Reforming the culture and practices of civil litigation will also be necessary to reduce costs and improve access to justice. Judges, practitioners and most litigants will instinctively support the Committee’s objectives—at least, in concept. In practice, it is more difficult.
12. Case management should extend beyond timetabling. Currently, the extent to which judges truly manage cases, and take meaningful steps to discourage litigants or



lawyers from acting disproportionately, is patchy. Problems that could be addressed at case management conferences are often deferred for formal applications or left for the trial judge. The absence of a docket system allows recalcitrant parties to benefit from encountering a judge with less knowledge of what has gone before and a fresh store of patience. At trial, problems can again be deferred while the judge sees how the case unfolds. The judicial inclination to avoid procedural breaches compromising substantive rights can impose costs throughout the system. Taken too far, this inclination can allow poor practices (particularly by repeat offenders) to escape meaningful sanction and consume court time and party costs. The limits of acceptable behaviour are learned in encounters with the court. Limits are set at least as much by how parties experience the application of rules as by their promulgation.

13. The limits of rule-making alone can be seen in rule 9.1. This rule, introduced in 2013, explicitly requires the court and the parties to pursue the just, speedy and inexpensive determination of the proceeding in applying the rules relating to briefs, oral evidence directions, common bundles and chronologies. The parties “must also ensure that the briefs and the common bundle are commensurate with the goal of keeping the cost of the proceeding proportionate”. Documents produced at trial and the evidence-in-chief must also be “prepared, produced and led” in that way.
14. Rule 9.1 was introduced with the same goals that the Committee is (again) pursuing now. It was promoted through a NZLS seminar led by senior judges. Yet, it has made no noticeable impact on briefs, oral evidence directions, common bundles or chronologies. We have found only two judgments citing the rule since it was passed. Awareness of the rule seems to be faint, at best.
15. Practitioners and parties, who will readily sign up to the concept of litigating proportionately, can find it all too tempting in the heat of battle to “do whatever it takes” to win. Many litigators promote and pride themselves on their determination to do just that. Parties in the midst of a dispute want it, too. Litigating more proportionately will involve leaving some stones unturned. Many parties and their lawyers will not find that easy. That is why judges need to lead and to support counsel raising genuine proportionality concerns.
16. In one recent case of ours, a plaintiff challenging the survey of the boundary of a parcel of land with a rating value below \$500,000 called 12 experts, 8 of whom were in just two disciplines. The case managing judge’s response to complaints that this was disproportionate was that it was not for him “to tell the plaintiff how to run his case”. A three-week trial was allocated. Only a week was ultimately used—spread over three weeks—thanks largely to a heroic feat of reading in by the trial judge. The profession and the bench should try harder to avoid this sort of thing.

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17. Judges have a tremendous capacity to manage cases well by exercising both hard and soft power. That hundreds of cases in the Earthquake List have generated very few interlocutory applications can be traced to Miller J's insistence at the outset that the Court would not allow claims to become bogged down with interlocutory skirmishes. His successors were similarly robust and practitioners never got into the habit. Sparse pleadings that might have generated applications in other contexts proved adequate for the case to proceed, when coupled with the invariable direction at the first case management conference that the parties exchange expert reports upfront. On the other hand, defaulting parties have managed to head off wasted costs applications by insisting upon formal applications and in-person hearings, the cost of which outweighs any likely order.
 18. Unless our system moves to a more overtly inquisitorial model, the effectiveness of rules intended to limit the facts and law in issue is undermined if they are not seen as constraining judges too. When counsel are concerned about issues the court *might* raise, as well as what the opposing party *has* raised, preparation costs increase. This issue is perhaps more confronting in appeals but it can affect trials too.
 19. Promotion, education and enforcement are all necessary. New forms of adjudicating will require concerted judicial encouragement, since lawyers and parties often act conservatively and can be reluctant to embark on unfamiliar and untested processes. Changing longstanding cultures and practices will be a long term effort.
 20. Litigating proportionately is an acquired skill. Training in the practical skills of advocates—pleadings, evidence, witness examination, and effective written and oral submissions—are too often seen as the preserve of junior lawyers. Mid-level lawyers, who often carry the burden of preparing initial drafts of documents, should be encouraged to take skills training regularly, but more experienced practitioners also should be encouraged to refresh their skills. Sessions in which judges participate—reminding counsel of what works and what isn't so effective—are welcome.
 21. The court's ability to offer timely fixtures is another important component of cost. A practice of allocating trial fixtures at an early stage in the life of a 'standard' proceeding would also assist. Generally, the longer a proceeding takes to get to a hearing, the more it costs—more time allows more steps to be taken in the proceeding and requires the file to be put down and picked up again more often, generating sunk 'gearing up' costs each time. It also increases the costs that parties incur in dealing with each other, costs the courts do not see (or compensate).
 22. It is difficult to overstate the importance of changing the culture and practices of civil litigation so that litigating proportionately is seen as a professional duty, a skill to be




