PHILIP SKELTON QC
BARRISTER

10 September 2020

Auckland High Court
PO Box 60
Auckland 1010

Attention: Sebastian Hartley, Clerk to the Rules Committee
Email: Sebastian.Hartley@justice.govt.nz

BY EMAIL

Dear Mr Hartley

SUBMISSION TO THE RULES COMMITTEE IN RESPONSE TO THE "IMPROVING ACCESS TO CIVIL JUSTICE" DISCUSSION PAPER

1. We welcome the opportunity to submit on the Rules Committee's Discussion Paper on Improving Access to Civil Justice.

2. It is our experience that unless a plaintiff is a large corporation, an individual with a high net wealth or an individual who qualifies for legal aid, the cost of bringing a civil proceeding to the District Court or High Court with the assistance of legal representation is prohibitive. At present, it is not economic for litigants to employ counsel to run cases in the High Court unless the claim value exceeds $500,000. While we have more limited experience in the District Court, we are also concerned by the Committee's observation that "[l]itigating a defended civil claim worth less than $100,000 in the District Court is routinely considered to be uneconomic."[1]

3. Accordingly, it would appear that the objective of the High Court Rules 2016 ("**HC Rules**") and the District Court Rules 2014 ("**DC Rules**") to "secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application"[2] is not presently being achieved.

4. Our submission focuses on two of the proposals put forward by the Rules Committee in its Discussion Paper. These are **Proposal Two** (Introduction of Inquisitorial Processes) and

---

1 The Rules Committee *Improving Access to Civil Justice* (Discussion Paper, 11 December 2019) at [55] (hereinafter referred to as the "**Discussion Paper**").
2 Rule 1.2 of the HC Rules and Rule 1.3 of the DC Rules.

Proposal Four (Streamlining Standard Pre-Trial and Trial Processes). The primary purpose of this submission is to bring to the Committee's attention the civil procedure models used in other jurisdictions that are not referred to in the Discussion Paper, but which might be helpful to further developing these two proposals as part of the next stage of the Committee's work. As an alternative proposal, we suggest that the Rules Committee consider recommending to the Government an increase in the jurisdiction of the Disputes Tribunal.

SIGNIFICANT DRIVERS OF DISPROPORTIONATE COST IN LITIGATION

5. In our experience (which primarily relates to High Court proceedings), the key drivers of disproportionate cost are:

   (a) **Discovery.** In lower value commercial disputes (where the claim is less than $1 million), it is not uncommon for the cost of discovery to the client to still be several tens of thousands of dollars. We attribute the cost to the use of digital formats to create documents and send communications, which has significantly increased the number of documents which lawyers are required to review (in our experience, the numbers can be in the tens of thousands in defective building and construction disputes, even where claims are worth less than $1 million).

   (b) **Producing written briefs of evidence.** We agree with the comment in the Discussion Paper that "[m]uch of the expense associated with preparing a case for trial relates to the preparation of witnesses' briefs of evidence."[3] The observations of the Rules Committee in its Consultation Paper from 2008 and quoted at paragraph 45 of the Discussion Paper remain apt.[4] In particular, we consider briefs of evidence give rise to significant costs because they are almost always drafted by lawyers following an interview with the witness, which results in multiple revisions, careful editing and a focus on precision of language in the evidence to be given. Like discovery, it is not uncommon for the cost of preparing witness briefs to be several tens of thousands of dollars.

   (c) **Expert evidence.** Beyond the admissibility rule in s 25 of the Evidence Act 2006 (relating to opinion evidence), there are no specific rules focussed on reducing the costs associated with expert evidence in civil proceedings. It is typical for parties to civil litigation in New Zealand to respectively engage their own expert to give evidence in support of their case, rather than for the Court to appoint a single joint expert (as is the case in foreign jurisdictions). It is not unusual for the total fee

---

3 Discussion Paper at [43].

4 Rules Committee *Consultation Paper* (10 December 2008).

charged by one or more experts in a High Court proceeding to be in the tens, if not hundreds of thousands, of dollars in circumstances where the expert has to: (i) prepare a brief of evidence; (ii) conference with the expert on the other side with a view to identifying areas of agreement and disagreement; and (iii) attend the hearing.

(d) **Inefficiencies in the presentation of evidence, which unnecessarily prolong hearings.** First, the current practice of the court hearing all of the plaintiff's witnesses first, followed by all the defendant's witnesses (as opposed to hearing evidence on a topic-by-topic basis or by hot-tubbing witnesses of fact) is inefficient and results in the unnecessary repetition of evidence on the same topic days apart (or sometimes even weeks apart), thereby prolonging hearings. Second, the courts often do not place time limits on cross-examination, which gives undisciplined counsel license to cross-examine witnesses to the nth degree, even though the lines of questioning might not necessarily be material to the resolution of matters in dispute.

6. We acknowledge that the Committee's role is limited to matters that are within its rule-making power in legislation.[5] In order to achieve meaningful reform that reduces the costs associated with bringing a civil matter to Court, serious consideration needs to be given to the following matters that fall outside of the Committee's rule making powers:

(a) the high cost of legal representation and whether there should be regulation of legal fees, as occurs in other jurisdictions;

(b) high hearing fees charged by the Courts (the hearing fees in the High Court are currently $1,600 per half day).[6]

7. Until these matters are addressed, access to justice issues will continue to persist despite much needed reform to the Rules.

COMMENT ON PROPOSAL TWO: INTRODUCTION OF INQUISITORIAL PROCESSES

8. Proposal Two in the Discussion Paper suggests two models of dispute resolution that would take a more inquisitorial approach to resolving civil disputes than the current adversarial

---

[5] As noted at [65] of the Discussion Paper.

[6] We understand that the Rules Committee has recently referred to the Ministry of Justice's newly established Access to Justice Committee the issue of current hearing fee levels: *Minutes 03/18* (23 September 2019) at 8 (Item 2(f): Hearing Fees Levels).

approach. We refer to these as the **Panckhurst Model**[7] and the **Kós Model.**[8]

9. We consider there to be significant merit in Proposal Two and would encourage the Rules Committee to further develop it. In order to do so, we believe that the Committee would benefit from having regard to, and being informed by, two inquisitorial models that already exist in New Zealand: the Employment Relations Authority and the Disputes Tribunal. We also draw the Committee's attention to certain aspects of the German inquisitorial system which appear to help to reduce the cost of civil litigation.

Employment Relations Authority

10. The Employment Relations Authority ("**Authority**") is an investigative body constituted under s 156 of the Employment Relations Act 2000. Its role is to resolve employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities.[9] Its process is largely inquisitorial, rather than adversarial.

11. When the Authority replaced the old Employment Tribunal, there was initially a negative reaction from the legal fraternity. The Employment Tribunal operated an adversarial process, much like the current District Court processes. Employment lawyers were not used to inquisitorial processes and there was concern that if such a process were adopted, counsel would lose control of their cases. However, despite this initial trepidation from counsel, they have largely embraced the Authority, which manages to get through cases faster than the old Employment Tribunal and usually at a cheaper cost.

