chapman tripp

2 July 2021

Clerk to the Rules Committee
c/- Auckland High Court
CX10222
Auckland

by email

Improving Access to Civil Justice: submission on behalf of Chapman Tripp

1 Chapman Tripp welcomes the opportunity to provide submissions in response to the Rules Committee's Further Consultation Paper on Improving Access to Civil Justice (**Consultation Paper**).

2 Access to justice is a crucial part of ensuring the rule of law. Chapman Tripp endorses the principles underlying the Rules Committee's proposed changes, and agrees that certain aspects of civil procedure are currently unfit for purpose. However, we consider certain proposals suggested in the Consultation Paper may not produce the intended efficiencies, or may have unintended consequences which impede accurate and prompt decision making.

3 We **attach** as a schedule to this letter a table setting out our submissions, with reference to the summary included in the Consultation Paper. These submissions are informed by our experience as practitioners in the District and High Court. Chapman Tripp represents parties in a range of complex and high-value litigation, as well as in smaller disputes where the cost of litigation is often prohibitive for clients. We consider our submissions ensure the efficient case management of both complex and simple proceedings.

4 If you have any questions regarding Chapman Tripp's submission, please direct these to justin.graham@chapmantripp.com or kayla.grant@chapmantripp.com. We would be pleased to provide any further feedback or submissions that might be useful.

Ngā mihi nui

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Overarching observations: 1. Many of the aims of these proposals can already be achieved by recourse to the existing High Court Rules, but the Rules have not been used in that way to date. For example, the existing High Court Rules provide significant judicial power to manage all aspects of a proceeding to achieve a just, speedy and inexpensive determination. Nevertheless, we support more express provisions confirming efficient case management. 2. Many of these proposals will increase the burden on an already busy judiciary – we observe there may be resourcing issues associated with some of the proposals, including for example more fulsome issues conferencing in the High Court.		
Disputes Tribunal		
77(a)	Increasing the jurisdiction of the Disputes Tribunal to $50,000, or possibly higher, subject to the views obtained on further consultation	1. Chapman Tripp supports an increased jurisdiction for the Disputes Tribunal. 2. There may be ways to tailor the jurisdiction or offer different options for higher value disputes – for example, increase the Disputes Tribunal limit to $100,000, with an option to transfer to the District Court at $75,000; or allow lawyers to appear/assist on Tribunal matters for the higher band of disputes. The latter suggestion could have an ancillary benefit of increasing advocacy opportunities for junior lawyers.
77(b)	Changing the right of appeal from decisions of the Disputes Tribunal, if its jurisdiction is extended beyond $50,000	1. We support this proposal, particularly for higher value cases.
77(c)	Re-naming the Disputes Tribunal the "Community Court" or "Small Claims Court"	

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77(d)	Making further reforms to its procedures as summarised in paragraphs 51(b)-(f) above, which include: 1. Tribunal appointed experts; 2. increased fees for referees to attract referees able to deal with higher value claims; 3. granting the Tribunal a limited costs jurisdiction, and an express ability to award disbursements and grant fee waivers; and 4. better enforcement options for successful claimants.	1. We support these measures. Experienced lawyers – and maybe Queens Counsel – carrying out referee work would increase the accuracy and efficiency of Disputes Tribunal processes.
District Court		
77(e)	Appointing a Principal Civil Judge of the District Court.	1. It is imperative that the District Court have the necessary capacity and expertise with civil cases to ensure just and efficient outcomes for all parties. Accordingly we welcome the proposals to: a) create a Principal Civil Judge of the District Court; b) improve civil registry expertise in the District Court; and c) use part-time Deputy Judges/Recorders for civil cases in the District Court.
77(f)	Improving or restoring the civil registry expertise in the District Court, as overseen by the new Principal Civil Judge in conjunction with the Ministry.	
77(g)	Making use of part time Deputy Judges/Recorders for civil cases in the District Court.	

