Before the Rules Committee

In the matte of a submission on access to justice by Andrew Holgate of Whangārei

Contents

May it please the Committee:

1. INTRODUCTION:

1.1. Thank you for the opportunity to make a submission.

2. SYNOPSIS:

2.1. In this submission it is contended that:

2.1.1. For any innovation to succeed the legal profession needs to be engaged;

2.1.2. There is the goodwill within the profession that should there be a resourcing issue, the legal profession can, and should be asked to provide more *pro-bono* assistance;

2.1.3. The move to extend the Disputes Tribunal is a good one provided certain logistical issues and professional support for referees is provided for;

2.1.4. The lower end of the District Court jurisdiction could resolve matters on the basis of equity and good conscience to extend justice further for litigants;

2.1.5. Recorders in the District Court will be a good innovation, but at this stage the case load in a place like Northland doesn't really require them;

2.1.6. The High Court Rules could be simplified in some places by in reality they are effective;

2.1.7. The use of electronic casebooks and evidence is a good thing but could be simplified a lot;

2.1.8. The Rules could be more explicit about condoning or excusing non-compliance with the rules.

3. ISSUE 1: THE ELEPHANT IN THE ROOM:

3.1. Any innovation to create access to justice needs the legal profession to assist the Courts, to engage with the process and to help achieve the goals.

3.2. Sometimes lawyers will be paid to do this by clients, at other times lawyers may be paid by legal aid, and at other times they will provide services *pro bono*. The latter is an under-utilised resource.

3.3. While I'm the first to admit that engaging with the legal profession will involve herding cats, I would also submit that collectively the profession has a lot of good will towards the community and will provide people who will gladly do *pro bono* work if they are asked to, and if they can be pointed to the parties in need.

4. ISSUE 2: DISPUTES TRIBUNAL CHANGES:

Monetary limits:

4.1. The increase of the Disputes Tribunal jurisdiction to $50,000.00 would be a good thing. It will deal with those claims that matter but where the cost of proceedings exceeds the result.

4.2. The legislation should not be changed back to allow for consent to jurisdiction. The present wording is clear and unambiguous and we should value that.

Following the Law:

4.3. The Disputes Tribunal and a Court hearing an appeal from a Disputes Tribunal have the right to determine the claims in terms of equity and good conscience. This is already allowed in:

4.3.1. Very small District Court claims;

4.3.2. The Employment Relations Authority;

4.3.3. The Employment Court.

4.4. If the legislation makes it clear that the Disputes Tribunal can reach decision this way it may be helpful.

Appeal rights:

4.5. The current appeal limit could remain in respect of the amounts below $5,000.00.

4.6. Any amount over that can be an appeal by way of a rehearing. The appeal would be similar to that from the Tenancy Tribunal. There aren't floods of appeals from the Tenancy Tribunal, so the risk of the District Court being bogged down with appeals is unlikely.

Changing the name to the Small Claims Court:

4.7. Calling the Disputes Tribunal a Court may clarify its place in the legal process. This may be helpful given the multifarious tribunals that exist in our legal system.

Referees remuneration:

4.8. The remuneration of referees is not that bad, but does not really correlate with what other judicial officers earn.

Practical issues:

4.9. Referees have to provide decision quickly and don't always have the resources. Even now it would help if referees are able to give oral decisions that can be transcribed or have clerical staff who can type reserved decisions.

4.10. An extension of Disputes Tribunal jurisdiction will mean that referees see a lot more:

4.10.1. Building disputes and connected issues like plumbing and painting;

4.10.2. Franchise agreements for basic services like cleaning services that have come to grief.

4.11. From experience Referees often don't have knowledge in these areas, so increased support and training is needed to keep referees effective.

Open Court:

4.12. South Africa has its Small Claims Court hearings in public. It also has a police constable sitting next to the commissioner to stop violent incidents. These do happen.

4.13. While open justice is preferred, public hearings aren't risk free. While not ubiquitous, it happens often enough in the District Court and High Court that one litigant's supporters pack the gallery to intimidate the opposite side. Any move to have open court hearings should ensure that Court security can stop any mischief.

Claimants that are financial service providers:

4.14. Quite a few consumer credit contracts in Northland are assigned by the vendor to Auckland financial service providers.

4.15. When a consumer defends a claim by financial service provider and it is referred to the Disputes Tribunal the financial service provider often argues for the matter to be transferred to the Court closest to its office. Although the Law initially states that the claim should stay in the District Court registry where it was launched, the tribunal does accede to these requests for transfer. This creates a barrier to access to justice for the consumer who has often fallen on financial hard times.

