w shortlandchambers.co.nz/ab

Andrew Barker QC
Barrister
BA / LLB (Hons), LLM (Tor)

8 July 2021

Sebastian Hartley
Clerk to Rules Committee
PO Box 60
Auckland

By Email: rulescommittee@justice.govt.nz

Dear Sebastian

IMPROVING ACCESS TO JUSTICE – CONSULTATION PAPER

Introduction

1. This is my submission on the further consultation paper by the Rules Committee on Improving Access to Civil Justice dated 14 May 2021. I apologise that I am a few days later with the submission. Work got in the way last week.

2. I wanted to take the opportunity to file a further submission, mainly to express my support for the proposals that have been made. I thought the consultation paper was a measured and realistic response to the issues identified.

3. The comments I make are directed to some ancillary aspects of the reforms proposed rather than any a challenge to their general direction. They are mainly directed to proposed changes to the High Court Rules. I am not sure that I am qualified to comment on the Disputes Tribunal, and it has been some time since I did cases in the District Court. Nevertheless, the reforms you discuss in respect of both of those Courts seemed sensible.

4. My comment are as follows.

Senior Practitioners sitting as judges in the District Court

5. You have raised the possibility of senior practitioners sitting as part time judges in the District Court. I think this is an excellent idea, and that it would have strong support within the profession. I think the appeal would be broader than simply those considering judicial appointment.

6. For my own part, and I think this is an experience shared by other senior practitioners, we are looking for ways to contribute to the profession and the community. It is not always easy to find meaningful ways of doing so. Giving seminars, sitting on committees and making submissions such as this are important and necessary. However, they can at times feel like an indirect contribution to the real justice need we all know exists. This initiative would provide an opportunity for contribution in a way that maximises the skills that we can offer.

7. You may also find that the role of a part time judge appeals to those who expressly do not want to undertake a judicial role on a fulltime basis (!).

Disclosure in the High Court

8. The Committee is considering whether discovery to be is replaced by a disclosure regime at the time of filing pleadings. I am sceptical this would work or yield any real benefit.

9. At one level, the proposed test for disclosure is not that different from the test for relevance under Rule 8.7. So all that is being proposed is that discovery is done at the time of filing rather than sometime later in the proceedings. There is a risk that this just imposes additional costs on cases that might otherwise resolve before discovery.

10. However, I think that the practical problems are more significant. It would be a counsel of perfection to require parties to conduct reasonable searches to ensure that have been identified all documents that support their case, and all documents that are adverse to their case, at the time of filing a claim or defence. I cannot say that I have ever seen a case where that has been done. Usually, you are familiar with the key documents to which the case relates, and which from the basis for the pleadings. These would be included in the initial disclosure. However, whether those are all the key documents that support the case, and more importantly, whether they are also all the adverse documents, is a matter which generally takes some time to determine.

11. The issue is particularly difficult for a defendant. The plaintiff in one sense is unrestricted in its time frame. It can take as long as it likes to prepare its claim and the supporting documentation. The defendant, however, has only 25 working days in which to respond. This proposal would see the defendant only having to work out exactly what the case is all about, including the nature of the defence, but also to effectively complete their discovery.

12. I wonder whether a better solution might be something along the lines of a default timetable for disclosure. For example, six weeks after the filing of the defence. That would keep the case moving forward but also gives the parties a reasonable period in which to ensure that they are able to properly comply with their disclosure obligations. I address this issue further below.

13. I have not commented on the standard for disclosure that is proposed. I have been opposed in the past to the various attempts to minimise the extent of the discovery obligation. In my view, discovery is the most important part of the pre-trial processes, and it is critical to ensuring fairness in process and accuracy in decisions. The *in terrorem* arguments that have been made against discovery tend to come from very singular experiences that are not representative of most High Court litigation.

14. However, I have in the past written two detailed submissions against proposed reforms to discovery. While I am sure they were listened to, they were not acted on. I accept that this battle at least has been lost

Interlocutories

15. The proposal by the Committee is that most interlocutories are dealt with on the papers. I agree with the Committee that many interlocutories do not require a hearing. Arguments over security for costs, particulars, interrogatories and the like often assume greater significance (and impose greater costs) than is justified. My concern, however, is that we just passing the costs of these applications onto the Courts.

16. If interlocutories are merely filed, presumably with submissions at some point, and at a date in the future a judgment is released by the COurt, then there is no real disincentive to a party in making an interlocutory application. For most interlocutory applications at the moment, the spectre of the hearing before a judge tends to force agreement on issues. Invariably, an interlocutory hearing opens with counsel advising the Court that they had agreed on issues 1 through to 3, and only require the Court to deal with issues 4 and 5. That discipline would be lost if all a party has to do is file an application with the Court and wait for the answer.

17. There is also the potential for delay both in terms of increased waiting for judgments on an increasing number of interlocutory applications.

