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NEW DISTRICT COURT PROCESS

New District Court Rules will come into force on 1 November 2009. They will apply to claims filed after that date, with all existing proceedings governed by the current Rules. The review of the Rules has occurred because District Court Judges and Rules Committee have determined that the existing procedural process is too slow and cumbersome and does not properly meet the demand for access to affordable justice.

INTRODUCTION

The touchstone of the Rules is at Rule 1.3. This states the objectives of the Rules. They are:

- (1) Access to justice;
- (2) Just, speedy and inexpensive to termination of proceedings including:
 - Ensuring all parties are treated equally;
 - Saving expense;
 - Proportionality of process
 - Appropriate allocation of Court's resources – impact of steps on other cases.

The basis objective is settlement. The defended witness action is the last resort. To reduce the cost and enhance prospects of an

early settlement the Court has changed the Rules to:

- (1) End interlocutory warfare;
- (2) Change the present cumbersome and expensive discovery process;
- (3) Place a far greater emphasis on the early identification of issues and disputed facts; and
- (4) Put in place a procedure which is user friendly to all litigants, including lay litigants.

Interestingly, at the moment the Court's records show that historically just 3% of claims issued in the District Court are defended and of those only 5% ever reach a trial. Those figures are used to justify the Court's concern that the system is not achieving the desired result.

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This new process does not apply to proceedings in defamation, admiralty or arbitration awards. Such matters are still dealt with in a way consistent with the existing Rules.

THE NEW PROCESS

The new process is set out in Part 2 of the new Rules. The basic outline of the new process is set out below.

Notice of claim

To begin an action a plaintiff files the notice of claim in the District Court and serves a copy of the claim on the defendant. It is intended that a standard form will be used by all plaintiffs. This will be known as Form 2 and is available on the Court's website, from where it can be completed. The new notice of claim has been written in the plain English style. It is form of fact pleading. It requires the plaintiff to identify:

- (1) The connection between the plaintiff and the defendant;
- (2) Details of the duty the defendant owes the plaintiff;
- (3) What happened that led to this claim;
- (4) The facts showing why the defendant should pay or give what is being claimed;
- (5) The loss suffered by the plaintiff;
- (6) What are you asking the defendant to give you or to do;
- (7) Any claim for interest;
- (8) Details of costs and claims being sought.

The plaintiff is required to sign the document confirming that they believe the facts they *"have stated in this notice of claim are true and correct"*. This places an onus on the

plaintiff at the outset to only include facts which are considered to be true and correct. It will be necessary for insurers or their insured to sign this.

This still needs to be filed in hard copy. There is no provision for on-line filing.

If the plaintiff prefers to utilise the existing statement of claim process, there is provision in Rule 2.7 for the plaintiff, by interlocutory application, to apply for leave (either with or without notice) to file a statement of claim, or to file an originating application. The notice of claim must not be served until the Court has determined the application. Relevant facts in deciding whether to grant leave include the objectives set out in Rule 1.3, which includes (for the purpose of this Rule):

- (1) The amount of money involved;
- (2) The importance of the case;
- (3) The degree of difficulty or complexity to which the issues in the proceedings give rise;
- (4) Urgency;
- (5) The financial position of each party;
- (6) Any other matters the Court considers relevant.

If leave is granted under Rule 2.7, the High Court Rules generally apply, subject to any directions made in the order granting leave which could include directions as to service of documents, requiring a JSC to be convened, requiring the exchange of will say statements or documents supporting their case.

Response by defendant

In the event that a Rule 2.7 application is not filed, or leave is not granted, the notice of claim must be served on the defendant.

Form 3 is a *"Response by Defendant"*. It is the defendant's response to the notice of claim.

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Put simply it gives the opportunity to agree or not with the plaintiff's claim. There is room to indicate any legal references such as reliance on the Consumer Guarantees Act or any other legislation which may be relevant to a defence. It must:

- (1) Admit the claim and immediately pay or comply with the requested relief or remedy; or
- (2) Admit the claim but offer an alternative remedy to that requested in the notice of claim;
- (3) Deny the claim; or
- (4) Partially admit and partially deny the claim.

The response must then be served on the plaintiff within 30 working days of receiving the notice of claim. It is not filed in Court. It must also indicate whether the defendant intends to make any counterclaims.

If it denies/partially denies the claim, or indicates any counterclaim, then the response must also:

- (1) Succinctly state the defendant's version of the facts;
- (2) Succinctly state any facts the defendant intends to rely on at trial that are not stated in the notice of claim;
- (3) Contain a signed statement verifying the truth of those facts;
- (4) State an address for service.

