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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

RESPONSE TO PARTICULAR PROPOSALS IN CONSULTATION PAPER

Written briefs of evidence

1. There is a continuing debate around the use of briefs of evidence, which together with discovery, seem to have become the proxy cause of everything that is wrong with modern civil litigation.

2. In my view, the problem with written briefs is that not enough use is made of them.

3. The criticism of written briefs is that they are seen as not as accurate as oral evidence, and they cost a lot to prepare. We would get to the truth, and cases would be run a lot more quickly (and less expensively) if only we could return to the 'golden age' of litigation where everything was done orally and controlled by clever counsel.

4. I disagree with this.

5. At a practical level, I cannot see that leading oral evidence is going to be more efficient than the use of a written brief. The significant increase in documentary evidence, coupled with the decline in skill in the leading of evidence is likely to lead to an explosion of time needed at trial. We already have witnesses being cross-examined for days on end. I hesitate to think how long it will take the 'cautious' advocate to work through the '11 bundles in the common bundle'.

6. The great strength of the written brief is that it is a confined and clear statement of the witnesses' evidence. The problem is that the Courts have not followed through on the logical consequence of the written brief. Because it is written, it does not need to be read out. It can be read by the court. This offers the potential for significant time savings in terms of trial length.

7. I am also sceptical about the perceived benefits of the oral examination of a witness, and indeed cross examination. Witnesses react in all sorts of ways under the pressure of giving evidence. I do not think that their response under pressure is always to give the "real truth". In my experience, the reaction of most witnesses after giving evidence is that they forgot about a document or some other event or got tricked into saying something that they did not actually mean. Contemporary documentation is often a much more reliable indicator of what actually happened.

8. One of the benefits of a written brief is that it is the opportunity for a witness in a considered environment, having had access to the contemporary documentation, to explain the facts as they understand them.

9. It is an easy criticism to say that written briefs are written by their lawyers. Of course they are. This is an area of expertise for lawyers; the presentation of evidence to the Court. Clients may have no idea of the issues they need to cover. Issues they see as irrelevant may be critical from a legal perspective. Lawyers have a crucial role to play in helping their clients put their evidence before the Court. It does not mean that it is not the clients' evidence.

10. Of course, there are bad examples of witness statement where the impression (and possibly the reality) is that it is the lawyers telling the client what to say. That is a

badly prepared witness statement. But when this criticism is made, the question that is rarely asked is whether the Court found the evidence helpful and persuasive. I doubt that it did. The reality is that you cannot legislate for bad advocacy.

11. I think that we are at the stage now where we need to finally accept that written briefs are the way evidence is presented, and to give up the pretence of having a witness read that statement in Court. It is, for example, how most evidence is given in arbitrations.

More inquisitorial processes

12. In my covering letter, I made some suggestions about the way hearing times are allocated and the trial is run. What I was suggesting is that the Court assert greater control over its own processes. I was not suggesting that it adopt a more inquisitorial approach. I am not familiar enough with the way the inquisitorial system works in civil law countries to offer any meaningful comment on that alternative. However, I do think that reforms of that nature are constitutional rather than procedural. I do not think that it is appropriate for them to be dealt with in a rule making body such as the Rules Committee.

13. However, I do make some comments of the two inquisitorial forums that the Committee did discuss.

Pankhurst J

14. I am not familiar with this Tribunal, although I am familiar with the nature of the claims more generally. I understand they were the remnants of a failed class action against Southern Response.

15. I think we need to be very careful in drawing conclusions from these cases. They involved a single defendant, where the liability issues were not in dispute. The dispute in most of those cases likely involved contested expert evidence on the necessary extent and quantum of repairs. They were cases that were structurally suited to a settlement.

16. I do have real doubts, however, that a judge who has been actively involved in negotiations, can then give an impartial decision on the merits. I think it is both unrealistic and potentially quite unfair.

17. In the context of a negotiation, parties are likely to take all sorts of positions in an attempt to avoid the risk of an adjudicated outcome. They may explain their motivations in a way that is prejudicial to their underlying case. They will undoubtedly put forward positions that are contrary to what they will assert at trial.

18. I think it is hard for that party and their counsel to then turn around in the afternoon and argue for a position that they were prepared to abandon in the morning. How does a party argue for $100 in compensation when they were previously prepared to accept $60? How could a judge fairly evaluate the claim by the plaintiff, when the judge also believes that the plaintiff acted unreasonably in the settlement negotiations that morning?

19. The easy answer is to stay that our judges are experienced and would be able to separate these things in their mind. For my part, I think that is unrealistic.

Proposals by Kós J

20. I think that the proposals by Justice Kós are interesting. My concern is that the proposals he is making are something that cannot be done by the Rules Committee. He is essentially proposing a new Dispute Resolution Service.

21. My experience in the District Court is some time ago now. However, if we accept the premise that it is not economic to run a claim for under $100,000 in the District Court, then I am not sure that playing with the underlying procedures is going to alter that a great deal. The fixed costs for simply preparing a claim and attending a final hearing, which will be the basic steps in any system, would still likely make that claim uneconomic. That is before we deal with interlocutory matters.

