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Sebastian Hartley
Clerk to the Rules Committee
c/- Auckland High Court
PO Box 60
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Dear Mr Hartley

Improving Access to Civil Justice

1 Introduction

- 1.1 The prohibitive cost of civil litigation is the greatest challenge to the rule of law in New Zealand today. Civil proceedings are generally speaking lengthy, complex and costly. As a result, many New Zealanders are prohibited from asserting their legal rights when they have been wronged, or defending themselves when sued. When access to justice is threatened, so too the rule of law.
- 1.2 We are solicitors at Meredith Connell, the office of the Auckland Crown Solicitor. Our practice sees us predominantly appearing on behalf of the Commissioner of Police in civil proceedings under the Criminal Proceeds (Recovery) Act 2009 (**Act**). Those proceedings are initiated and conducted entirely within the originating application process in Part 19 of the High Court Rules 2016 (**Rules**).
- 1.3 We have reviewed the Rules Committee's discussion paper "Improving Access to Civil Justice", dated 16 December 2019, and have considered its proposals. We agree with the Committee's general proposal to reform the Rules to improve access to civil justice by reducing the costs associated with bringing a civil matter to Court. More specifically, we support the Committee's third suggested reform – introducing a requirement that civil claims be commenced by a process akin to an application for summary judgment – as having much to commend it.
- 1.4 After a general discussion of proceedings under the Act and our context, we make our submissions in two parts:
 - (a) First, we comment on the specific proposal relating to civil proceedings commencing as summary judgment applications. We do so in light of the parallels between the summary judgment and originating application process, and our experience litigating defended proceedings via the latter.
 - (b) Second, we commend to the Committee's consideration the prospect of broadening the scope of the originating application process to include a greater number of defended proceedings. In our view, both the Committee's proposal and our own offer the prospect of simplifying civil proceedings, reducing cost and facilitating access to civil justice.

2 Proceedings under the Criminal Proceeds (Recovery) Act 2009

- 2.1 Proceedings under the Act are generally, although not necessarily, litigated in two stages:
- (a) First, and following an initial investigation into the affairs of the respondent, the Commissioner will ordinarily apply for restraining orders over the respondent's property – either on the basis that the property has been acquired with the proceeds of crime and is therefore tainted, or that the respondent has benefited from criminal activity, and therefore their property can be forfeited to repay the debt they owe to the Crown as a consequence of their unlawful benefit.
 - (b) Second, the Commissioner will apply for civil forfeiture of the restrained property – either by way of asset forfeiture order in respect of tainted property, or a profit forfeiture order where the evidence is that the respondent has benefited from criminal activity.
- 2.2 Restraint itself is regularly pursued in two stages, with the Commissioner first applying for without notice restraining orders, to ensure the property subject of the application is not dissipated during the course of argument over restraint, and shortly thereafter an on notice application for restraining orders. It is at the on notice stage the respondent has the opportunity of opposing the Commissioner's application for restraining orders.
- 2.3 We acknowledge there are unique aspects about the way the Commissioner litigates. First, the Commissioner has wide information gathering powers under the Act, which but for in exceptional cases, do away with the need for discovery. Second, the great majority of civil proceedings under the Act are initiated alongside, or after, parallel criminal proceedings, buttressing the Commissioner's information gathering powers by recourse to the Search and Surveillance Act 2012.
- 2.4 Additionally, and if successful in his application for civil forfeiture, the Commissioner may be entitled to two separate forms of relief, assets and profit forfeiture, both of which attach to actual assets of the respondent's, and ordinarily those assets will have been restrained and already be in the custody and control of the Official Assignee – the effect being that successful litigation is almost always beneficial for the Commissioner and the Crown and at the very least should not leave the Commissioner in a worse financial position than if he had never litigated.
- 2.5 As noted, all proceedings brought under the Act are commenced by originating application as per Part 19 of the Rules. Since the commencement of the Act over 10 years ago, the Commissioner has brought hundreds of proceedings for restraining and civil forfeiture orders, involving the restraint and forfeiture of close to a billion dollars. Accordingly, the Commissioner is the litigant in New Zealand most familiar with the prosecution of defended proceedings using the originating application process. As counsel for the Commissioner who act in the greatest number of proceedings on his behalf, we consider ourselves well placed to comment on the efficacy and suitability of the originating application process in defended proceedings, and also the use of affidavit evidence in defended civil proceedings more generally.

