23 February 2023

Rules Committee
By email: rulescommittee@justice.govt.nz

Dear Committee

Improving access to civil justice: further consultation

Introduction

1. This letter responds to the Rules Committee's report on improving access to civil justice sent to the Minister for Justice and the Attorney-General in November 2022 and in respect of which a further round of consultation has been permitted.

2. I wish to focus on one aspect of the proposals. That is the effect of Recommendation 17 in relation to witness statements. This also bears some relation to discovery which I will comment on too.

Witness Statements

3. It is proposed that witness statements be served shortly after the exchange of pleadings and any preliminary interlocutory applications, but before discovery. Aside from that, witness statements are not to be argumentative or engage in recitation of the chronology of events to be established by documentation at trial.[1]

4. I have no issue about the necessity to exclude matters of opinion (unless expert), argument, submission and the like. This has long been a problem with written briefs in New Zealand and I refer to that a little more below.

5. Equally, I have no argument with the proposition that witness statements be produced prior to discovery. Putting aside the fact that this may be done in New South Wales under Practice Note SC Eq11 and also, by exception, in some cases in Singapore, the procedure is not at all unusual (although it needs to come with appropriate safeguards). For instance, in international arbitration under the UNCITRAL Arbitration Rules a statement of claim is provided and, with it, "all documents and other evidence relied upon by the claimant…" and the same is to apply in respect of the statement of defence. Discovery is not provided prior to the exchange of evidence or even, necessarily, at all. But it may be ordered separately "at any time".[2]

6. Adopting an approach which is in some ways comparable to what is seen in international arbitration is workable. It *does* work because it is done as a norm in major disputes that are settled in this way.

7. The difficulty I have with the Rules Committee's recommendation is that, putting aside when they are provided, the witness statements are to take the form of "will say" statements.

[1] Which reflects the content of the High Court Rules as they presently stand: HCR 9.
[2] UNCITRAL Arbitration Rules Articles 20, 21 and 27.

8. To be more precise, this is referred to at six points in the Committee's Report. At 2(d) it is said that it is intended to replace "briefs of evidence with "will say" statements, giving greater primacy to documentary evidence, and reducing presumptive discovery obligations".

9. I comment here that the reduction of presumptive discovery obligations in my view is a positive step but my concern for the present lies with the words "replacing briefs of evidence with "will say" statements". This indicates that "will say" statements are something markedly different and (impliedly) less than briefs of evidence.

10. "Will say" statements are referred to again at paragraph 44(c), the aim being to remove "… the traversal of documents and inadmissible advocacy that is presently a feature of briefs of evidence…". Again, the clear implication is that will say statements will be something dramatically less than briefs of evidence (it is not disputed that briefs of evidence ought not to have inadmissible content).

11. There is a reference at paragraph 167(a) that factual "will say" or witness statements will replace briefs of evidence. Again, this must indicate that a "will say" statement is something less than a brief of evidence – even a brief of evidence as it should be, namely one which comprises evidence only, excludes inadmissible material and avoids recitation from documents.

12. Finally, at paragraph 189, there is a reference to "will say" statements and there is, here, some reference to their format. This is described as being: "… closer in format to the former "will say" statements that used to be common in civil litigation".

13. The only other indication relevant to the format of "will say" statements is that they be provided at the outset. This too tends to indicate that they will be more summary in nature than a comprehensive brief of evidence (by "comprehensive" I mean full but, also, one which excludes inadmissible material).

14. Alongside the recommendations is the comment that trials will proceed on the basis of "will say" statements combined with the documentary record. This, for example, may be seen at 2(d) of the Report.

15. My concern is that whether or not the above replicates what is in practice done pursuant to the Practice Note SC Eq11 in New South Wales, it will not work for a great many civil trials in New Zealand. In particular, it will not work at all for really large and complex civil trials including but not limited to commercial cases.

What is a "will say" statement?

16. The Committee's report, with respect, are not particularly definitive about what a "will say" statement is. It does refer to briefs of evidence as used formerly, and which were "common in civil litigation". In my experience, prior to the introduction of the written brief which was/is read *viva voce*, while there were briefs of evidence which were used at trial, they were primarily for the guidance of counsel regarding what a witness could say. They were not read but rather used as prompts for the process of producing evidence orally via questions. They were never called "will say" statements, but simply briefs or statements. They tended to be much shorter than briefs of evidence as they are currently seen, but that is a false comparison: the two different types of document did not exist side-by-side in that era.

