

11 September 2020

Attention: Sebastian Hartley
Clerk to the Rules Committee
C/- Auckland High Court

By email: Sebastian.Hartley@justice.govt.nz

**RULES COMMITTEE CONSULTATION PAPER: IMPROVING ACCESS TO CIVIL JUSTICE
OUR FILE REF: 326496-52**

WRMK Lawyers are grateful to the Rules Committee for the opportunity to make this submission on behalf of its clients.

WRMK's submission aims to accommodate what is arguably the largest section of society,¹ with a procedure which provides certainty as to the cost and time involved in civil litigation, allowing parties an opportunity to be heard and the all-important sense that justice has been served.

WRMK is Northland's largest legal service provider with offices in Whangarei, Kerikeri, Dargaville, and Warkworth. The wealth of its clients is varied, from those with considerable financial wealth to those living in extreme poverty. A large number of WRMK's clients fall between those financial extremes, being individuals with reasonable income but no assets and/or a limited asset pool; small businesses; sole traders; and unemployed individuals living off assets.

WRMK has a litigation team of 8 lawyers, with one lawyer specialising in civil litigation, and two senior civil litigators who also practice in other areas.

In the past three years, WRMK has had a number of clients in the financial situations described above seek assistance from the civil courts. A portion of those had, or still have, good prospects of a favourable judgment, however have had disappointing outcomes resulting from the current procedure, as follows:

1. Withdrawal from proceedings prior to a scheduled judicial settlement conference because the costs incurred became financially crippling. It was a fact the defendant could only afford to repay \$100 per week. The costs and energy involved in proceeding to trial and then enforcing the judgment resulted in the client abandoning the judicial process altogether;
2. Accepting a settlement offer made at a judicial settlement conference for much less than the client considered was legally and morally right, calculated by the amount of the claim, less scale costs to proceed to hearing and litigation risk. The clients were desperate have their matter heard by a judge, but the negative health and financial implications resulting from the cost and delay involved in proceeding to trial led to the acceptance of an unsatisfactory settlement offer;

¹ Individuals with income but no assets and/or a limited asset pool; small businesses; sole traders; and the unemployed living off assets.

3. Becoming embroiled in a six cause of action counterclaim and procedural freight train of work. The legal fees incurred to date have become a significant portion of the quantum of both parties' claims. The substantive counterclaim had little merit from the outset, which has now been proved by discovery and an expert's report, and the joinder of a third party. The issues were complicated by the procedure, costs and time involved, which are now significantly disproportionate to the value of both parties' claims;
4. Limiting their instructions to only investigating the legal position and attempting resolution via correspondence, with no desire to engage in the current civil procedure;
5. Following a failed summary judgment proceeding, applications for further discovery are still being made against a defendant who does not engage toward resolution, likely in an attempt to distance himself from the inevitable claws of the Official Assignee with procedural delays;
6. After spending over a year in the civil procedure, and in excess of \$14,000 obtaining judgment by default against a defendant who initially engaged with the civil procedure but then failed to appear at the hearing, and a further \$11,000 attempting to enforce the judgment followed by an unsuccessful opposition to application to set aside bankruptcy notice, the proceedings were referred back to full trial, with an adverse costs award. The client was back to the beginning of the procedure, although \$25,000 poorer. He had run out of money in his 'war chest' and walked away from the judicial process altogether.

These are only an example of six clients from one lawyer that immediately came to mind. If WRMK analysed its historical file list, there would be more. All of these clients are financially and/or emotionally worse off than they were before they engaged in the civil procedure and/or have become disenchanted and disappointed in the justice system. Two suffered considerable emotional and mental distress from the delays, cost, and frustration of being unable to be heard and obtain judgment, and ultimately walked away from the process altogether.

During the same three year period, the same lawyer has not had a single case proceed through to trial.

WRMK makes this submission because changing the civil procedure is the best service it can provide to its past, present, and future clients.

WRMK's views

WRMK supports the views of the New Zealand Law Society contained in its submission dated 25 August 2020. Adopting the Law Society's favoured approach would considerably reduce the costs involved in civil proceedings. However, WRMK consider further diversion from the current procedure and proposals, to one which has a user based approach, would better serve the needs of the majority of the population.

