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Improving Access to Civil Justice – Response to Rules Committee's 14 May 2021 Paper

Introduction and Executive Summary

1. This is our response to the Committee's 14 May 2021 paper.

2. We are both barristers in practice in Wellington. Our practice largely consists of High Court civil litigation across a wide range of commercial and public law disputes.

3. We have limited our comments to the reforms proposed for the High Court.

4. We understand the intention of the reforms is to improve access to justice, including by ensuring that litigation in the High Court is more cost-efficient, that costs are more proportionate to the matters at issue in a proceeding and that, ultimately, the court process works better to allow litigants to obtain justice.

5. We understand these reforms are driven by a view, which we understand and share, that litigation is too expensive and that this prevents some people from obtaining a just determination of their case at a fair cost to them.

6. In our view, the latest proposal from the Rules Committee will not be the most effective way to allocate judicial resource to secure the outcomes sought and will not yield the cost savings to parties that are intended. In summary our views are:

   6.1. For the issues conference centred proposal to work, additional judicial resource would need to be made available. If such judicial resource is available, we suggest such judicial resource would be better expended elsewhere, in particular making more substantive hearing time available sooner.

   6.2. We have some misgivings that the proposal to end discovery by right in all cases and replace it with increased initial disclosure and a requirement to disclose adverse documents will have the cost savings to parties that are sought. We set out below (at [18]–[22]) why we think there are underlying problems with trying to produce cost savings through winnowing the quantity of documents that parties are required to provide to other parties in litigation.

6.3. For matters of moderate to significant complexity (legal and/or factual), or where substantial monetary sums are at issue, we think the current High Court Rules are largely fit for purpose.

6.4. The area ripe for reform is less complex cases not suitable for summary judgment (say a trial of 3–5 days or less). For such cases, we favour introducing a short trial process (along the lines proposed by the Committee). These cases would be eligible for a regime with more intensive case management, an issues conference of the nature proposed with early engagement with the pleadings and merits by a Judge, no right to discovery (unless directed at the issues conference, and then only on a tailored basis), disclosure of adverse documents being required and interlocutories that are not dispositive of the proceeding being dealt with on the papers.

6.5. A limited reform could also be made to the rules for summary judgment. Where an application for summary judgment is dismissed, we suggest that the Judge should be required (after hearing from the parties) to make directions for the disposal of the case. In some cases, this might involve a full trial with the usual processes, or a trial limited to particular contested issues with discovery and oral evidence in relation to those issues alone. We think that this requirement would allow some cases where summary judgment fails (because there are one or two discrete factual contests) to be resolved more expeditiously.

High Court litigation currently

7. We start by noting that where a case is suitable for summary judgment, in our experience, justice can be obtained in a cost-effective manner. Primarily this is because the parties are quickly brought to a hearing without the need for interlocutory steps.

8. Given the high threshold for summary judgment, most cases are not suitable for summary judgment. A successful summary judgment application allows the applicant to avoid the costs of discovery, interlocutory processes, and the testing of oral evidence. We therefore do not propose any change to the threshold for summary judgment.

9. Once you set aside cases that are suitable for summary judgment, there remains the bulk of High Court proceedings to which the High Court Rules are applicable.[1]

[1] It would be interesting to know how percentage of proceedings are commenced with an application for summary judgment and how many of these cases are successful.

10. This covers an extremely wide range of cases from very simple matters that might require a very short trial through to matters of significant complexity that require many weeks or months of trial time.

11. In a formal sense, the High Court Rules and case management really treat these cases in the same way. Trials of shorter duration do come on for hearing sooner because interlocutory matters are typically shorter, evidence takes less time to prepare and trial time is available sooner but there is no structure in the High Court Rules which dictates as such.

The Rules Committee's current proposal

12. The Rules Committees' proposed approach takes all ordinary High Court proceedings and by default applies the same regime to them with respect to disclosure and no right to discovery but with the ability for parties to use an issues conference to seek orders necessary for that proceeding.

13. We consider it will rely heavily on issues conferences achieving the aims proposed for them, which in turn, will require extensive resourcing both:

    13.1. in terms of hearing time because every case will require an issues conference and to achieve the aims of the reforms that conference will take some time (an hour or more may be required, certainly more than the typical 15-minute telephone conference); and

    13.2. to allow the presiding Judge at those issues conferences sufficient preparation time to be well placed at the issues conference to achieve the aims of those conferences. Unless time is available for the Judge to meaningfully review the pleadings and memoranda in order to form views on merits, central issues in the proceeding and areas where discovery might be required, we doubt they will substantively achieve the aims of the reform.