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		2. We consider there is merit in offering certain Judges/Deputy Judges/Recorders the opportunity to hold a civil warrant only, if it would help attract individuals to the role. 3. We do not consider that senior practitioners acting in a part time Deputy Judge or Recorder role presents "insurmountable" conflict issues. Senior practitioners can be counted to appropriately recuse themselves if allocated a case in respect of which they may be conflicted. And we do not consider that senior practitioners will be dissuaded from taking on a Deputy Judge or Recorder role on the basis that they may conflict themselves from further work. The senior practitioners that the Committee Paper contemplates taking on such roles are unlikely to take on District Court matters in many instances, reducing the likelihood of conflicts. 4. As a final point, we observe that the District Court's civil registry appears to be functioning under considerable resourcing pressure. The Registry's efforts despite resourcing issues are much appreciated. While we acknowledge that resourcing is not within the Rules Committee's remit, we observe that increased civil expertise with the Judges/Deputy Judges/Recorders ought to be complemented by a well-resourced registry.
77(h)	The introduction of pre-action protocols for debt collection matters in the District Court, and considering the introduction of other pre-action protocols as already operate in England and Wales.	1. In principle we welcome the introduction of pre-action protocols in the District Court. Our experience is that in most cases where parties are legally represented, such processes already take place, but it would be useful to mandate it. We do not consider such processes will increase costs overall, but rather will front-load them. 2. A question remains about timing of steps within such a protocol. The UK pre-action protocol for debt claims regime requires a defendant to

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		respond to a Letter of Claim within 30 days, and if it does not do so, the plaintiff may begin Court proceedings. We see merit in a similar timeframe being required in New Zealand to encourage substantive engagement between the parties. However, if there is no formal response in that timeframe, we consider that a truncated period for filing a statement of defence (and any opposition papers, in relation to a summary judgment application) would be appropriate. 3. In addition, we agree that there should be cost implications for failing to comply with the process.
77(i)	Introducing a more flexible process for determining substantive claims, drawing on the more inquisitorial aspects of the procedure of the Disputes Tribunal.	1. The Committee's paper appears to contemplate two different types of inquisitorial process being produced, namely: a) Procedural directions as to how and on what basis the proceeding is to be set down for determination, based on the relevant issues; and b) The substantive determination of disputes using an 'iterative' process where issues may be narrowed and resolved over multiple hearings, and evidence called more than once. 2. We agree that the introduction of Judge-driven procedural directions at an early stage of the proceedings would help with overall efficiency. The Court's engagement on what it sees as the relevant issues will help to narrow the eventual evidence and submissions required. That of course relies on the same judge handling the case from case management through to the substantive hearing. 3. We consider that introducing more inquisitorial aspects at any later stage of the proceedings ought to be done cautiously, and is perhaps best suited for lower value disputes, and/or disputes where one or both parties are self-represented. An 'iterative' hearing approach in more complex

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		disputes is likely to lead to inefficiency if witnesses have to be called multiple times to give complex factual or expert evidence. And the greater the complexity of the dispute in that scenario, the greater the potential for procedural injustice to occur.
High Court		
77(j)(i)	Disclosure rules being introduced in place of the discovery regime.	1. We agree with the Committee that specific consideration should be given in each case to whether discovery is necessary or proportionate, and that in many cases it may be appropriate to limit discovery to key documents on which parties rely and known adverse documents. 2. However, we have concerns about the manner in which the Committee proposes to introduce these reforms. 3. The proposed requirement to disclose known adverse documents as part of initial disclosure may lead to increased cost and less robust pleadings: a) It will often be necessary for parties to carry out discovery exercises to identify all known adverse documents. Large organisations will need to carry out searches to identify what documents are "known" by any of its directors or employees. And lawyers will need to work closely with clients, and possibly review large volumes of documents, to ascertain which documents are adverse. That work will be duplicative where the court subsequently makes a standard or tailored discovery order. b) Parties may be discouraged from searching for relevant documents while they investigate a claim/defence and prepare their pleading, or at later stages in the proceeding, out of concern they may discover something prejudicial.

