SUBMISSIONS TO THE RULES COMMITTEE ON DISCUSSION PAPER –

"IMPROVING ACCESS TO CIVIL JUSTICE"

Background

1 These submissions are written in response to the discussion paper produced by the Rules Committee on improving access to civil justice.

2 The writers, Sarah Simmonds and Emily Flaszynski, were directly involved with the earthquake insurance claim resolution process chaired by the Honourable Sir Graham Panckhurst QC referred to at page 5 of the discussion paper, Proposal Two: Introduction of Inquisitorial Processes.

3 We worked for GCA Lawyers, solicitors for the plaintiffs in the class action which was settled by this process. Sarah was involved in the negotiation of the resolution process which is discussed at Proposal Two, and together we were responsible for the day-to-day management of the 24 claims involved in that process which included working the detail of each claim, preparing the claim and the policy holders for facilitation, attending and conducting the facilitation, preparing claims in which adjudication was required and attending to all matters associated with the process.

4 These submissions are primarily in favour of introducing an inquisitorial process for the resolution of certain claims in the High and District Courts. We aim to offer insight as to why the process chaired by Sir Graham Panckhurst QC was successful, in the hope that these insights will assist the Committee. For the ease of reference we will refer to this process as "the Panckhurst Process.

5 Given our experience of the Panckhurst Process the focus of the submission is around that process, but based on our experience of that process, we also have some wider preliminary comments to make as regards the concepts discussed in the consultation paper.

Conceptual Comments

6 The heading of the discussion paper refers to "Civil Justice" a concept that in our view is not reflective of how the profession or the public generally speak about the civil jurisdiction of the courts. Ideas of "justice" are more confined to criminal matters.

7 Concepts such as litigation, civil procedure and perhaps dispute resolution represent more of the thinking around civil disputes than the idea of “justice”.

8 Similarly, although it is discussed at paragraph 6 of the discussion paper, it is our view that it is not widely known nor is it a focus of those practicing in that area that the rules of practice and procedure have the objective “to facilitate the just, speedy, and inexpensive determination of proceedings and interlocutory applications.”

9 In addition deep pocketed litigants can use the existing system to ensure that litigation is not speedy or inexpensive as a strategy for furthering their position.

10 The cornerstone of the Panckhurst Process was the five fundamental concepts underlying it. As part of negotiation of the process, the ability to identify and agree these principles was instrumental in the development of the process itself. The process was agreed to be:

10.1 fair and just;
10.2 flexible;
10.3 efficient;
10.4 cost effective; and
10.5 prompt.

11 In addition, the claims were to be determined in accordance with the “substantial merits and justice of the case” as well as with regard to the contract of insurance and general legal principles.

12 During the Panckhurst Process these fundamental concepts were referred to frequently and were actively used by the parties to influence, define and find agreement about how to advance individual claims.

13 The fact that current civil processes and procedures may already contain good mechanisms for improving access to civil justice has been identified by the Rules Committee at paragraph 11 where it comments that some of the changes required may be to the culture of litigation, with the obvious inference that both judges and lawyers have an important role to play in ensuring that civil litigation becomes civil justice.

14 Based on our experience of the Panckhurst Process, effective change will require active work by the judiciary, not necessarily more work, but encouragement and leadership on how civil procedures and processes should be used to facilitate a just, speedy and inexpensive determination of proceedings. Focus on the process, and its

aims is integral to the results that those processes and procedures can achieve. Although we consider that there is room for further changes to civil procedure which would support this, it is important that any changes which come out of this discussion paper are not focused just on changes to rules and procedures but incorporate attempts to change the culture of civil litigation.

15 This change of mindset may be very challenging for lawyers as it requires them to rethink their approach to the resolution of disputes. It may also raise fears about client complaints and other disciplinary concerns as clients become fearful partway through a process which is less adversarial.

16 It is also clear that it is difficult for such change to be made, and perhaps for courts to lead that change, without the co-operation of counsel.

17 The other constraint to genuine change is the fear that curtailing process may result in poorer decision-making. This concern is expressed in paragraph 13 of the discussion paper where it is suggested care must be taken to ensure that the concept of a decision being "just" is not lost in looking for processes that are quicker and less expensive.

