To: The Chief District Court Judge

From: Judge Paul Kellar

Re: Improving access to justice

Introduction

There are unmet needs for civil justice in the District Court. This "justice gap" as it has been called manifests itself in two main respects. The one is that the legal costs of taking a defended civil proceeding to trial can be disproportionate to the amount at issue leading to a rise in the number of litigants in person. The other is that people either simply do not bring, or defend, a claim because of the cost of so doing.

The objective of the District Court Rules 2014 is the "just, speedy and inexpensive determination of proceedings and interlocutory applications".[1] There is no doubt that it sometimes takes too long to determine civil proceedings. Indeed, despite falling numbers, it is taking longer now to hear and determine civil proceedings than it did five years ago. And, there is a widely held perception that it is uneconomic to bring a proceeding for a claim under $100,000 in the District Court.

It is important to understand the work of the District Court civil jurisdiction to consider making meaningful change. In 2019, 17,781 civil proceedings were filed in the District Court over 13,000 of which are recorded in the Court Management System as "Debt Recovery" and/or "Financial/Credit Contract." Debt-collection in other words. When a civil proceeding is filed, the registries in which it is filed

[1] Rule 1.3 District Court Rules 2014. Rule 1.3 is a somewhat abbreviated version of the objective of the District Courts Rules 2009 which referred to proportionality, but the effect is the same. The rule is also the key objective of the Higher Courts. Senior Courts Act, s 145; High Court Rules 2016, r 1.2

send the proceeding (with some exceptions) to the Central Registry.[2] The Central Registry enters judgment by default where the claim is for a liquidated sum and no defence is filed. Sixty percent of the civil proceedings which the Central Registry receives will result in judgment being entered by default. The remaining forty per cent await a triggering event, either the filing of a statement of defence or an application for judgment by default. It is also worth noting that procedures to enforce judgments have also been centralised in the Central Registry, some sixty-five per cent of which are attachment orders on the income of a defendant.

Besides these what might be called "general" civil proceedings, the civil jurisdiction of the District Court is vast. It includes appeals from various Tribunals and decision-making bodies, applications for restraining orders under the Harassment Act and the Harmful Digital Communications Act, and applications under the Returning Offenders (Management and Information) Act. Indeed, there are approximately 550 Acts and Legislative Instruments which confer civil jurisdiction on the District Court.

There is an apparent tension between the words "just", "speedy" and "inexpensive" as objectives for determination of civil proceedings. Yet, what is "just" incorporates expedition in the determination of a proceeding (the oft-repeated phrase "justice delayed is justice denied") and proportionality. Rule 1.1 of the Civil Procedure Rules 1998 (UK) states that the overriding objective of the rules is to enable the courts to deal with cases "justly." Rule 1.1(2) of those rules defines what "dealing with a case justly" means -

> (2) Dealing with a case justly includes, so far as is practicable—

[2] Applications for summary judgment, interlocutory applications for an injunction or other interim relief, applications for restraining orders under the Harassment Act are amongst those not sent to the Central Registry.

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate—

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

These are commendable objectives and it would be helpful if the rules of civil procedure contained a similar definition.

Proposals for reform

The Rules Committee is seeking comment on four potential areas of reform of the High Court Rules 2016 and the District Court Rules 2014. In a recent article in a NZLS publication the Chair of the Rules Committee, Justice Francis Cooke stated:

> "The Committee is not limited to the initial ideas. Other matters are being raised in the submissions we have received, and it is really important that we make a genuine attempt to fully consider all possibilities. Submitters are encouraged to be brave".

The four proposals for reform which the Rules Committee has put forward are:

1. Introducing a short trial process in the High Court and/or modifying the existing short trial process in the District Court;

2. Introducing an inquisitorial process for resolution of certain claims;

3. Introducing a requirement that civil claims be commenced by a process akin to an application for summary judgment;

4. Streamlining current trial processes by making rule changes intended to reduce complexity and length of civil proceedings such as by replacing briefs of evidence with "will say" statements, giving greater primacy to documentary evidence, and reducing presumptive discovery obligations.

The Rules Committee consultation paper of 16 December 2019 sets out the proposals in detail. The Rules Committee has received/is receiving submissions from a wide variety of submitters that the Committee will begin to consider and discuss at its upcoming meeting on 21 September.

In many ways, the existing District Court Rules 2014 contain enough flexibility to "deal with a case justly" as that term is defined in the Civil Procedure Rules (UK). Under the District Court Rules 2014, once a statement of defence is filed, a first case management conference is convened at which the key issue is whether the case is suitable for a short trial or a judicial settlement conference without the burden of unnecessary interlocutory steps and detailed briefs of evidence.