14. In short, to be effective we consider that the proposals would require an increase in the number of Judges or Associate Judges. We understand that around 1000-1100 general proceedings are commenced in a calendar year.[2] Assuming an even distribution, and allowing for the summer holidays, that anticipates around 22 issues conferences per week, with time set aside for judicial officers to prepare. We are not sure if issues conferences are intended for judicial review applications and originating applications, but this would add further issues conferences, if so.

15. If that level of necessary additional resourcing is available, we query whether it would not be better deployed by making more substantive hearing time available (in conjunction with the reforms we propose below).

[2] https://www.courtsofnz.govt.nz/the courts/high court/annual statistics/annual statistics for the high court 31 december 2020/

16. We have some doubt that an early issues conference is practical or likely to achieve these aims for matters of moderate to significant complexity. For such matters we think that the current High Court Rules are largely fit for purpose.

Our view, in short

17. If, as we understand it, the problem is access to justice and imposing proportionate cost on parties in a proceeding, then we suggest the better way to deal with this problem is the following:

    17.1. For matters of moderate to significant complexity (legal and/or factual) or where substantial monetary sums are at issue, we think the current High Court Rules are largely fit for purpose.

    17.2. The 'sweet spot' for reform is less complex cases which are not suitable for summary judgment, for example, because there are some limited facts that will be in dispute and/or which take up a relatively small amount of hearing time. We suggest below a threshold of 3-5 trial days or less. These are the types of the cases that the previous Rules Committee paper has suggested would be suitable for a short trial process. We consider that proposal still has merit and think it would be better to pursue more cost-effective outcomes for these shorter matters than to change interlocutory and discovery procedures for all cases. In the same way that the uniform set of rules currently in place is not optimal to deal with all cases, we consider that a new uniform set of rules with a default for a shorter trial process with an early issues conference will also not work for all cases (particularly cases of moderate to significant complexity). Expressly adopting a two-track process would be preferable.

    17.3. Active case management of less complex cases at a very early stage including by deploying an early initial issues conference (as proposed by the Committee) is, we consider, far more practically possible for the parties and the judiciary and could lead to real gains in access to justice for such claims.

February 2012 Discovery Rules

18. The changes to discovery were implemented in 2012 to reduce litigation costs and delay. We apprehend this was because discovery was seen as an area that was causing significant litigation cost increases.

19. Two of the main reforms were:

    19.1. A change to what documents were required to be discovered: the *Peruvian Guano* 'chain of inquiry' was replaced with the formulation set out in HCR 8.7. As we understand it this was meant to decrease the discovery burden.

    19.2. The ability to seek tailored discovery orders under HCR 8.8 and the presumption of tailored discovery where one or more of the qualifying circumstances.

20. We commenced practice as barristers in 2009 and 2010. We have largely practiced under the new discovery regime (which came into effect on 1 February 2012) although we had some exposure to the discovery processes prior to this.

21. The following are our impressions:

21.1. Parties still largely use "relevance" in a 'chain of inquiry' way as the basis for when to discover documents. We haven't noticed an appreciable change in the volume or types of documents that are discovered since 1 February 2012.

21.2. Although there may be some cultural and practical reasons for this (which we note below), we think that the problem is more fundamental. The issue is at least twofold (although the issues overlap):

21.2.1. Only a minority of documents individually standing alone support or adversely affect a party's case. Most documents either support or adversely affect a party's case when put alongside other documents or facts to be proved. Given that it is usually the connection between documents and/or other facts that matters, a degree of 'chain of inquiry' type reasoning is embedded in the discovery process.

21.2.2. Because the extent to which documents support or adversely affect a party's case is dependent on other documents and facts, the issue comes into sharper focus as the case proceeds to trial. Documents may take on a different complexion in light of the other parties' documents disclosed in discovery, witness briefing, information contained in other parties' briefs of evidence and additional ongoing discovery.

21.3. Proving questions of facts or mixed fact and law is an art, not a science. While there will almost certainly be some key documents that all advocates will use in a case, different, but similarly skilled advocates, will likely go about the task of proving facts in different ways, with recourse to different documents. This is one explanation why there can be good faith disputes about the requirement to discover specific documents or classes of document.

21.4. For cost efficiency reasons discovery is largely carried out by less experienced lawyers (and, in some cases, third party providers) with margin calls on relevance, confidentiality and privilege elevated to more senior lawyers where necessary.