12. We have summarised the key aspects of the Authority's process for resolving employment problems and why those processes appear to reduce litigation cost in **SCHEDULE ONE** to this submission. We consider the key features of the Authority that help to reduce cost are:

    (a) A different approach to pleadings (written in narrative style and attaching the documents relevant to the resolution to the problem), which help to facilitate the early identification of issues.

    (b) Effective early case management processes which are designed to identify the issues in dispute and the key witnesses who will be required to attend at the Authority's Investigation Meeting.

    (c) No formal discovery.

---

7 Being the earthquake insurance claim process adopted by the Hon Sir Graham Panckhurst QC.
8 Being the inquisitorial process suggested by the Hon Justice Kós.
9 Employment Relations Act 2000, s 157.

(d) A flexible investigatory process run by the Authority Member (not counsel) that usually results in shorter hearing times, during which the Member is primarily responsible for the examination of witnesses.

13. However, the cost of running an employment problem in the Authority is not cheap, in part due to the requirement in most cases to file and serve written briefs of evidence. We understand that Authority Members find briefs of evidence useful, as they are provided to Members in advance of the hearing and enable the Members to prepare lines of questioning for the examination of witnesses. However, as with High Court proceedings, briefs are increasingly being prepared by the lawyers and have become carefully manufactured documents. This means that when briefs of evidence are required, it can in some situations still cost $30,000 to $40,000 to bring a case to the Authority as a claimant.

Disputes Tribunal

14. The Disputes Tribunal ("**Tribunal**") is a division of the District Court.[10] The Tribunal provides a forum in which disputes can be resolved in a cost effective and an efficient way, and which results in a decision that is binding on the parties.[11] It appears that the Disputes Tribunal is achieving this goal. In the year ending 2016, 13,341 new claims were filed with the Tribunal; 13,460 were disposed of; and the Tribunal had about 3,000 active claims.[12]

15. The Tribunal has jurisdiction in respect of claims founded in contract/quasi contract actions; claims in tort relating to the destruction of, damage to or recovery of property; and certain statutory claims. There must also be a "dispute". Undisputed and/or liquidated debts cannot be recovered through the Tribunal.[13] Its jurisdiction was recently increased to disputes that do not exceed $30,000.[14]

16. We have summarised the Tribunal's process for resolving disputes in **SCHEDULE TWO** to this submission.

17. The key features of the Tribunal's process include:

(a) Commencing a claim is a simple and straightforward exercise that can be done online.

(b) The prohibition on lawyers representing parties during hearings eliminates a

---

10 Disputes Tribunal Act 1988, s 4.

11 Anne Daroch and Daniel Shore *The Disputes Tribunal: Preparing Clients* (ADLS CPD, July 2017) at [1.1].

12 At [1.2], citing https://www.courtsofnz.govt.nz/publications/annual-statistics. See also Bridgette Toy-Cronin & Bridget Irvine *Access to Justice in the District Court of New Zealand* (15 February 2019) at 2-3.

13 There are exceptions: see s 11(2) of the Disputes Tribunal Act 1988.

14 Disputes Tribunal Act 1988, s 10

significant expense (but potentially gives rise to other concerns discussed below).

(c) There is no formal discovery process and no requirement to exchange briefs/written statements in advance of the hearing.

(d) The hearing follows an inquisitorial process, which is run by the Referee. This enables the Referee to examine the dispute on an issue-by-issue basis, as well as the flexibility to determine the process that is run on the day. It also helps to address some of the concerns regarding "equality of arms".

(e) While there is a statutory obligation on Referees to assess whether it is appropriate for the Tribunal to assist the parties to negotiate an agreed settlement, there is the backstop of the same Referee being able to issue a binding decision if settlement is not possible (cf the judicial settlement process in the High Court and District Court).

18. Some concerns have been raised about the Disputes Tribunal's processes. First there is the so-called issue of "repeat players". There are certain groups who use the Disputes Tribunal's services frequently, such as insurance companies brining subrogated claims in relation to motor vehicle accidents, or to recover an excess under an insurance policy. These repeat players are well versed in what is required to pursue a successful claim before the Disputes Tribunal. Where a non-commercial and/or an inexperienced respondent is facing a claim from a repeat player, there is a possible issue of inequality of arms. The absence of lawyers from the Tribunal might be exacerbating the problem, as the respondent does not have a representative to assist them during the hearing.

19. Second, there are misunderstandings about enforcement. Members of the general public may not understand that they will need to engage in further legal procedures in the District Court in order to enforce the decision of the Tribunal against a respondent who refuses to comply with the Tribunal's orders. Media reporting has identified many instances where the respondent has refused to pay and claimants have not realised they have to invest further time and money (which they may not have) to enforce the order.[15] We believe this is an education issue, which can be resolved through better communication to the public.

The German Inquisitorial System

20. Hon Justice Kós (writing extrajudicially) notes that it "has been suggested that a typical

---

15 https://www.stuff.co.nz/business/113269590/disputes-tribunal-process-distressing--law-expert; https://thespinoff.co.nz/business/22-10-2019/the-toothless-disputes-tribunal-is-failing-the-people-its-meant-to-help/; https://www.stuff.co.nz/business/111461150/why-is-it-so-hard-to-get-your-money-back-when-you-have-been-ripped-off.

patents case in Germany will cost half the equivalent United Kingdom cost".[16] Similar comments have been made to us in relation to the cost of litigating a civil proceeding in New Zealand as compared with Germany by lawyers who have practised in both jurisdictions. Accordingly, we think there is merit in exploring the key features of the German model to understand why disputes (in particular, disputes that have low monetary value) can be resolved more cost effectively in that jurisdiction.

21. We have summarised the German inquisitorial process in **SCHEDULE THREE** to this submission.

22. The inquisitorial approach to litigation in Germany appears to require more front-end work from the lawyers, as the parties are required to commence their claim by filing a pleading which is more akin to the opening submissions that are filed in New Zealand Courts. This means that counsel require a clear picture of the issues and the evidence required to prove the claim prior to filing. However, counsel then play a backseat role when it comes to the hearing itself, which is driven by the judge (resulting in the parties incurring less cost at later stages of the proceeding), if the dispute has to proceed to a hearing.

23. Many of the costlier aspects of civil litigation in New Zealand are absent from the German approach: there is no discovery, no briefs of evidence; there is unlikely to be a proliferation of expensive expert evidence (as the court controls the appointment of experts); and hearings are shorter. However, one further factor which appears to help keep the cost of litigation low in Germany is that both lawyers' fees and court fees are regulated and are lower than those charged in New Zealand.[17]

Drawing the threads together

24. We do not offer any fixed or final opinion as to which inquisitorial option(s) would best address the issue of disproportionate cost in civil litigation. This will ultimately be a policy decision for the Rules Committee and Government to make, should the Committee elect to further refine Proposal Two. However, an inquisitorial model designed to reduce the cost of civil litigation in New Zealand could have the following features.

The model could apply to most (if not all) low-to-medium value disputes

25. We think there is merit in the Rules Committee considering whether the inquisitorial model could be applied on a wider scale than the Kós Model (cases where one party is self-

---

[16] Justice Stephen Kós "Civil Justice: Haves, Have-nots and What to Do About Them" (Address to the AMINZ and International Academy of Mediators Conference, Queenstown, March 2016) at [69], citing John Hansen "Court Administration, the Judiciary and the Efficient Delivery of Justice: A Personal View" (2007) 11 Otago L Rev 351 at 375.