honed and a measure of success. As we have seen with culture changes in other contexts, education and enforcement are both necessary.

Proposal One: Introduction of Short Form Trial Processes

23. We support the introduction of a short form trial process in the High Court. The rules should set out criteria for cases for which the procedure is intended whilst giving the court a limited discretion to depart from the standard criteria and time frames for good reason consistent with the objective of the rules. The discretion needs to allow minor variations to standard rules without losing the format's essential character.
24. If a short form trial process is introduced, it will be important for the court to be able to offer fixtures promptly and set expectations for judgment delivery. Parties and counsel will not appreciate having to file and serve evidence within weeks only to wait 6-9 months or more for a hearing and judgment. We suggest that the court publishes expected wait times for short form hearings and that the (in)ability of the court to offer a hearing within that time frame be one factor considered in deciding whether to direct a short form trial or in setting the timetable.
25. Short form trial process will require parties to incur their litigation costs in a much more concentrated period. For some litigants this may be an impediment. Truncated timelines to hearing may also reduce the practical opportunities for settlement.

Introducing the District Court short trial format into the High Court Rules

26. The High Court jurisdiction would benefit from introducing a short form trial process modelled like the short trial and simplified trial procedures in the District Court. In relation to those procedures, we comment:
 - a. The time frames for preparing evidence and readying the case for hearing need to be commensurate with the expected number of witnesses and hearing days. While a short form procedure could readily accommodate a hearing of two days, perhaps even three, a matter requiring four days of hearing time may well not be suitable for a short form trial. A matter requiring a four-day hearing should involve too much complexity to qualify for a short form procedure.
 - b. The procedure should generally be for lower value claims where a full trial would be disproportionate, but should also be available for high value claims that lack factual or legal complexity.
 - c. Sequential service of evidence is usually preferable to simultaneous exchange.
 - d. The short form procedure could decide single issues or individual causes of action that can be expected to resolve or substantially resolve the dispute.


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- e. Bundles should generally be filed electronically, with exhibits hyperlinked. Where paper bundles are required, the repetition of exhibits in multiple affidavits could be avoided by permitting deponents to cross-refer to an exhibit in a previously-served affidavit.
 - f. Page limits and time limits on a party's evidence-in-chief (expert and non-expert) should apply to a party, not to a witness, to prevent parties working around limits by splitting evidence across multiple witnesses.
27. Having a short form procedure in the High Court with the same basic structure as the District Court counterpart could help raise the profile of the District Court process.

NZBA's short causes procedure

28. This proposal includes page limits on pleadings, affidavits and will-say statements, and determination of interlocutory applications on the papers unless a hearing is truly necessary. These features could usefully be incorporated into a short form trial procedure modelled like the District Court process.
29. The NZBA proposal also provides for case management by a single judge through to trial. We agree this would be beneficial although we understand that the resourcing is not available to provide single judge case management routinely.