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		4. A presumption against discovery may result in significant material not coming before the court, and encourage disputes about whether discovery should be ordered, particularly if parties are concerned discovery may identify prejudicial documents. Discovery can be critical in achieving the fair resolution of a proceedings. It ensures documents relevant to issues in dispute are brought to the attention of the parties and the court. Discovery does not always make a difference. A 1990s Allen and Overy survey found discovery yielded significant documents that would not otherwise have come to light in only 17 of 86 cases.[1] However, particularly in disputes involving large sums, is often worth incurring the cost of discovery to ensure any and all significant material is before the court. We note that the cost of discovery will only reduce, as AI discovery technology speeds up existing discovery processes. 5. To address these concerns, we suggest the following discovery rules: a) HCR 8.5 should be amended to clearly empower the Court to decide not to make a discovery order if discovery is not necessary or proportionate to fairly determine the matters in dispute. At present HCR 8.5 provides that the Court may decide not to make a discovery order if "*he or she considers that the proceeding can be justly disposed of without any discovery*". This arguably focuses on the necessity, but not the proportionality, of discovery. b) Specific consideration should be given to whether discovery is necessary or proportionate at the issues conference.

[1] This is referred to in the Law Commission's 2001 report "Reforming the Rules of General Discovery" at para 10: https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20PP45.pdf

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		c) Introduction of a third kind of discovery order – requiring parties to disclose all of the key documents they seek to rely upon in support of their claim/defence, and known adverse documents.[2] This order would be made in lieu of rather than potentially in addition to standard or tailored discovery. 6. Alternatively, if the Committee's recommendation to replace the rules of discovery with an expanded initial disclosure is adopted, we suggest: a) The presumption against discovery applies only to cases of low to medium value or complexity (i.e. Category 1 proceedings and Category 2 proceedings where the total of the sums in issue does not exceed $2.5 million). b) The initial disclosure obligations are continuing (i.e. each party has a continuing obligation to disclose documents on which they rely and known adverse documents).
77(j)(ii)	Early and comprehensive engagement by Judges at issues conference. (at [70]: "This would be an expansion of the issues conference currently contemplated under the Rules. The plaintiff would be expected to explain its case and outline the evidence it has for establishing it. The defendant would have to do the same. The	1. Chapman Tripp on the whole supports more thorough engagement at issues conferences (and throughout the pre-trial process). Engagement on case management is likely to produce a more efficient trial, and assist prospects of settlement. 2. We note that the existing process contemplated by HCR rr 7.2-7.4 (and sch 5) is already expansive – see for example the broad powers at 7.2(3) – the Judge may make any direction "to secure the just, speedy and inexpensive determination of the proceedings". Our understanding from

[2] This is a recommendation of the UK Disclosure Pilot Scheme https://www.judiciary.uk/announcements/update-on-the-operation-of-the-disclosure-pilot-scheme-disclosure-pilot/

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	merits of the claim would be fully addressed and discussed.”)	review of previous Rules Committee minutes is that the rules as they are currently drafted were intended to achieve a similar case management process to that now proposed by the Rules Committee. 3. Despite the scope of the High Court Rules, case management conferences tend to involve only high-level consideration of the issues in each case. 4. The Rules Committee should consider the following practical steps which might lead to more valuable issues conferences: a) Assigning an allocated Judge to a proceeding early on, and having that Judge (rather than an Associate Judge or Duty Judge) hear all case management conferences and interlocutories (with an exception for some interlocutories, such as evidence admissibility questions, that it is more appropriate for a different judge to hear). Given the Judge will eventually hear the trial, there will be benefit for him or her to read into the substance of the case early on for the purposes of case management. b) Allowing more time for case management conferences (ideally, half a day). While Chapman Tripp recognises the Court’s time is limited, proper ventilation and consideration of the issues at a case management conference might have a meaningful effect on prospects of settlement, and give the Court more information on which to usefully make case management directions. c) To the extent parties are unable to provide the information a Judge needs at a case management conference (because, for example, they are still reviewing evidence and determining witnesses), considering having one short, high-level conference early on, with a view to setting down a more in-depth conference at a point parties are more