[17] See paragraph [113] of Schedule Three below.

represented and/or the claim is worth less than $100,000). We note that the Panckhurst Model has been used to resolve higher value claims ranging from $500,000 to $2 million for each claimant.[18]

26. So, we suggest that the Rules Committee consider an inquisitorial model for **all** civil disputes in the District Court **and** some High Court disputes (possibly those worth less than $500,000). The civil jurisdiction of the District Court appears to be underused at present other than for debt collecting purposes,[19] and it is abundantly clear that lawyers try to avoid it as a forum for resolving disputes.[20] This makes it worthwhile to consider a fundamental departure from the existing adversarial model for resolving civil matters within the District Court's jurisdiction.

27. We also see no reason to limit the application of inquisitorial processes to self-represented litigants only. As the Authority, Disputes Tribunal and German models show, an inquisitorial model can help to reduce lawyers' fees associated with litigation by removing or streamlining otherwise expensive steps in proceedings (such as discovery, briefs of evidence and hearings). Adopting an inquisitorial model in the High Court / District Court could enable individuals to afford the cost of instructing counsel. Furthermore, if an inquisitorial model were to apply to self-represented litigants only, there is also a risk of creating the perception of a two-tier justice system: one system for those who can afford lawyers; and one for those who cannot.

The rules for pleadings could be designed to facilitate the early identification of issues

28. The early identification of issues is a key feature of the Authority, German and Kós Models. We think the rules around pleadings can be designed to better identify the issues between the parties prior to trial to enable the court to monitor interlocutory steps, arguments and evidence for relevance and proportionality, and also to reduce the risk that the parties take unnecessary steps resulting in costs disproportionate to the matters in dispute.

29. So, one option would be for pleadings to take the form of "opening submissions", as is the case in Germany and in the Panckhurst Model. Adopting this approach, both the plaintiff's and defendant's pleadings would:

    (a) be written in a narrative style;

---

[18] Discussion Paper at [28].

[19] The Rules Committee *Minutes 03/18* (23 September 2019) at 4 (Items 2(a)-2(e): Promoting Access to Civil Justice); Bridgette Toy-Cronin & Bridget Irvine *Access to Justice in the District Court of New Zealand* (15 February 2019) at 2-3.

[20] Bridgette Toy-Cronin & Bridget Irvine *Access to Justice in the District Court of New Zealand* (15 February 2019) at 8-10.

(b) put forward their respective affirmative cases;

(c) outline the parties' respective understandings of the law;

(d) identify relevant documents to be relied on in the hearing; and

(e) identify the factual witnesses that the parties intend to call and a brief description of the evidence the witness will give.

30. Alternatively, something more similar to the current approach to pleadings could be maintained, but there could be a requirement to file and serve with the pleadings all of the documents that the parties intend to rely on at trial, as is the case in the Authority.[21]

There could be Court review of pleadings filed by self-represented litigants

31. We believe there is serious merit in the Hon Justice Kós's suggestion that where the plaintiff is self-represented, there should be a requirement that a legally trained court-appointed assessor review the statement of claim filed in Court.[22] We understand this to be based on Chapter 42 of the Swedish Code of Judicial Procedure (1998) (Sweden also having an inquisitorial judicial system).[23]

32. While pleadings review would require additional resourcing costs to be incurred by the Court, it could ultimately result in an overall cost saving, as valuable judicial time would not be wasted on hearing hopeless claims. It would also prevent self-represented litigants from throwing good money after bad claims.

33. In the event that practising lawyers were appointed as "court assessors" to carry out the review of the pleadings, consideration would need to be given as to whether changes need to be made to the rules relating to retainers (including whether the assessor is performing services on a limited retainer)[24] and potential insurance issues.

The Rules could be designed to allow litigants to assess costs liability upfront

34. The German system enables parties to determine their likely costs liability if they fail in a proceeding before the pleading is filed. In Germany, the losing party pays for: (i) their lawyer's costs; (ii) the opposing lawyers' costs; and (iii) the court fees, all of which are set by

---

21 See paragraph [71] in Schedule One below.

22 Discussion Paper at [36](b).

23 See Justice Stephen Kós "Civil Justice: Haves, Have-nots and What to Do About Them" (Address to the AMINZ and International Academy of Mediators Conference, Queenstown, March 2016) at [43].

24 Further information about "limited retainers" can be found in the New Zealand Law Society publication *Practice Briefing: Guidance to lawyers considering acting under a limited retainer* (December 2017).

statutory rates that are proportionate to the size of the claim.[25]

35. If liability for costs in New Zealand were determined in a way which was proportionate to the value of the claim (as opposed to being determined based on "steps" taken in litigation)[26] it could:

    (a) assist litigants in making the commercial decision of whether to commence a claim; and

    (b) could assist in disciplining counsel to only pursue steps in litigation that are proportionate to the value of the claim in dispute, knowing that, for example, if counsel attempt trial by attrition through raising several interlocutory points, their client will not be able to recover such costs if successful.

36. In the Employment Relations Authority, costs are predictable and set on a tariff basis. The successful party is awarded $4,500 for the first day of the Authority hearing and $3,500 for each subsequent day (subject to the Authority having discretion to alter the tariff in appropriate cases). The Authority will almost inevitably record in its Minute following the first management conference the costs tariff rules and the consequences for the losing party so that there is clarity as to the likely costs outcome from the get-go.

The rules could provide for a single "docket" judge to case manage the proceeding from filing through to its resolution

37. A key feature of the inquisitorial model is that a single judge manages the proceeding from filing to its resolution. This has advantages from a cost perspective because the continuity of a single Judge who is familiar with the case from an early stage can help to facilitate the efficient progress of the case through the Court system and efficiency at trial (including keeping a tight rein on argument to ensure it is relevant to the matters in dispute).

38. This type of efficient case management process is already used in New Zealand for high value, commercial disputes in the High Court.[27] There is a serious argument for re-directing this resource to reducing the cost of going to Court for individuals and corporates who are not well-capitalised.

39. One potential concern with "docket" judges is the risk that they become "tainted" during the case management that takes place pre-trial, which might lead them to favour one parties'

---

[25] See the Lawyers' Remuneration Act [Rechtsanwaltsvergütungsgesetz] and the Court Costs Act [Gerichtskostengesetz]. It is our understanding from discussions with a German lawyer that where one party agrees to pay their lawyer more than the regulated fee, they are only able to recover the regulated fee from the losing party when it comes to costs.

[26] See High Court Rules 2016, r 14.2(c).

[27] Senior Courts Act 2016, s 19; Senior Courts (High Court Commercial Panel) Order 2017.

case. We note that the Kós Model partially gets around this issue by having a "court-appointed assessor" deal with certain pre-trial steps – including identifying with the parties the key issues in dispute – before the matter is put before a Judge.[28] An alternative, as often occurs in the High Court on complex matters, is to have a single judge assigned to dealing with all interlocutory matters, but who is not necessarily the trial judge for the matter.