17. Apart from the above, a "will say" statement means to a current practitioner the type of statement which is used for a judicial settlement conference or a mediation. It is abbreviated by comparison with evidence a witness would ultimately give at trial (once fully briefed up) and tends to focus on general themes shorn of detail. It is not the case that a "will say" statement fits that description just because it avoids inadmissible content including submission, argument or opinion and sticks only to the facts. A "will say" statement is a high-level extraction of a factual brief in the minds of most practitioners. It tends to be conclusionary – something which while

suitable for mediations is not at all suitable for trials as I comment on below in more detail.

18. The Rules Committee could easily dismiss my concerns (as outlined below) by contending that "will say" statements are to be nothing more (or less) than "proper" briefs of evidence: purely factual in content and devoid of argument, etc. But, in that case, that is what the recommendation should say. I do not think any experienced litigator would equate a "will say" statement in any way with a brief of evidence, even a brief of evidence scrupulously clear of inadmissible content and submission/argument, etc. What follows proceeds on the basis that by "will say" statement the Committee intends to refer to what is normally thought of as a will say statement and actually does intend that civil trials will be run off the back of those.

Will the proposal work?

19. One can easily see that in some cases the Rules Committee's proposal to use "will say" statements alongside the documentary record would work. A dispute concerning a recently entered into sale and purchase agreement for real estate in standard form might be able to be disposed of at a trial where the only evidence adduced is a "will say" statement comprising the bare facts of entry into the agreement and what had gone wrong, together with production of the agreement itself and, to the extent relevant, any surrounding correspondence. Particularly if the dispute is purely one of contractual interpretation, there may not be much call for anything else. In addition, the "will say" statement which stands as evidence is capable of being produced early in the piece very much in the same way as a supporting affidavit might be produced for a summary judgment application.

20. But "will say" statements (given their heavily reduced content and the time in which they are to be produced) will not work in longer and more complex civil disputes. Not only that but, on the face of it, it is not the procedure which is envisaged in Practice Note SC Eq11.

21. Little of the current trial work which I am engaged in could be coped with in this way. Avoiding matters currently before the Court, I will illustrate this with examples of cases both theoretical and actual which have been disposed of in the past.

22. There are many instances of construction and IT disputes which, perhaps surprisingly, do not have applicable dispute resolution clauses in their relevant contracts. They go to Court. A significant construction dispute, for example, will or may comprise numerous claims relating to such matters as earthworks, concrete production and construction, and other aspects where some of the individual claims are high-value, and equally, some of relatively low-value. Then, surrounding these direct costs claims, there will be claims for delay and prolongation costs, overheads, indirect and financing costs not to mention escalation which apply to some or all of the direct cost claims.

23. As per the status quo, each of these need to be proven up with reference to documents where necessary (although not recitation from them) to the required standard. There is normally intensely detailed factual evidence about construction processes on and off site. There has to be. It is indispensable for proof in a concrete variation claim for example that the decision maker know the relevant detail of what concrete is, and how it is made. The notion that in a construction or an IT dispute before the Court summary form "will say" statements near the beginning together with a (likely very large) selection of relevant documents will suffice to inform the presiding Judge sufficiently to make a competent decision, cannot be seriously contended for. Yet, literally, that is what the Rules Committee's Report appears, on the face of it, to envisage.

24. Intellectual property litigation is commonly the subject of extensive marketing evidence where passing off and/or Trademark/Fair Trading Act claims are concerned. Witnesses (sometimes numerous) testify individually and, in addition, there is evidence both factual and expert from market research witnesses who testify to the

design, implementation and results flowing from market research. Typically, in intellectual property trials, proceedings are issued with urgency to obtain an interim injunction for the purposes of halting the conduct complained of before it does significant damage. Then, if a trial is to proceed, it proceeds over a much longer period of time with refinements for the pleadings and evidence and details to follow.

25. The notion that this type of claim can be dealt with in the form of a statement of claim, statement of defence and promptly supplied "will say" statements (in many cases before the evidence which would be contained in them has even been obtained) simply does not pass muster as a viable means of litigating these disputes.

