Duncan Cotterill

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Clerk to the Rules Committee
c/- Auckland High Court
CX10222
Auckland

By email: RulesCommittee@justice.govt.nz

Attention: Mr Sebastian Hartley

Dear Sir

Improving Access to Civil Justice

1 We refer to the consultation paper issued by the Rules Committee on 14 May 2021, inviting comment on potential reforms.

2 We are grateful for the opportunity to comment on the potential reforms.

Introduction to submissions

3 Duncan Cotterill is a large national law firm, with a significant litigation practice. We have five offices, 43 partners and more than 280 people. A number of our partners and their teams specialise in civil litigation and appear across the full spectrum of New Zealand's court system, from tribunals to the Supreme Court.

4 We have become increasingly concerned over the years at the length of time it typically takes to bring a civil claim to a hearing, and at the escalating costs of civil litigation in New Zealand.

5 We act for a wide range of clients: many of whom are well resourced, repeat litigants who are experienced in their use of the civil litigation system. Other clients are new to litigation and much less well resourced. The common experience across the board is for clients to feel concerned at the considerable time and costs involved in pursuing, or responding, to litigation.

6 We support the Rules Committee's work in proposing reform to remedy these problems, and to improve access to justice. Above all else, we suggest there are two crucial requirements to ensure any reforms achieve the desired intention:

6.1 The allocation of sufficient judicial and registry resources (a number of the reform proposals will require more active involvement from judges and registry staff, which we welcome); and

6.2 The active use of cost consequences for litigants and lawyers (as the circumstances require) for breaches of the Rules and case management orders.

7 We also suggest that any reform to the Rules ought to be accompanied by the appointment of more judicial officers at every level, including Judges, Associate Judges, Recorders (if adopted), and Disputes Tribunal Referees (or Adjudicators). We are concerned that without sufficient judicial and registry resources, any Rule reforms will fail to achieve their intended purpose.

Proposed reforms in the High Court

8 The significant majority of our firm's litigation work is in the High Court.

Discovery

9 Discovery continues to place significant costs on parties to litigation. Our experience has been that:

9.1 the volume of documents being discovered continues to increase;

9.2 when one party is not well-resourced, discovery is often done in an indiscriminate manner, by bulk-scanning and listing documents and with little attention being given to the relevance of documents; this results in increased costs for the other parties in the time taken for inspection;

9.3 there are diverging attitudes within the profession (and among judges) as to whether tailored discovery deems a document to be relevant if it falls within an agreed category, or whether a separate relevance test is also required;

9.4 in high value cases, tailored discovery has substantially increased the burden of discovery; and

9.5 in most cases, the volume of discovery and the cost that discovery processes entail is out of proportion to the value of the claim.

10 We agree with the Committee's proposals to reform the rules relating to discovery.

11 We would support an approach utilising an adapted form of the current initial disclosure process:

11.1 On commencing a claim, and a defence, a litigant should be required to serve copies of any key documents relied on, and any adverse documents.

11.2 A second tranche of discovery could follow. Plaintiffs could be required to provide a second tranche of documents relating to any affirmative defences raised by defendants. Defendants (and third parties) could be required to provide a second tranche of documents as there will often be insufficient time for them to review and collate all necessary documents for disclosure before a statement of defence is due.

12 The issues conference, which we discuss in further detail below, could then include a review of what disclosure has been provided, and whether any residual discovery is required, and if so, on what terms.

13 One matter for consideration ought to be whether any documents falling within tailored (residual) discovery categories are deemed to be relevant, or whether documents that fall within those categories also require an individual relevance assessment.

14 Consideration could be given to whether itemised lists of documents are required, and if so, the form of those lists – not every case will require an individually itemised list of documents to be exchanged.

15 We suggest there could be costs consequences for sub-standard discovery, including to guard against failures by parties to discover relevant material, particularly adverse documents, and for cases of over-discovery.

16 Our experience has been that there are varying ways that discovery, and the costs of the process, are now being managed and approached by litigants, with some adverse results:

16.1 A number of law firms are choosing to outsource the discovery process, in whole or in part, to third party external providers. Those parties are then seeking full cost recovery by claiming external providers' costs as disbursements.

