Improving access to Civil Justice

There is much that everybody would agree with in the general principles referred to in the paper. Given that resources to fund the system and for participants are limited differentiating between levels of process makes sense. Proportionality should always have been a criteria. Litigation is rarely about absolutes, whatever the particular parties may like to think. The fundamental objective of any process is to ensure that a participant feels satisfied that she or he has been fairly heard.

Small Claims/District Court

I generally agree with the proposals and, for my part, would err on the side of increased jurisdiction. I note the suggestion that the Civil Registry requires strengthening. It would also be appropriate to note that there has in the past been an under resourcing, at least in the Auckland District Court, of judges with civil experience. That jurisdiction has in recent times relied upon the expertise and experience of Rod Joyce QC and Gary Harrison.

High Court

Litigation in the High Court has become ridiculously expensive. It has also become unduly complex and delayed. I appreciate the difficulty of altering processes and culture which have become ingrained and I respect the efforts which have been made to suggest mitigations.

However, in my view, except with discovery where the ability to multiply communications without any personal contact has vastly exacerbated cost since the days of Peruvian Guano, the causes of the present complexities and costs are not organic to litigation but have been imposed by the system. The ever-increasing complexity of the Rules of Court, the requirement for written material at every step of the way, the introduction and failure to police written briefs and the rules of evidence are all significant causes. In my view the proposals risk exacerbating not moderating the existing causes.

I am not aware of any attempt to do the sort of analysis, which would be normal in business, of pulling apart a number of significant High Court cases and identifying and attributing the costs and benefits to each step of the process. If that analysis has been done I apologise for my ignorance but I do not know of any counsel who has been involved.

Without the benefit of that analysis I can only comment from my own experience. In my view the proposals imply that the problems lie with the oral process, whether interlocutory or substantive, in court. In my view that is not the cause of the escalation in costs or complexity. I practised in the days of no written submissions, interlocutory or substantive, no written briefs instead oral evidence and regular oral judgments both interlocutory and substantive. Costs

were within bounds. Costs did not explode because of talking too much, they exploded because of writing too much.

Most cases never get anywhere near a hearing, certainly not a substantive hearing. The costs which cripple cases are incurred in the out of court processes. The worst, introduced because of the same incorrect perception, was the introduction of written briefs. In my recollection all experienced litigators advised against their introduction in the carte blanche form adopted.

I appreciate that experiments have identified the fallibility of human memory, even if that was not already self-evident. However, I am not aware of any study which has tested the fallibility of written briefs. Produced as they often are by teams of lawyers conscious of the factual and legal issues, through multiple drafts and remote from the actual words of the witness, I understand their convenience but am sceptical of their authenticity. Indeed, in my observation, judges rarely if ever include quotes in judgments from written briefs, but often quotes from oral evidence or answers in cross examination.

Written briefs are not policed in the way oral evidence was and accordingly the rules of evidence, including the fundamental requirement for relevance, have largely been obliterated. And the length of one party's briefs compounds the lengths of the other party's briefs. The cost, in my view, is entirely disproportionate to any benefit and disproportionate to the cost of producing oral evidence. Indeed I see written briefs (or affidavits) as further disadvantaging access to justice for the ordinary litigant/witness. A plumber can always explain things better in her or his words than have it written by lawyers.

The problem is not cured by adopting affidavits instead of written briefs. Indeed my understanding of the practice in New South Wales, at least while Jim Farmer QC was at the New South Wales Bar, was for affidavits to be read paragraph by paragraph by counsel with objection taken paragraph by paragraph. That practice may have altered but that it existed is an illustration of the importance that should be attached to rules of evidence including relevance. My understanding is that the process imposed a significant restraint on profligacy, an issue with the content of written briefs which we find in New Zealand.

I agree with para. 25 of the paper which suggests the desirability of greater proportionality, early identification of the key issues (and focus on those issues), and earlier judicial engagement with those issues. I also agree, although with some trepidation, with the paper's recommendation as to the scope of the initial issues conference. The success of that proposal will immediately depend on the discipline and experience of counsel and the judge. It would also depend upon whether that front loading of cost is in practice outweighed by the early disposal of proceedings or the more efficient disposal (without duplication of cost) of

proceedings which continue. Without discipline it risks adding a further layer of cost without benefit. If introduced its outcomes should be monitored.

I am certain that all litigators would support the desirability of identifying issues and evidence at an early stage. As will be apparent, I am opposed to full written briefs or affidavits but I do see that this initial conference could be an appropriate place for a judge to set a page limit for precis briefs with the evidence to be led orally. Sensible co-operation between judge and counsel would allow uncontentious evidence to be led. And, despite what is said in the paper, provide an opportunity for the court to assess the witness before being subject to attack under cross-examination. In my view, the present proposal risks disadvantaging the ordinary litigant/witness.

I have reservations about the proposal in para. 75(a) that the contents of documents be admissible as to the truth. It seems to me that it will add further complexity and cost because of the necessity of an added process to identify what in an array of documents is relevant, claimed to be truthful, and will have to be considered for challenge. Inevitably that is going to add further written processes. Written processes cost money.

I do not pretend to fully understand what is implied in the proposal and so my reservations may be misdirected. At the moment unless evidence is led to establish such facts the documentary allegations are not of themselves evidence of truth. I understand how to deal with positive evidence of fact. The truth or otherwise of the fact will depend upon assessment of the evidence supporting the alleged fact.

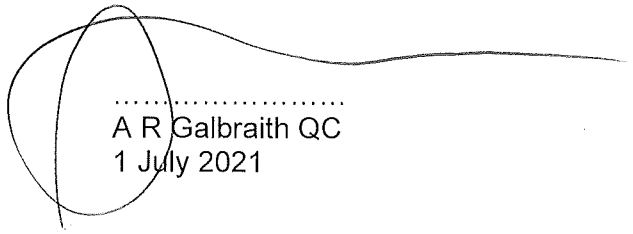
I do not understand the practical consequences of having to deal with bald assertions of fact, now to be evidence of truth, contained in a mass of documents. How does one satisfactorily prove a negative against an asserted fact which is to be deemed truthful? How does one deal with documents, such as I recently saw in a case, running over dozens of pages containing a vast number of factual allegations. This risks becoming an invitation to litigation through written documentation. It certainly risks further written processes, complexity and cost.

It does seem to me wrong that a long recognised principle, the application of which is understood and which I am not aware of having caused injustice, should be overturned with consequences of which there is no certainty.

Having said that I fully agree that written briefs, or affidavits, should not be a regurgitation of the contents of documents. The evidence should be evidence of fact. The worst excesses I have seen are of witness briefs traversing documents of which the witness had no personal knowledge or responsibility. That misuse does not, in my submission, justify an uncertain reversal of the law.

The proposal in respect to interlocutory applications makes sense. But given the detail contained in the application and the notice of opposition, many interlocutory applications do not justify the costs of repetitive written submissions or judge time in writing anything other than a minute in response. Rather than the universal requirement for written submissions I would suggest a decision on the application and notice or, where necessary, a confined time telephone conference, with a presumption against written submissions unless directed.

I hope the Committee will excuse me if I do not comment other than superficially on the discovery proposal. The cost implications of discovery are significant but I have never been able to satisfy myself with a solution to the conflicting issues which are involved. It would be great if an obligation of candour provided the answer but I suspect that all counsel, as I can, will be able to think of situations where candour would have been a wishful thought. However, targeted discovery is a failure, something has to be attempted, but if candour is to be introduced the results should be monitored in real life experience.



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A R Galbraith QC
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