Proposal Two: Introduction of Inquisitorial Processes

30. Intrusive case management has introduced more inquisitorial processes to our courts. Skilful case management is beneficial, but inviting judges to descend further into the arena raises more fundamental questions about our system of justice.
31. Our experience, which is informed by acting in a large number of earthquake insurance claims brought by individual litigants, is that:
- a. Parties understand the distinction between facilitation and adjudication and have different expectations of the two processes.
 - b. Views expressed by judges on the merits carry weight with the parties. If those views are not adequately informed they can be counterproductive and unjust.
 - c. Any sense by parties that a judge is stepping into the arena can provoke strongly adverse reactions about the fairness and legitimacy of the process.
32. Some of these concerns may be tolerable in lower value disputes.
33. Our experience of the Canterbury Earthquakes Insurance Tribunal, whose proceedings are expressly inquisitorial, is that in practice the Tribunal is not radically more inquisitorial than the High Court. Tribunal claims differ from court proceedings largely in that the case management is more frequent, more intrusive and less formal.




The Tribunal directs expert facilitations and appoints its own experts (at the Tribunal's expense). It also receives and responds to informal email communications. Members convening settlement conferences do not preside over adjudications.

34. These characteristics of the Tribunal are avowedly an attempt to make it a jurisdiction where claimants do not require lawyers; lay litigants are encouraged. In that respect it does not provide a model for the High Court.
35. Within the same practice area, the Christchurch High Court Earthquake List is often held up as a potential model. There are lessons to be taken from the Earthquake List, but the unique context also has to be recognised. The key characteristics of the List are a relaxed attitude to pleadings, discouragement of interlocutory applications, a requirement to obtain and exchange expert reports upfront and—in the early years—fast-tracking of test cases. With those characteristics firmly established by hard and soft judicial direction, most cases in the List have required (and been given) almost no active judicial case management. Trials have been few and far between. Settlements have been the almost invariable mode of disposition. This has been possible because of the repetitive nature of the legal and technical issues involved, and the development of a specialist bar. Many of these features would not readily translate to the more varied diet of general civil litigation in the High Court.

Panckhurst process for resolving earthquake insurance claims

36. Institutionalised alternative forms of resolving earthquake insurance claims came relatively late in the cycle, when the Courts had established most of the principles and practitioners were familiar with the legal and factual issues (and each other). This familiarity paved the way for settlement. What has mattered most in recent years is the completion of the expert reports and having a forum (it has rarely mattered what) compelling the parties to come together to work towards a compromise.
37. The Greater Christchurch Claims Resolution Service offers a facilitation service and a determination process. The facilitation service was well utilised and successful; the determination process much less so. This is probably because the parties agreed to facilitation when they had the information they needed to compromise. It probably also explains why few claims that went through Sir Graham's process proceeded beyond facilitation to adjudication. (None of our earthquake claims have gone through a GCCRS or Panckhurst adjudication.)
38. The absence of appeal rights from the GCCRS determination process discouraged its use. Parties are reluctant to submit to adjudication without rights of appeal. (Parties have been similarly unwilling to submit technical disputes to expert determination. Expert facilitation, however, has been more successful, particularly if the convenor is



also an expert.) If parties must submit to an avowedly less “perfect” procedure, there should be a mechanism for correcting serious error, even if appeal rights are limited.


39. Inquisitorial techniques can enhance effective case management. However, we do not favour introducing into the High Court a “facilitated” or “mediated” procedure that involves judges adjudicating disputes they have facilitated. (This was not the GCCRS model either: there were distinct panels, the facilitators typically being qualified mediators and the determiners being retired judges.)

Inquisitorial process suggested by the Hon Justice Kós

40. This proposal warrants further consideration for lower value disputes in the District Court, where more radical reform is likely to be necessary if the court is to attract disputes with \$150,000 or less at stake. We support the proposal for early claim triage by an independent assessor, if the funding can be found.
41. It is perhaps worth noting that many claims made in the Canterbury Earthquakes Insurance Tribunal lack a workable claimant’s pleading. Variations on “we can’t agree on a scope with our insurer” are not uncommon. Identifying the issues is often left to the respondent insurer and to the Tribunal questioning the claimants at the first case management conference.

