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Improving Access to Civil Justice - Submission

1. This letter responds to the Rules Committee's call for submissions on the Further Consultation document on Improving Access to Civil Justice issued on 14 May 2021.

2. We wish to record, again, our support for the objectives of this project and our appreciation for the value we have obtained from the Consultation Paper in considering this next stage of proposed reforms. Our earlier submission, of 11 September 2020, summarised our experience as practitioners for plaintiffs and defendants on matters across a wide spectrum of size and complexity.

High Court

3. We start with the proposals for the High Court, since proceedings in this Court are core to our practice.

Discovery

4. The "abrogation" of discovery "in most cases" would reduce costs, but the extent to which a significant tilt in favour of "access" could compromise "justice" should not be underestimated. As the Committee is aware, contemporaneous documents are often the best evidence in civil cases. Key documents have often been lost to memory until they are turned up through the discovery process. Much will depend on the availability of tailored discovery to rectify unfair prejudice that may arise under a reduced disclosure regime. The role of the judge at the initial issues conference will be critical to ensuring a fair process.

— *Disclosure under a duty of candour*

5. Whether disclosure under a "duty of candour" will reduce costs and strike a more proportionate balance between access (cost) and justice will obviously depend on the scope of the duty. It is not clear whether the proposed "duty of candour" is intended to apply only to known documents, or to require a search. Searches can

obviously range from the comprehensive (and no less onerous than they are now) to the perfunctory or self-serving. Any new regime will have to define the search obligation in terms that strike a just balance.

6. It is common for key documents to be identified only through a search process that initially returns a significant number of documents that have little or no relevance. Electronic searches, including searches assisted by "learning" algorithms, are continuing to improve, but it is hard to dispense with broad searches without compromising justice, potentially fundamentally in some cases. We do not yet have the ideal instrument for efficiently locating the needles in the haystack.

7. An obligation to disclose only the "key" documents in support of and adverse to a party's case may be sufficient to do justice in cases of lower value and complexity. Paring back default obligations significantly in such cases, by reducing the sheer amount of paper generated by the dispute, will reduce costs and offer real benefits.

8. For many cases in the High Court, however, finding even "key" documents takes time and effort, usually trawling emails and other electronic documents. This is true of cases involving extended factual chronologies and cases brought long after the fact.

9. Disclosing only "key" documents is not necessarily less onerous. The selection of key documents from a larger body of more or less relevant documents calls for judgement and, therefore, expertise, experience and expense. Parties are often unable or disinclined to select material documents, particularly adverse documents. Many prefer simply to hand over "everything" to their lawyers. It can be easier and cheaper to disclose (most of) the whole rather than the neatest selection.[1] Disclosing an obviously incomplete selection of documents provokes the other party's curiosity, if not suspicion, thereby generating correspondence and further costs.

10. We consider that any reform of discovery should:

    a. Require parties and their lawyers to focus their searches on the most likely sources of the most relevant documents;

    b. Discourage the unthinking or disproportionate attempt to search every potential source of relevant documents; and, importantly,

    c. Provide a speedy and cost-effective means of discouraging and correcting any party that:

[1] This concern is comparable to the time and expense involved in the conscientious whittling down of a common bundle for trial to the "truly relevant" documents to be included in a case on appeal.

i. fails to conduct a proportionate search or that misdirects "proportionate" disclosure efforts (whether through mismanagement or cynically); or

ii. makes disproportionate demands for more extensive disclosure.

11. The success of the first two criteria in practice will depend on the availability of the third, particularly as a change to the current "maximalist" disclosure culture beds in.

12. If a plaintiff's initial (and default) disclosure is to include adverse documents, the plaintiff will have to anticipate issues in dispute ahead of service of the defence. It is reasonable to anticipate that prospective defendants engaging in pre-action correspondence will advise plaintiffs of the adverse documents they will expect the plaintiff's initial disclosure to include. Plaintiffs can be expected to do likewise to defendants. If plaintiffs' initial, default searches under their duty of candour do not anticipate the issues raised by the defendant (such as causation and loss, contributory negligence or knowledge going to limitation), then any continuing duty of candour will require plaintiffs to search their records at least twice. While disclosure has always been a "continuing" obligation, giving discovery after service of both sides' pleadings usually means there is only one main search for relevant documents.

