30 August 2020

Sebastian Hartley
Clerk to the Rules Committee
c/- Auckland High Court
PO Box 60
AUCKLAND 1010

Dear Sebastian

SUBMISSIONS ON RULES COMMITTEE DISCUSSION PAPER – IMPROVING ACCESS TO CIVIL JUSTICE

1. By way of introduction, my name is Joshua Pietras and I am a litigation solicitor based in Lower Hutt. I am a relatively new lawyer and currently have 4.5 years PQE.

2. I have reviewed the Rules Committee's discussion paper on 'Improving Access to Civil Justice', and wish to comment on the proposal that all civil claims be commenced by a process akin to summary judgment.

3. I will preface these submissions by saying that the civil jurisdiction of the District Court has largely been reduced to unopposed summary judgment applications and judgments by default. It is simply uneconomic to commence ordinary proceedings for any claim worth less than $100,000.

4. However, for the purposes of these submissions, I will only focus on two issues:

    a. whether the timeframes for filing summary judgment documents are out of step with reality; and

    b. whether *Calderbank* correspondence should be admissible for costs purposes following an unsuccessful application for summary judgment.

Issue 1: Timeframes under the Rules do not comply with reality

5. The delays with obtaining a fixture for a short trial or simplified trial (typically 12 to 18 months) make the option of summary judgment very attractive, even when it will be hard to show that the defendant has no arguable defence.

6. In reality, however, it often takes just as long to obtain a hearing date for an opposed summary judgment application.

7. In the writer's experience, the Rules dealing with the timeframes for filing and serving summary judgment documents have become somewhat meaningless.

8. Rule 12.7 states that the Plaintiff must serve the summary judgment application at least 25 working days before the hearing date. If the Defendant wishes to oppose the summary judgment application, then Rule 12.9(1) requires the Defendant to file and

serve a notice of opposition and affidavit in answer at least 3 working days before the hearing date.

9. Rule 12.9(3) then states that if the Defendant does not file and serve these documents at least 3 working days before the hearing date, the Defendant may not be heard in opposition to the application without leave from the Court.

10. However, in practice, the Defendant (or their Counsel who is often instructed at the last minute) will appear on the morning of civil list, and seek an adjournment through to the next available civil list. The adjournment will invariably be granted with no adverse consequences for the Defendant.

11. Meanwhile, the Plaintiff is forced to wait another month or two for the next available civil list, which will typically involve a nominal appearance to obtain a hearing date a few months down the track.

12. Likewise, the timeframes for the filing and exchange of written submissions are almost never observed in practice.

13. Rule 7.32(2) states that if the Defendant files a notice of opposition and affidavit in answer at least 3 working days before the hearing, then the Plaintiff must file and serve a synopsis of argument at least 2 working days before the hearing. The Defendant must then file and serve a synopsis of argument at least 1 working day before the hearing.[1]

14. In practice, these timeframes are not observed because there is never enough Court hearing time to deal with an opposed summary judgment application at the end of a busy civil list.

15. More problematic is the long waiting time to obtain a firm fixture date for an opposed summary judgment application.

16. By way of example, the writer recently acted for the Plaintiffs in a defended summary judgment application involving allegations of professional negligence and breaches of the Fair Trading Act 1986.

17. The application was filed and served on 26 November 2019, with a scheduled hearing date on 3 February 2020. The Defendant filed its notice of opposition and affidavit in answer on 31 January 2020, in accordance with Rule 12.9(1). The scheduled hearing date on 3 February 2020 was immediately vacated and adjourned to the next available half-day fixture on 25 May 2020 (some 4 months away).

18. The opposed summary judgment hearing took place on 25 May 2020 and (unsurprisingly) resulted in a reserved decision.

19. On 18 August 2020 (almost 3 months after the hearing), the Court released its reserved decision and dismissed the application for summary judgment. The matter has now been scheduled for a call-over on 4 September 2020 to allocate a fixture for a two-day simplified trial, which will undoubtedly be 6 to 8 months away.