3 Civil proceedings commencing by way of summary judgment

- 3.1 A plaintiff's application for summary judgment requires the applicant to file both a statement of claim and a supporting affidavit. The affidavit must verify the allegations in the statement of claim, must depose to the belief of the person making the affidavit that the defendant has no defence to the allegations and set out the grounds for that belief.

Parallels between originating application process and summary judgment

- 3.2 Notwithstanding that a proceeding brought by way of originating application does not require a statement of claim or defence, there are clear parallels between the originating application procedure and summary judgment.
- 3.3 Most fundamentally, both the originating application procedure and the summary judgment procedure require the applicant to “front foot” their evidence by contemporaneously filing an affidavit in support of the respective applications.
- 3.4 Moreover, the essence of both summary judgment and the originating application procedure is swift disposal. In neither is discovery available as of right. Instead, discovery is in the discretion of the Court, and the approach to exercising that discretion has been described in both jurisdictions as conservative,¹ or as requiring exceptional circumstances.²

The Committee’s proposal

- 3.5 The Committee’s proposal is for appropriate civil proceedings, having been triaged at initial case management, to commence by way of an application akin to summary judgment. The Committee suggests the benefits of that process would include:
 - (a) early clarification of the issues and identification of the points of difference between the parties;
 - (b) early assessment of the evidence produced by the plaintiff;
 - (c) an initial judicial reaction to the strength of the parties respective cases; and
 - (d) reducing the costs of trial by making it easier to tailor the scope of discovery and limiting the number of issues to be addressed at trial.
- 3.6 In our experience, the suggested benefits – deriving from a process whereby the plaintiff (or applicant) is required to front foot their evidence and define the parameters of their case at the earliest stage of the proceedings – ring true. We consider each in turn.

Early clarification of the issues and assessment of the evidence

- 3.7 Requiring the plaintiff to contemporaneously file an affidavit in support of their application, ensures that proceedings are not commenced without some evidentiary basis for the claim against the defendant. The way proceedings are currently structured, a plaintiff can bring an unmeritorious claim, wholly lacking an evidentiary basis, and the onus would fall to the defendant to initiate his or her own application for strike out or summary judgment in order to dismiss the proceeding.
- 3.8 If a plaintiff wishes to sue, it is only fair and principled to require them to set out their evidentiary basis at the outset of the proceeding, giving the defendant the earliest possible indication of the basis for the claim against them, and its strengths and weaknesses. Generally speaking, there will be no reason why such supporting evidence should not be put forward by a plaintiff at the earliest stage of the proceeding.
- 3.9 Requiring evidence up front ensures that plaintiffs are forced to assess their case at the front end of the litigation process, with the result that their claim is necessarily tailored to the actual documents

¹ *Manchester Securities Ltd v Body Corporate 172108* [2015] NZCA 29 at [15].

² *Mobil Oil New Zealand Ltd v Bagnall* (1999) 12 PRNZ 655 at 659.

and witnesses they have available to them, rather than broad allegations which the plaintiff lacks an evidentiary basis to substantiate.

- 3.10 Tailoring the plaintiff's claim, such that fewer speculative actions are initiated and proceeded upon, will greatly limit the scope of discovery if, after both sides having initially filed evidence, discovery of additional documents is necessary. This is consistent with general principles that discovery should be proportionate and relevant to the *real* issues in dispute between the parties, and should not be used as a fishing exercise to extract evidence for an as yet unsubstantiated claim.
- 3.11 In our experience, the requirement to simultaneously file supporting evidence encourages a rigorous assessment of the prospects of success at the outset, and ensures only those grounds which are supported by evidence are advanced.