18. Again, I suggest that one way around these problems may be a default timetable for the filing of interlocutories. That would allow them to be dealt with by the judge at any conference that is called, a possibility I discuss below.

Conference

19. I strongly support the idea of a substantive and meaningful case management conference being held for each case, so that all procedural matters can be dealt with, and the case set down for hearing.

20. The conference must be meaningful. For that to occur, I think it needs to take place at a time when the issues in the case have started to clarify. Part of the problem with the current system is that the initial case management conference is just a device for setting a timetable for the case. Neither the Court nor the parties are in a position to deal with more substantive matters, or indeed to take a position on the issues in the case more generally.

21. It seems to be that the most beneficial time to hold a conference would be after disclosure has been completed and interlocutories filed. By that time, the parties are going to know what interlocutory matters are outstanding, including whether there is further disclosure that is required. These issues can hopefully be dealt with at the conference, or if not, the process for their resolution can be decided.

22. By that stage, the parties will also have a much better idea of what the trial is going to look like. It is unrealistic for parties to take a position on the trial and witnesses at the time when pleadings are filed, or indeed before disclosure is complete.

23. To facilitate such a conference, I favour having some form of default timetable running from the date of filing the statement of defence. That timetable may look something like the following:

    a. On the filing of the statement of defence, the matter is allocated a case management conference of (say 1 hour). The conference would be at least three months after filing the defence.

    b. Six weeks after filing the defence, the parties are to provide disclosure.

    c. Four weeks after disclosure, any interlocutories are to be filed and served.

    d. Any opposition to interlocutories are to be filed within a further two weeks.

24. On this basis, by the time the parties have any interaction with the Court, the issues in the case are well developed and can be addressed from a position of knowledge. Some interlocutories can (hopefully) be resolved. The dynamics of the trial can be determined. The conference would be meaningful.

25. I am concerned that a suggestion such as this will provoke complaints from some parts of the profession based on the types of cases that "they" are involved with. There will always be cases where a default procedure will not be appropriate. It may be that some mechanism can be introduced to deal with that (for example amendments by way of memoranda to the civil list judge). But I think that too often when dealing with procedural reform, we have allowed the exception to become the rule. In my view, a default process such as that outlined above would benefit most cases.

Trial

26. I largely agreed with the proposals concerning the trial process. The few comments I have are as follows.

27. One of the consequences of having evidence taken as read will be to place a further burden on the Court. The Court will need to be given time to read the material. That should be a part of any trial timetable.

28. There are also other matters that I raised in my initial submission which were not picked up by the Committee in its consultation paper. It may be that they were rejected by the Committee, but their substance did seem to be consistent with the direction of the Committee in its report. I raise them again, in case they have been overlooked:

    a. Defendant's opening. I still think there would be real benefit in terms of identifying the issues at trial if the defendant is also required to open at the start of the trial. The objections to this, as I noted in my earlier submission, seem to be driven by an outdated concern with the uncertainty over the case the defendant will face. In the modern environment, with the exchange of briefs of evidence and a written opening, I cannot imagine a situation where a defendant is not fully aware of what the plaintiff's arguments and evidence will be at trial prior to the trial starting, nor the nature of their intended response. It

can only help an identification of the issues if the defendant is required to state their position early in the trial.

b. The Committee may still wish to consider whether they also deal with how expert evidence is to be given. My own experience is that where experts address similar issues, "hot-tubbing" is particularly effective in saving time and aiding understanding. Members of the Committee will have their own experiences with this procedure.

c. I also think that the Committee should consider abandoning the rule in *Browne v Dunn* and the obligation to put your case in cross examination. I find this often to be a largely pro forma and meaningless obligation, given the filing of substantive briefs of evidence and reply evidence (whether in writing or as led by counsel). Some counsel take a very broad approach to this obligation. Others are very careful and particular and devote a significant amount of time in putting each aspect of their case to every witness. The same variability in approach to the obligation applies to the judiciary.

d. For my part, I often find it frustrating having to finish a cross examination with a list of questions you have to 'put' to the witness, when everyone in the Court knows what the answer will be, the witness having already explained their position on the issue, and likely responded to your client's evidence in their own evidence in chief. The Court simply has to decide the conflict, generally based on documents rather than witness testimony many years after the event. The questions are put just to tick the box, so that a submission can be made in closing. However, often there is no real intention (or need) to engage with the witness on the substance of the response.

e. It is hard to see the point of this. It can often take some time. The better approach in my view would be to deal with the issue as a matter of weight, in that if a witness has not been questioned on a particularly crucial issue, then that is a factor the Court can take into account in assessing the evidence.

29. I hope the Committee finds these comments of assistance. I would be happy to discuss them with the Committee or any member as required.

Yours sincerely

Andrew Barker QC