Proposal Three: Requiring all proceedings to begin with a summary judgment application


42. We do not support this proposal. If the threshold for summary judgment is to remain the same (as we believe it should), then this proposal would require most proceedings to start with an application that will fail.
43. One of the supposed benefits of the proposal is that early judicial identification of the strength of a party’s case will encourage and expedite settlement discussions. In our experience, this occurs far less often than one might hope.
44. In the earthquake litigation, early identification of the issues often had a modest impact. Many parties confronted with good responses to their positions went searching for new positions or simply declined to engage. Getting from the early identification of an issue to a resolution often took more steps and costs.
45. Parties with weak cases often need some other incentive to force them to face up to their position. Well-resourced and sophisticated parties can muddle along from a weak position. Inexperienced and self-representing parties can plough on in the face of serious or insuperable weaknesses. Such parties need to be forced—by a mediation, settlement conference, or impending hearing—to confront their weak position. The refusal of summary judgment acknowledges that a claim or defence is



arguable and any firm indication of its strength beyond that is usually inappropriate. A party with a weak case that survives summary judgment can often take false hope.

46. Another reason summary judgment cannot serve as a triage mechanism is that it is often difficult to identify which party has the stronger case early in a proceeding.
47. It can be unjust and counter-productive for judges to offer a premature view of the merits. If that were to become a purpose of summary judgment, parties would feel compelled to load pleadings and evidence with material intended to sway that assessment rather than directed to the criteria for summary judgment. Judges, too, might feel pressure to make the process more “useful” for parties by expressing views they would not otherwise have considered necessary or appropriate.
48. In other jurisdictions, parties are required to attend a settlement conference or private mediation before a matter is allowed to progress past a certain point. These processes can be controversial and we have doubts about their utility in the context of High Court civil litigation. Having filed proceedings, in our experience the next point at which the parties profitably engage in discussion is following discovery. The other usual waypoints are after the exchange of briefs of evidence and immediately before trial. The last of these waypoints remains stubbornly the most common, even when the parties have been able to assess their litigation risk much earlier.
49. We also observe that the reduction of judicial involvement in settlement conferences some years ago was explained in part because it was undesirable for judges to give potentially misplaced merits indications. In similar vein, the Court of Appeal appears to have pulled back from offering “tentative” obiter views to trial judges when remitting matters for rehearing. These changes remain sound.
50. Greater use of the separate question procedure would be more productive than trying to use summary judgment for a purpose for which it was not designed. Cases involving contractual interpretation that do not meet the threshold for summary judgment could be tried in this way. Often, the extra steps – cross-examination of the deponents, for example—could be accomplished with only modest further steps. The Court of Appeal’s decision in *Local Government Mutual Funds Trustee Ltd v Napier City Council*¹ is a recent example. Some summary judgment applications could be converted into separate question determinations, so that the resources of the parties and the court are used most productively. Suitable candidates could be identified in case managing an opposed application. Respondents could be required to explain what more must be done before the matter is ready for determination. More rigorous

¹ [2019] NZCA 444 at [42].




case management might discourage weaker applications from proceeding or, with modest further steps, pave the way for a non-summary determination.

Proposal four: Streamlining standard pre-trial and trial processes

51. For these processes in particular, it is necessary to distinguish between practice that is poor for any case and practice that is disproportionate to what is at stake in the specific case. While the former must be tackled, we see the access to justice issue as arising more from the latter.