26. Trust, family protection, and estate litigation often involves claims based on historic evidence. There may be causes of action in proprietary estoppel, constructive trust, lack of capacity, undue influence, breaches of fiduciary duty and related claims. A similar case involving at least some of these elements may be seen by way of example in the recent decision of the Court of Appeal in *Pollock v Pollock* [2022] NZCA 331. In that case, there were no fewer than 38 witnesses dealing with but one subject being the relationship between the deceased and the person (his wife) said to have exerted undue influence on the deceased, these being fact witnesses. The Court of Appeal did not suggest any of them were unnecessary: on the contrary, it relied on the evidence of quite a number of them without suggesting any were superfluous.

27. The notion that this evidence could have been obtained upfront in the form of summary and somewhat thematic "will say" statements shortly after the issue of proceedings and yet, somehow, in a form satisfactory for long haul litigation and for use in a multi-week trial is not realistic, with respect. And yet, on the face of it, that is what the Rules Committee's proposal involves.

28. Valuation litigation is yet another useful example. Valuers engaged in corporate finance and/or the valuation of securities are periodically sued in negligence for making a hash of their valuations. Whether the valuer has been negligent will be the subject of evidence by the defendant valuer (amongst others) explaining what they have done. Valuation is a complex exercise.

29. To adequately defend themselves on the facts necessarily involves the valuer giving evidence on the choice of valuation methods; if a discounted cash flow (DCF) method then the choice of discount rate, the choice of the beta factor as part of establishing the discount rate, the method of cross check, whether net tangible asset backing calculation or price earnings multiples or both, what comparables were selected in the latter case, the justification for that selection and so on. Nuances, value judgments and experience form a significant part of the exercise. It is scarcely believable that this could be covered adequately in a will say statement. Obviously, the court would have the valuation report at the time but underlying the valuation report in a large-scale valuation are many studies and evaluations which would need to be canvassed.

30. I could give, as I believe could any experienced senior counsel, if not a limitless list, certainly a long one with both theoretical and factual examples of the sort of thing I am discussing above. In short, the "will say" statement proposal, at least as it is described, is not fit for purpose and ought to be abandoned. It is not what is required on the face of the New South Wales Practice Note SC Eq11. Correspondingly, Practice Note SC Eq11 is likely to be workable because it envisages something similar to what is involved in international arbitration, namely the provision of statements of evidence whenever they are provided together with documents on which the parties rely, but with discovery, if at all, by exception.

31. I appreciate the Report's recommendations would allow supplementary evidence – see [192]. But a combination of will say statements and supplementary evidence cannot stand in place of an adequate brief in the first place. Supplementary evidence is axiomatically something less than the initial evidence so that it is unlikely to round out evidence to any real extent. It also complicates the record

which will invariably comprise the will say statement, the supplementary evidence, plus oral evidence during the hearing. While it would be allowed subject to judicial control, that is nothing new.[3]

32. Specific examples apart, there are other more general issues and knock-on effects associated with the use of will say statements. For example, what is to happen to cross examination? By that I mean to ask, may a witness who reads out (or has taken as read) a cursory will say statement of 5 pages then be cross examined for days at a level of detail not dreamed of in the will say statement? That would entail that the bulk of the witnesses' evidence is adduced, adversely, in cross examination – surely an unintended consequence?

33. I appreciate the Report at [191] envisages limiting cross examination but the limitation envisaged is to prevent counsel "…putting arguments to witnesses or inviting arguments in answers." That is something which should not occur irrespective of the form of the evidence in chief. Cross examination of the type I refer to above will not be affected by this proposed limitation and nor can (or should) it be prevented at all.

34. Next, a particular aspect of the "will say" statement is that its abbreviated format necessarily makes it conclusionary. Use in evidence of conclusionary statements is objectionable. It is unhelpful to judges as it hampers scrutiny of the grounds on which an assertion is made. It hinders counsel as well as it gives rise to a need to cross examine to unpick a contention which may be erroneous. That would lengthen proceedings rather than making them more efficient.