[1] DCR 7.32(5).

20. Based on this recent experience, there seems to be very little advantage in commencing summary judgment proceedings, save for straight-forward debt recovery cases.

Solution – Opposed Summary Judgments to be determined "on the papers".

21. Putting the issue of judicial resourcing to one side, Part 12 of the District Court Rules should be amended so that all opposed summary judgment applications are determined 'on the papers', unless the Judge directs otherwise.

22. In most cases, there is little need for the Court to hear oral submissions from counsel to determine whether the Defendant has an arguable defence to the Plaintiff's claim.

23. This question can be answered by carefully reviewing all of the affidavit evidence and the legal arguments raised in counsels' written submissions.

24. Determining summary judgment applications "on the papers" will result in significant cost and time savings for both parties. It will also free up the Court's hearing time for other civil and criminal matters.

25. In the writer's view, this outcome would be consistent with the District Court Rules' primary objective of securing the "just, speedy and inexpensive determination of any proceeding or interlocutory application".[2]

26. It will also ensure that the costs of a summary judgment application are not out of all proportion with the total claim amount.

Issue 2: Costs following unsuccessful application for summary judgment.

27. Another issue not currently addressed by the District Court Rules is whether *Calderbank* correspondence is admissible for costs purposes following an unsuccessful application for summary judgment. There has been no known case law on this point in New Zealand, Australia, the United Kingdom or Canada.

28. The general rule is that costs should be reserved pending the final disposition of the proceeding. However, there are certain situations in which the Courts will be willing to award costs following the event, such as when the summary judgment application should never have been made.

29. Where costs are sought, the successful party will often be tempted to produce *Calderbank* correspondence to seek increased costs.

30. However, it is unclear whether *Calderbank* correspondence is subject to 'settlement privilege' until the final disposition of the proceeding.

[2] DCR 1.3.

31. Rule 14.10 states that a party to a proceeding may, at any time, make to any other party to the proceeding a written offer that:

    (a) is expressly stated to be without prejudice except as to costs; and

    (b) relates to an issue in the proceeding.

32. Rule 14.11 then goes on explain the effect of *Calderbank* offers on costs. It provides:

    "(3) Party A is entitled to costs on the steps taken in the proceeding after the offer is made, if party A—

    (a) offers a sum of money to party B that exceeds the amount of a judgment obtained by party B against party A; or

    (b) makes an offer that would have been more beneficial to party B than the judgment obtained by party B against party A."

33. In the writer's opinion, *Calderbank* correspondence should be inadmissible for costs purposes following an unsuccessful application for summary judgment. There are three main reasons for this:

    a. Settlement offers are typically made on the basis that they will be in full and final settlement of the proceeding (i.e., the proceeding as a whole);

    b. *Calderbank* correspondence should have no effect on costs in terms of Rule 14.11(3), because even if the summary judgment application is dismissed, it is impossible to say whether the various offers and counter-offers were reasonable in all of the circumstances; and

    c. If the Judge who presided over the summary judgment hearing sees the *Calderbank* correspondence, then the Judge will have to recuse himself or herself from the substantive hearing. While this is not such an issue in the larger centres (Auckland, Wellington, Christchurch, Hamilton), it is problematic for the smaller registries where there is typically only one or no Judges with a civil warrant.

Solution – Calderbank correspondence should be inadmissible following an unsuccessful application for summary judgment.

34. To address this issue, a new Rule 14.11(5) should be inserted as follows:

"(5) This rule does not apply to an application for costs following an unsuccessful application for summary judgment".

35. This new rule would make it clear that *Calderbank* correspondence should only be produced at the end of the substantive hearing, when the Court is in a better position to consider the reasonableness and timing of any settlement offers.

Yours sincerely,

Joshua Pietras
Solicitor