13. Any new regime should provide for fuller disclosure to be given in larger and more complex cases after pleadings have been exchanged in much the same way as now. Twenty-five working days for the filing of a statement of defence is not enough time for completing a disclosure of any significant size or complexity.

— *Disclosure review at the first issues conference*

14. The introduction of a substantive issues conference early in the proceeding will be an important component of any new disclosure regime.

15. We support the Committee's view that a broad judicial discretion, exercisable at the issues conference, is preferable to the more prescriptive regimes piloted overseas.

16. Tailored discovery orders could be reconceived (particularly for lower value or less complex matters) as a means of providing limited disclosure on discrete issues where a case for disclosure can be demonstrated and the cost is not disproportionate. The current tailored discovery regime is often applied expansively in practice, as parties try to ensure any "tailored" order captures everything that might conceivably be relevant, rather than as a means of narrowing the standard discovery obligation.

17. At present, the lack of a speedy and inexpensive judicial check on compliance with discovery obligations forces parties either to give up a reasonable position (by acceding to demands for further disclosure or surrendering challenges to incomplete

disclosure) or suffer the cost and delay of an interlocutory hearing. An early and inexpensive opportunity for judicial intervention at an issues conference should greatly assist in policing any new regime and help the profession to assimilate a new and more proportionate approach to discovery.

Issues conference

18. We support the introduction of a substantive issues conference early in the proceeding. The conference would need to be at least six weeks after the defendant's defence and initial, default disclosure is served so that a plaintiff has had time to review the material and counsel have had an opportunity to confer and file memoranda. The rules will need to allow for the deferral of the conference where a defendant intends to join other parties whose attendance will be necessary for the conference to be able to achieve its objectives.

19. The first issues conference should consider whether the trial can be allocated at that time. In cases of lower value or complexity, there should be an expectation that a fixture will be allocated at the first conference unless there is good reason not to.

20. Conferences could be before either a Judge or an Associate Judge. We see no reason to prefer either Judges or Associate Judges for the task. The presence of either should be sufficient inducement to preparing adequately and advancing sensible proposals for progressing the matter efficiently and proportionately.

21. Efficiency would be improved if any issues arising subsequent to the conference could be referred back to the same judge.

22. The introduction of such conferences will have the effect of increasing legal costs early in the litigation process. Practitioners will require to be well-prepared for such conferences both in order for them to serve their purpose, and for tactical advantage. There is some risk of a well-prepared plaintiff having a tactical advantage of a defendant who has had a (relatively) short time to prepare. We do not think these risks outweigh the benefits of the proposal, but they will need to be managed.

Proportionality

23. We strongly support the introduction of a general objective of proportionality, for the reasons explained in our submission of 11 September 2020.

Interlocutories

24. We support the introduction of a presumption that interlocutory steps would be disposed of on the papers unless an oral hearing is directed. Applications for strike-out and summary judgment should generally be accorded an oral hearing.

25. The Court should have the power to convene a "mini-hearing", including by telephone or video, if the Judge requires further assistance of counsel or if this would otherwise be efficient and proportionate. A short telephone or video hearing may dispose of some matters more efficiently, particularly the whittling of disputes over discovery, particulars and interrogatories that often seems to occur only at the hearing. A short hearing could save considerably on judgment-writing time.

Trial

26. The proposed changes to evidential rules and other trial practices may reduce trial costs somewhat. We consider it less likely, however, that they will materially reduce the overall costs of the litigation process, in particular in the many cases that settle after evidence is exchanged and before trial.

27. *Common bundle.* We support a presumption that documents in the common bundle are admissible as to the truth of their contents (subject to challenge), so long as the new rule does not provide that everything in the common bundle is taken as *admitted* into evidence unless challenged. The requirement that a document is in evidence if it is referred to in opening or by a witness serves as a valuable filter given the conservative instincts that lead to over-inclusive common bundles. (This rule should be extended to include any document referenced in a memorandum setting out the chronology that emerges from the documents, if that proposal is adopted.)

28. We note the Committee's view that a presumption of admissibility is likely to require amendment to the Evidence Act 2006. We suggest that consideration also be given to whether s 8 of the Act should be amended to permit the exclusion of evidence (whether given in direct or under cross-examination) where the evidence is disproportionate. Section 8 is arguably able to meet this task,[2] but it has not generally been applied to exclude evidence that is relevant but disproportionate.