35. But more than that. In the hurly burly of dissatisfaction with the status quo (delay and inadmissible evidence) it is easy to plump for a new regime which overlooks other important things. One is that justice needs to be seen to be done in public. That will be curtailed if evidence in chief is cut down to superficial will say statements.

36. Another is that within permissible and reasonable limits (as opposed to unreasonable ones designed in the heat of frustration at the status quo) parties have a right to be heard. They won't be through will say statements.

Preferable approach

37. Criticism of the Rules Committee's proposal carries an obligation to supply a suggestion in its place which might work. I do not for a moment suggest that there are no problems: there are. Two of the major problems are:

    (a) Complex (and even not so complex) civil litigation is frequently bogged down in interlocutory procedures and disputes particularly, but not exclusively, relating to discovery.

    (b) The content of briefs of evidence (I needn't repeat the list of issues).

38. Dealing first with discovery, the Rules Committee's Report notes (and with respect I agree) that part of the problem is the presumptive aspect of discovery. It used, of course, to be the case that a very broad test was always applied for discovery of documents namely anything relevant or capable of being relevant - the *Peruvian Guano* test. This is long since gone in theory but its effect lingers and causes significant expense and delay in civil cases.

[3] It is anyway under the current regime: see R.9.8. But that is against the background of there being comprehensive briefs in the first instance thus justifying the limited role for supplementary evidence as Rule 9.8 and the cases which have consider it describe.

39. We can do nothing about the quantity of material which is potentially responsive even to a carefully crafted and targeted discovery order. The fact is that more records are generated and retained these days. That bulks out any discovery as an almost automatic consequence.

40. However, the other problem with discovery even with the targeted discovery regime in the High Court Rules, is its presumptive nature which the Rules Committee's Report touches on. My proposal is that there should be no presumption as to discovery at all. Discovery as per the procedures involved in the UNCITRAL Rules should be introduced. It would be limited to:

    (a) An obligation on parties when providing their evidence to hand over any documents they rely on; and

    (b) Discovery by exception (namely for a party to make out a case that it really needs to have discovery of a certain type of document in order to advance its case it may make an application – as envisaged by the Inter-Trial Rules by way of example).

41. Dealing then with briefs of evidence, Rule 9 of the High Court Rules is clear. The problem is not (and never has been) the adequacy of the Rules but rather unwillingness/inability to abide by them and reluctance to enforce them.

42. I submit that if the problem is evidence which breaches the rules we should endeavour to enforce the rules – not abandon them for new ones which have unwanted side effects.

43. I am not suggesting for this purpose institution of a new regime to be applied rigidly let alone punitively in cases of transgression of the Rules. It needs to be remembered that just as judges at times face challenges to their patience and, collectively, to judicial time and resources by having to deal with badly drafted evidence, lawyers too face significant challenges in this area.

44. For them, considerations of cost and deadlines at times just do not allow them to produce evidence which is as adherent to the required standard as is desirable. In other cases, clients are insistent and there is a good deal of "grey" in whether something under discussion really should go into evidence or not.

45. Lawyers do not wish to expose themselves to liability in professional negligence. The sheer volume of material in some cases does not allow even very skilled and experienced lawyers to "cut to the chase" with quite the dexterity often expected in hindsight. By leaving something out they understandably fear that they are rendering themselves liable even where later and, again, with the benefit of 20:20 vision, that part of the case could have been jettisoned earlier.

46. Bearing in mind the constraints and pressures on both sides (bench and bar) it ought to be possible to take steps to encourage adherence to the rules. In the parts of the Rules Committee's report which I do not challenge there are already changes that are calculated to produce significant efficiencies: evidence before discovery, limiting discovery yet further, removal of the presumptive nature of discovery in New Zealand, and taking evidence as read are radical steps in themselves. We would be well advised to let these play out before, via the use of will say statements, we essentially discard a system which we know does work and will work better when norms of admissibility are adhered to more regularly.

Conclusion

47. I contend the "will say" proposal is not workable, at least not as a general rule. It is an overreaction to the current problem. It will either not be adhered to in practice or, if it is, it will work injustice. It should not be proceeded with. There are other measures which if followed up judiciously and in the right cases will help develop a culture shift towards compliance with the rules and greater efficiency in the litigation process.

Yours sincerely

Justin Smith KC