WRMK proposes a framework based on the summary judgment model, involving the exchange of evidence upon application, one directions conference, and a hearing followed by written legal submissions and a judicial decision. If such a process was available, it would not only be preferred by the majority of litigants who are otherwise unable to bring their cases to court, but it would be appropriate for the legal and factual complexity involved. If such a process was available for the clients referred to above, they would have taken it. The clients' needs and best interests would have been met with reduced and more certain costs involved, with the invaluable benefit of having been heard, and seeing justice served by judicial decision, one way or the other. Under the

current procedure, they would have received better outcomes by simply walking away at the outset.

There is risk the proposed procedure may result in a party not being afforded all of the evidence to support its claim/defence via the case management and discovery process. This is something that would need to be explained to the client before issuing proceedings. The proposed procedure is not intended to be appropriate in cases where a party is missing evidence to support its cause of action and in need of a search for the 'smoking gun'. It is intended to address the large number of disputes in which the relevant evidence is already available to the parties at the outset.

The financial cost to be heard under the current civil procedure is simply too great for clients with reasonably limited means. Not only that, the stress and anxiety resulting from frustrating procedural delays which are difficult to understand has, in some cases, a greater negative effect than the financial cost of litigation. The real value for both parties may be in a quick and cost efficient judgment, simply as a means of resolving the dispute so both parties can get on with their lives. This is unachievable under the current civil procedure.

From a civil litigator's perspective, or at least in Northland, confidence in the justice system is defeated by:

1. Clients, who have a cause of action and good prospects of success, receiving advice that they may ultimately be better off to walk away than issue proceedings and seek justice; and
2. The clients' inevitable disappointment either at the beginning of the process, the middle, or the end.

WRMK would like to be able to offer its clients an alternative procedural avenue for achieving resolution by judicial decision. One which values the opportunity to be heard over the right to seek and obtain all documentation relevant to the proceedings. An alternative where, if the circumstances of the case allow, the parties can choose a procedure which better suits the needs of their circumstances.

Below is:

- A. A proposed procedure which caters for those in society who:
 - (a) Are in the financial situations described above;
 - (b) Have relatively narrow disputes that are in need of judicial intervention,
("the proposed procedure");
 - B. An explanation for each step and why it should be adopted;
 - C. Comments on how the profession and other agencies, such as the Legal Services Agency and Community Law Centres, can collaborate/facilitate access to justice under the proposed procedure (although WRMK acknowledges this is outside the scope of the Rules Committee).
- A. *The Proposed procedure*

The proposed procedure draws from a number of points made by the Rules Committee in proposals one, two and four, however is founded on the summary judgment model in proposal three.

Each proceeding would be managed by a single judge, to provide continuity, efficiency, and increased judicial understanding of the case; and judges and counsel would bear greater responsibility for ensuring the timely and appropriate identification of issues, disclosure and evidence.² It would also be preferable if civil judges were allocated solely to the proposed procedure, which would avoid the delays associated with civil judges being required to preside over criminal trials (particularly in the regions), some for over two weeks at a time.

It is suggested the proposed procedure be limited by:

1. The number of parties to the proceedings. If the joinder of further parties is required, the proceedings are likely more appropriate for standard case management; and
2. The causes of action sought.

The complexity of proceedings increases with the number of parties and causes of actions. A proceeding with say, any more than three parties and causes of action, is likely more appropriate for the standard case management procedure. If parties wish to take advantage of the proposed procedure and submit to it, they will need to ensure the legal issues are narrowed and focussed from the outset.

Proceedings under the proposed procedure can be sought by filing a statement of claim, together with an application submitting to the proposed procedure, supported by affidavit evidence and/or witness statements that will be relied upon in support of the cause of action/s at trial.

A defendant can accept the proposed procedure by filing a defence/counterclaim, with all evidence in support, or oppose the application and seek case management as already provided under the Rules on the basis that the complexity of the case is not appropriate for the procedure. If the proposed procedure is submitted to by both parties, the plaintiff will have an opportunity to reply to the defendant's evidence, followed by readying the proceeding for trial.