There could be mandatory issues conferences at an early stage

40. As identified by the Kós Model, issues conferences assist the parties and the decision-maker to identify the real claims and defences in the proceeding.[29] This is important to enable the decision-maker to monitor argument and evidence for relevance, enabling intervention where one of the parties takes an unnecessary step that might increase cost.

41. In the Employment Relations Authority, issues are identified by the Authority Member at the first case management conference and summarised in the first Minute. This ensures at an early stage that both the parties and the Authority have a list of issues, which in turn informs what the parties are to address in witness statements. This is particularly useful when the pleadings have been prepared by lay litigants.

42. The HC Rules already provide for a Judge to direct issues conferences (r 7.5) to advance the identification and refinement of the issues. The Rules Committee should consider whether the process set out in r 7.5 should be a mandatory step for all matters determined by an inquisitorial process.

43. Consideration should also be given to whether it should be a requirement that issues conferences (and other case management conferences) take place in person and with clients present, which was the approach that the High Court took to proceedings on the Christchurch Earthquake List. We understand that this helped to facilitate discussions between parties that increased the chances of settlement.[30]

There could be restrictions placed on discovery

44. There is no formal discovery in the German approach,[31] Authority,[32] or Disputes Tribunal.[33] This approach has obvious cost saving advantages. However, the absence of discovery could prove to be a disadvantage in cases, for example, where the claim advanced against

---

28 Discussion Paper at [36]. See, in particular, the steps outlined at [36](a)-(d), which do not appear to require the involvement of a Judge.

29 Discussion Paper at [36](c).

30 See Nina Khouri *Civil Justice Responses to Natural Disaster: New Zealand's Christchurch High Court Earthquake List* (2017) 36 C.J.Q 316 at 330-332.

31 See paragraph [104] of Schedule Three below.

32 See paragraph [76] of Schedule One below.

33 See paragraph [91] of Schedule Two below.

the defendant alleges fraudulent, dishonest or deceitful conduct, and where proof of the claim depends on the plaintiff obtaining documents which it believes the defendant holds. This is mitigated in the three systems we have discussed, as the decision-maker has the power to compel parties to produce documents on their own motion.[34] But if the Rules Committee is concerned that coercive powers of the decision-maker are unlikely to result in plaintiffs with meritorious claims getting access to the key documents they need to prove their case, then the solution in the Kós Model (where parties would be required to produce any documents adverse to their case) might strike an appropriate balance.[35]

There could be restrictions placed on the use of written briefs

45. Briefs of evidence are expensive. However, they can also provide helpful background to a decision-maker acting inquisitorially to determine a matter (as is the case in the Employment Relations Authority). Striking the appropriate balance where the costs of briefs are proportionate to their utility to the decision-maker acting inquisitorially is difficult. The potential options for the Rules Committee to consider include:

    (a) no briefs (as is the case in Germany, in the Disputes Tribunal and in the Panckhurst Model);

    (b) will say statements (which is what is currently required prior to Judicial Settlement Conferences);

    (c) (short) affidavit evidence (proposed by the Kós Model, and which appears to also be the case for Short Trials in the District Court);[36] and

    (d) exchange of full briefs of evidence (which is increasingly the case in the Employment Relations Authority).

46. In our view, the best approach is for there to be a rule against the use of briefs / affidavit evidence for fact witnesses, unless there are compelling reasons for having formal written statements in the circumstances of the particular case, and where the costs of preparing written evidence are likely to be proportionate to the amount in dispute.

There could be restrictions placed on the use of experts

47. While experts can offer significant assistance to the Court, their presence adds expense for clients. In the German and the Kós Models, it is the Court who appoints the expert where

---

[34] See paragraph [80(g)] of Schedule One, paragraph [93] of Schedule Two and paragraph [104] of Schedule 3 below.

[35] See paragraph [36](d) of the Discussion Paper.

[36] District Court Rules 2014, rr 10.3-10.4.

expert evidence is required.[37] We discuss the issue of expert evidence, including Part 35 of the Civil Procedure Rules in England and Wales, when commenting on Proposal Four at **paragraphs [55] to [64]** below. We would invite the Rules Committee to consider Part 35 when determining whether it is appropriate to place restrictions on the use of experts in inquisitorial processes.

The Judge would be responsible for the examination of witnesses

48. Inquisitorial processes are premised around judges investigating the matter in dispute to reach a decision. Under all of the inquisitorial models, it is the Court who is responsible for examining the witnesses on their evidence and on the documents. The advantage is that the inquisitor is able to ask the questions that they consider to be necessary to obtain the information that is needed to make the determination. Our experience from participating in hearings in the Employment Relations Authority is that witnesses are far more likely to willingly provide information to the decisionmaker than to opposing counsel under cross-examination.

49. This type of model is likely to require significantly more judicial resourcing and preparation prior to the hearing than is ordinarily the case in an adversarial process, which is something the Rules Committee and Government will need to bear in mind. However, based on the German experience, inquisitorial trials are shorter than adversarial trials,[38] and so reduced hearing lengths might be able to free up judicial time for the additional preparation required.

50. Should the Rules Committee decide to progress an inquisitorial model, the process to be followed by the Judge should be flexible – including allowing for witnesses of fact to be hot-tubbed so that evidence to be heard on a topic-by-topic basis, as is the case in the Authority.[39]

51. Consideration will also need to be given to what limits are to be placed on examination in chief and cross-examination by the counsel/parties during hearings: should leave of the Court be required first; or should there be an automatic right of examination? We would tend to favour the latter, but with restrictions that the Judge can intervene to restrict examination by counsel where questions are irrelevant, not necessary and repetitive (again, as is the case in the Authority).[40] Where the decisionmaker is the first person to ask the questions of the witnesses, usually the key topics relevant to resolving the dispute are considered. This in turn substantially reduces the time required by counsel when it comes to examining witnesses. The role of counsel is to cover other relevant topics that the Inquisitor may not have touched on, or by follow-up questions, to extract additional

---

37 Discussion Paper at [36](f).
38 See paragraph [110] of Schedule Three below.
39 See [80] of Schedule One below.
40 See [80] of Schedule One below.

information on topics which the Inquisitor may not have fully covered. For another party's witness, evidence can be tested by way of cross-examination in the usual way.

There could be form requirements for judgments to ensure their speedy issue

52. Both the Panckhurst and Kós Models suggest that the judgments issued under inquisitorial models should be brief, capturing essential reasons only.[41] Again, if only brief judgments are required, this might help free up judicial resource for the more intensive aspects of the inquisitorial process, such as preparation for the examination of witnesses.

Appeal rights

53. We would be concerned with an inquisitorial process that has limited (if any) rights of appeal, as is the case in the Panckhurst Model.[42] At the very least, there should be a right of appeal where there is a failure to observe natural justice, as is the case in the Disputes Tribunal.[43]

54. We do not necessarily see appeal rights as creating a risk of disproportionate cost. As Justice Kós observes in relation to the civilian system, there is a greater proportion of appeals brought in inquisitorial rather than adversarial countries, but another reason for that may be that after an inquisitorial adjudication, parties still have the resource left with which to bring an appeal.[44]

In the Employment Relations Authority, a party who is dissatisfied with a determination of the Authority can elect a de novo hearing of the matter in the Employment Court as of right.[45] This means that the party effectively gets two first instance adjudications – one in the Authority (using an inquisitorial approach) and if a party does not like that, another one in the Employment Court (which adopts an adversarial process). This has been described as "extravagant" from an access to justice perspective.[46] However, we consider this criticism to be overstated, as we understand that only a relatively small number of cases (in the order of 20%) elect a de novo hearing in the Employment Court.[47] It seems that employment litigants are more interested in simply having a decisionmaker arrive at an answer.

