***The High Court Rules Committee Proposals on Improving Access to Civil Justice***

***Summary Judgment Triage***

1. *Introduction*

The High Court Rules Committee (“theCommittee”) is currently seeking feedback on its reformative proposition that most proceedings should be required to begin with a summary judgment application.[[1]](#footnote-1) The purpose of the Committee’s reform is to address the justice gap,[[2]](#footnote-2) by attempting to streamline litigation. There is a growing number of self-represented litigants solely as a result of the affordability of litigation which is impacting the Court’s ability to come to a just determination as “persons who lack legal knowledge are therefore poorly placed to defend their rights in Court.”[[3]](#footnote-3) This contradicts the Court’s objective to facilitate the just, speedy, and inexpensive determination of any proceeding.”[[4]](#footnote-4) The growing need for civil justice is negatively impacting the Court’s ability to meet this civil need and as a result the Committee must find a suitable reform to current litigation procedure.

Summary Judgment applications provide an avenue for litigants to have their case determined, at an early stage of proceedings before trial, if they can satisfy the Court that there is no cause of action or defence to a cause of action available to the other party.[[5]](#footnote-5) The basis for the Committee’s proposition is that a mandatory summary judgment application will act as a mechanism to triage proceedings by providing an early clarification of issues, the adequacy of evidence, the probable judicial reaction and the best path for trial.[[6]](#footnote-6) This application would not be required for any proceeding where a cause of action can already be established like fraud or liquidated demands.

1. *Early Clarification of Issues*

The Committee outlined that requiring all proceedings to commence with a mandatory summary judgment application would enable the parties to identify the points of difference early on in a proceeding.[[7]](#footnote-7) When a party brings Court proceedings against another, the parties must determine what material or legal issues are in contention. It is important to clarify these issues as early as possible so that the parties are then able to debate these points and reach some form of resolution in a timely manner. The current mechanism for identifying the points of difference in a case, prior to trial, are case management conferences.[[8]](#footnote-8) The Committee has proposed this reform as the adopting a triage instrument would allow the clarification of these issues to occur prior to the commencement of ordinary proceedings.

The Committee has set out that the requirement for parties to commence a mandatory summary judgment application will allow ordinary proceedings to operate in a timely fashion. However, this proposition appears to be misguided for two reasons. Firstly, there is a minute number of applicants that have summary judgments awarded in their favour. Therefore, the number of proceedings that would be dealt with solely in the triage mechanism would be insignificant. Secondly, clarification of the issues in contention will still need to occur at some point in the proceeding. Whether or not this clarification is made early in the summary judgment application or later in the ordinary proceeding will be indifferent as to the timely operation of the Court. On that basis, the proposition to introduce a mandatory summary judgment application prior to the commencement of ordinary proceedings by the Committee should be rejected.

1. *Early Clarification of the Adequacy of Evidence*

The Committee proposed that requiring parties to commence proceedings with a compulsory summary judgment application would allow for an early assessment of the adequacy of evidence.[[9]](#footnote-9) In civil litigation points, a common point of debate is what evidence produced by the Plaintiff is material to the proceedings and how wide the scope of discovery should be to determine the relevant issues. Debates surrounding necessity of the evidence often creates multiple additional applications to be made to the Court, such as applications for further and better discovery. These debates negatively impact the Court’s ability to operate in a timely manner. Reaching a determination of the scope of evidence and its relevancy in a summary judgment application would mean that these debates would not occur in an ordinary proceeding.

The Committee’s proposition would enable the ordinary proceedings to operate in a more timely fashion however this would negatively impact the time taken to reach a final determination. The scope of discovery is still an issue that would need to be debated at some point in a proceeding. Just because the necessity of evidence is clarified early on in a proceeding, does not mean that the argument becomes less time consuming. Therefore, the early clarification of the adequacy of evidence, through the introduction of a summary judgment triage mechanism, would provide no procedural benefit to civil litigation.

1. *Informed Judicial Reactions*

The Committee outlined that requiring all proceedings to commence with a compulsory summary judgment application would enable the parties to gain an understanding as to the Court’s probable position.[[10]](#footnote-10) It is important in any system of justice that the Courts adopt a position of clarity. Lawyers and their clients often believe that their argument has the ability to win and it would be pointless to fund a legal proceeding otherwise. Currently in civil litigation, unless points are argued prior to trial and Court minutes are released, parties will not have an indication as to what position the Court’s will likely adopt. Providing the parties, at an early stage of a proceeding, with the likely position that the Court’s will enable litigants to make informed decision as to whether pursuing litigation is the best course of action. This early understanding would enable litigants to reconsider their position at an early stage of the proceeding before the expenditure of time and money has become to great.