22. I see Justice Kós's suggestion as being an argument in favour of an increased jurisdiction for the Disputes Tribunal, with perhaps a greater sophistication of the adjudicators within that tribunal, so that they are able to deal with more complex civil matters.

Trial processes: Discovery

23. I have commented on the trial processes above. I have sympathy for a number of the suggestions made by the Committee. However, I do have some further comment on discovery.

24. I have always thought that the concerns over the costs of discovery are exaggerated and driven more by a few extreme examples rather than a broader understanding of usual cases that comes before the High Court.

25. I see discovery as being a critical part of the civil litigation. Indeed, I think it is the most important interlocutory matter.

26. I also do not think that the Courts always best placed to understand the importance of discovery. They see a case which turns on a comparatively few documents. They naturally question why the parties could not have produced these at the start and dispensed with discovery entirely. What the Court does not always appreciate, however, is that the trial itself, the submissions that were made and the evidence as presented, was entirely shaped by the discovery process. It is all prepared and presented against a background of knowing what information is there and knowing the full story.

27. I am also sceptical about the claims that discovery is an onerous undertaking. In my experience, and in most cases I have been involved in, I would not categorise it as particularly onerous at all. Usually the client and/or the instructing solicitor has a file and there will need to be a search undertaken of an email inbox. It is usually necessary to identify a few other categories of documents that should be searched for. But the extent of the documentation is not overwhelming.

28. I do not recall any case in the last three years that I have been involved in where I consider discovery is disproportionate to the amount at issue and the value it provided.

29. That is not to say that discovery cannot be extensive and oppressive. In my more junior days, I supervised a number of discoveries which involved many junior solicitors working for months on end on disclosure. Any idea of the utility or proportionality of that process had long been abandoned. I would not want to guess what the cost was to the client.

30. But these cases are in my view the exception. They are cases where the nature and scope of the discovery obligation should be carefully reviewed and a detailed and careful approach to discovery determined.[1] These are not the cases that should be the basis for rules of general application. A better paradigm would be a claim by an individual or a smaller commercial operation, arguing over land, the terms of the sale and purchase agreement, restraints of trade, the sale of a business, trusts and so forth. It is unlikely in these cases that discovery will be a significant exercise.

31. My own view is that the proposal that has been made gets things around the wrong way. The presumption should be that there is disclosure in line with the amended rule on relevance, with the ability for a party to apply to restrict that if it would otherwise be oppressive.

Short form / Fast track

32. In principle, I support the idea of some form of short form / fast track trial procedure. My reservations are to do with the practicalities of any separate procedure, and the necessity for it if reforms along the lines I have proposed in the covering letter were implemented.

33. I think that the idea of a simple, narrow case involving only a limited issue for determination by the Court is one we talk about more often than we encounter. By the time of trial, the case may have that character. But it is rare that the case is understood in that way at the time of filing.

34. The usual candidate we talk of for this procedure is the "simple" claim involving a point of contract interpretation, for which disclosure is not necessary. In my experience, lawyers are reluctant to pin their colours to the mast so early in the process. A claim relying on a particular interpretation of contract is usually accompanied by an alternative argument as to implied term, mistake or estoppel. There may be alternatives of misrepresentation or misleading and deceptive conduct. If these arguments are not raised in the claim, then they may well be raised in the defence. The result is that it is hard to exclude the facts relevant to the formation of the contract at this initial filing stage.

35. There is also the tactical dimension. If the procedure is to be done by way of application, it may well be opposed. Even if the application is dealt with on the papers (as happens with application for priority fixtures) there will still be the costs

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[1] There is something of this in the reference by the Committee in its paper to the Law Commission report in 2002, and the example of a major commercial dispute having a discovery cost of $1.5 million. If the discovery is going to cost anything like that amount, then there should be very active management of the discovery process. But this sort of case is not a helpful example of the ordinary case that comes before the High Court, which should be the basis for its default rules.

associated with the application and opposition. A party may look to appeal the decision to place the case on the list. It could easy lead to a delay of three or four months while the issue is dealt with, and timetable orders made.

36. My own view is that, when cases of this nature arise, they are best left to counsel to deal with. It is something that should be encouraged, but not imposed by a Court.

37. Having said that cases of this nature are rare, I do have a recent example. The case involved a very narrow issue of interpretation on the terms of a side letter to an agreement. After the defence was filed, counsel discussed the matter and filed a memorandum with the Court, setting out the timetable for all interlocutory steps as well as directions for trial. A three-day hearing was sought and allocated. There was a short argument over discovery, but other than that, the parties had no interaction with the Court until trial. The claim was filed in August 2018 and was heard in July 2019. It ultimately required only a day's hearing.

38. The point of the example is that in my view the process only really works if the parties are both committed to it. The focus for the Court – and any procedures that are developed - should be on ensuring that this alternative is available to the parties if they believe it is appropriate, rather than imposing it on them.

39. This does sound similar to the old 'fast track' procedure, which required consent of the parties. That does not appear to have attracted a great deal of business. There are, however, incentives that the Court could offer to make this process more attractive. For example, there could be a commitment to a hearing time within a certain timeframe. It may be a procedure that is only offered through the Commercial Judges of the Court.