Judicial reaction

- 3.12 Obliging plaintiffs to initiate their proceedings alongside an application for summary judgment will entail a judicial ruling on the merits of the plaintiff's case early in the proceedings, potentially obviating the need for the matter to proceed to a full trial. Regardless whether the plaintiff is successful at this early stage of the proceeding, the judicial reaction the parties receive to the respective merits of their cases may have the benefit of discouraging unmeritorious litigation, or otherwise encouraging early settlement – with all its benefits of saved time and resources.
- 3.13 As noted, proceedings under the Act generally proceed in two stages, with the Commissioner first applying for restraining orders, and restraining orders themselves being sought in two stages, both without notice and subsequently on notice. Acquiring restraining orders requires the Commissioner to lead evidence that the property he proposes to restrain is tainted, or evidence that the respondent has benefited from criminal activity – though to a lower standard than that required for forfeiture. When restraint is sought without notice, a Minute will be issued by a High Court Judge as to whether the Commissioner has satisfied the requirements for restraining orders to be made. Occasionally, the strength of the Commissioner's case will be commented on, other times the strength is plain and the summary nature of the Minute granting the requested orders serves to confirm it. When restraint is sought on notice, and if the respondent takes the opportunity to oppose the application, a judgment will issue, giving an even firmer steer on the merits of the Commissioner's and the respondent's respective cases.
- 3.14 In some cases, the Commissioner may fall short in one aspect of his application for restraining orders. For instance, by failing to demonstrate to the requisite standard that the property he proposes to restrain has been derived from criminal activity, while succeeding in showing the respondent has nevertheless benefited from criminal activity.
- 3.15 In our experience, an early and positive judicial appraisal of the Commissioner's case does encourage respondents to engage with the Commissioner in settlement negotiations, thereby expediting the resolution of the proceedings and removing the need for a lengthy and costly defended hearing. Additionally, a less favourable appraisal encourages the Commissioner to address any defects in the evidence in his case. It can also encourage the Commissioner to commence early (and realistic) settlement negotiations.

Reducing the costs of trial

- 3.16 By requiring both the plaintiff and the defendant to file their respective application and opposition together with evidence in support at an early stage of the proceeding, the swift resolution of the dispute becomes a very real prospect. Structuring civil procedure such that both parties are positioned to assess the respective strengths and weaknesses of each other's cases at an early

stage of the proceeding incentivises early settlement, saving both costs and time for both parties, and frees up judicial resources.

- 3.17 The economic benefits of limiting discovery to only those issues truly in dispute, and encouraging settlement at an early stage of the proceeding, are self-evident and require no further explanation.

4 Expanding the originating application process

- 4.1 We also commend to the Committee's consideration the prospect of expanding the originating application process to include a greater number and variety of defended proceedings.

The originating application process

- 4.2 Although originally conceived to provide a speedy and inexpensive mechanism for disposing of applications where there was in reality no opposing party and no issues in dispute, the originating application process has been gradually expanded to include defended proceedings, including those brought by the Commissioner under the Act for restraint and forfeiture of the proceeds of crime. As Asher J said in *Hong Kong and Shanghai Banking Corporation v Erceg*:³

[26] ... Randerson J's statement that the matters covered by the originating application procedure is much wider than earlier envisaged is, with respect, undoubtedly correct. It is no longer right to say that it cannot be utilised where there is an opposing party.

- 4.3 The principal differences between the originating application process and ordinary civil proceedings – in addition to the requirement to file supporting evidence contemporaneously with the application, as discussed above – are:
- (a) full pleadings are not required, and instead the applicant files an abbreviated application setting out the relief sought, the grounds on which that relief is sought and reference to any legislative or common law authority on which the applicant relies;
 - (b) discovery is not available as of right, and instead is at the discretion of the Court; and
 - (c) case management is limited to the parties seeking directions from the Court under r 7.43A of the Rules.

Benefits of the originating application process compared to ordinary civil proceedings

- 4.4 The limitations on discovery and the expedited process, with limited case management, together ensures (for the most part) timely and cost effective litigation. The expense of excessive discovery is well covered in the Committee's discussion paper.
- 4.5 The expense attributable to excessive case management is less of a focus in your paper, but was well canvassed in a paper prepared by Chief Justice Allsop of the Federal Court of Australia.⁴ Drawing on the findings of studies into the benefits and drawbacks of case management in the United States,⁵ the United Kingdom,⁶ and Australia,⁷ Allsop CJ remarked that judicial case

³ *Hong Kong and Shanghai Banking Corporation Ltd v Erceg* (2010) 20 PRNZ 652 (HC).

⁴ James Allsop "Judicial case management and the problem of costs" *An invitation to speak at the Lord Dyson lecture on "the Jackson Reforms to Civil Justice in the UK"*, 9 September 2014.