---

41 Discussion Paper at [32](d) and [36](i).

42 Discussion Paper at [30] and [32](e) –[34].

43 Disputes Tribunal Act 1988, s 50.

44 Justice Stephen Kós "Civil Justice: Haves, Have-nots and What to Do About Them" (Address to the AMINZ and International Academy of Mediators Conference, Queenstown, March 2016) at [68].

45 Employment Relations Act 2000, s 179.

46 Hon Justice Miller "Barriers to participation in employment litigation: what might make a difference and would it work?" (22 May 2019) at 7-8.

47 Between 1 July 2019 and 30 June 2020, there were 173 new cases filed in the Employment Court (compared with 183 cases filed in 2018/2019 period) and the Court disposed of 224 cases. Not all of these cases were elections for a de novo hearing, as the Employment Court also has first instance jurisdiction. For the Employment Court's workload statistics see: https://employmentcourt.govt.nz/what-to-expect/annual-statistics/.

COMMENT ON PROPOSAL FOUR: STREAMLINING STANDARD PRE-TRIAL AND TRIAL PROCESSES

55. One area of significant cost in civil litigation that is not directly addressed in Proposal Four of the Discussion Paper is the cost of expert evidence. If the Rules Committee is minded to progress Proposal Four further, then we think there is merit in the Committee considering incorporating two specific aspects of Part 35 of the Civil Procedure Rules used by the Courts in England and Wales ("**CPR**") into the HC and DC Rules, which have the effect of reducing cost to parties.

No expert evidence without the permission of the Court

56. First, the CPR provides that no party may call an expert or put in evidence an expert's report without the Court's permission.[48] This reflects the purpose of Part 35, which is to "limit the use of oral expert evidence to that which is reasonably required".[49] We note that there is no such restriction in the HC Rules.

57. When parties apply for permission from the English courts, they must provide an estimate of the costs of the proposed expert evidence; the field(s) in which expert evidence is required and the issues that the expert will address; and (if practicable) the name of the expert.[50]

58. The factors the English courts take into account when exercising this discretion to allow expert evidence include:[51]

    (a) how cogent the proposed expert evidence will be;

    (b) how helpful it will be in resolving any of the issues in the case; and

    (c) how much it will cost and the relationship of that cost to the sums at stake.

59. When permission to call an expert is granted, the court limits the amount of a party's expert's fees and expenses that may be recovered from any other party.[52]

A single, joint expert wherever possible

60. Second, Part 35 contemplates that, "where possible, matters requiring expert evidence should be dealt with by one expert."[53] So, where two or more parties wish to submit expert evidence on a particular issue, the Court may direct that the evidence on that issue be given

---

48 Civil Procedure Rules (E&W), r 35.4(1).
49 Practice Direction 35 – Experts and Assessors at [1].
50 Civil Procedure Rules (E&W), r 35.4(2).
51 *Mann v Messrs Chetty & Patel* [2000] EWCA Civ 267 at [17].
52 Civil Procedure Rules (E&W), r 35.4(4).
53 Practice Direction 35 – Experts and Assessors at [1].

by a single, joint expert.[54]

61. It is also the case that where the claim is on the "small claims track" (usually claims worth less than £10,000) or the "fast track" (usually claims worth between £10,000 and £25,000), and permission is given for expert evidence, such permission will normally be given for evidence from only one joint expert on a particular issue.[55] Furthermore, the Court will not direct an expert to attend the hearing of a "small claims track" or "fast track" matter unless it is necessary to do so in the interest of justice.[56]

62. There is a process in the CPR for the court to resolve disagreements over who should be the single joint expert.[57]

63. Where the court gives a direction for a single joint expert to be used, any relevant party may give instructions to the expert, but must at the same time send a copy of those instructions to the other relevant parties.[58] The Court can give directions about the payment of the expert's fees and expenses (usually the parties are jointly and severally liable for paying the expert).[59]

64. The courts have found joint single experts to be appropriate, for example, to deal with questions of quantum in cases where the primary issues are as to liability; and also where expert evidence is required to acquaint the court with matters of expert fact.[60] However, joint expertise might not be appropriate where it is of value of the court to hear a range of views, for example, where the issue is whether a party acted in accordance with proper professional standards.[61]

FURTHER PROPOSAL: INCREASE THE JURISDICTION OF THE DISPUTES TRIBUNAL

65. An alternative proposal to reduce the costs of bringing a civil proceeding is for the Rules Committee to recommend to the Government that the jurisdiction of the Disputes Tribunal be increased to cover claims of up to **$200,000** in value.

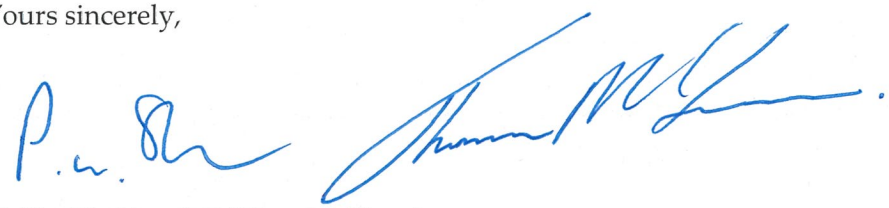
66. The prohibition on the use of lawyers could remain in place for all disputes worth less than $30,000, but legal representation could be allowed for disputes above that sum in order to mitigate the issue of repeat players using the system to the disadvantage of litigants with no

---

54 Civil Procedure Rules (E&W), r 35.7.
55 Rule 35.4(3A).
56 Rule 35.5(2).
57 Rule 35.7(2).
58 Rule 35.8(1)-(2).
59 Rule 35.8(3)-(5).
60 *Halsbury's Laws of England* Civil Procedure Vol 1 at [893].
61 Above.

previous Tribunal experience and who require legal representation in order to assist them in defending a claim (as discussed above at paragraph [18]).

Yours sincerely,



Philip Skelton QC / Tom McKenzie

SCHEDULE 1 – PROCEDURE IN THE EMPLOYMENT RELATIONS AUTHORITY

67. The Employment Relations Authority ("**Authority**") is an investigative body constituted under s 156 of the Employment Relations Act 2000 ("**ERA**"). Its role is to resolve employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities.[62] Its process is largely inquisitorial, rather than adversarial.

Commencing a claim in the Authority

68. A proceeding is commenced by lodging a statement of problem in the prescribed form.[63] The prescribed form requires an applicant to the Authority to (among other things):[64]

    (a) state fully, fairly and clearly the facts that have given rise to the employment relationship problem; and

    (b) attach a copy of the applicable employment agreement and the documents that the applicant considers to be relevant to the employment relationship problem.

69. The respondent then has 14 days to lodge a statement in reply, in which the respondent is required to:[65]

    (a) state its account of the relevant facts fully, fairly and clearly;

    (b) supply any further information that it wants to put before the Authority; and

    (c) attach copies of the applicable employment agreement and documents that it considers to be relevant to the problem.