21.5. Those less experienced lawyers are not well placed to make calls on documents that look like they may be relevant but on thorough inspection do not actually fit within HCR 8.7. That is a matter of quite fine judgement and the parties (with different theories of the case) may have good faith disagreements about where the line is drawn. Winnowing out documents that might be relevant (or of interest to the other parties) but don't fit within HCR 8.7 will be a time-consuming task. If it is done, the other party will often be able to see that documents are missing and (quite reasonably) want to inspect them to satisfy itself that the documents are truly irrelevant. It is therefore usually easier and more cost efficient to discover such marginal documents at the outset.

21.6. There has never been a mindset change in the profession from *Peruvian Guano* / relevance to HCR 8.7. (For the reasons noted above in the second bullet point we think that there are good structural reasons for this and it does not simply reflect old practices dying hard.) That means that after discovery and inspection almost invariably there is correspondence (and sometimes applications for further discovery) to obtain further documents. Here is a stylised example:

21.6.1. Party A (a company) discovers an email ("x") between two employees commenting on a matter at issue in the proceeding. The email refers to another email ("y").

21.6.2. Party A's lawyers review email "y" for discovery but do not discover email "y" because they consider that it does not fit within HCR 8.7.

21.6.3. Following inspection, a request for email "y" is almost inevitable though as Party B's solicitors will want to review the email and so the parties will have to correspond over discovery of it. Often it will be provided voluntarily (and the process may repeat) and if not an application for particular discovery may be made.

21.7. While it may put it casually, we think the mindset that parties apply to discovery of document is "Would I, as lawyer for a party, like to read that document?" We think that this is both the reality and also reflects a practical approach that deals with issues noted above.

21.8. Despite tailored discovery being presumed for certain cases under HCR 8.8 it is very often not used. The reasons include:

21.8.1. Agreeing tailored discovery categories adds an additional burden.

21.8.2. Tailored discovery works best in a case where the issues are confined and each party has a good idea of the type of documents likely to be held by the other side and so can target categories with that in mind. Where they are a large number of issues, the number of categories involved can become unwieldly.

21.8.3. No practitioner wants to risk a scenario where they do not ask for a category of documents that might furnish them with information that is useful to them. That means when considering tailored discovery categories there is a tendency to 'cast the net' very wide to make sure you are obtaining all documents you might require. This is particularly the case where (as often happens) one party has little to no knowledge about what type of documents the other party is likely to hold.

21.8.4. In our experience, agreeing tailored discovery does not generally reduce the cost of discovery. The same core set of documents is provided for review, regardless of whether discovery is standard or tailored. However, the review process can be more costly with tailored discovery (especially if the number of categories is large) because (even putting aside the costs of arguing over categories) the reviewer needs to identify whether each document falls into a category, rather than asking a simple relevance question.

21.8.5. Because of the above points (individually or separately) it is often easier to agree standard discovery under HCR 8.7 to avoid the cost of argument over categories and because the discovery you will ask for through tailored categories will impose the same burden as standard discovery.

21.8.6. There is a trade-off as to what is less costly. Dispute and agonising over discovery categories or providing standard discovery.

22. Overall, we think looking at the number of documents to be discovered is not the right metric if cost saving is the goal. Tailored discovery, or proposals whereby you must only identify documents you rely upon or are adverse to your case, reduce the number of documents that need to be discovered or disclosed. But they also substantially increase the cost of reviewing which documents have to be discovered or disclosed. This is because there is more work to be done and at a higher level to winnow documents down to this refined selection. So, reductions in numbers exchanged may come at a higher litigation price, or at least at a far lesser difference in cost to the current regime than what might be expected.

23. While technology on discovery continues to be developed, these platforms are good at running key word searches and filtering by details such as senders and recipients but are not yet able to filter by category (such as might be suggested in tailored discovery). This requires human input, usually at multiple experience levels in the litigation. To limit documents and costs the only effective way to do this electronically is by using date ranges or, in rare cases, agreeing on relevant recipients and senders.

The Committee's proposed changes to Discovery and Issues Conferences

24. The Committee's proposal as we understand it ends discovery as of right and in its place:

24.1. increases initial disclosure obligations and requires parties to disclose adverse documents; and

24.2. makes discovery a matter to be dealt with at an early-stage issues conference where parties can apply.

25. Under the current High Court Rules discovery is carried out after the pleadings are settled (or, at least, there has been an initial exchange of pleadings: statement of claim, defence (counterclaims) and reply).