Simplifying civil procedure

It is fair to say that not as much use is made of the short trial as a mode of trial or judicial settlement conferences as there could be. There are likely to be several reasons for this. Part of the problem with civil litigation in the District Court is that the amount at issue and complexity do not always equate. In many civil proceedings the amount at issue has no bearing on the factual or legal complexity of the case. But, the main reason (for not utilising the short trial or judicial settlement conference) is that the adversarial model of civil litigation and the professional obligations of lawyers encourages leaving no stone unturned.

A change to the culture of civil litigation is required so that lawyers can focus on "dealing with the case justly" in the knowledge that judges will continue to encourage and support attainment of that objective. Too often, the costs of compliance with procedural rules drive the parties to settlement. For most cases, procedures need to be simpler to ensure that civil trials are proportionate to the nature and value of the issues in dispute. Hence, the rules could contain a presumption in favour of a simpler, streamlined process unless a party could demonstrate why more time-consuming and expensive procedures were appropriate. And, there could be cost implications if it was ultimately determined that a simplified process would have achieved the interests of justice.

Inquisitorial process

Our model of civil litigation is wedded to an adversarial approach. This is seen as the best way of dealing with a case justly. It would be wrong to attribute the justice gap and other unmet civil litigation needs to the use of

an adversarial model of civil litigation. But, other approaches may attain the objectives of the rules particularly where the amount at issue is not great and the case is not unduly complex. The Rules Committee consultation paper contains two suggestions which would take a more inquisitorial approach. The one based on a highly abbreviated adjudication/facilitation process as developed by the Honourable Sir Graham Panckhurst and then adopted by the Greater Christchurch Claims Resolution Service for the determination of earthquake claims. The other is suggested by Justice Kós for District Court proceedings involving claims for up to $100,000 where at least one party is not represented. The procedures would be very simple, and the court would ultimately act in an inquisitorial manner, giving a reasonably brief, prompt decision. There is much to commend either of these approaches although they depend for their success on the availability of judicial resources.

The Disputes Tribunal

The Disputes Tribunal conducts hearings largely along inquisitorial lines to bring the parties to an agreement of their dispute. Where the Tribunal is unable to get the parties to agree, it is required to determine the dispute according to the substantial merits and justice of the case, and in doing so it shall have regard to the law but shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities.

The current jurisdictional limit of the Disputes Tribunal is $30,000. There is merit in increasing the jurisdictional limit to $50,000 whilst preserving the present limited right of appeal (procedural unfairness adversely affecting the outcome of the hearing). There are relatively few appeals from the Disputes Tribunal to the District Court. It is a testament to the way the

Referees conduct the hearings and the quality of their decisions that very few appeals succeed.

There is a perception that it is uneconomic to bring a claim in the District Court for less than $100,000 having regard to legal costs and scale awards of costs. That might support the argument for increasing the jurisdiction of the Disputes Tribunal to $100,000. However, if the jurisdictional limit was increased to that sum then there is an argument for saying that there would have to be a general right of appeal. And, if that is so the key objective of the Tribunal would be lost, namely the simple, expedient determination of small claims.

Pre-trial protocols

Under the UK rules of civil procedure, Pre-action protocols set out what must be done, in relation to a claim to which they apply, **before** court proceedings can be issued. Failure to comply with a Pre-action Protocol will be considered in any court proceedings which follow. The defaulting party may be ordered to pay additional costs resulting from their failure. If they are awarded costs by the court, the amount may be reduced because of their failure. Other sanctions may be applied.

There may be merit in considering adopting a Pre-action protocol (either by rule or Practice Note) for debt-collection proceedings. As is noted above, the vast majority of civil proceedings filed in the District Court are debt-collection claims in which judgment is obtained by default, with little or no judicial oversight, as a pathway to the creditor/plaintiff obtaining an attachment order over the debtor/defendant's earnings. Often, a defendant will have no knowledge of her/his rights or where to obtain advice. And,

defendants are likely to be very apprehensive about incurring cost which they have no ability to meet. Hence, there are good reasons for trying to avoid court proceedings being issued in the first place.

Summary

Reform of the rules of civil procedure in the District Court needs to be approached very carefully after full consideration of feedback from lawyers, community groups and the public generally.

My key recommendations are for consideration of –

1. A presumptive model in favour of a simplified process for civil proceedings unless a party can demonstrate that more extensive interlocutory steps/full briefs of evidence are required.

2. Adoption of an inquisitorial model for the determination of claims involving modest sums of money;

3. Increasing the jurisdiction of the Disputes Tribunal to $50,000, retaining the current limited right of appeal;

4. Consideration of Pre-action protocols for debt-collection proceedings.