70. Importantly, the respondent cannot simply "deny" or "admit" each allegation in the statement of problem – the respondent must affirmatively plead its version of events.

71. The parties are expected to provide the following documents as a matter of course in the exchange of statements: the written employment agreement; letters of warning or dismissal; all relevant correspondence between the parties; relevant employment policies or extracts from manuals; wage, time and leave records; and information about the employee's subsequent earnings when a claim for lost remuneration is being made.[66]

72. The parties to a proceeding in the Authority are likely to know, at an early stage, the theory

---

62 Employment Relations Act 2000, s 157.
63 Section 158.
64 Employment Relations Authority Regulations 2000, reg 5 and Form 1.
65 Regulation 8 and Form 3.
66 Rosemary Monaghan "Running a Case in the Employment Relations Authority" (September 2014) at 5.

of each party's case due to the pleadings being written in narrative style and the requirement to attach the documents relevant to the resolution of the employment problem.

73. Only properly completed statements are accepted as being "lodged" in the Authority.[67] An Authority Officer (the equivalent to a Court Registrar) vets the pleadings to check whether the wording and contents of the statement of problem and statement in reply are such as to fairly, fairly and clearly inform all parties and the Authority. Where this is not the case, the Authority Officer will seek clarification or any necessary additional information from the author of the particular statement.[68]

Case management

74. Once the statements of problem and reply have been lodged with the Authority and served, the matter is then referred to an Authority Member for a preliminary case management conference. Prior to the case management conference, the Authority Member reads the information provided by the parties in their respective statements. The matters dealt with at the conference include:[69]

(a) identification of the factual and/or legal issues central to the determination of the problem;

(b) considering whether the matter should be sent to mediation;

(c) identification of likely witnesses;

(d) setting a timetable (including filing and service of any briefs of evidence/affidavits);

(e) fixing a date for the Authority to commence its investigation; and

(f) outlining how the Authority Member intends to conduct the investigation meeting (including whether the matter is appropriate for an oral determination or oral indication of preliminary findings).

75. Importantly, following the case management conference the Authority Member will issue a Minute which provides a succinct summary of the key issues to be determined. This is particularly helpful to clarify matters when lay litigants have filed the statement of problem or statement of reply without the assistance of legal counsel.

---

[67] Employment Relations Authority *Practice Note 1: Steps to be Taken in Proceedings* (31 March 2016) at [2].
[68] Above.
[69] At [8].

No provision for discovery

76. The Authority has no formal provision for the disclosure of documents – meaning there is no discovery "as of right" in the Authority. There is, however, the power for the Authority to require the production of a specified document by summons.[70] In straightforward cases, all of the relevant documents are provided with the statement of problem and statement in reply. In more complex cases, the parties will usually reach an agreement as to disclosure of any further documents, but will seek directions from the Authority if difficulties arise. This means that the costs of carrying out informal discovery in the Authority are rarely disproportionate to the benefits of ensuring the Authority has all relevant documents in front of it to resolve the employment issue. Often the Authority will exercise its power under s 160 on its own motion to direct the parties to provide documents to the Authority that it considers relevant to the issues in dispute.

Briefs of evidence

77. In advance of the investigation meeting, the parties will usually exchange written statements of the evidence of each witness to be called. Increasingly, these are fully fledged briefs of evidence, similar to what would ordinarily be filed in a High Court proceeding.

78. We understand that Authority Members find briefs of evidence useful as they are provided to Members in advance of the hearing and enable the Members to get a clearer picture of the issues in dispute, which focus lines of questioning. However, as with High Court proceedings, briefs are increasingly being prepared by the lawyers/lay advocates and have become carefully manufactured documents. This means that when briefs of evidence are required, costs are significantly increased and can reach levels disproportionate to the amount in dispute.

The investigation meeting

79. Unlike in the High Court, it is the Authority Member – not the parties – who run the investigation meetings and who are primarily responsible for the examination of the witnesses. The obvious benefit of this approach is that the decision-maker is more likely to make a better decision because they are the ones who are focussed on eliciting the information they require to make a decision, rather than relying on counsel to determine what is important.

80. The process on the day varies from Authority Member to Authority Member due to the

---

[70] Employment Relations Act 2000, s 160 and Schedule 2, cl 5.

degree of flexibility each Member has in running their investigation meetings.[71] However, the key attributes of the investigation meeting are usually:

(a) All of the parties and counsel sit around a table with the Authority Member.

(b) The Authority Member confirms the procedure to be followed in the particular case.

(c) There are no formal openings.

(d) If written statements have been exchanged in advance, the relevant witnesses will confirm on oath or by affirmation the statements of evidence already provided. The Authority Member may then fully examine the witness, which we consider to be a key advantage of the Authority's process as the Authority is often able to get to the truth of the matters quickly. In many cases, the Authority Member will ask the witness to put their written statement of evidence (usually prepared by a lawyer) to one side and explain what happened – and the witness will start talking.

(e) It is also common for the Authority Member to swear all of the witnesses in at the same time and for all of the witnesses to be present for the entirety of the hearing so that the Authority Member can question the witnesses on a topic-by-topic basis (ie asking Witness 1 about Topic A, then asking Witness 2 about Topic A, before proceeding to hear from Witness 1 again on Topic B etc). This is similar to the "hot-tubbing" process that takes place in the High Court where the Court hears from experts concurrently. However, in cases where credibility is in issue, the Authority Member can choose to exclude witnesses from the hearing room and bring them into the meeting one-by-one.

(f) Once the Authority Member has examined a witness, each party will then be able to cross-examine the other party's witnesses, provided such questions are relevant, necessary, courteous and not repetitive. Cross-examination is more focussed and takes less time in the Authority, as the Authority's questioning will have often elicited much of the relevant information anyway and have focussed the issues to be dealt with in the hearing. Usually, cross-examination is an opportunity to deal with relevant issues that the Authority Member might have missed or to raise additional clarifying questions. Furthermore, a cross-examining lawyer is often perceived to be the enemy – this can result in evasive (and possibly coached) answers. However, our experience is that when the decision-maker is asking the

[71] See generally Employment Relations Authority *Practice Note 1: Steps to be Taken in Proceedings* (31 March 2016) at [9]-[14].

questions, witnesses seem to be more open and prepared to tell the truth.

(g) Authority Members have wide-ranging powers to call for documents. So they have the ability to say this is a document which the Member wants to see, and the parties have to produce it.[72]

(h) At the close of the investigation meeting, the parties (or their representatives) submit concise, written closings and the parties are usually invited to briefly speak to their closings.

81. If the Authority reserves its determination, it is required to deliver its decision within 3 months, unless the Chief of the Authority decides exceptional circumstances exist.[73] A party who is dissatisfied with a determination of the Authority can elect seek a de novo hearing of the matter in the Employment Court.[74]

---

[72] Employment Relations Act 2000, s 160 and Schedule 2, cl 5.
[73] Section 174C.
[74] Section 179.