However, the defendant is also able to:

- (1) Apply under Rule 2.12.2, by way of interlocutory application, for an order requiring the plaintiff to file a statement of claim or originating application and continue under Rule 2.7. This must be made within the time

allowed for serving the response, and be served together with the response, which must contain a statement notifying an application under Rule 2.12.2. A Judge will then determine it on the same basis as outlined above should the plaintiff seek leave for this purpose;

- (2) Object to the claim on the ground that a District Court does not have jurisdiction to hear and determine the claim. In that case, instead of serving a response, the defendant must file and serve an appearance in the specified form stating the objection and the grounds for it – Rule 2.12.7.

Information capsule

Having received the defendant's response, the plaintiff must serve an "information capsule" on the defendant within 30 working days. Remember at this stage none of this documentation is required to be filed in the District Court. The purpose of the plaintiff's information capsule is to:

- (1) Inform the defendant of the essential nature of the plaintiff's case;
- (2) Disclose to the defendant the information on which the plaintiff intends to rely as at the time of service of the capsule.

This will be a very important part of the process. The aim is to allow the defendant at an early stage to know precisely what the dispute involves and what evidence the plaintiff has on which it intends to rely. The strength on the plaintiff's case will be known.

The information capsule must:

- (1) Rebut the defences raised by identifying and addressing the essential facts in dispute;
- (2) Explain why any offer made by the defendant has been rejected. This

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does not apply to any offer made expressly stated to be without prejudice save as to costs;

- (3) List the witnesses the plaintiff intends to call during the trial;
- (4) Include or attach will say statements for each witness;
- (5) List or describe sufficiently the essential documents supporting the plaintiff's claim; and
- (6) Verify the contents on oath or by affirmation.

Defendant's information capsule

Assuming the defendant still wishes to dispute the claim, it must then serve within 30 working days after it receives the plaintiff's information capsule, its own information capsule. The requirements for the defendant's information capsules are the same as those for a plaintiff.

Importantly, if the defendant fails to serve its information capsule within 30 working days of receiving the plaintiff's capsule, the plaintiff may proceed to judgment. At this stage, there is still only the notice of claim filed in the Court.

The intention at this stage is for the parties to assess the relative merits of their positions, and to negotiate if that is possible, to achieve a satisfactory settlement.

Notice of pursuit of claim

If there is no settlement by this point, the plaintiff must within the period of 90 working days after receiving the defendant's information capsule, file and serve a notice of pursuit of claim. Accompanying the notice of pursuit of claim will be:

- (1) The defendant's response;
- (2) The information capsules from both parties.

At this point, the Court will then decide the next stage, although it will take account of any preference which the parties express. There are two possibilities only, if it has not settled; judicial settlement conference (JSC) or a short trial.

There remains the ability to claim against a third party where the defendant is entitled to a contribution, indemnity or other relief or remedy from that party. A third party notice must be in Form 7, and be signed by the defendant after informing the third party of:

- (1) The plaintiff's claim against the defendant;
- (2) The fact that service of the notice makes the third party a party to the proceedings;
- (3) The defendant's claim against the third party;
- (4) The steps the third party is required to take if they dispute the claim;
- (5) The consequences to follow if the third party fails to dispute the claim.

The third party notice and defendant's notice of claim against the third party must be filed within 15 working days (or by leave, some additional time) after service of the plaintiff's notice of pursuit of claim, with service on the plaintiff immediately after filing, and within 15 working days on the third party. The defendant must also serve on the third party a copy of everything it has received or served to that point.

Within 30 working days of service of the notice, a third party must file and serve on each plaintiff and defendant a response to the third party notice, fulfilling the same requirements as the defendant when preparing its response. If a response is not filed within the time allowed, the third party is treated as admitting the validity of, and is bound by, any judgment given in the proceeding or any decision on any question specified in the

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defendant's notice of claim. There also remains the ability for a third party to apply to set aside the third party notice.

There are also provisions at this stage which deal with counterclaims, and claims between defendants which generally require compliance with the general notice of claim procedure, including the exchange of information capsules. There also remains the ability to join fourth and subsequent parties.

Transfer

There remains a window of opportunity to have the proceedings transferred to the High Court. In particular, Rule 3.2 provides that within 5 working days after service of the notice of pursuit of claim, or notice of proceeding, but including the day of service, the defendant can issue a notice under s43 District Courts Act 1947.