Replacing briefs of evidence with 'will say' statements

52. The problems with briefs—too long, too much evidence of little or no value, too much pejorative detail, too much summarising of the documents, argumentative, and not truly in the words of the witness—are problems of execution rather than concept. The problems are widely known, long-standing, and seemingly frustrate judges wherever they are used. And yet, the obligation to serve a statement of the evidence that each witness proposes to give serves invaluable functions. They can facilitate settlement, particularly where material facts are not adequately established in contemporaneous documents. They can help refresh recollections ahead of trial.
53. Poor practices originate with practitioners but they thrive because there is almost no meaningful enforcement of the rules. The provisional receipt of challenged evidence “de bene esse” often gives a pass to evidence that should not be admitted. It is as if the speed limit is 50 km/hr but parties and lawyers know there is little risk of getting a ticket driving below 100 km/hr. It must be acknowledged, however, that enforcement is easier said than done and that there are practical obstacles to it.
54. We accept that reforming current practice in some way is desirable. Some reforms could improve the quality of evidence-in-chief. Some of the preparation costs could be deferred to closer to trial. It is harder to be confident, however, that they will necessarily reduce costs overall. The Australian reforms, which have been raised as a potential model, are relatively recent and we have found no research or reports considering whether they have helped reduce costs.
55. When most of the evidence is in the documents, the documents must be gathered, sorted, read, selected, and presented to the court in the way that best expresses the position of the party. The cost of that effort will not be avoided by dispensing with briefs. The effort that currently goes into crafting detailed narratives in briefs would shift to submissions. This would at least defer some costs to trial, leaving the parties to negotiate settlements on the basis of the documents and will say statements.
56. Equally, witnesses’ evidence will still need to be briefed for trial. One can imagine practitioners preparing a document akin to a full proof of the evidence to use in




preparing the witness and leading the evidence at trial, even though the other party will receive only a will-say. Witnesses will have to be prepared for cross-examination on all of the documents, which will require the lawyers to review them regardless.

57. The key will be to create both rules and a culture through which parties and their lawyers accept and internalise that some cases do not need this time-intensive document review because it is disproportionate.
58. If briefs are to be replaced by will-say statements, the rules should require parties to provide a genuine summary so as to avoid surprises at trial. Where a witness's precise words matter, the will say statement should include them.
59. Given the correlation between the length of a brief or affidavit and its cost, page limits would be a blunt but effective way of reducing cost. Page limits would reduce the scope for needlessly "comprehensive" briefs, pejorative but irrelevant detail, argument, and attempts to cover off every potential angle of cross-examination. Tailored orders could be made for witnesses addressing specific issues, or in more complex cases, where the need to exceed standard limits can be justified.
60. Page limits or time limits could be set so that the fixture length is proportionate to what is in issue. Rather than building up fixtures by reference to proposed witness numbers, the starting point could be a (proportionate) fixture. The evidence, whether read or led, would be limited to a time that fits the fixture length, unless a justification for more time can be demonstrated. In a two-party, five-day case, that might allow one day for submissions, and two days for each party's evidence with an hour of cross-examination for each hour of evidence-in-chief. Such a system might accommodate 50 pages of written evidence per court day (assuming a witness can read 20 pages per hour and one hour of cross-examination).
61. Any reform of briefs will be undermined if the poor practices we see in briefs are transferred across to will-say statements, affidavits and leading oral evidence. Firmer controls on admissibility are still necessary. So too is a willingness to sanction breaches of the rules with costs.
62. There are other levers for controlling excessive evidence that could be used in conjunction with reform. One is the power to exclude relevant evidence if its probative value will needlessly prolong the proceeding.² Another is to apply the substantial helpfulness test in s 25 of the Evidence Act to exclude disproportionately long expert reports or the calling of multiple experts in the same discipline.³

² Evidence Act 2006, s 8.

³ District Court Rule 10.6 limits each party, at a simplified trial, to 1 expert witness per specialist discipline unless the court allows more witnesses by leave. A similar rule could be introduced in the High Court.