SCHEDULE 2 – PROCEDURE IN THE DISPUTES TRIBUNAL

82. The Disputes Tribunal ("**Tribunal**") is a division of the District Court.[75] The Tribunal provides a forum in which disputes can be resolved in a cost effective and an efficient way, and which results in a decision that is binding on the parties.[76]

83. Proceedings in the Tribunal are governed by the Disputes Tribunal Act 1988 and the Disputes Tribunal Rules 1989. Claims in the Tribunal are determined by Referees, who are usually legally trained.

Jurisdiction

84. The Tribunal has jurisdiction only in respect of:

    (a) claims founded in contract/quasi contract actions;

    (b) claims in tort relating to the destruction of, damage to or recovery of property; and

    (c) certain statutory claims.[77]

85. There must also be a "dispute". Undisputed and/or liquidated debts cannot be recovered through the Tribunal.[78]

86. The Tribunal's jurisdiction was recently increased to disputes that do not exceed $30,000.[79]

87. The Tribunal does not have jurisdiction in respect of disputes concerning recovery or title to land and/or disputes concerning entitlements under a will; goodwill; any chose in action or any trade secret or other intellectual property.[80]

Commencing a claim

88. A claim in the Disputes Tribunal can be filed online or by post by completing a relative straightforward form.[81] It requires the claimant to include:

---

75 Disputes Tribunal Act 1988, s 4.

76 Anne Daroch and Daniel Shore *The Disputes Tribunal: Preparing Clients* (ADLS CPD, July 2017) at [1.1].

77 Disputes Tribunal Act 1988, s 10(2), including certain types of claim under the Consumer Guarantees Act 1993, Credit Contracts and Consumer Finance Act 2003, Fair Trading Act 1986, Fencing Act 1978, Friendly Societies and Credit Unions Act 1982, Miners Contracts Act 1969 and Motor Vehicle Securities Act 1989.

78 There are exceptions: see s 11(2) of the Disputes Tribunal Act 1988.

79 Disputes Tribunal Act 1988, s 10

80 Section, s 11(5).

81 https://disputestribunal.govt.nz/how-to-make-a-claim/apply-online.

(a) their personal details;

(b) their insurance details (if relevant);

(c) the respondent's details;

(d) the details of the dispute – including the monetary value of the dispute and an explanation of what the claimant claims to have happened with relevant dates and locations; and

(e) an explanation as to how the claim is disputed by the respondent.

89. The filing fee charged is graduated, depending on the amount at stake. For claims less than $2,000 the fee is $45; for claims between $2,000 and $4,999 the fee is $90 and for claims between $5,000 and $30,000 the fee is $180.

90. Once a claim is filed, the Tribunal serves the application form on the respondent. The respondent does not need to file any forms in reply, unless they want to make a counterclaim.

No discovery or exchange of briefs

91. The Tribunal does not have a formal discovery process. The parties are simply required to bring relevant documents and evidence to the hearing. Parties are advised, however, to attach key documents to their claim form.[82]

92. When using the online form, a claimant can upload up to three additional documents with the claim form. Where a claimant has engaged a lawyer to assist it with preparing legal submissions in support of its claim, these should usually be filed with the claim form.[83]

93. A Referee has the power to issue a summons for a witness to attend the hearing and to require summonsed witness to produce documents in their control.[84] While evidence during the hearing need not be given by oath, the Tribunal can require that evidence be given by oath.[85]

The Hearing

94. Unless provided for in the Disputes Tribunal Act, the Disputes Tribunal Rules or any practice note, the Tribunal has full procedural discretion to adopt such procedure as it thinks

---

82 Anne Daroch and Daniel Shore *The Disputes Tribunal: Preparing Clients* (ADLS CPD, July 2017) at [11.11].
83 At [11.8].
84 Disputes Tribunal Rules 1989, r 14.
85 Disputes Tribunal Act 1988, s 40.

best suited to the ends of justice.[86] The hearing is informal and is usually set up like a meeting room.[87] Parties are not entitled to be represented by legal counsel at the hearing (which arguably eliminates a significant expense).[88]

95. In the paper *The Disputes Tribunal: Preparing Clients*, the authors (which include the Principal Disputes Referee) helpfully set out the process on the hearing day:[89]

a) The Referee will bring the parties into the room and introduce him or herself. They will then ask the parties to state their names and explain that the hearing is being recorded. The Referee then explains the process the hearing will follow.

b) A brief opening statement is made by each of the parties so that the Referee can understand what is at the heart of the dispute. The applicant speaks first.

c) The Referee will then set out the issues and the general legal framework.

d) The Referee then explores each issue with the parties. This is when the specific evidence on each point is reviewed. The Referee will also explain any relevant law which applies to each issue and may traverse the strengths and weaknesses of the evidence presented.

e) If there are witnesses, they will then be brought into the room to give their evidence. Both parties as well as the Referee can question the witnesses. The general position is that witnesses wait outside until their evidence is called, preventing them from being influenced. However, the Referee can determine it is appropriate for them to be present for all the evidence.

f) The Referee will then consider whether a settlement discussion is appropriate and if so, they will facilitate this discussion. A Referee is required to approve any settlement, although it would only be in unusual circumstances (such as a power imbalance) that a Referee would not approve a settlement.

g) It is not unusual for a hearing to be adjourned if there has been insufficient time to canvass all the issues or if further evidence is required.

96. As can be seen from this description, the Tribunal follows an inquisitorial and not adversarial process.

97. With regard to the settlement process, the Disputes Tribunal Act directs that the Tribunal

---

86 Disputes Tribunal Act 1988, s 44.

87 https://disputestribunal.govt.nz/going-to-a-hearing/what-to-expect/.

88 Disputes Tribunal Act 1988, s 38.

89 Anne Daroch and Daniel Shore *The Disputes Tribunal: Preparing Clients* (ADLS CPD, July 2017) at [16.1].

shall, as regards every claim within its jurisdiction, assess whether, in all the circumstances, it is appropriate for the Tribunal to assist the parties to negotiate an agreed settlement in relation to the claim.[90] Where a settlement cannot be reached, the Tribunal will make a determination.[91]

98. The fact that the Referee is able to facilitate settlement discussions during the hearing, but with the backstop of being able to issue a binding decision should settlement not be possible, means that the inefficiencies with the judicial settlement process in the District Court are avoided.[92] In the District Court, r 7.3 of the DC Rules prevents the Judge who runs the judicial settlement conference from deciding the particular proceeding at trial, unless all of the parties to the judicial settlement conference consent. This often results in delay as a hearing with a different judge then has to go ahead and be scheduled.

Enforcement, rehearing and appeals

99. Any order made by the Tribunal requiring the payment of money or the delivering up of specific property is enforceable as if it were an order of the District Court.[93]

100. A rehearing can be ordered where justice requires.[94] Grounds for rehearing include where: a party was not informed of the date of hearing; a party or their witness missed the hearing unexpectedly for a valid reason; the Referee made in an error in the quantum ordered to be paid; or new information comes to light that undermines a settlement agreement approved by the Tribunal.[95]

101. There is a right of appeal to the District Court, but the ground of appeal is limited to where the proceedings were conducted by the Referee in a manner that was unfair to the appellant and prejudicially affected the result of the proceedings.[96] One example given in the legislation is where the Referee fails to have regard to any provision of any enactment that is brought to the attention of the Referee at the hearing.[97]

---

90 Disputes Tribunal Act 1988, s 18.

91 Section 18(5).

92 This is similar to the earthquake insurance claim process adopted by the Hon Sir Graham Panckhurst QC where the same Judge who is actively involved in settlement discussion can then go on to issue a decision if there is no resolution: see the Discussion Paper at [32](b).

