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GREATER EFFICIENCY IN CIVIL PROCEDURE

Hon Justice Venning
Chief High Court Judge, New Zealand

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[1] We have had case management in the High Court for 25 years.

[2] With case management there has been a shift from party autonomy and control of the case to management and control of the case by the Court. That has had several consequences. There are now at least two generations of lawyers who look to the Court to direct the next step in the proceeding, rather than taking the initiative themselves to advance their client's case. Case management has also impacted on advocacy. It is rare for counsel to now be required to lead evidence of a witness in chief. Attempts to re-examine without leading can be fraught. With the move to written openings and written closing submissions, even on interlocutory matters, oral advocacy has changed. The emphasis on written material has also been a contributing factor to the increased length of judgments.

[3] A principal objective of case management was to promote the prompt and economic disposal of cases. The initial pilot established in May 1994 set a number of standards. Cases involving less than five days' hearing time were expected to be heard within 52 weeks. More complex cases were expected to be heard within 18 months.

[4] It is debatable whether case management has met its objectives. Figures going back to 1994 are not available, but recent figures show the following general trends in the High Court since 2008:

(a) the length of time required for hearings has generally increased;

(b) there are fewer shorter hearings;

(c) the number of cases disposed annually has decreased; and

(d) the average age of cases disposed has increased.

[5] There may be a number of reasons or explanations for this. They include:

(a) Society generally and civil litigation in particular has increased in complexity over the last 25 years. It could be said that without case management the situation might be worse.

(b) There are categories of cases which depend on the availability of a limited pool of specialist experts: Earthquake claims and Leaky Building cases for example.

(c) Over recent years the relatively stable economic conditions have led to less debt recovery proceedings. There are less applications for summary judgment. That has impacted on the timeliness figures.

(d) More cases are going to hearing. There has been an increasing trend for some time in the number of general proceedings going to trial. The figure is now at 9.5%.

(e) The success of case management is in part dependent on the engagement of the parties and the Judge managing the file. It normally does not suit one party to co-operate. The enthusiasm for case management varies between Judges.

(f) There may be limited financial incentive on participants to reduce interlocutory steps in the proceedings and thereby reduce costs. Economic activity follows the most rewarding path.

(g) The courts may not be robust enough in enforcing non-compliance with Court orders or procedural rules.

[6] In relation to the last point, in *Aon Risk Services Australia Ltd v Australian National University*[1] the High Court of Australia confirmed that, when considering

[1] *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27.

whether it was just to grant a very late application to amend pleadings and consequent adjournment, the Court must take account of the interests of other litigants in other cases awaiting hearing, not just the parties to the proceedings. The Court rejected that case management principles should only be applied "in extreme circumstances".

[7] In New Zealand the Supreme Court has not addressed the issue directly. The Court of Appeal has referred to *Aon* in a number of cases. In general terms it has confirmed the principle, but its application has not been particularly robust.

[8] In *Central Plains Water Trust v Synlait* the Court made a passing reference to *Aon*, acknowledging that:[2]

> There is a need to achieve procedural efficiency, rather than permitting it to be swamped by aspiring to substantive perfection, recognised by the High Court of Australia in relation to litigation generally (*Aon Risk Services Australia Ltd v Australian National University*) and which must apply with particular force to RMA procedures.

[9] In *SM v LFDB* the Court of Appeal reaffirmed that there is a public interest in ensuring that justice is administered without unnecessary delays and costs and upheld the application of an unless order:[3]

> Obedience is the foundation upon which the Rules operate. From time to time the Court encounters a party who chooses not to obey, seeking perhaps to avoid accountability to the other party or to secure an unfair settlement. In such a case the interests of justice require that the Court do whatever is necessary to enforce obedience to its orders.

[10] However, in the more recent case of *Parlane v Hayes*, while acknowledging the principle set out in *Aon*, the Court allowed an appeal where the High Court had excluded evidence because the delay would have led to an adjournment of the fixture. The Court of Appeal considered that, in that case, the interests of justice did not favour exclusion of the evidence and stated:[4]

> In this context, we think the Judge's reliance on *Aon Risk Services v Australian National University* was somewhat misplaced. That decision of the High Court of Australia recognised, as New Zealand courts have long done, that the interests of justice include the public interest in the efficient use of court time. By recognising that, the Court encouraged judges to take control of case management from the parties, for whom the public interest seldom matters. The

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2 *Central Plains Water Trust v Synlait* [2009] NZCA 609, [2010] 2 NZLR 363 at [92].
3 *SM v LFDB* [2014] NZCA 326 at [28].
4 *Parlane v Hayes* [2015] NZCA 341 at [32].