18 It is absolutely integral to any proper system of civil justice that decisions are seen to be "just," but if "just" is seen as a synonym for saying that these decisions are objectively and 100% correct, then the ability to look at different processes can be hamstrung for the fear that the decision becomes less correct with a more streamlined process.

19 One of the lessons learned from the Panckhurst Process, and in our opinion, one of the ideas which enabled both parties to use that process successfully, was an acceptance that in very few civil disagreements is there one absolute and true solution. The focus therefore moves from "the" answer to "an" answer.

Proposal One: Short Form Trial Processes

20 We have two brief observations to make:

20.1 as litigators, we are very familiar with High Court processes but significantly less so with District Court processes. We see this as reflective of many in the profession, where the relatively high cost of litigation has led to a profession which tends to see lower value claims as uneconomic to pursue. This has the flow on effect that litigation claims tend to be the higher value, more complex claims that fall within the High Court jurisdiction. There may therefore be an

argument that there is a need for education about the availability and use of short form processes in the District Court.

20.2 Based on our experience of the Pankhurst Process, we would support exploration of a short causes procedure as suggested by the New Zealand Bar Association. The two features of this that we think would contribute to its efficacy are:

(i) short and specifically stated page limits;

(ii) the management of a case from commencement to completion by a single judge.

21 Both these ideas are discussed more fully in our submissions on the Panckhurst Process.

Proposal Two: Inquisitorial Processes – The Panckhurst Process

22 Before discussing the merits of the Panckhurst Process, it is worth noting some key features of the process (without unduly breaching the generally confidential nature of the resolution process as a negotiated private resolution process between two parties):

22.1 there had been a pre-existing adversarial litigation relationship between the parties, and this continued during early attempts to negotiate a resolution process to the dispute. This meant the parties had aired and, to an extent, "tested" this type of approach with each other trying to find a resolution.

22.2 The Panckhurst Process was designed and explicitly accepted by the parties. This resulted in a mutual commitment to seeing the Process succeed. In addition, the parties understood and accepted any "trade-offs" implicit in the process as against continuing High Court litigation.

22.3 At least one significant point of dispute was settled as part of the negotiation of the resolution process and thus the Panckhurst Process could focus more narrowly on the technical and value aspects of the claim without significant legal questions needing to be addressed.

22.4 The resolution process itself was recorded in a simply worded two and a half page schedule – a deliberate pathway adopted by the parties which both showed their commitment to a simplified and different process that was

intended to be significantly different from ordinary litigation or even a standard ADR process.

22.5 Before the Panckhurst Process began dealing with individual claims, there was a two-day hearing, described as a "Global Briefing." This was an opportunity for each party to outline to Sir Graham key aspects of the background to the dispute as they each saw it and to describe the ways in which the party saw this process working in order to achieve the agreed purposes.

22.6 Although the claims were all complex and involved significant technical questions requiring expert evidence, the subject matter of all claims was similar, as the Panckhurst Process was for the resolution of residential earthquake claims all managed by a single insurer.

22.7 There was a very high degree of consistency across all the individual cases in terms of counsel acting for each side, the insurer's representative at the hearings and the experts called by each party. The parties' counsel both had extensive experience and expertise of earthquake litigation and dispute resolution.

23 The Panckhurst Process reserved a great deal of discretion to the Judge in terms of how the Process was managed which allowed the Judge to determine the way in which evidence/information was gathered and issues determined ensuring that the focus was always on the underlying justice. The purpose of the Pankhurst Process was to provide an answer to the claimants in the minimum amount of time and without unnecessary complexity.

24 The Panckhurst Process deliberately used different language from ordinary litigation and ADR processes. It talked about "information" rather than evidence, and "questions" rather than cross examination. There was a deliberate rejection of the types of procedures that are common in litigation or arbitration which can be slow, cumbersome and costly.

25 This meant it was important that the lawyers involved in the Panckhurst Process did not become stuck or slip into traditional ways of approaching a disputed claim. The aim was not to "win," labour over the finer points of law to try and convince the other side or the Judge of one position over another, or to cloud the process with unnecessary issues or arguments. The Panckhurst Process was aimed at finding a solution or to

assist the Judge to make a determination of a fair and just outcome should the parties be unable to agree.

26 The core purpose of the Panckhurst Process was to quickly isolate the key issues inhibiting the settlement of claims and seek to use information or evidence to find a resolution to disputes that was long overdue.