93 Disputes Tribunal Act 1988, s 45.

94 Section 49.

95 Anne Daroch and Daniel Shore *The Disputes Tribunal: Preparing Clients* (ADLS CPD, July 2017) at [21.4]

96 Disputes Tribunal Act 1988, s 50.

97 Above.

SCHEDULE 3 – GERMAN INQUISITORIAL MODEL

Initiating a claim and pleadings

102. Court proceedings are initiated by filing a statement of claim with the Court, which specifies the competent court, parties, relief sought and the subject matter and grounds for the claim raised.[98] A statement of claim must also nominate the means of proof which the party will rely on to prove their factual allegations,[99] which might involve the provision of the names and addresses of particular witnesses, attaching relevant documents (such as contracts, correspondence, or photos) or a statement that expert evidence will prove the allegation.[100] In practice, German pleadings tend to resemble the opening statements which are filed in New Zealand civil proceedings and normally include a discussion of the law.[101]

103. A defendant has an obligation in their statement of defence to state the facts on which the defendant's defence is based. The German Code of Civil Procedure prevents the defendant from simply denying allegations in the defence (as a denial without explanation is treated as an admission of the particular pleaded fact).[102] As with statements of claim, a defendant must also set out the evidence the defendant will be relying on to defend the claim.

No discovery

104. There is no pre-trial discovery in the German legal system and only limited disclosure obligations (eg where a document referred to is in the other party's possession, that party might be ordered by the Court to produce it).[103] As a result, it is up to the parties to prove their case on the documents in their possession. Parties are not obliged to disclose all information, even if it is relevant to the case.[104]

No briefs of evidence

105. In German trials, witnesses give evidence orally. Written witness statements can only be used if the court considers a written statement as sufficient in light of the questions to be proven and if the witness can be considered trustworthy. This is usually where there is no need for the court or litigants to ask further questions, no doubt about credibility and it is

---

98 Code of Civil Procedure 2005 (Ger Fed), ss 130 and 253.

99 Code of Civil Procedure 2005 (Ger Fed), s 130.

100 Annette Marfording with Ann Eyland *Civil Litigation in New South Wales: Empirical and Analytical Comparisons with Germany* UNSW Law Research Paper No. 2010-28 (July 2010) at 182-183.

101 At 317.

102 At 183, referring to case law considering Code of Civil Procedure 2005 (Ger Fed), s 138.

103 Stefan Rützel, Andrea Leufgen and Eric Wagner *Litigation and enforcement in Germany: overview* (Thomson Reuters Practical Law) at [16].

104 Above.

foreseeable that the evidence will not be contradicted by other witnesses.[105]

106. In practice, written witness statements are very rare.[106] In fact, it is unusual for lawyers calling a particular witness to meet with them prior to the hearing in order to avoid the risk of the lawyer influencing the witness's testimony.[107]

The active role played by the Judge in the proceeding

107. In Germany, a judge case manages the progress of a proceeding from filing through to its final resolution, which means that all case management is in the hands of the same Judge.[108] The judge defines the issues; controls the evidential process; the judge engages the experts; and undertakes primary questioning (but not cross-examination) of witnesses.[109]

The hearing

108. The trial runs similar to an inquiry, with the process being staged and the parties meeting several times.[110]

109. Witnesses are examined primarily by the court. The court asks the witness for their personal knowledge of the relevant facts while the other witnesses are not present. The parties then have a right to ask the witness questions – but the courts usually do not allow for extensive cross examination.[111]

110. Trials in Germany are usually shorter in length than in common law jurisdictions. This has been attributed to (among other things):[112]

(a) judges having a detailed knowledge of the case and issues between the parties prior to trial due to the individual case management system, the detailed nature of the parties' pleadings and the requirement to prepare for each hearing;

(b) as a result, judges are in a position to monitor argument/submissions for relevance;

(c) judges being primarily responsible for conducting the examination of witnesses

---

[105] Annette Marfording with Ann Eyland *Civil Litigation in New South Wales: Empirical and Analytical Comparisons with Germany* UNSW Law Research Paper No. 2010-28 (July 2010) at 268.

[106] At 287, referring to case law considering Code of Civil Procedure 2005 (Ger Fed), ss 358A and 377

[107] At 287-288.

[108] At 144 and 148.

[109] Stefan Rützel, Andrea Leufgen and Eric Wagner *Litigation and enforcement in Germany: overview* (Thomson Reuters Practical Law) at [1].

[110] At [9].

[111] At [18].

[112] Annette Marfording with Ann Eyland *Civil Litigation in New South Wales: Empirical and Analytical Comparisons with Germany* UNSW Law Research Paper No. 2010-28 (July 2010) at 315-318.

and, again, can monitor examination for relevance;

(d) opening submissions being unnecessary, as the pleadings (which have been read by the judge) resemble opening statements in common law countries.

Experts

111. The court (and not the parties) engages and selects the expert(s) for the proceeding (where expert evidence is required), but the court has to hear from the parties prior to the appointment.[113] The court may also limit itself to appointing a single expert.[114]

112. The court-appointed expert does not represent the interests of one party, but provides independent and impartial advice to the court. Each party can also submit their own written expert's opinion, but such reports are not considered independent evidence and are treated as being part of each respective party's submissions.[115]

Requirement to instruct lawyers

113. At Regional Court level and up, there is a requirement that a party to a proceeding be represented by a lawyer.[116] However, this does not appear to be a significant driver of cost in litigation because:

(a) Counsel play a more limited role in the hearings (requiring less engagement and preparation), which is usually limited to asking some questions of witnesses; and

(b) Lawyers' fees are fixed by law and governed by the Lawyers' Remuneration Act 2004 [Rechtsanwaltsvergütungsgesetz], unless the parties expressly agree a different fee. The regulated fees are calculated in proportion to the value of the matter in dispute.[117] They appear to be significantly cheaper than the fees charged by lawyers in New Zealand.[118]

---

[113] Code of Civil Procedure 2005 (Ger Fed), s 404.

[114] Above.

[115] Stefan Rützel, Andrea Leufgen and Eric Wagner *Litigation and enforcement in Germany: overview* (Thomson Reuters Practical Law) at [19].

[116] Code of Civil Procedure 2005 (Ger Fed), s 78(1).

[117] Stefan Rützel, Andrea Leufgen and Eric Wagner *Litigation and enforcement in Germany: overview* (Thomson Reuters Practical Law) at [5].

[118] The German litigation financing company offers an English language version of a litigation cost calculator based on the regulated lawyers' fees and court fees, which can be accessed here: https://www.foris.com/en/litigation-costs-calculator/?tx_datamintsforiscalc_pi1%255Baction%255D=index&tx_datamintsforiscalc_pi1%255Bcontroller%255D=ProcessCost&cHash=cefb64b9d0f48f2dc5cf225df08835d9#processcost-calculator.