Changing the presumptive mode of giving evidence

63. We agree that rule 9.12 should be reformed so that a brief of evidence need not be read aloud in its entirety (or at all). The need for such a reform will obviously depend on any reform to briefs. The objective of any reform of this rule should be to ensure that the reading aloud of evidence is proportionate. It is important to bear in mind, however, that the needs of judges and lawyers are not the only consideration.
64. While taking evidence as read improves efficiency, reading evidence aloud (or at least a portion of it) can:
 - a. enhance fairness by helping to settle a witness, which can be important for those who might be intimidated by the court environment;
 - b. enhance a party's sense they have been heard (something that was obvious for plaintiffs bringing earthquake insurance claims, even though the lawyers and judges could have managed with the evidence being taken as read); and
 - c. enable the judge to absorb the evidence better, reducing the risk of misunderstanding it (particularly technical evidence).
65. If the court wishes to encourage greater use of oral evidence directions, the rules could usefully identify situations where that might be expected. Leading evidence orally obviously takes longer than reading a prepared statement (to say nothing of the upskilling of civil litigators that will be necessary if this becomes more routine). If briefs are to be replaced by will say statements, it will be important that the time saved in preparing them is not all spent later on in slower leading at trial.
66. Rule 9.10 permits the court to direct that evidence be given orally "before the giving of evidence". The rule was intended to enable practitioners to be prepared to have to lead oral evidence. In one recent case, however, the court considered that it could not give an oral evidence direction after a witness had commenced giving evidence even though "myriad difficulties" with the brief became manifest as the witness attempted to read it.⁴ We respectfully doubt that the rule is so limited, but the court should have a clear right to make an oral evidence direction after a witness has begun reading a brief if the reading reveals concerns about authorship.


Changing discovery obligations

67. Discovery remains a substantial cost in some proceedings. It serves a valuable function, but its full extent can be disproportionate, particularly in lower value cases. The 2011 reforms introduced a helpful new test but did not materially reduce costs.

⁴ *SCC (NZ) Ltd v Samsung Electronic New Zealand Ltd* [2018] NZHC 2780 at [208].

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68. Our perception is that litigants generally see value in a discovery process that requires both sides to disclose their adverse documents. This 'cards on the table' approach is entrenched as part of a fair process in our civil justice system. Litigants can, however, be justifiably disillusioned where the cost of achieving that legitimate objective becomes disproportionate due to the process adopted to achieve it.
69. Searching for documents through old email accounts and computers is time-consuming and costly, often disproportionately so. Often, only a small proportion of the discovered documents turn out to be relevant and a smaller proportion still are material. However, the challenge for reforming discovery is that the documents on which a case turns are often not located in the most obvious of places; and informal documents are often more revealing than formal documents.
70. The consultation paper refers to a 2002 Law Commission report stating that a party to a major commercial dispute could spend \$1.5m on discovery alone. Discovery costs of this magnitude are rare, in our experience. Of more concern are disputes with less than \$1,000,000 at stake, where discovery costs can be disproportionate if there are extensive electronic records that could be searched. Aside from the general issue of increasing the costs of litigation, substantial discovery costs early in the process can create sunk costs that become an impediment to pragmatic resolution.
71. We comment on the proposals:
- a. All discovery should be proportionate. In cases of lower value it is reasonable to reduce the availability of discovery and its breadth.
 - b. The general principles that govern the pilot scheme in England⁵ are all sound and should guide any reform in New Zealand.
 - c. Initial disclosure greatly assists the review of pleadings and early assessments of issues and merits. It should be retained. The pilot scheme in England does not require initial discovery where over 1000 pages or 200 documents would have to be disclosed. We are not convinced this exclusion is necessary. If initial discovery is substantial, the disclosing party could be given more time to make their discovery rather than having to serve it with their pleading.
 - d. The provisions for extended disclosure in the English pilot scheme appear more complicated than may be necessary. Rather than requiring parties to select from four or more pre-packaged disclosure "models", it may be preferable for the rules to indicate a range of tailored discovery orders that can be made and criteria for making such orders. The English scheme refers to disclosure of information that "contradicts or materially damages" a party's case. Any test

⁵ Consultation Paper at Appendix 2.



should leave as little room as possible for a party to make a self-serving assessment of the materiality of a damaging document. Our current adverse documents test is preferable.