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		able to explain the issues to the Court. It may also be necessary to convene a further issues conference once discovery is completed. d) One thing that parties ought to be prepared to discuss is their document management system – do they have all emails on a server, are files saved in local drives, do employees use email/text/Teams etc – this will help assess "known" adverse documents, and the proportionality of any discovery exercise.
77(j)(iii)	Interlocutories presumptively being determined on the papers.	1. Chapman Tripp supports this proposal for simple applications/interim matters, with a relatively low leave requirement for an oral hearing. We note, however, that strike out and summary judgment applications are interlocutory applications, and it would not be appropriate for applications to dispose of a claim to be determined on the papers. 2. We agree with the proposed standard, being whether it is proportionate to the complexity and importance of the interlocutory dispute and the proceeding as a whole; and whether it would be beneficial to convene an oral hearing. 3. The notice of application should direct whether an oral hearing is required with submissions in support if so. 4. There should be allowances for lay-litigants to be heard in person, so the Judge can assist lay-litigants with deciphering their claim. 5. One concern we have identified is that by moving to dealing with these matters on the papers may limit the opportunities for developing oral advocacy. While Chapman Tripp considers this is not in of itself a reason to stop the move to determining matters on the papers, perhaps the Rules Committee could consider whether the Court should introduce an

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		approach to encouraging junior counsel to offer oral arguments similar to the Court of Appeal's practice note dated 1 March 2018 to counteract this.
77(j)(iv)	Greater emphasis being placed on the documentary record to establish facts, with the documents admissible as to the truth of their content. (at [75](a): "Documents in the common bundle would be admissible as to the truth of their content subject to a challenge being advanced, revising the current rules set out in rr 9.4–9.6 of the High Court and District Court Rules. This proposal would likely require amendment to the relevant provisions of the Evidence Act 2006".)	1. We have concerns over the scope of the proposed changes to the common bundle rules. Under the current r 9.5(1), each document is considered to be admissible, accurately described, and "be what it appears to be". Documents must nonetheless be referred to in either opening submission or by a witness to be "in evidence", and while basic information (such as the sender or recipient of a document) may be presumed to be correct, the substantive content of a document cannot. 2. To the extent the Rules Committee is proposing all documents in the common bundle are "in evidence", and presumed to be able to be used to prove the truth of their content, we oppose this proposal: a) In complex trials involving large common bundles, this rule would require all parties to review in depth every document in the common bundle for possible inconsistencies with its case, so that objections could be made. This would be a costly exercise, and has the potential to add another 'layer' of evidence objections a Judge has to manage whether pre-trial or during the trial. b) Similarly, in Chapman Tripp's experience trials run smoother when there is a simple mechanism for nominating documents to the common bundle mid-trial. If the Rules Committee's proposed changes are adopted, there is a higher likelihood parties will object to late nominations to the common bundle on the grounds they should not be admissible as to the truth of their content, forcing mid-trial evidence rulings and delaying the trial. 3. Conversely, we suggest there is an efficiency in complex trials to having a large (electronic) common bundle so that all documents are available to

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		counsel, witnesses and the Court, with prospect for arguments over the meaning and contents of certain documents at trial. 4. To the extent the Rules Committee is concerned with reducing the time spent at trial establishing a chronology, or referring a witness to non-controversial documents just so they are in evidence, the following alternative proposals might achieve the same aim: a) A possibility for parties to nominate certain documents they agree ought to be "in evidence" without the need to refer to them in opening submissions or evidence. b) A mandatory requirement to file an agreed statement of facts, so that non-disputed parts of the chronology do not need to be proved. 5. Separately, in relation to common bundle efficiencies generally, Chapman Tripp supports a transition towards electronic courtrooms and electronic common bundles. We **attach** a bundle protocol adopted by the parties in *White v James Hardie* (variations of which were used in other complex trials including *Cridge v Studorp*, and *Ngāti Whātua Ōrākei v Attorney-General*), as a good example of a way to increase workability of the electronic common bundle.
77(j)(v)	Evidence being given primarily by way of affidavit, supplemented by oral evidence only in areas of factual contest.	1. Chapman Tripp supports a presumption that evidence be taken as read. However, for the purposes of "settling the witness" before cross-examination, we suggest that for all witnesses giving oral evidence, the affidavit / brief of evidence should contain a compulsory summary of (say) not more than two pages which the witness reads aloud prior to cross-examination. Such a summary would add minimal time to the trial but would have real benefits in terms of witness comfort.