This provides that where any proceeding is commenced in which the amount of the claim, or value of the property or relief claimed or in issue:

- (1) Exceeds \$50,000, the defendant can give notice that it objects to the proceeding being tried in the District Court. In those circumstances a Judge shall order that the proceeding be transferred to the High Court – s43(1);
- (2) Does not exceed \$50,000, the defendant can still give a notice objecting to the District Court jurisdiction, but transfer to the High Court is dependent on the Judge determining that there is some important question of law or fact is likely to arise – s43(2).

Short trial

The purpose of a short trial is to deal with claims where the issues are relatively uncomplicated, a modest amount is at stake, and the trial time is not likely to exceed one day.

The features of a short trial are:

- (1) The ability to exchange further will-say statements and any additional documents the parties intend to rely on during the trial;
- (2) Limited interlocutory applications;
- (3) No requirement for bundles of documents;
- (4) Time limits on submissions and evidence:
 - Submissions - Each party will only have 30 minutes to make its submissions. That is a significant restriction;
 - Witnesses. Evidence in chief is limited to 40 minutes; cross-examination to 20 minutes; and re-examination to 10 minutes.

The intention of this process is to ensure the short trial is finished within the day allocated on the basis that the emphasis will be on issue identification and strictly relevant evidence. A judgment will follow in the usual course, and the existing appeal rights remain.

Judicial settlement conference

In the alternative, the Court may allocate a 90 minute JSC, although a longer time can be requested. This has already been trialled in Christchurch with some success. It is intended that the 90 minute time limit will ensure the parties focus promptly on the critical issues.

Judge Joyce QC (one of the main supporters of the changes to the Rules) appears to be slightly more sceptical as to whether 90 minutes is appropriate as the default time, but the workability of this amount of time to achieve resolution can always be reviewed once the Rules come into force.

Obviously if a settlement is achieved at the JSC the dispute is at an end. If not, then the Rules

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envisage that the JSC will become a directions conference. The Judge must then allocate either:

- (1) Simplified trial; or
- (2) Full trial.

Depending on which is to be pursued, the Judge will also deal with other matters at the directions conference, including such things as:

- (1) Identifying and if possible disposing of, any interlocutory issues/ applications then outstanding;
- (2) Assessing if more formal pleadings are required;
- (3) Giving directions as to evidence and how that is to be adduced;
- (4) Length and date for the trial.

Simplified trial

This is a hybrid between a short and a full trial. The features of a simplified trial are:

- (1) There will be pre-trial disclosure of documents and affidavits of evidence in chief;
- (2) Limited ability to make interlocutory applications;
- (3) Witnesses will be limited to one expert per area of expertise;
- (4) Witnesses need only appear if they are the subject of a notice to cross-examine;
- (5) Time limits will be:
 - Cross-examination: 50 minutes per witness;
 - Re-examination: 10 minutes.

- As with the short trial, submissions are limited to 30 minutes per party.

Full trial

A Court may prefer to allocate a full trial. The full trial follows the High Court procedure as we presently know it and the High Court Rules will apply

Summary judgment

This is available in a proceeding for which a simplified or full trial is allocated, but not for the short trial process. If appropriate, it should be made by way of an interlocutory application, with the usual Rules concerning summary judgment applications to apply.

Summary judgment is also available to enforce an agreed settlement arranged by mediation or any other form of ADR, or at a JSC.

Strike out

Under Rule 2.50 the Court may strike out any part of a pleading which discloses no reasonable cause of action or defence, which is likely to cause prejudice, embarrassment or delay or which is otherwise an abuse of process of the Court. This application may be made at any time.

Defendant's Costs

Under Rule 2.50.4 a defendant may apply for indemnity costs if a defendant has served its response but the plaintiff has not filed its information capsule within 30 working days. Additionally a defendant may also apply for indemnity costs where the defendant has served an information capsule but the plaintiff has not pursued the claim.

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RADICAL CHANGE TO DISCOVERY OBLIGATIONS

As we know, in a general sense, the "discovery" of information involves full disclosure of information that is relevant to a party's case to ensure no one is taken by surprise if the proceeding ultimately goes to trial. This enables each party to assess the strengths and weaknesses of their own case, as well as that of their adversary, at a relatively early stage.

The current Rules have evolved from two essential requirements:

- (1) Information to be discovered must be, or have been, in that party's control, and which relate to a matter in question in the proceedings;
- (2) Solicitors must ensure their clients search for and disclose any document which "*may fairly lead him to a train of enquiry*" which may either advance his own case, or damage his opponents. This classic statement is from the UK decision in *Peruvian Guano* which has been adopted in most common law jurisdictions, including New Zealand.