16.2 Those firms that continue to undertake the discovery process in-house are restricted to seeking scale costs for this work.

17 We favour a consistent approach being adopted to the awarding of costs for discovery, and would prefer an approach whereby discovery costs cannot be claimed as a disbursement.

Commencement

18 We agree with the Committee's proposal that proceedings ought to continue to be commenced by way of the filing of statements of claim and defence, in the usual way.

Issues conferences

19 We are strongly in favour of an initial, preferably in person (or in some cases by VMR) issues conference.

20 We recommend consideration is given to whether these should be held, in whole or in part, on a without prejudice basis. That ought to encourage candid discussion by counsel of the real issues rather than tactical positioning. It may also allow judges greater latitude to probe and test propositions at an early stage.

21 To be successful, such issues conference will require the allocation of sufficient judicial resources. Judges will need sufficient time to prepare. We would expect many conferences to require a quarter day, and in some cases, a half day, to allow sufficient time for discussion of issues (which may be conducted on a without prejudice basis) as well as time for any case management aspects (which would be conducted on an open basis).

22 Judges who have presided over an issues conference that is held on a without prejudice basis, in whole or in part, ought not to preside if the case proceeds to a full hearing. For that reason, it may be that Associate Judges could be deployed as the principal judicial officers to preside at issues conferences.

23 The question of experts should be raised at this first conference. Suitable experts are usually very busy, and if their appointment is left too long it can result in extensive delays where nothing else can be done while parties wait for expert reports.

24 The discussion about experts at an issues conference should include consideration of what experts are needed, and whether a single expert (court-appointed, with the costs shared by the parties) could be used in appropriate situations. Where each party requires their own experts (on core issues, or issues that are highly contested), this should be limited to one expert, per topic, per party.

Interlocutory applications

25 There has been some disagreement within our firm as to the merits of the proposal for interlocutory applications to be dealt with on the papers.

26 Some applications are highly amenable to being dealt with on the papers, whereas others, particularly those that can be determinative of the proceeding, are not.

27 A possible compromise could be that interlocutory applications be dealt with on the papers unless a party requests a hearing. An alternative is that the proposal could be developed further, to specify which interlocutory applications as a default rule will have an in person hearing (such as summary judgment and strike out applications) and which as a default rule will be dealt with on the papers (such as perhaps security for costs).

28 We suggest that many interlocutory applications, where a hearing is required, could proceed by VMR, rather than in person, particularly where out of town counsel are involved. This would reduce the travel cost and time involved in a hearing.

29 If interlocutory applications are to be dealt with on the papers, there should be active steps taken to require compliance with page limits and other restrictions. It is common to see one party keep to the ten-page limit for submissions, while the other party will be commended for the thoroughness of their 30+ pages of submissions. The sanction should not be purely costs consequences, but rather something to require compliance.

Evidence at hearings

30 We agree with the proposal to provide more weight to documentary evidence. The current requirement that documents must be referred to in opening submissions or in evidence leads to longer narrative briefs which simply set out the chronology of events. This could be significantly curtailed.

31 We have differing opinions as to whether evidence should be *viva voce* or by way of affidavit. There is concern that if there is a complicated factual narrative, or if expert evidence is complex, parties will be unsure of whether their position has been truly understood if they have not had the opportunity to give *viva voce* evidence in chief.

32 As with other aspects of these proposed reforms, the changes to evidence would need to be supported by appropriate sanctions for breaches of the Rules and the Evidence Act.

Proposed reforms in the District Court

33 Ensuring that there are judges in the District Court who are focused on civil matters is critical, and so we welcome the proposal to introduce a Principal Civil District Court Judge.

34 We support, in principle, the proposal to institute a Deputy Judge/Recorder role. There was some concern raised over the quality of the lawyers who may be willing to act in that role, but we are confident that could be managed through the criteria set for the appointments.

