2 July 2021

Clerk to the Rules Committee
High Court
Auckland

By email: RulesCommittee@justice.govt.nz

Dear Clerk

Rules Committee consultation on Improving Access to Civil Justice

1. Thank you for the opportunity to submit on the Rules Committee's consultation document "Improving Access to Civil Justice".

2. We are barristers practicing at Stout Street Chambers in Wellington. Our practice areas are broadly in the civil jurisdiction of the High Court, and we focus our submission on that aspect of the consultation.

3. We are broadly supportive of the kaupapa of the consultation document, and of encouraging a less "maximalist" approach to litigation. Our comments chiefly relate to practical concerns about the implementation of the Committee's proposals.

Discovery

4. The Committee proposes replacing discovery rules with a requirement for parties to disclose key documents and adverse documents with their pleadings.

5. One concern with this proposal is that a plaintiff will not necessarily know what documents are "adverse documents" until it has received pleadings from the other parties. Lawyers will be reluctant to advise clients to disclose documents when the other party's theory of the case is not yet known and it is not possible to tell whether a document will be adverse.

6. The Rules Committee's proposal may lead to a practice of plaintiffs conducting an initial review for adverse documents at the time of preparing the statement of claim, and then being requested or ordered to conduct a further review for adverse documents once the statement of defence is received. There are costs and inefficiencies in this double handling.

7. The proposed approach to disclosure also involves front-ending the costs of searching for documents. Under the current system, some proceedings are able to be settled prior to the parties incurring the significant costs of discovery (indeed, the significant costs of discovery may incentivise settlement).

Issues conferences

8. The Committee proposes an initial issues conference being held with a Judge, counsel and party representatives.

9. We are generally supportive of an issues conference being held, especially where one party is self-represented. There is already provision for this to occur under rule 7.5. We suggest that Judges and lawyers are given clearer guidance on when it would be appropriate to propose an issues conference. At present, we understand that issues conferences are mainly used for complex proceedings, but they may be able to be utilised for simpler proceedings where judicial assistance to identify issues would be beneficial.

10. We query the workload implications for Judges and lawyers in requiring an issues conference to be held for all or most civil proceedings. The role of the issues conference, as suggested by the Rules Committee, would probably require a half day hearing and a similar or longer preparation period. That would likely be infeasible without a significant increase in judicial staffing.

11. We also query the statement at [70] of the consultation document that at an issues conference "[t]he merits of a claim would be fully addressed and discussed". This suggests that the conference will go further than just identifying issues and will engage with the merits of the litigation. Observations made by a Judge in such circumstances could, depending on the parties, have a significant effect, including on the parties' appetite to settle the dispute.

12. The advantages of the proposed issues conferences must be considered against the potential risks arising. In particular we see there may be natural justice and systemic confidence implications of having a Judge test and potentially make observations on the strength of the parties' arguments without having heard the evidence and submissions. For example., there is a risk that certain parties (and, perhaps, self-represented litigants especially) may see the issues conference as being determinative without having had a chance to fully explain their claim and provide supporting evidence.

Proportionality

13. We agree with the Committee's suggestion that proportionality should be a guiding principle for the administration of civil justice. It should be noted that proportionality should not be measured purely in monetary terms. For example, many public law claims have a significance that cannot be assessed in monetary terms.

Interlocutories

14. We agree that more interlocutories should be resolved on the papers.

15. However, we query the utility of setting a rule that interlocutories are presumptively resolved on the papers. Interlocutories come in many types. The sorts of interlocutories that are often appropriate for determination without an oral hearing would include applications for further particulars or for particular discovery. By contrast, applications for strike out or summary judgment should not be dealt with on the papers by default, as these may finally dispose of a claim. It should be possible to sort interlocutories into categories that are presumptively appropriate for resolution on the papers.

16. Where there is a presumption in favour of a written determination, the Rules should clearly provide that the Court has the power to order the matter be dealt with on the papers in the face of objection from the parties. Experience suggests that the courts may otherwise defer to a request that an oral hearing be held, which would run counter to the efficiency objectives of such a presumption.

17. One suggestion to further streamline interlocutories would be to remove the default requirement for affidavits in support and opposition to be provided. The requirement for affidavits to be settled and sworn by a client is an unnecessary procedural hurdle. Often there is no significant factual contest in an interlocutory application, and parties should therefore be permitted to simply provide an indexed bundle of relevant documents (contracts, correspondence, etc).

Trial

18. The Rules Committee proposes amending trial procedures so that documents in the common bundle are admissible as to the truth of their contents, witnesses are not expected to address the chronology of events revealed by that documentation, and evidence is to be primarily given by way of affidavit.

19. We agree that this would be a more efficient way to establish background chronology matters and adduce some or most evidence.

20. A party should give early notice of the facts that it considers can be drawn from the background documents in the common bundle and which it does not consider the witnesses are required to address. This early notice could be provided at or before the time a party serves its affidavit evidence. It would be too late for this notice to be provided with opening submissions, as the consultation paper suggests at [75(b)].

21. We have some concern as to how a witness who has not just read their brief of evidence or affidavit may feel less prepared or less familiar with their evidence and as such have more difficulty with cross-examination, simply for not having recently read their evidence aloud. We consider this risk can be mitigated by allowing the witness to refamiliarise themselves with key or contentious parts of their brief by reading aloud the relevant paragraphs, which would be notified in advance by

counsel. We note that for many briefs of evidence there is already a practice adopted in some High Court trials of limiting the sections of the evidence that are read aloud to the most relevant paragraphs (with the balance being taken as read).

Court-appointed experts

22. The Committee proposes making greater use of Court-appointed experts who are paid by both parties.

23. We agree this would be useful in some cases. Judges and lawyers should be encouraged to propose this, especially where expertise is required on an issue that is not highly contentious.

24. However, widespread use of Court-appointed experts may not necessarily reduce cost. For contentious issues, parties will probably want to engage a "shadow" expert to assist counsel on what questions and propositions to put to the Court-appointed expert.

Conclusion

25. We are generally supportive of the proposed reforms, and our submission is intended to highlight potential difficulties with the implementation of the Rules Committee's vision. These difficulties should be considered carefully before any amendments to the High Court are implemented.

Yours sincerely

Mike Lennard, Paul Chisnall, Wendy Aldred, Jack Wass, Duncan Ballinger, Eve Bain, Kate Fitzgibbon

Barristers
Stout Street Chambers