29. *Content of a witness's brief/affidavit.* We agree that having witnesses give comprehensive recitals of chronologies revealed by documents can be artificial (particularly witnesses for corporates traversing documents to which they were not party at the time) and inefficient (particularly when read aloud). The time witnesses currently spend reading the documentary chronology into the record can be dispensed with by taking their statements (or those parts of their statements) as read.

30. The proposal to remove into a separate memorandum the chronology and other evidence that emerges from the documents raises a number of issues:

[2] Section 8 provides that a Judge "must" exclude evidence if its probative value is outweighed by the risk that it will (a) have an unfairly prejudicial effect on the proceeding or (b) needlessly prolong the proceeding.

a. The proposal is unlikely to reduce costs. The cost of writing such evidence into an affidavit will still be incurred in writing the evidence into a memorandum.

b. A separate memorandum recording the chronology and other evidence emerging from the documents risks becoming another platform for the parties to try to be fully "comprehensive", rather than proportionate. One can imagine it being prepared by more junior lawyers, with less ability to judge what is truly relevant, and then "edited" conservatively (lightly) by a more senior lawyer.

c. The memorandum should be served with the party's evidence. Documents do not always speak for themselves; even when they do, parties can differ in the meaning or implications to be taken from them. A party should not have to guess whether their opponent claims that their position is supported by a document or what the other party says ought to be taken from a document.

d. The party filing an evidence memorandum will have to designate a person or persons who can be available for cross-examination on the evidence in the memorandum. Parties may find it easier in practice to do this by dispensing with the memorandum and having all of their evidence in their affidavit(s).

31. If affidavits are to be taken as read to save trial time, trial judges will obviously need time to read the evidence ahead of cross-examination: either before the hearing or, perhaps, in an adjournment after the party's opening submissions.

32. Judges should retain a discretion to call for parts of evidence-in-chief to be led where credibility is in issue or if there is concern as to authorship of the witness's affidavit.

33. We remain of the view that some other constraint on the excesses of witness statements is required. The Consultation Paper refers to briefs containing argument masquerading as evidence, which is undoubtedly a concern, but so too is evidence (properly so called) that is simply disproportionate to the dispute. We do not see the proposed new documentary evidence memorandum as addressing these problems.

34. We suggested page limits in our previous submission, although we are not unmindful of the difficulty in setting them. Time limits for trials are an alternative: giving a case of a certain value or complexity a fixed trial duration including a fixed time for each case to be presented. Introducing page or time limits would help dispel the notion that the right to present one's case entails the right to file as much evidence and submissions as the parties, their lawyers and the Court will bear.

35. We doubt that appealing for greater enforcement of the rules—necessary though that may be—is sufficient to curb excessive or argumentative witness statements. There are real institutional impediments to enforcement. In short trials there often

simply isn't time to take the judge through an objection that a brief is excessively long or argumentative. Costs awards against counsel are likely to be reserved only for the worst excesses.

36. Limits on evidence (and submissions) could be more or less "hard" and explored with counsel at the issues conference at which the trial is allocated. Counsel could be expected to indicate the number of witnesses and proposed scope of their evidence, perhaps outlining a timetable. The Judge could interrogate each side's proposal to help ensure that it is proportionate. Even if hard page or time limits are not set, the recording of such expectations should oblige a party to work within them unless a real need to depart from them can be demonstrated.

37. *Expert evidence*. We support the proposals for a presumptive limit of one expert per party per issue and for mandatory conferencing of experts where more than one party has called an expert on an issue.

38. The Earthquake List adopted a practice of directing expert conferral before the exchange of briefs, rather than after as is the more common practice in the general jurisdiction. This was generally an efficient way of flushing out and debating the technical issues earlier in the process and avoiding wasted costs of briefing issues not really in contention.

39. The appointment of a court appointed expert to facilitate the experts conference can be productive in large cases. Appointing a court expert in a quasi-adjudicative role is a more significant step towards an inquisitorial model but one which we would support in cases where the reduction in costs achieved would contribute materially to the proportionality of the overall process.

Earlier fixtures

40. We address this matter under its own heading because we consider it an essential component of improving access to justice, and not merely by reducing costs.

41. Civil litigation is desperately in need of an intermediate gear between the only two we seem to have now: frantic (injunctions) and slow-to-glacial (everything else). Prompt fixtures could make a greater contribution to the reduction of costs, particularly in lower value cases, than just about any reform of the rules themselves.