35 We would like to see greater, specialist, resources being made available to the civil registry of the District Court. Our experience has been that District Court civil registry staff often lack experience in civil litigation and do not have the experience and resources necessary to progress civil litigation as commonly occurs with High Court registry staff.

36 Our experience of civil litigation in the District Court has been such that we regularly consider whether cases can properly be brought in the High Court, even though that is a more expensive environment in which to litigate.

37 We are not in favour of the proposal to include a pre-action protocol. A number of our partners who have first-hand experience of using such processes in other jurisdictions have commented that they result in longer processes, with the potential for increased costs from interlocutory skirmishes complaining about the exact content of what was provided pre-commencement. We believe a pre-action protocol process is likely to result in further steps, and further costs, without improving access to justice.

38 We note the discussion about the potential to increase the jurisdiction of the Disputes Tribunal, which we address below. If that occurs, the likely consequence would be a discussion about a further increase in the jurisdiction of the District Court. We would not be in favour of an increase beyond $350,000 at this time, as we would prefer to see that changes in the District Court were having an effect and making hearing time available, before adding further to the District Court's caseload.

Proposed reforms in the Disputes Tribunal

39 We are generally in favour of a further expansion to the jurisdiction of the Disputes Tribunal.

40 Claims of less than $100,000 are not economic to bring in the District Court, and we support the increase of the Disputes Tribunal's jurisdiction to that level. $100,000 is, however, a significant sum. We believe that for claims between $50,000 and $100,000, there should be:

40.1 a right of appeal;

40.2 a requirement for the referee/adjudicator to be a qualified and experienced lawyer; and

40.3 the right to have a lawyer appear for a party (though no right to seek costs, other than as we discuss below).

41 We would like to see the jurisdiction of the Disputes Tribunal jurisdiction re-framed, so that undisputed debt recovery claims can be heard there. As things currently stand, there is no easy way to obtain and enforce a judgment against a debtor who simply refuses to pay. The Disputes Tribunal could readily deal with these claims, but for the fact that they are not "disputed". We are aware that some people send such claims to the Disputes Tribunal, on the basis that there must be a dispute if the debtor has not paid. However, we support the jurisdiction of the Disputes Tribunal being clarified.

42 We believe that increasing the jurisdiction of the Disputes Tribunal may facilitate greater access to justice as it could alleviate some of the cultural and informational barriers in engagement with the District Court, as the process is more informal.

43 We consider costs in the Disputes Tribunal should not generally be available, but there should be the ability to seek an award of costs in cases of bad faith by one party. This is similar to the provisions of other Tribunals, including the Weathertight Homes and Canterbury Earthquake Tribunals.

44 We support the proposals to rename the title of "referee" to that of "adjudicator"; to allow proceedings to be conducted in public, unless the referee considers that to be inappropriate in a particular case; and to increase the daily fees for referees.

45 We agree with the renaming of the Disputes Tribunal, particularly to remove the "disputes" part of the name if undisputed debt recovery is included within the jurisdiction. However, we have no strong preference on a new name.

46 In relation to filing fees, other courts all have the power to waive fees, so we agree that the Disputes Tribunal should also have that power. The power should be required to be exercised on a principled basis, using the same criteria as the District Court.

Other suggestions

47 Although this may be outside the ambit of this consultation, we note our view that the current scale costs regime in the High Court and District Court provides a significant barrier to many civil claims being advanced. For example, the current costs regime makes no allowance for different levels of resourcing between parties, such that one party can bring multiple interlocutory applications and raise procedural issues in the knowledge that the other party simply cannot afford to deal with them.

48 The time that judgments take to be released is also of concern. It is now common for judgments on substantive matters to take six months to be released after the date of the hearing. An appeal can add a two-year delay to a proceeding by the time that the hearing is held, and judgment issued. While this is beyond the scope of this consultation, the resulting delays do affect access to justice.

Conclusion

49 Thank you for the opportunity to comment on these proposals. We look forward to the outcome and would be pleased to provide any further information that may assist the Rules Committee.

Yours sincerely

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Chair and Partner

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Professional Support Lawyer