DAVID BIGIO QC

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Clark to the Rules Committee
c/- Auckland High Court
By email

rulescommittee@justice.govt.nz

Improving Access to Civil Justice

I refer to the Further Consultation paper concerning improving access to civil justice and provide some comments on that part of the paper which deals with High Court procedure.

I support the retention of the adversarial system but with greater early judicial management.

By way of general comment, however, early judicial management will not be successful unless Judges are willing to be active and not defer considerations of key case management issues to the trial judge. The latter is usually allocated far to close to the actual hearing date (even in relation to hearings for substantial periods of time). This results in hearing time being taken up dealing with matters that should have been dealt with pre-trial, which then has the effect of reducing the time available to hear the substantive claim. This is particularly true for evidential objections in relation to expert evidence.

Commencement

I agree with the continuation of the use of statements of claim and statements of defence in the usual way. There is a trend now towards excessively long pleadings. While continuing education on drafting pleadings always encourages brevity and clarity there is no effective sanction for prolix statements of claim.

Discovery

I agree with the increased emphasis on initial disclosure.

In my view, the adverse documents test was a definite improvement on the previous regime but has been overwhelmed by the tailored discovery regime. The time to negotiate categories of tailored discovery has added significant time and cost to the discovery process. In colloquial terms, tailored discovery is frequently more trouble than what its worth.

If increased emphasis **is** put on initial disclosure, then the parties will have the opportunity before the first case management conference to review the state of that disclosure.

Parties should attend the initial conference, whether it be a case management conference or an issues conference, prepared to give an indication of where they consider the opposing parties disclosure to be lacking and identifying categories of documents in the opponent's

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possession which they consider to be relevant to either the claim or the defence as the case may be.

If parties are given an opportunity to provide further documentation pursuant to that indication from the opposing party and fail to do so to the satisfaction of the other party, then that is when an application for particular or further and better discovery can be made.

While a presumption that interlocutories will be dealt with on the papers appears attractive, one of the practical factors which comes into play in relation to interlocutory applications is the narrowing of issues by Counsel before the hearing. If interlocutories are presumed to be determined on the papers the Court runs the risk of being overtaken with more interlocutories than are desirable.

Trial

I support the provision of evidence by way of affidavit.

This system has worked adequately for part 18 proceedings in which I have been involved.

If the proposal for affidavit evidence is adopted and the trial proceeds directly to cross-examination, then the concern expressed at paragraph 75(b) of the paper may be overcome.

I do not support a rule stipulating page limits. In my view, the better approach is to provide for the filing of affidavit evidence early on, allowing time for pre-trial evidential objections to those affidavits to be heard and determined.

In my view, the period for issuing cross-examination notices under rule 9.74 needs to be modified for part 18 proceedings and for any other proceedings for which evidence is given by way of affidavit. The three working day requirement is simply not fair on parties or deponents, and in the recent part 18 cases I have been involved with I have proposed, and the Court has accepted, that cross examination notices are issued several weeks before the hearing date.

The use of affidavits may also overcome frequent issues which arise in relation to the service of supplementary briefs and the application of Rule 9.8.

I am happy for this letter to be made publicly available and would willingly engage further with the Committee if they considered it appropriate.

Yours faithfully

David Bigio QC