> question in this case is not whether the Court might invoke the public interest but whether the interests of the public and the plaintiffs together outweighed those of Mr Parlane. …

[11] A number of High Court Rules have been amended to incorporate case management practices.

[12] High Court Rule 7.1 provides for a distinction between complex and ordinary defended proceedings:

> **7.1 Proceedings subject of case management**
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> …
>
> (4) In this rule, —
>
> **complex defended proceeding** means one that, in a Judge's opinion, needs intensive case management and therefore needs more than 1 case management conference before a fixture is allocated
>
> **ordinary defended proceeding** means one that, in a Judge's opinion, does not require intensive case management and therefore does not need more than 1 case management conference before a fixture is allocated.

[13] The intent is that ordinary defended proceedings will not need more than one case management conference and will be allocated a fixture from that conference. That is confirmed by High Court Rule 7.6:

> **7.6 Allocation of key dates**
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> (1) If it appears to the Judge at the first case management conference that a proceeding can be readied for hearing or trial, the Judge must immediately allocate a date for hearing or trial.
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> (2) If a proceeding has not been allocated a hearing or trial date at the first case management conference, the Judge must allocate a date for its hearing or trial when the Judge is satisfied that it can be readied for hearing or trial.
>
> (3) A proceeding can be readied for hearing or trial for the purpose of subclauses (1) and (2) if it is reasonably anticipated that it will be able to proceed to hearing or trial without the need for—
>
> (a) any significant amendment of the pleadings; or
>
> (b) any significant interlocutory application; or
>
> (c) any significant refinement of the issues in the proceeding.
>
> …

[14] Civil cases are triaged to determine whether they are complex or ordinary. Less than 10% are complex. But the remaining ordinary cases, more than 90% of the civil workload, are not being allocated hearings from the first conference. A change in approach by both counsel and the judiciary is required to meet the objective of the rules.

[15] Other rules have been amended to meet the objectives of case management. The rules relating to discovery were amended as from 1 February 2012. Rule 8.2 requires the parties to co-operate to ensure the processes of discovery and inspection are proportionate to the subject matter of the proceeding and are facilitated by agreement on practical arrangements:

> **8.2 Co-operation**
>
> (1) The parties must co-operate to ensure that the processes of discovery and inspection are—
>
> (a) proportionate to the subject matter of the proceeding; and
>
> (b) facilitated by agreement on practical arrangements.
>
> (2) The parties must, when appropriate,—
>
> (a) consider options to reduce the scope and burden of discovery; and
>
> (b) achieve reciprocity in the electronic format and processes of discovery and inspection; and
>
> (c) ensure technology is used efficiently and effectively; and
>
> (d) employ a format compatible with the subsequent preparation of an electronic bundle of documents for use at trial.

[16] Rule 8.11 reinforces the obligations on the parties to co-operate and endeavour to agree on appropriate discovery orders:

> **8.11 Preparation for first case management conference**
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> (1) The parties must, not less than 10 working days before the first case management conference, discuss and endeavour to agree on an appropriate discovery order, and the manner in which inspection will subsequently take place, having addressed the matters in the discovery checklist in accordance with Part 1 of Schedule 9.

(2) The joint memorandum, or separate memoranda, filed under [[rule 7.3]] must, in addition to the matters required to be addressed [[under rule 7.3(2)]], set out the terms of the discovery order that the Judge is requested to make and the reasons for a discovery order in those terms.

(3) If the parties agree to vary the listing and exchange protocol set out in Part 2 of Schedule 9, they need advise the Judge only that variation has been agreed, not the details of that variation.

[17] While it might be said that if counsel complied with the current rules and the rules and timetable orders were enforced by the Court some, at least, of the current issues and delays might be addressed, I take this opportunity to suggest some rule changes, or changes in approach, which may also assist.

[18] The suggestions I raise for consideration also lead into the discussion about a short trial procedure. The topics for consideration fall into four main headings:

(a) proportionality;

(b) discovery;

(c) witness statements/evidence; and

(d) conduct of the trial.

Proportionality

[19] While proportionality is referred to in relation to the scope of discovery, the concept could be applied more generally.