⁵ JS Kakalik et al, *Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act* (RAND, 1996).

⁶ J Peysner and M Seneviratne, *The Management of Civil Cases: The Courts and Post-Woolf Landscape* (UK Department of Constitutional Affairs, DCA Research Series 9/05, November 2005).

management, if done badly, will have no impact on costs or will counterproductively increase them. This occurs in two ways:

- (a) where costs are front-loaded, with the result that parties who would have settled their dispute in any event are obliged to pay significant sums in compliance with case management; and
- (b) where the costs of case management are so excessive that the cost savings resulting from the matter being streamlined for trial through case management are wiped out by pouring funds into directions hearings.

Expanding the originating application process

- 4.6 While we accept that not all proceedings may be appropriately initiated and pursued under the originating application process, we do consider that a greater variety of proceedings would benefit from the cost savings of that process. Claims which have some combination of the following features may, in our view, be suitable candidates for initiation under Part 19:
- (a) Where relief is sought under well-defined statutory provisions or longstanding and well defined common law principles (by which we *include* contractual and tortious claims). In such circumstances detailed pleadings should not be necessary to elucidate the grounds on which the plaintiff proceeds.
 - (b) Where discovery is not necessary to advance the plaintiff's cause of action, because their claim is simple and the relevant documents are already in their control, or because they have alternative means of accessing the relevant information.
 - (c) Where the plaintiff's case can be considered strong from the outset, such that an expedited procedure with limited emphasis on case management and other interlocutory steps is appropriate.
- 4.7 We do not consider that the number of parties to the proceeding, nor the prospect of counterclaims and crossclaims, should tell against a claim proceeding by way of originating application. Proceedings under the Act are routinely commenced against multiple respondents and other interested parties, and those respondents and interested parties regularly apply for relief from forfeiture – in effect a counterclaim. Moreover, the Commissioner is often confronted with identifying and clarifying the nature of various equitable, statutory and legal interests in property in the course of his proceeding. In our experience, these issues are satisfactorily dealt with under the originating application process.

Reformulating r 19.5

- 4.8 Rule 19.5 allows the Court to permit any proceeding to be commenced by way of originating application, provided it is in the interests of justice. If the Committee is amenable to our suggestion of increasing the scope for civil proceedings to be commenced by way of originating application, it may wish to consider reformulating r 19.5's jurisdictional basis.
- 4.9 We suggest the Committee consider compelling intending plaintiffs to consider Part 19 as their appropriate procedural vehicle, and rendering it mandatory in suitable cases. The Rules could obviously stipulate suitable case criteria, including that issues in dispute, the number of parties and

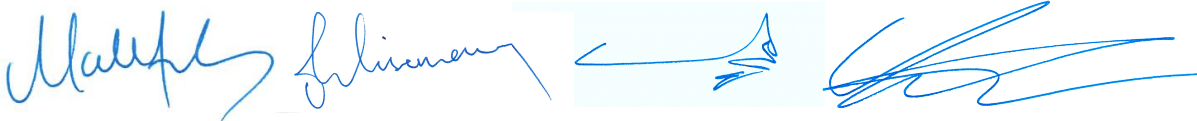
⁷ A Eyland et al, *Case Management Reform: An Evaluation of the District Court of NSW and County Court of Victoria 1996 Reforms* (Law and Justice Foundation of NSW, July 2003).

the likelihood of counterclaims and crossclaims do not tell against commencing as an originating application.

Conclusion

- 4.10 Civil proceedings can be complex and unwieldy things. Procedures which oblige the plaintiff to be upfront with the evidence they possess in support of their claim at the outset, thereby limiting both the issues in dispute and the need for discovery, offer the prospect of simplifying civil litigation. The benefits – faster disposal of proceedings and reduced costs of litigation – will assist with access to civil justice for litigants from all walks of life.
- 4.11 With that in mind, we commend to the Committee's consideration both its own proposal for civil proceedings to commence by way of a process akin to summary judgment, and our proposal for an expansion of the number and types of proceedings that may be commenced by way of originating application.
- 4.12 Thank you for the opportunity of commenting on these important issues.

Yours faithfully



Mark Harborow | David Wiseman | Hannah Macdonald | Conrad Purdon
Partner | Associate | Associate | Solicitor