- e. The Australian Federal Court seems to require the parties to justify any request for discovery and provides for standard discovery akin to our current regime in all but those rare cases where more extensive discovery may be granted. Requiring a justification to be made for discovery in every proceeding seems unnecessary, whilst providing for standard discovery in every such case would do little to reduce discovery costs in most High Court litigation.


- 72. The Court of Appeal's recent decision in *Taylor v Asteron Life Ltd* is a timely reminder that extensive discovery is sometimes essential to just adjudication. The holder of an income protection policy who was held to have made a dishonest claim for a disability benefit complained that the discovery sought by the insurer was disproportionate.⁶ The Court held that "extensive" discovery was necessary to enable the insurer to demonstrate that the insured had acted dishonestly.⁷ That determination is easy to make when the plaintiff had been found dishonest. Under some of the proposed reforms, the insurer might face more difficulty persuading a judge to order extensive discovery against an individual protesting his innocence and complaining that the insurer is acting disproportionately and trying to deny him access to justice. Ensuring the cost of discovery is proportionate is necessary, but a fair balance must be struck.

Providing for greater judicial control of hearings

- 73. Greater judicial control of hearings could make a significant difference to litigation costs. As with briefs, cost is largely a function of time. Cases with less at stake should generally receive shorter fixtures. Parties should have to make their cases within the time allowed unless a justification for more time can be demonstrated, not merely because the case has "run on".
- 74. More rigour should be introduced in setting the length of fixtures: parties should have to identify the witnesses they intend to call (if not by name then at least by subject). Completing the fixture in time may well require a combination of evidence taken as read and evidence read aloud, with limits on cross-examination and opening submissions. Pre-trial conferences, presided over by the trial judge and attended by trial counsel, should be mandatory and involve robust planning of the timetable.
- 75. We do not favour more judicial intervention in the examination of witnesses. While it is not surprising that lawyers do not like it, parties quickly question the impartiality

⁶ *Taylor v Asteron Life Ltd* [2020] NZCA 354 at [163].

⁷ At [164].



of a judge whose questioning appears to favour the other side. Costs should be contained if parties have to work within time limits proportionate to what is at stake.

Some other suggestions for reform

76. We make these further suggestions for reform.

Interlocutories – less formality and fewer in person hearings

77. The cost of interlocutory applications is often disproportionate, particularly in lower value claims. These costs could be reduced by:

- a. Allowing matters to be raised in memoranda for conferences rather than requiring every application to comply with the formal on notice procedure;
- b. Limiting oral submissions – for example, by hearing from counsel briefly at a conference or on a strictly time-limited basis at another time;
- c. Allowing for routine applications to be determined on the papers or at a hearing conducted by telephone or video conference.
- d. Imposing shorter judgment delivery expectations, and permitting more truncated reasons, for procedural interlocutories such as particulars or discovery (a quick decision within a reasonable range of outcomes is usually more important than a perfect decision that arrives after 3 months or longer).


78. Strike-outs and summary judgments, which could bring the proceeding to an end, should continue to receive a formality that reflects their seriousness. Less significant applications should be able to be made with less formality.

79. The court should have the power to hear a matter on the papers even where a hearing has been arranged if the issues have narrowed to the point where a hearing is unnecessary. In one recent case, two parties both flew senior counsel from Auckland to Christchurch for a half-day hearing to resolve whether security for costs should be calculated based on a 3-day hearing or a 5-day hearing, costs on an application for particulars, and the timing of filing an amended claim.⁸ Court time should not be required to resolve differences of this nature.

Power to strike-out allegations

80. In two recent cases, the High Court in England has struck out parts of a party's case that were judged "likely to obstruct the just disposal of the proceedings" (CPR 3.4(2)(b)) and cause disproportionate costs.

⁸ *Exit Timeshare Now (NZ) Ltd v Classic Holidays Ltd* [2020] NZHC 2046.