This has meant in many cases a relatively lengthy and involved process of reviewing all relevant information, identifying both privileged and non-privileged documents, listing them in an affidavit of documents which is sworn and exchanged with other parties.

The Rules Committee has determined that the existing process in the District Court is overly onerous, time consuming and expensive in the context of litigation at this level. As a result, a substantial change to the discovery process has been introduced.

The first point at which a plaintiff must disclose information (other than that contained in the notice of claim) to a defendant is 30 working days after receipt of a defendant's response to the notice of claim. By that date a plaintiff must serve an information capsule under Rule

2.14. The information capsule must, amongst other things:

- (1) List or describe sufficiently the essential documents supporting the plaintiff's claim - Rule 2.14.3(f);
- (2) To the best of the plaintiffs knowledge or belief, verify the contents on oath or affirmation.

There is no obligation on a party serving an information capsule to refer to any document which is harmful to that party's case. To the contrary, the information capsule regime is designed to advise the opposing party only of the strength of their case.

If the defendant intends to contest the plaintiff's claim then it is obliged to comply with a similar obligation to a plaintiff as to supporting documents/information when it serves its information capsule within 30 working days of receiving the plaintiff's capsule. Pursuant to Rule 2.15.3(f), the defendant must list or describe sufficiently the essential documents supporting its case, and to the best of the defendant's knowledge or belief, verify the contents on oath or affirmation.

There appears no express provision in the Rules requiring a party to compel another party to provide copies, or allow inspection of, the documents in the list provided with an information capsule. In practice, if a party wishes to persuade another of the strength of its case, then it would appear that there would be no detriment in providing copies of the documents relied on, particularly given there is no obligation to refer to any adverse document.

The next point at which any additional documents may be provided is where no settlement eventuates from the exchange of information capsules, and the plaintiff serves a notice of pursuit of claim. Even then, it is only if a short trial is to occur (rather than a judicial settlement conference) that a party has the ability to serve any further documents which it

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intends to rely on. In that case, no later than 15 working days before the trial) a party must exchange such further documents.

The intention of the Rules Committee is that it will take some persuasion by a party to the Court in order for documents to be referred to at the short trial if they are not identified in the information capsule, or 15 working days before the trial. In addition, no bundles of documents are required for the short trial. The Rules does not say these are prohibited. As a result, in practice, particularly when a party is legally represented, the cost of preparing a key bundle will not be high, and will assist with the efficiency of the one day hearing, so may still be prepared, although the cost of doing so is unlikely to be included as a disbursement payable by the unsuccessful party.

If the case proceeds by way of a JSC rather than a short trial, and settlement is not achieved, then the exchange of information/documents will take one of the following forms:

- (1) Summary judgment (Rules 2.42-2.43): Documents can be annexed to affidavits in support of an application for summary judgment;
- (2) Simplified trial (Rule 2.51):
 - A party must disclose the documents they intend to rely on;
 - At least 15 working days before the trial, a party must give a copy of the documents to all other parties;
 - Evidence is filed by way of affidavit, so these are likely to annex documents relied on;
 - There is also the ability to apply, by interlocutory application at or after the start of the judicial directions conference, for a pre-trial order that another party disclose particular documents.

Such an order made where a Judge is satisfied that:

- The documents are relevant to the issues between the parties;
 - Disclosure is necessary to decide the matter fairly; or
 - For any other reason the documents should be disclosed;
- Full trial (Rule 2.54): If the proceedings are allocated a full trial, the High Court Rules apply, subject to Rule 2.49 dealing with interlocutory applications.

Finally, Rule 2.49 provides an intending plaintiff may apply for discovery of particular documents under Rule 3.61.2 by making an interlocutory application before starting a proceeding – Rule 2.49.2. However, it would appear that if there is seen to be a need for pre-commencement discovery, then such a case would likely be best suited to the statement of claim procedure from the outset.

It therefore appears that the only time a full list of documents might be required is for a full trial, and where an interlocutory application is made for discovery under Rule 2.49.2 or 2.49.4. Otherwise, there is no longer any requirement to list every relevant document, whether favourable or adverse.

The Rules Committee has expressed the view that in its experience the number of cases where there has been a critical document left undiscovered is so rare as to make the prerequisite for that system to continue is simply not justified in the overall interests of justice.