27 In many respects the Panckhurst Process set up the parties to work in a collaborative way rather than an adversarial one.

28 The Pankhurst Process proved to be very successful. This success can be attributed to the following aspects:

28.1 A **problem solving mindset** by all parties involved:

(i) This mindset evolved over time.

(ii) The focus was centred on ways to resolve the problem rather an arguing why one side's opinion/position was likely to be more right than the other side and therefore should be adopted.

(iii) Acceptance that there might not always be agreement on an issue but being prepared to find a way to move the claim forward all the same.

(iv) Acknowledgement that the other party could be right or might have a valid point to make.

(v) A corresponding genuine effort to listen to the points being made by the other party.

(vi) Choices were made by everyone involved about what to say but more importantly about what NOT to say or to leave unsaid– the aim being to keep the dialogue going so a way forward could be found, and differences could be discussed respectfully and without raising the level of conflict.

(vii) An agreement to find AN answer not necessarily THE answer.

(viii) A real commitment and understanding of the purpose of the process.

28.2 **Early and continued co-operation**

(i) Information, such as expert reports, were shared with the other party as soon as they were available.

(ii) Where unavoidable delays occurred, “point scoring” or other complaint was not made. Communication about any delays was genuine and timely.

(iii) Agreed templates were used.

(iv) Most required completion jointly. To meet the tight timeframes of the process, the parties had to actively work together to ensure material was delivered to the Judge on time.

(v) Agreed approaches to some evidence (eg how costings for repair work would be presented) were taken so that there was no risk of talking past each other or the Judge not having comparable evidence to evaluate.

28.3 Keeping the **paper-work brief and simple**

(i) At the outset, the parties were required to complete a simple template form that stated the key issues that needed to be addressed, the expert reports required and when they’d be available. Each party recorded their own perspective but all of this had to be filled out in one single page.

(ii) A brief ‘position’ paper was prepared by each party. It was non-technical in its language, it was agreed it shouldn’t really be more than 5-10 pages and it gave an overview of the party’s position. There were no directions about what this covered so each party could emphasise what mattered to them. This gave insight into the dispute and sometimes the possible solutions.

(iii) For some evidence, a single page comparison document was prepared jointly by the parties. This made comparison between the parties’ positions easy and often identified the main driver of the lack of resolution to date.

28.4 Time constraints and fixed deadlines

(i) Dates were set for facilitation (and later determinations) and were not changed.

(ii) Parties were expected to do what they could in the time available ie to cut to the chase and focus on the nitty gritty.

(iii) Experts had only that limited time to review/prepare their reports. These were expected to focus on points in dispute.

(iv) This meant energy and effort was put into steps that would lead towards the resolution of the claim, as there was only time to address what really mattered.

28.5 The **power of one Judge** who controlled the facilitations and the determinations and heard all of the claims.

(i) Led to transparency and consistency of approach.

(ii) There were two effects of this in the Panckhurst Process. The first is relevant to class or group resolutions. The second has wider implications that would apply to all types of claims:

Class/Group Resolutions

(a) Patterns of behaviour, conduct, process, become clear over a series of similar cases.

(b) Things learnt throughout the process are able to influence the outcomes for other cases.

(c) The Judge was able to develop a deeper understanding of all of the issues and the positions the parties and their experts took.

(a) Positions and arguments made at facilitation needed to be genuine and not bargaining positions as the same Judge would be hearing the substantive matter at adjudication if the claim was not resolved by agreement.

(b) All behaviours that were displayed at facilitation would be known to the Judge so would be able to be taken into account should

a matter proceed to adjudication This could have implications on credibility, assessment of damages etc.

(c) The use of a Judge therefore removed any incentive to use 'techniques' that were not-constructive to a proper consideration of the claims and exploration of whether settlement was possible.

28.6 The homeowners were able to **speak and be heard** in an informal manner.

(i) A statement was written by the claimants themselves (not the lawyers) and was circulated to all as part of the position paper ahead of facilitation.

(ii) They were then able to speak uninterrupted to their statement.

(iii) The insurer did not attempt to justify what had gone before but simply acknowledged the claimants' feelings and reiterated their intention and hope to find a resolution to the claim. The insurer may have had strong views about the validity of any grievances raised but put that to one side in the interests of the process.