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81. In *HRH The Duchess of Sussex v Associated Newspapers Ltd*,⁹ Warby J struck out allegations of dishonesty, malice and bad faith because they were not ingredients of liability for the tort of misuse of private information. The Judge observed that he would have struck out one of the allegations even if it was relevant to the cause of action because it called for enquiries that would be disproportionate to their value. The Judge stated:¹⁰

[T]he costs and time that would be required to investigate and resolve the factual issues raised by the case as currently pleaded bear no reasonable relationship of proportionality with the legitimate aim of recovering some additional compensation for emotional harm.

82. In *Christoforou v Christoforou*,¹¹ Judge Eyre QC (sitting as a High Court Judge) struck out from a defence, on case management grounds, allegations that were accepted to be of at least some relevance to the parties' cases. The defendant had pleaded that the claimant's litigation was "yet another episode in a series of attempts by the Claimant ... to harass [the defendant] and deprive him of his assets" and listed 14 alleged examples of such attempts. The Court excluded all but three of the allegations from consideration at trial, preventing both the calling of evidence and cross-examination in relation to them.
83. The cases cited in these two judgments show that the courts can and do exclude peripheral issues from trial where it would be disproportionate to allow them to proceed. In *McPhilemy v Times Newspapers Ltd*, Lord Woolf stated:¹²

While under the rules a party cannot be prevented from putting forward an allegation which is central to his or her defence, the court can control the manner in which this is done and thus limit the costs involved. Both sides should co-operate in enabling this to be done.

84. We suggest that the strike-out or case management powers be expanded to permit the court to exclude even potentially relevant issues if they are not central to a party's case and the time and cost of permitting them to be pursued is disproportionate.

Costs on summary judgment and strike-out


85. The costs rules treat summary judgment and strike-out the same as any other interlocutory application and yet they are often considerably more costly. We do not support the view that increasing allowances would encourage greater use of the procedure. On the contrary, the current regime can encourage speculative

⁹ [2020] EWHC 1058 (Ch).

¹⁰ At [72].

¹¹ [2020] EWHC 1196 (Ch).

¹² [1999] EMLR 751 at 794.



applications and force parties to incur substantial costs that can impede the ability to have the resources necessary to proceed to trial.

More rigorous assessment of costs payable to successful parties

86. The threshold for reducing costs payable to an otherwise successful party could be revisited. The notion that “limited success is still success” is often successfully invoked to resist a reduction in costs even when substantial parts of the evidence and trial have been directed towards parts of the case that have failed.

Reforming the rule in Brown v Dunn

87. Reform of this rule could help reduce some of the unnecessary cross-examination that is conducted in an effort to avoid falling afoul of the rule. The existing rules providing for exchange of pleadings and full briefs of evidence mean a witness has usually had the opportunity to respond to what is said against them, and the rule can be limited to points of sufficient import that a direct confrontation is required.
88. This reform would be more difficult if written briefs were abolished or reduced.

Power to direct expert facilitations convened by an expert

89. Expert facilitations convened by an expert can be more productive than conferences of the experts alone or conferences facilitated by lawyers. Experts can find it harder to hold to a technically dubious position when the convenor is also an expert.

Lifting the Disputes Tribunal jurisdiction

90. While the Committee is obviously not in a position to direct this, we have noted a number of its members have called for it. We wish to record our support for this. The Tribunal’s jurisdiction could be increased to \$100,000. One additional feature that could be useful is to permit the Tribunal to seek the opinion of the District Court on a point of law in the same manner as the Canterbury Earthquake Insurance Tribunal may seek an opinion of the High Court.



Conclusion

91. We appreciate the opportunity provided by this consultation period to reflect on how reforming civil procedure might reduce costs and improve access to justice. It is challenging and important work. We look forward to the outcome of the consultation and would be glad to support the project further if we can be of assistance.

Yours sincerely,



Matthew Harris

Partner