The parties and counsel will have ongoing disclosure obligations from the date of filing the application through to trial, but confined to known adverse documents.

Prior to the trial, a judicial directions conference will be scheduled, covering issues such as whether the proposed procedure remains preferred/appropriate, which witnesses will be required to give oral evidence/cross examination, and any inadmissibility issues. The parties should file a common bundle of documents prior to the directions conference so each are aware of exactly what will be relied upon at the trial.

At the directions conference all parties should appear either in person or via AVL, with counsel. This will promote understanding by the Judge of the issues involved and interests of the parties, with a focus on timely resolution. The Judge is open to take a semi-inquisitorial approach in order to ready the matter for trial, having the ability to suggest/direct further witnesses/documentation necessary to adequately hear the matter. A court appointed assessor specialised in civil litigation could take an inquisitorial role in obtaining the information required by the Court, although WRMK acknowledges this in itself will come at a cost. Robust directions as to inadmissibility of evidence

² Rules Committee Discussion Paper, Improving Access to Civil Justice, 11 December 2019, Appendix 2, Discovery Models B and C, at [22].

and further discovery can be made,³ but without compromising the allocation of a trial date. The parties have submitted to the procedure, and by doing so agree to be bound by any directions which they would otherwise be able to challenge/avoid under the current procedure. A hearing date and duration of trial will be set, taking into account the nature of the evidence.⁴

Prior to the hearing, both parties should pay into Court, or the trust account of their solicitor following undertakings, security for costs in an amount to be prescribed by the Rules Committee. An appropriate sum affordable to the sector and which reflects the limited complexity of proceedings under the proposed procedure, would likely be between \$7,500 and \$10,000 (“the prescribed security amount”). The costs to be awarded to a successful party would be capped at the prescribed security amount.

Requiring payment of the prescribed security amount will allow both parties to be certain:

1. Of the legal costs that will be awarded against them in the event of an unfavourable judgment/adverse award;
2. That their lawyer will be paid (at least in part) following a favourable costs award, reducing the procedural steps and costs involved in having to enforce same;
3. Facilitate the engagement between lawyers and their clients regarding the scope of instructions and costs involved.

At the trial, the Judge will again take a semi-inquisitorial approach, probing witnesses on what she/considers are important issues of the case.⁵ To reduce hearing time, affidavit evidence can be taken as read, with witnesses giving only a brief oral summary, followed by cross examination/judicial examination.⁶

Legal argument is given by way of written submissions following the trial. Submissions should include submissions on costs, referring to any Calderbank offers made. There may be a default position of indemnity costs if a party rejects an offer that they fail to improve on at trial.⁷ Default indemnity costs will:

1. Require parties and counsel to narrow the issues in dispute;
2. Deter parties from abusing the affordable process (vexatious litigants); and
3. Require parties to seriously consider any offer of settlement made.

The Judge will then issue her/his decision on the substantive issues and costs.

The orders that can be made by the Judge are:

³ Rules Committee Discussion Paper, Improving Access to Civil Justice, 11 December 2019, Appendix 2, Discovery Models B and C, at 19.

⁴ Rules Committee Discussion Paper, Improving Access to Civil Justice, 11 December 2019, at [16] and [17].

⁵ Rules Committee Discussion Paper, Improving Access to Civil Justice, 11 December 2019, at [32.b.] and [32.c.].

⁶ Submission of New Zealand Law Society to Rules Committee Discussion Paper, Improving Access to Civil Justice, 25 August 2020, at 3.7(j).

⁷ Submission of New Zealand Law Society to Rules Committee Discussion Paper, Improving Access to Civil Justice, 25 August 2020, at 2.10(g)ii.

1. Award judgment to either party, with the prescribed security amount to follow;
2. In the event a decision is unable to be made on the evidence before the Court:
 - (a) Give an indication of the strength of each party's legal position and make suggestions for resolving the dispute, which the parties can choose to adopt by entering into a settlement deed;
 - (b) Direct the proceedings be transferred to the standard case management track for discovery and full trial;
 - (c) Direct the prescribed security amount be returned to the parties.