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		2. In terms of practical implementation of these changes, Chapman Tripp notes that: a) For the most part, a distinction between affidavits, or briefs of evidence taken as read, is one of form not substance. However, there may be benefit to retaining briefs of evidence but taking them as read, because a brief allows a witness to refer to a document in the common bundle without annexing it; affidavits for trial which refer to numerous or large documents will become unwieldy. b) If evidence-in-chief is being primarily treated as read, Judges will need to read evidence before the trial. This will mean evidence will need to be filed in Court rather than only served. It may also mean parties need to elect earlier whether they will call all the witnesses who have prepared written evidence (so that the Judge does not read evidence which is not called). There could be some mechanism to allow parties to agree some evidence can be admitted without a witness presenting themselves for cross-examination. c) In general, we support oral evidence directions from judge. Tailored evidence directions (including cross-examination timing – which feeds into trial length) ought to come out of an issues conference where appropriate, with evidence challenges for the most part ought to be dealt with at that early stage. We also support greater willingness to strike out evidence if it is inappropriate, including enforcement of the expert evidence "substantial helpfulness" test.
77(j)(vi)	Greater controls being imposed on expert evidence, including:	1. Chapman Tripp opposes a move towards single court-appointed experts:

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	2. making greater use of single Court appointed experts, paid for by both parties; 3. imposing a presumptive limitation of one expert witness per topic per party; and 4. providing that expert evidence is not to be received unless there has been a joint expert conference, except by leave.	a) A presumption of a single court-appointed expert creates a risk delegation of decision making by the Court, or at least an impression of that being the case. It is also likely to lead to a poorer quality of expert information before the Court; rather than hear two competing experts present literature and analysis, and cross-examination as to the merits of each expert's position, a Judge will hear only the conclusion the single expert has landed upon. b) The appointment process is also likely to lead to inefficiencies in terms of selection. Disputes over the selection process are inevitable, and given the selection of an expert known to be adverse to a parties case has the potential to be determinative of the case, appeals are likely. c) Any presumption that a single expert is appointed goes against the adversarial basis of the Court system; parties ought to have the right to call experts in support of their claim. This process is also unlikely to reduce costs for parties, who will likely instruct their own experts to assess the Court-appointed expert's work. d) Finally, it will be difficult to appeal a single expert's findings. The only available ground of appeal is likely to be for a major procedural flaw, such as failing to take into account a relevant consideration or taking into account irrelevant considerations, rather than on substantive grounds. 2. For those cases where a single expert is of use, the existing process for appointment of an expert / pūkenga will allow for one to be appointed. 3. Chapman Tripp supports a presumptive limitation of one expert witness per topic per party, and a requirement for joint expert conferencing before expert evidence is received. In terms of practicalities, we suggest: a) Topics on which expert witnesses may be called should be set at an issues conference. Whether more than one expert is needed for a

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		particular topic should be determined with reference to what is necessary for the just, speedy, and inexpensive determination of the case – with proportionality also a consideration to the extent it is incorporated as a guiding principle (with a particularly complex, high-value, or central topic more likely to warrant a second expert). b) Parties should have leave to apply for a further expert in the event a sub-topic emerges in the course of preparing evidence that they consider warrants a further expert. c) Joint expert conferencing is likely to produce the most benefits once briefs (including in reply) have been served; experts will be able to go into the conferences with the issues more clearly defined by the evidence that has been prepared, and the results of any expert testing/analysis complete. The expert conferencing process could be supplemented by a requirement to file a document summarising areas of agreement and disagreement between the experts.
77(k)	Introducing proportionality as a guiding purpose of the High Court Rules 2016.	1. We agree proportionality should be incorporated, acknowledging it is a touchstone of civil procedure in the United Kingdom. We nonetheless query whether this represents a marked difference from the existing principles underpinning the High Court Rules – a proportionality assessment is inherent in the existing "just speedy efficient" standard.