1 July 2020

Sebastian Hartley
Clerk to the Rules Committee
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Dear Sebastian,

1. I am writing to respond to the Rules Committee's Improving Access to Civil Justice Further Consultation Paper ("the Paper"). I am a PhD candidate at the University of Cambridge, researching judicial approaches to the admissibility of improperly obtained evidence in civil proceedings. I have previously worked as a Judges' Clerk in the New Zealand High Court, as a barrister employed by Andrew Brown QC, and as a foreign qualified solicitor at Watson, Farley & Williams LLP (London).

2. My response is limited to commenting on:

   - The proposal to include a reference to proportionality as a guiding purpose of the High Court Rules; and
   - Decisions on the papers.

Changing legal culture

3. The Paper recommends the introduction of "proportionality as a guiding purpose of the High Court Rules 2016."[1] This is, in part, to constrain the "maximalist approach" of the current culture of litigation prevailing in New Zealand,[2] and to reflect "the Committee's assessment that justice can be done, in a manner which still accords with citizens' expectations that they will receive a fair hearing, and which recognises the importance of proceedings involving disputes of significant importance to individuals being disposed of correctly, using [streamlined] procedures."[3]

4. I support the introduction of proportionality as a purpose in the High Court Rules, and wish to comment on the inclusion of proportionality wording in the English Civil Procedure Rules, as well as suggest that the Committee consider whether the English approach to relief from sanctions when rules have not been complied with may assist in promoting cultural change in the New Zealand legal profession.

5. As the Committee will be aware, the guiding theory of civil litigation in England and Wales prior to the enactment of the Civil Procedure Rules was "substantive justice".[4] Under this approach, it was thought that "everything was to be done to enable the court

[1] Committee Paper at [71], [72], [77](k).
[2] At [31].
[3] At [39].
[4] A shorthand label for the concepts of "arriving at a decision on the merits", "justice on the merits", or "doing complete justice".

to be in the best position possible to accurately determine a claim",[5] with an accurate determination being the correct application of true fact to right law.[6] This approach resulted in a proliferation of evidence before the courts, and associated costs and delays. The comment by the authors of McGechan, referred to in the Committee's Paper, demonstrates this: "the ultimate aim must always be to ensure that justice is done, even though this may not be the quickest or cheapest solution". However, substantive justice is no longer the guiding theory for English civil procedure – substantive justice (application of true fact to right law to reach a substantively accurate determination) is now one of three goals, rather than the ultimate goal of the system.[7] The other goals are proportionality and expediency, and the theory is referred to as "proportionate justice". In summary, proportionate justice as a guiding theory for civil litigation means that considerations of time and cost are to be seen as aspects of a just outcome, rather than external to the achievement of a just outcome.

6. *O'Leary v Tunnelcraft Ltd* is a good example of the effect of the change.[8] The proceedings involved a personal injury claim. Thirty-one days before the trial was set to begin, the defendants disclosed evidence of surveillance footage and photographs taken of the claimant. Their application to rely on that evidence at the trial was refused – there was no reason why the evidence could not have been disclosed earlier, and granting the application would have meant that the original trial date would be lost, and the trial would be lengthened. If holding a substantive justice view of civil litigation, the evidence should have been admitted and the trial delayed, because the evidence would increase the likelihood of a substantively accurate determination. On a proportionate justice conception, such an approach could not be justified, given the increase in costs to the claimant, and inefficient use of court resources by loss of the trial date.

7. It seems that the Committee is hoping to prompt a similar "paradigm shift"[9] from substantive justice ideas to proportionate justice in New Zealand, with the inclusion of proportionality as a guiding purpose of the High Court Rules.[10] If so, the English experience with the "overriding objective" contained in CPR 1.1 suggests the need for careful attention to wording, as well as an education campaign for the profession, otherwise the desired cultural change may not be achieved. The original version of the overriding objective stated that the overriding objective of the Civil Procedure Rules was to enable the court to deal with cases "justly". For anyone who has read the Woolf Reports leading to the enactment of the Civil Procedure Rules, it is clear that "a radical

[5] John Sorabji *English Civil Justice after the Woolf and Jackson Reforms A Critical Analysis* (Cambridge University Press, Cambridge, 2015) at 60.
[6] At 2.
[7] Adrian Zuckerman *Zuckerman on Civil Procedure* (3rd ed, Sweet & Maxwell, London, 2013) at [1.43].
[8] *O'Leary v Tunnelcraft Ltd* [2009] EWHC 3438 (QB).
[9] Sorabji, above n 5 at 3.
[10] Arguably, New Zealand already subscribes to proportionate justice. See *Opai v Culpan* [2017] NZHC 1036 [39]-[48], where Katz J was confronted with an argument that the New Zealand High Court Rules place less emphasis on litigation proportionality than the CPR, and concluded that this was not the case; and s 6 Evidence Act 2006, which states that the Act is to help secure the just determination of proceedings, by, among other things, avoiding unjustifiable expense and delay. In the report accompanying the draft Code which led to the Evidence Act, the New Zealand Law Commission was clear that "efficiency, finality, and the avoidance of delay" are not subsidiary considerations, and are instead "important policy objectives [that] must play a substantive role in evidence law" (NZLC Report 55, para 20 – 21).