[20] The time and expense devoted to a proceeding ought to be proportionate to what is at stake in the proceedings and, if possible, take into account the parties' resources or ability to bring the case to a hearing.

[21] The following considerations could inform what resources should be applied by the parties and the Court to the proceedings:

(a) the value of the claim;

(b) the importance of the issues at stake (apart from money value);

(c) the complexity of the issues;

(d) the parties' resources;

(e) the burden of discovery, including a cost/benefit analysis.

[22] The rules should provide sufficient flexibility for the Court and the parties to take proportionality into account in dealing with the proceedings. Practical proportionality could be achieved in a number of ways – by limiting one or more of the following processes: discovery, interlocutory applications, the length of evidence and/or submissions, and the time allocated for hearing.

[23] I raise for consideration whether the concept of proportionality should be expressly referred to in the rules as an overarching and guiding principle, just as rule 1.2 provides the objective of the rules is to serve the just, speedy and inexpensive determination of the proceeding. Proportionality may be a means to achieve that objective.

Discovery

[24] Discovery is acknowledged as a major contributor to both the delay and cost of proceedings.

[25] In February 2012 the rules relating to discovery were amended. The requirement to discover all documents relating to a matter in issue as prescribed by *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co*[5] was abandoned in favour of a narrow adverse documents test for standard discovery or, in an appropriate case, tailored discovery.

[26] Despite the amendment, discovery still remains a significant contributor to cost and delay.

[27] There are alternatives to the present process. In the Equity Division of the New South Wales Supreme Court for example the Court will not make an order for

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[5] *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, at 63.

disclosure of documents until after the parties have served evidence, unless there are exceptional circumstances necessitating disclosure and it is necessary for the resolution of the real issues in dispute in the proceedings.

[28] Any application for an order for disclosure, even if consented to by the parties, must be supported by an affidavit setting out the reason why disclosure is necessary for the resolution of the real issues in dispute, the classes of documents as to which disclosure is sought, and the likely cost of such disclosure. The Court may also make an order limiting the recoverable costs in respect of disclosure.

[29] The practice was described by Bergin CJ (in Eq) in *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* as:[6]

> The ambit of that disclosure is confined to the real issues between the parties as defined by not only the pleadings, but also the evidence. This process will require the proofing of witnesses at a very early stage of the litigation with the need for forensic judgments to be made as to the existence of admissible evidence in support of the respective claims. This will of course require the client and/or witnesses to provide the relevant documents to the lawyers in support of the particular claims in their evidence. However it is envisaged that the process will engender a far more disciplined analysis of the need for disclosure by reference to those real issues, compared to the carte blanche gathering in of every document the respective clients have generated in their lengthy relationship for "review" by teams of lawyers and students in the absence of any knowledge of the proposed evidence.

[30] While the practice may leave open a possibility that some cases may be determined on an incomplete factual basis, such cases will be rare. That may be the price individual litigants have to bear for a general reduction in the costs of litigation and consequent improvement in an overall access to justice.

Witness statements/evidence

[31] The next issue I raise for consideration is whether the current practice of written briefs assists the prompt and economic disposal of cases. The advantages of written briefs are said to include:

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6 *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* [2012] NSWSC 393 at [66].

(a) a saving in court time (in part that is dependent on witness statements being taken as read);

(b) early settlement which is promoted by the advanced disclosure of intended evidence;

(c) avoiding wasted expenditure as a result of trial by ambush and/or adjournments because of late disclosure of the other party's case;

(d) requiring the parties to co-operate and identify the factual matters in issue.

[32] The disadvantages include:

(a) they are not the best evidence. Briefs are statements prepared by lawyers. They become the lawyer's words rather than the unassisted recollection of the parties;

(b) the provision of briefs affords the other side an opportunity to rehearse their response in some detail;

(c) the supposed benefit of shortening of hearing time may be illusory. Oral evidence-in-chief will often be more economical and confined;

(d) they prevent the court from controlling leading questions;

(e) preparation of a witness statement may affect a witness' memory. The preparation and review with relevant documents, may establish the contents of the brief in the witness' mind.

[33] There are numerous examples of criticism of the current practice. In *Renaissance Capital Ltd v African Minerals Ltd* Field J noted:[7]

[7] *Renaissance Capital Ltd v African Minerals Ltd* [2014] EWHC 004 (Comm).

> There has been an increasing trend in Commercial Court trials for factual witness statements to get longer and longer and to indulge in speculation, advocacy and submissions rather than relate concisely what the witness did or heard or observed … This trend to produce over lengthy and argumentative witness statements must stop.