(iv) This ability to be heard without dispute was an integral step to successful resolutions. Being heard is a powerful process. Listening without defensiveness is a good reality check.

(v) Once heard it was possible to put historical grievances to one side allowing the parties to focus on the live issues that could be resolved.

Why the adoption of the Panckhurst Process to the GCCRS was not as successful

29 The GCCRS process has been a useful tool in addressing outstanding residential earthquake claims in Christchurch. However, most of its success has occurred at the broker or direct negotiation stage. It is our understanding that those aspects of the GCCRS model which most reflect the Panckhurst Process had not been as successful in finding resolutions to outstanding claims as was hoped.

30 The writers of this submission do not profess to know the internal details of the GCCRS process as we were not part of that organisation, but our observations about where it appeared to differ in important aspects are as follows:

30.1 it is not clear that those involved in the process really understood that it should be something totally different from mediation and arbitration. Although nomenclature of “facilitation”, for example, was adopted, it was used interchangeably with the term “mediation” by some of the key people in the process, which suggested to us that those involved were missing some of the integral principles and concepts which were crucial to how the Panckhurst Process worked.

30.2 This then meant that parties and their advisers, as well as the decision-makers were less likely to be able to make the move away from traditional approaches to embrace a collaborative problem-solving mindset and process.

30.3 There is a degree of trust between parties which is required to work in this way. When the parties and their advisers are constantly changing, it is a real leap of faith for those individuals to enter the process believing that a non-adversarial approach could be successful, particularly against the background of lengthy and often quite high levels of dispute between them. That trust is easier to develop when there is consistency of personnel involved. For the GCCRS process to have been able to achieve this, it would have required real understanding of the model and significant leadership (including almost enforcement) of that by the decision-makers.

30.4 We understand that it was not common for parties to select the resolution pathway in the GCCRS process where adjudication follows automatically from (failed) facilitation and the decision-maker in both stages of the resolution process is the same person. This commonality of decision-maker and facilitator is very rare in legal resolution processes because of concerns around natural justice. However, there are important effects both on the behaviour of the parties and on decisions around how information/evidence is dealt with which follow from this joint role, and which contributed significantly to the success of the Panckhurst Process.

30.5 It may be that there was less commitment by the parties to the GCCRS process as it was a process independently established and offered to them, rather than one which they committed to and then negotiated. It was also one amongst a variety of possible processes available to resolve the insurance disputes. The fact there were “backup” options for resolution may have diluted the commitment to making the process work. In the Panckhurst Process there were

no other options than to agree at facilitation or have the matter resolved at adjudication from which there was no right of appeal. The commitment to making the process work under those conditions was significant.

Conclusion

31 We consider the Panckhurst Process to have delivered both accurate and relatively quick justice. It also did so in a cost-effective and lower stress environment than both litigation and standard ADR models.

32 The issues the Panckhurst Process was faced with were highly complex, often very detailed and arose out of circumstances where there was significant distrust and high levels of conflict between the parties. We therefore consider that it is a process that would be capable of being used across a wide variety of disputes.

33 Although it may require judicial time in terms of becoming familiar with what the process can achieve and in ensuring that in each individual claim the parties and the pathways for progression of the claim are consistent with this different model, overall there should be less judicial time consumed by such a process, particularly as compared to standard litigation. The claims settled through the Panckhurst Process included claims worth over $1 million, and all but one case required no more than one day of hearing time. Most claims included a teleconference which took something in the order of perhaps 15 minutes per claim, and obviously there was time spent by Sir Graham in preparation, and in the few cases that went to adjudication, in coming to his decision.

34 If there was interest in developing an equivalent type process, we say the key features should be:

34.1 In entering the process, the agreement must be both facilitation and adjudication if required. Whether there could be appeals from any adjudication is an open question.

34.2 All stages of the resolution process must fall within the jurisdiction of a single decision-maker.

34.3 The decision-maker must clearly and staunchly state and enforce the key principles of the process.

34.4 The focus can only be on the key issues which need to be resolved and historic or other grievances cannot be allowed to interfere, but do need to be acknowledged as valid.

34.5 There must be a commitment to the established time frames.

34.6 Creating processes that require active co-operation between the parties is helpful.

Should you have any further queries regarding these submissions please feel free to contact us.

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