change of culture" was intended.[11] However, in proceedings following the enactment of the Civil Procedure Rules, "the impression was sometimes given that considerations of economy of time and resource were incompatible with doing justice in the sense of reaching decisions based on the substantive merits of the case."[12] As such, it was considered necessary to introduce a second version of the overriding objective to "remove the conception that where justice on the merits conflicted with proportionality, the former prevails."[13] The second version (currently in force) states that the overriding objective is to enable the court to deal with cases "justly and at proportionate cost".

8. The English experience suggests that explicit reference to proportionality (or perhaps proportionate justice) may be necessary in order to prompt the cultural change that the Committee is seeking.[14] Footnote 45 of the Committee's Paper suggests replication of ss 7-15 of the Civil Procedure Act (Vic), where the over-arching objective of civil procedure is stated as being "to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute". This is not very different from the current "secure the just, speedy, and inexpensive determination" wording in the current High Court Rules, and may be insufficient to break the commitment to substantive justice.

Relief from sanctions

9. In the interests of promoting cultural change, one thing the Committee may want to consider is the approach taken to breaches of the Civil Procedure Rules in England and Wales, as contrasted with the approach to non-compliance with rules in r 1.5 HCR. CPR 3.8 and 3.9 provide:

> **3.8**
> (1) Where a party has failed to comply with a rule, practice direction or court order, any sanction for failure to comply imposed by the rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanction.
> (2) Where the sanction is the payment of costs, the party in default may only obtain relief by appealing against the order for costs.
> (3) Where a rule, practice direction or court order –
> (a) requires a party to do something within a specified time, and
> (b) specifies the consequence of failure to comply,
> the time for doing the act in question may not be extended by agreement between the parties except as provided in paragraph (4).
> (4) In the circumstances referred to in paragraph (3) and unless the court orders otherwise, the time for doing the act in question may be extended by prior written agreement of the

[11] Sir Harry Woolf *Access to Justice: Interim Report of the Lord Chancellor on the Civil Justice System in England and Wales* (1995) at chapter 4, para 4: "a change of this nature will involve not only a change in the way cases are progressed within the system. It will required a radical change of culture for all concerned." See also chapter 4 para 6: "if 'time and money are no object' was the right approach in the past, then it certainly is not today. The achievement of the right result needs to be balanced against the expenditure of the time and money needed to achieve that result."
[12] Zuckerman, above n 7 at [1.42].
[13] Zuckerman at [1.42].
[14] See Zuckerman at [1.17], citing Lord Dyson MR as saying "it is easy to see why, not least given the long heritage we have of striving to secure justice on the merits in each case and the intuitive understanding that doing justice is to reach a decision on the merits, mistaken assumptions took hold. **This was compounded by the failure to make explicit in the overriding objective that it includes a duty to manage cases so that no more than proportionate costs are incurred and so as to enforce compliance.**"

parties for up to a maximum of 28 days, provided always that any such extension does not put at risk any hearing date.

3.9
(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
(a) for litigation to be conducted efficiently and at proportionate cost; and
(b) to enforce compliance with rules, practice directions and orders.
(2) An application for relief must be supported by evidence.

10. As seen here, the defaulting party is subject to the relevant sanction for failure to comply automatically, unless successful in applying for relief from sanctions. I assume that the need to apply for relief from sanctions is a significant disincentive to deliberate rule breaking and associated delays, as affected lawyers would have to inform their clients of the failure in order to get instructions to apply for relief from sanctions. I imagine that it would only be a particularly bold lawyer who would ask their client to pay the costs of preparing and filing an application for relief from sanctions, meaning that the firm would have to wear these costs as a further disincentive to non-compliance. In contrast, failure to comply with a rule in the NZ High Court Rules enables the court to respond in a discretionary manner. It seems to anticipate that an application will be made by the non-breaching party, asking the court to deal with the non-compliance. This suggests a more lenient response to rule breaking which may enable litigants to 'get away with it' more easily. There are suggestions in the Committee's Paper that an increased use of sanctions is already being contemplated.[15]

Open justice

11. I generally support the proposal that interlocutory hearings should be decided on the papers. However, one downside to this is that it will decrease public opportunities to observe hearings in person and hear the arguments being made. If feasible (and subject to any privacy concerns), it would be interesting to be able to view copies of parties' arguments on the Courts of NZ website, as a replacement. This may also facilitate public legal education.[16]

12. Thank you for the opportunity to respond.

Yours sincerely,

Alexandra Allen-Franks

[15] See e.g. [75](c).
[16] It would also be interesting to have publicly available access to parties' submissions even where cases have oral hearings, as was recently the case with the UK Supreme Court and *Miller No 2* (the prorogation case).