The usefulness of gaining an early understanding of the Court’s likely view lies in options available to a party for the resolution of a dispute. It becomes harder for a party to choose another avenue for resolution as they get closer to a trial date and more costs have been incurred. This proposition gives a party, if needed, an avenue to seek a settlement at an early stage of litigation. Although this stage is always available to a party, parties are not always aware that this is the most beneficial option until they are informed of the Court’s position. This view is consistent with the current intention of the Committee as encouraging a party to resolve disputes outside of the Court is the more cost-effective and time-efficient option. Therefore, the fact that the proposition will provide parties with an early informed view of the Court’s probable position is a positive aspect of the reform.

1. *Impact on Court Costs*

The Committee outlined that requiring all proceedings to commence with a mandatory summary judgment application would reduce the costs incurred by parties throughout civil litigation.[[11]](#footnote-11) It was suggested by the Committee that this proposition would enable parties to identify the most cost-effective avenue to pursue in ordinary proceedings. The Committee’s intention to streamline litigation arises from the justice gap resulting from the cost of proceedings. Parties to a proceeding are not being adequately represented in many instances due to the significant cost that would be incurred by hiring lawyers.[[12]](#footnote-12) These significant costs are a result from disagreements such as the scope of discovery and issues in contention which this proposition is attempting to remedy. “*The number of documents requiring consideration can be huge, the time required can run into months, and the cost to the parties of the whole process can be enormous.*”[[13]](#footnote-13) An early determination of the scope of discovery could potentially save some costs in the ordinary proceeding however the costs incurred by pursuing two applications, being a summary judgment application and the following claim, would be greater that the potential savings. Adding a mandatory summary judgment application increases hearing fees and the costs of lawyers which outweighs the potential reduction of costs.

The Committee’s proposition to reduce the costs of civil litigation is unsatisfactory. A compulsory triage mechanism of a summary judgment application will not extinguish the disagreements. It will merely determine whether the disagreements are necessary. This therefore demonstrates that a reduction in costs will only occur if the triage mechanism will reduce the number of claims that will carry on to ordinary proceedings. As set out above, this reduction will be insignificant.

1. *Conclusion*

In conclusion, the Committee’s reformative proposition to make summary judgment applications mandatory before the commencement of ordinary proceedings should be firmly disregarded. The purpose of a summary judgment application is to provide a party, who believes that they have a ‘knockout blow’, with a mechanism to deliver a ‘knockout blow’ to the other party. The instances where these applications are successful are minute as a party must satisfy the Court that the other party has “no reasonably arguable defence”[[14]](#footnote-14). Therefore, it cannot be argued that this reform will reduce the amount of proceedings that carry on to ordinary or complex proceedings.

The Committee set out that the benefit of mandating this triage reform stems from the basis that the early clarification of issues and evidence will benefit civil procedure. This is not the case. Whether these debates occur at an early stage of proceedings or during ordinary proceedings will not change the fact that these debates will still occur. The time and costs associated with these proceedings will not alter over the whole period and the justice gap will not be repaired. Therefore, it cannot be argued that the Committee’s reformative proposition will streamline litigation. On that basis, the Committee should not implement this reform into the High Court rules as it will add an unnecessary hurdle into the civil litigation procedure.

1. The Rules Committee *Improving Access to Civil Justice* (11 December 2019) at 37. [↑](#footnote-ref-1)
2. Helen Winkelmann “Access to Justice – Who Needs Lawyers” (Ethel Benjamin Address 2014, November

2014). Available at https://www.courtsofnz.govt.nz/publications/speeches-and-papers/#speechpaperlist-2014. [↑](#footnote-ref-2)
3. Adrian Zuckermann “No justice without lawyers — the myth of an inquisitorial solution” (2014) CJQ 355 at 355 [↑](#footnote-ref-3)
4. Rule 1.2 of the High Court Rules 2016. [↑](#footnote-ref-4)
5. Rule 12.2 of the High Court Rules 2016. [↑](#footnote-ref-5)
6. The Rules Committee *Improving Access to Civil Justice* (11 December 2019) at 40. [↑](#footnote-ref-6)
7. The Rules Committee *Improving Access to Civil Justice* (11 December 2019) at 40(a). [↑](#footnote-ref-7)
8. Rules 7.1(3) of the High Court Rules 2016. [↑](#footnote-ref-8)
9. The Rules Committee *Improving Access to Civil Justice* (11 December 2019) at 40(b). [↑](#footnote-ref-9)
10. The Rules Committee *Improving Access to Civil Justice* (11 December 2019) at 40(c). [↑](#footnote-ref-10)
11. The Rules Committee *Improving Access to Civil Justice* (11 December 2019) at 40(d). [↑](#footnote-ref-11)
12. Nicholas Jones “Access Denied” New Zealand Herald (New Zealand, 4 November 2019). [↑](#footnote-ref-12)
13. Law Commission *Reforming the rules of general discovery* (September 2001). [↑](#footnote-ref-13)
14. *Jowada Holdings Ltd v Cullen Investments Ltd* CA248/01, 5 June 2003, at [28] [↑](#footnote-ref-14)