26. We have some concerns about the proposal for increased initial disclosure:

26.1. First, it makes commencing a proceeding even more costly as a party must undertake a discovery exercise before filing a proceeding.

26.2. Second, when a party files a statement of claim they will not be aware of all the issues and points that the defendant will take. In a proceeding without a counterclaim, a plaintiff will have to take an educated guess as to what documents are relevant or adverse. What is more likely is that disclosure will have to be iterative: some with the statement of claim, some following the defence, perhaps some with the reply. There will then inevitably be written requests from opposing parties to deal with for further disclosure. In a claim where the defendant has a counterclaim it will certainly be iterative. As a result, further disclosure exercises will be required as the issues are properly settled. This will inevitably involve the same documents being reviewed multiple times. It will be more expensive to conduct disclosure in this way, rather than doing it once.

27. We note the intention for discovery to be considered at an issues conference and for discovery orders to be made there where necessary. Again, we expect that the conservatism of the profession will lead to parties commonly applying for discovery. We suspect that the presiding Judge at that conference is also likely to err on the side of directing discovery for similar reasons of conservatism.

28. We note the intention for the judiciary to be resourced sufficiently to be able to engage with the pleadings and merits at an issues conference. That is very laudable, if possible. However, we expect that would take a significant expansion in the number of Judges or Associate Judges to allow all cases to have an issues conference which does engage with the pleadings and merits at an issues conference.

Our View

29. As we have set out above, we think the High Court Rules are largely functional for complex or significant cases. We expect that the early issues conference proposed will be too premature to allow proper consideration of these cases and their merits and that discovery orders for these cases will be, close to, the default. We respectfully suggest those cases are better left to be dealt with as they are now, rather than using scarce judicial resource to intensely case manage those at an early stage when this is simply not, in most cases, going to be possible.

30. We suggest the Committee's earlier view of more targeted reform at less complex High Court cases to bring those matters to short trials promptly and therefore make these cases more cost effective to pursue is a better target for reform. We respectfully suggest there should be a (formal or informal) commitment from the Court to have them heard within 6 months of filing of the issues conference. As the Committee will be aware, the discipline of a trial date is a useful way to focus the parties' attention on an efficient disposal of the proceeding (whether by settlement or trial) and is likely to reduce unnecessary interlocutory steps.

31. We think complexity could principally be determined by expected trial length and suggest, for consideration, that cases which will require 3-5 trial days or less would be considered a less complex case. This trial length threshold could be set after consideration of case length data in the High Court. There could be scope for cases where a longer trial is anticipated to be able to opt in.

32. These cases would be eligible for a regime with more intensive case management, an issues conference of the nature the Committee has proposed with early engagement with the pleadings and merits by a Judge, no right to discovery (unless directed at the issues conference, and then only on a tailored basis), disclosure of adverse documents being required and interlocutories that are not dispositive of the proceeding being dealt with on the papers.

33. In relation to short form cases where discovery is appropriate, we also suggest that standard and tailored discovery need not been seen as mutually exclusive alternatives. In our experience, in most cases most of the critical documents are those generated in the lead up to the event in issue. Take for example, a case alleging that a particular act amounted to a breach of trust or contract. Most of the critical documents will have been generated in the week or perhaps month before the alleged breach. In short form cases where discovery is appropriate, the discovery burden could be eased, while still doing justice between the parties, if:

    33.1. the parties were required to provide discovery on a standard basis for a limited time window before the event (a week or a month); and

    33.2. discovery was otherwise on a narrowly tailored basis.

34. When filing their case management review memo either party could indicate that the case is a "less complex" case and so eligible for this short trial track with an early issues conference to follow.

35. Separately, we note that if an application for summary judgment is unsuccessful, the usual full trial processes— discovery, interlocutory processes, and the testing of oral evidence—follow in relation to all issues. That may be appropriate. But it is not invariably the case. For instance, an application for summary judgment may fail because the Judge determines that there are one or two contested factual issues which cannot be resolved in a summary way. To cater to such cases, we suggest that where an application for summary judgment is dismissed, the Judge should be required (after hearing from the parties) to make directions for the disposal of the case. In some cases, this might involve a full trial with the usual processes, or a trial

limited to particular contested issues with discovery and oral evidence in relation to those issues alone. We think that this requirement would allow some cases where summary judgment fails to be resolved more expeditiously. It should also be achievable in practice. The summary judgment hearing will have equipped the Judge to understand the issues in the case better than an issues conference would.

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