Following the decision the successful party will be entitled to seek a direction from the Court that the prescribed security amount be released to it.

The proposed procedure will have limited rights of appeal, perhaps with the threshold of 'substantial miscarriage of justice'. Discovery of material evidence following the decision, with strict relevance and weight requirements, as a ground of appeal may balance any potential injustice arising from the limited discovery process. If the applicant is unsuccessful in the proposed procedure and then again on appeal, the default position is that the applicant is liable for costs on an indemnity basis. This will require litigants to seriously consider the strength of their case going forward after having the benefit of receiving judicial decision/indication of the strength of each party's legal position.

B. Why it will work

The proposed procedure is a radical departure from the current, adopting a user led, resolution based focus at the risk of formal evidential requirements not being fully met. It offers an alternative that many litigants would prefer to adopt given the limited legal complexity involved in their claims and the significant costs involved in proceeding to trial. It offers litigants an opportunity to be heard and receive a decision in a timely manner, without all of the procedural and difficult to understand roadblocks that are currently frustrating confidence in the justice system.

By adopting a procedure as outlined above, a large number of WRMK's clients will have an opportunity to be heard in court for a cost that is achievable. It will enable better estimates as to the potential costs involved, with the expectation of receiving a judgment which will either resolve the issues completely, or give a firm indication of each party's legal position, enabling a more certain legal and financial assessment going forward.

WRMK would like to be able to offer its clients a process by which they can resolve disputes in a way relevant to their lives and within their financial means. A change in the civil procedure along the lines suggested above will enable provision of a service which meets a large portion of society's needs. The current procedural requirements defeat the fundamental right to be heard and determined by the Court. The outcomes for the clients referred to at the commencement of these submissions show that justice is not being served.

C. Going forward

The increased certainty as to associated costs and receipt of a decision resulting from the proposed procedure will:

1. Encourage parties and counsel to address and narrow legal issues based on the evidence available before them;
2. Encourage acceptance of a reasonable settlement offer; and
3. Make it affordable for litigants to engage counsel, reducing the numbers of lay litigants before the Court and the resulting strain on the justice system.⁸

Certainty of cost and a judicial decision is, for many, key to the facilitation of access to justice. WRMK envisages a civil litigant would be able to exhaust the proposed procedure for a cost of approximately \$15,000 to \$20,000 plus GST and disbursements. The litigation risk to both parties is alleviated by the certainty of cost and the giving of the prescribed security amount. The proposed procedure would be suitable for cases the short course procedure in proposal one intends to cater for.⁹ Contracting parties may be able to agree to adhere to the procedure in dispute resolution clauses.

Access to justice under the proposed procedure could be further facilitated by a register of civil litigation lawyers, much like the legal aid register. Community Law Centres and the Court could advise litigants of the costs involved and refer them to the register.

WRMK understands legal aid is outside the scope of the Rules Committee, however Legal Aid may be able to assist clients with funding the prescribed security amount if financial circumstances require, but on the basis that a lawyer from the civil litigation register is appointed. This will alleviate the strain on judges and the court resulting from the increasing number of lay litigants, but more importantly, will allow litigants an opportunity to be heard and determined by the Court.

The only other comment WRMK would like to make in terms of Legal Aid's contribution to access to civil justice is that funding litigants may alleviate access to justice, but the cost of litigation remains the same, it is just shifted to another entity. There would also still undoubtedly be a large portion of the population who remain ineligible for legal aid and unable to afford civil litigation.

The problem is in the procedure. Change is necessary.

WRMK is committed to obliging the needs of the Court and meeting the needs of its clients. Many thanks to the Rules Committee for inviting submissions on the improvement of access to justice in civil procedure. If the Rules Committee would like to hear further from WRMK in relation to these submissions, please make contact on the details below.

Yours faithfully

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⁸ Rules Committee Discussion Paper, Improving Access to Civil Justice, 11 December 2019, at [5].

⁹ Rules Committee Discussion Paper, Improving Access to Civil Justice, 11 December 2019, at [16] to [25].