[34] In *JD Wetherspoon plc v Harris and Others* Sir Terence Etherton noted the majority of witness statements served contained a recitation of facts based on documents, commentary on documents, argument, submissions and expressions of opinion and were abusive.[8]

[35] Again, there are rules that deal with some of these issues. Rule 9.7 provides for the requirements in relation to briefs as:

> **9.7 Requirements in relation to briefs**
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> …
>
> (4) Every brief—
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> (a) must be signed by the witness by whom the brief **[**is provided**]**:
>
> (b) must be in the words of the witness and not in the words of the lawyer involved in drafting the brief:
>
> (c) must not contain evidence that is inadmissible in the proceeding:
>
> (d) must not contain any material in the nature of a submission:
>
> (e) must avoid repetition:
>
> (f) must avoid the recital of the contents or a summary of documents that are to be produced in any event:
>
> (g) must be confined to the matters in issue.
>
> (5) If the brief does not comply with the requirements of subclause (4) the court, prior to or during the trial, may direct that it not be read in whole or in part, and may make such order as to costs as the court sees fit.
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> **…**

[8] *JD Wetherspoon plc v Harris and Others* [2013] EWHC 1088 (Ch).

[36] There is also provision for oral evidence in appropriate cases. Rule 9.10 provides:

> **9.10 Oral evidence directions**
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> (1) After the preparation and service of the chronologies of facts, the parties must bring significant facts that are disputed to the attention of the court.
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> (2) The obligation in subclause (1) may be discharged at a case management or issues or pre-trial conference, or at another time, but must, in any event, be discharged not later than 15 working days after service of the chronologies of fact has been completed.
>
> (3) The court may, before the giving of evidence, and either before or at the trial or hearing, direct that evidence be given orally (an oral evidence direction).

[37] Despite the existing rules, the perception of a number of judges at least is that the way written witness statements are prepared and used has affected the conduct of litigation and added to the length of trials. In a number of other jurisdictions, the Court has moved away from the preparation of written witness statements. Two examples will suffice.

[38] The default position in the Victorian Supreme Court Commercial Division is for oral evidence. Written witness statements are only permitted if the Court can be satisfied that witness statements would better achieve the overarching purpose of the rules than if their evidence was given orally.

[39] Western Australia has recently changed its default position. Written witness statements are no longer accepted as the evidence-in-chief. The amended practice direction issued by the Chief Justice in February this year noted that the objectives of promoting the efficient and just determination of civil disputes had not been met by the provision of written witness statements. The preparation of witness statements and objections to them added significantly to the cost of preparation for trial without significant benefit.

[40] The default under the amended practice direction is for evidence-in-chief to be given orally. To avoid ambush, witness outlines are required. The witness outlines provide notice of the evidence-in-chief but are not and do not become evidence. The witness outlines must:

- identify topics in respect of which evidence will be given;
- the substance of that evidence, including the substance of each important conversation.

Trial Conduct

[41] The last issue I raise for consideration relates to trial conduct and in particular the provision of time limits and enforcement of them by the trial judge.

[42] Under s 62 of the Civil Procedure Act 2005 (NSW) a judge can limit time taken with witnesses and the number of witnesses in addition to limiting the time for various steps in the proceeding and the length of hearing itself.

[43] In South Australia the rules provide for the court to control the trial. That extends to the ability to limit the time to be taken by a trial or any part or aspect of it, including limiting the examination, cross-examination, or re-examination of a witness, and/or limiting a party in its presentation of its case or making a particular submission.

[44] I raise for consideration whether at a pre-trial conference the parties and judge should discuss and set a timetable for opening, evidence (including limited cross-examination), and closing submissions, with the ability of the trial judge to enforce the agreed or set time limits.

Rules Committee

The Rules Committee has established an access to justice working group as a sub-committee to research and explore changes to the rules with a view to simplifying the court process. The group will be considering the above issues together with other initiatives that may be raised in consultation with the profession.

Conclusion

[45] Unnecessary delay and cost impede access to justice. The Court has limited resources, in terms of time, courtroom and judicial resource. The parties generally have limited resources to apply to the litigation. The Court and the profession have

an obligation to work together to ensure, as far as possible, the objectives of the prompt and economic disposal of cases are met. That may require a fresh approach to civil litigation, or at least a reset in the application of existing rules.