42. Nothing focuses the attention of parties and their lawyers more effectively than an approaching hearing, and the long wait to reach that point is a barrier to access. It not only contributes to costs but can add hugely to a party's burden. Even well-resourced commercial parties can be worn down by the wait. When moderate fixtures of, say, five days, are being allocated 12-18 months out (as has been our recent

experience), recalcitrant parties hardly need to employ delaying tactics themselves: the enforced wait for a hearing can do that by itself.

43. We are aware of the Attorney-General's interest in this project and that the Committee intends to take some proposals, outside of its own remit, to government. We simply make the point that allocating the resources necessary for parties to obtain timely fixtures is a significant component of improving access to justice.

District Court

44. We agree that strengthening the institutional competency of the District Court is an essential starting point and that this will assist in identifying whether any significant reform of the 2014 Rules is also required.

45. Case management could be streamlined by giving Registry staff the power to make routine directions on the papers and replacing list calls with telephone conferences. In-person appearances in Duty Judge lists can needlessly extend the cost of an otherwise brief call, particularly if counsel has to travel across town to court.

46. We have noted with interest the calls for greater judicial control of District Court proceedings (including by the Hon Justice Kós and the Hon Raynor Asher QC). While the Committee does not intend to take these forward at this stage, we would be reluctant to shut the door on greater "inquisitorial" flexibility in that Court. We accept, however, that institutional improvements should have priority.

47. We do not consider that a power to determine disputes using an "iterative" process through successive hearings is an improvement on the power to direct the determination of separate questions. Our experience of such a power in the Canterbury Earthquakes Insurance Tribunal has not been positive. While it sounds good in theory, in practice it has tended to drag proceedings out over longer periods, increasing cost and delay.

Disputes Tribunal

48. We support all of the Committee's proposals to make the Disputes Tribunal more accessible. In particular:

    a. We support lifting the Disputes Tribunal's jurisdiction to $50,000, with a view to lifting it higher still if the increase to $50,000 is successful.

    b. We would support increasing the Tribunal's jurisdiction to (say) $75,000 with the consent of the parties or with the consent of one party by leave of the Tribunal.

c. While we are perhaps not best placed to offer an opinion on a change in name, we question whether changing the name of the Tribunal to "Court" would increase its accessibility. "Court" still tends to connote greater formality and cost, and a process tailored more to lawyers than litigants in person.

d. Changing the title of "referee" to "adjudicator" may also be of little benefit. We doubt many users of the Tribunal would appreciate that such a change was intended to reflect the difference between facilitation and adjudication. Everyone understands that the job of a referee is to apply "rules" independently, consistently and fairly.

e. Limited rights of appeal other than for procedural fairness are appropriate for cases with a value above $30,000, in our view. Appeals on questions of law (and/or the ability for the Tribunal to refer a case stated to the District Court) may also be appropriate in cases of lower value where the question is one that, by its nature, is likely to arise repeatedly before the Tribunal. We have not reached this view without difficulty. If the strength of the current Disputes Tribunal jurisdiction is the ability to reach quick, final decisions on a robust view of the merits one would not wish this ability to be unduly diluted – either legally or in practice – through these reforms.

f. We support publication of referees' decisions in cases where it is in the public interest to do so. Cases that may serve as helpful precedents are an example. We would be cautious about routine publication, though. Our concern is that broadening the audience for awards from the parties to the general public would change the nature of the Tribunal process.

g. We also support giving the Tribunal the power to waive filing fees and a limited jurisdiction to award costs and disbursements. As to the latter, the criteria applied in the Weathertight Homes Tribunal and the Canterbury Earthquakes Insurance Tribunal provide useful models.[3] It would be important that any costs jurisdiction is exercised sparingly (as it is in those two tribunals), so that a costs jurisdiction does not generate significant new work for limited benefit.

Evaluating the success of any reforms

49. We agree with Professor Toy-Cronin's observation in her submission of 28 August 2020 that there is a lack of empirical evidence about how the complexity of procedure, as opposed to other factors, is driving the cost of litigation. We agree also

[3] Weathertightness Homes Resolution Services Act 2006, s 91; Canterbury Earthquakes Insurance Tribunal Act 2019, s 47.

with her suggestion that it would be helpful to put in place measures as part of the reform package to evaluate the effect of the reforms against their goal.

Yours sincerely,

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