Instead, other than in limited circumstances, the parties are initially expected to simply list, or describe, the documents which evidence the strength of their case, with actual copies of documents not being provided unless:

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- (1) Requested from those listed in an information capsule (but with no apparent ability to compel production);
- (2) Exchanged as an additional document to that listed in the information capsule which a party wishes to rely on at a short trial;
- (3) Provided to other parties 15 working days before a simplified trial;
- (4) There is an interlocutory application for discovery, either before starting a proceeding, or at/after the start of the judicial directions conference;
- (5) Annexed to an affidavit in support of an application for summary judgment.

MANAGING CLAIMS UNDER THESE NEW RULES

The new process requires a number of important procedural decisions to be made. We address each of these below.

Proceeding by statement of claim

The plaintiff can apply for leave to proceed by statement of claim (Rule 2.7) at the time of filing a notice of claim or the defendant can apply for an order that the plaintiff proceed by way of statement of claim at the time of filing its response (Rule 2.12.2). In either case an order is unlikely to be granted unless it is a complex case, has precedent value, has a substantial amount of money involved or where the parties can demonstrate that they have attempted to settle but there is virtually no prospect of settlement. Consideration should be given to such an application where it is envisaged that interlocutory applications may be required or that the trial will not fit within the restricted time limits imposed for short and simplified trials. However, it may be easier to apply for a full trial after the JSC.

Information capsules

Care needs to be taken in preparing the will-say statements. Unlike will-say statements prepared for judicial settlement conferences it appears that the parties will be able to be cross-examined regarding the contents of will-say statements.

In the case of plaintiffs it would pay to include quantum documents within the list of documents.

Particularly in the case of defendants early consideration should be given to appointing experts. If the defendant delays making a decision on an expert until receipt of the plaintiff's information capsule it may struggle to obtain the required expert evidence and will-say brief within the required 30 working days. A practical difficulty with the proposed system is that the plaintiff may not provide enough information in its capsule for the defendant to properly brief its experts on issues relating to breach, cause and loss. There is no means for the defendant to get that information in advance of the JSC. Indeed it may be difficult to get that information at all under short or simplified trial procedures. So in any case where it appears expert evidence will be a key factor consideration should be given to applying for a statement of claim, a full hearing or having the proceeding transferred to the High Court.

Third party claims, counterclaims and crossclaims

Defendants have 15 working days from receiving the pursuit of claim to file third party claims, counterclaims and crossclaims. Whilst there is provision to extend that time period by leave it should not be assumed leave will be granted. So it will pay to give the joinder of third parties and the possibility of counterclaims and crossclaims early consideration.

Interestingly there is nothing requiring a third party to file an information capsule.

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Transfer

Claims over \$50,000 can be automatically transferred to the High Court if the required form is filed within five working days of receiving the pursuit of claim. Whilst it is possible the claim may be referred back to the District Court by the High Court this seems unlikely given the wording of Rule 3.2 and s43 District Courts Act 1947. Serious consideration should be given to this procedure in any case where a defendant is concerned about its ability to obtain discovery, make necessary interlocutory applications or the restrictions placed on the conduct of the trial. This presents as an easier option of ensuring a full trial procedure than applying to the District Court under Rule 2.12.2, or applying for a full trial at the conclusion of a JSC.

Short trial

A short trial will only be appropriate for one or two issue cases where the trial can be concluded within one day eg a motor vehicle case where the issues are negligence and quantum. This procedure might also be suitable as a replacement for summary judgment where a party was confident that it could easily demonstrate that the other party's evidence was unreliable.

Decision at the conclusion of the JSC

At the conclusion of the JSC a decision will need to be made whether to proceed by way of simplified trial, to apply for summary judgment or to apply for a full trial. The main differences between simplified trial and full trial are the restrictions placed on the hearing in a simplified trial. The restriction on submissions to 30 minutes may well mean that cases with any legal complexity are unsuitable. Similarly if there are a number of parties then it simply may not be possible to present submissions within that timeframe. The restriction on cross-examination to 50 minutes also means that cases which turn on credibility which require a careful examination of a party's version of events, may not be suitable for a simplified trial.

The simplified trial procedure does have more restrictions on discovery but there is leave to apply to the Court for interlocutory relief.

Summary

Consideration should be given to transferring a proceeding to the High Court where quantum is over \$50,000 and where the defendant &/or its experts are likely to be reliant on information in the possession of the plaintiff. Alternatively the statement of claim procedure or full trial procedure should be used in such a case but there could still be restrictions on discovery and interlocutory applications under those processes. Full trial should be sought where submissions following the trial are likely to take more than 30 minutes and there may be extensive cross examination, which realistically is likely to be all but very straight forward cases. The short trial procedure may be useful for resolving straight forward cases or cases where the party is confident it can easily prove its case or demonstrate the weaknesses in the others case.

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