5. ISSUE 2: THE DISTRICT COURT:

Simplification of procedure:

5.1. It would save litigants time and money and keep Court costs down if Interlocutory Application for Summary Judgment can only be brought if the matter is defended. Very few Defendants show up for Summary Judgment hearings.

Civil proceedings generally:

5.2. The District Court is trialling a new online portal to attend hearing via AVL from remote locations. From experience there are a few bugs to iron out but generally it is effective.

5.3. There are very few civil proceedings happening. Most fixtures in Northland are for proceedings under the **Harassment Act 1997**. The District Court is utilising

counsel to assist because the Application and Cross-Applications are often disjointed and messy. Counsel assisting can also broker settlements in some cases.

5.4. The District Court in Northland seems to be using its resources to tackle its criminal and jury caseload. Despite economists and other who read the economic tealeaves saying the economy is rebounding, Northlanders are not spending money and are treating the current situation like a recession. As a result people are simply not spending money on legal claims and as far as possible, not spending money defending legal claims.

Equity and good conscience:

5.5. The Court has this jurisdiction for minor claims. Expanding this limit to $50 or $100,000.00 may alter any public perception of the Court and may be fairer when it comes to the power imbalance between corporate or well resourced litigants and those much lower down the pecking order.

Financial service providers:

5.6. The proposal that financial service providers follow a pre-trial process is a good thing. Having said that, the key issue will still be that many debtors will lack the resources to instruct counsel and fully utilise their rights.

Recorders in the District Court:

5.7. Having experienced lawyers to assist with civil claims would be good innovation. The effectiveness of this may only be felt some years down the line when the economy recovers. At the moment in Northland there are two District Court judges dealing with civil matters and that is plenty given the case load right now.

6. PART 3: THE HIGH COURT:

The Rules:

Simplifications:

6.1. It would save litigants time and money and keep Court costs down if Interlocutory Application for Summary Judgment can only be brought if the matter is defended. Where it is the Plaintiff applying for Summary Judgment the Defendants usually don't show up meaning that a fair amount of work is done for no compelling reason.

6.2. Generally the High Court Rules work really effectively although there is arguably room to simplify the rules. For example:

6.2.1. Providing that Bankruptcy proceedings to be done as originating applications using originating Application forms, once the Bankruptcy Notice is issued and served; or

6.2.2. Providing that judicial reviews are done by way of originating application. There are seldom evidential issues in these matters and if

there are any the Court can direct that the witnesses give oral evidence.

Irregularities and condoning non-compliance:

6.3. A more explicit provision in the rules about excusing non-compliance with the rules would be helpful. While the initial rules are provide for it to some extent, it is quite often left to the personal view of the judge, and some are more relaxed about non-compliance and errors than others.

6.4. Well resourced litigants are also prone to exploiting the rules to prolong the initial stages of litigation. Where the procedure hasn't been rigorously followed, but no one has suffered substantial harm the Court should be able and encouraged to excuse non-compliance with the rules.

6.5. In the case of an irregular step, it may be more just to expand the rules to allow for the party prejudiced by the irregularity to give notice to the party taking the step to rectify this. There could then be an Interlocutory Application to have the Court determine what to do with the irregularity.

6.6. The Court should also re-emphasise that minor irregularities are condoned – things like the details of the deponent at the start of an affidavit being in the third person not the first person. The probate section of the High Court is particularly against this and the community is not currently well-served by the attitudes of several of the staff in that department.

Other issues:

6.7. The electronic casebook protocol is far too complicated. As one who has and still works with computers a lot, there are ways to simplify the casebook so that it does what is intended without taking days to prepare. For example:

6.7.1. The pleadings can be one volume;

6.7.2. The briefs or affidavits for each side can be collated into one volume each;

6.7.3. The exhibits can be collated in 1 or more volumes.

6.8. The hyperlinking and cross referencing is exponentially easier when this happens. There are fewer technical issues too.

6.9. Electronic casebooks are far better than the paper versions as one doesn't need to be built like the Incredible Hulk to lug them into Court and finding references and documents during the hearing only takes seconds. The next problem to fix, is that the witnesses still use paper because the electronic screens are behind them. Touch-screen technology at the witness stand that lets witnesses see their briefs and the exhibits would fix this.

6.10. The other issue with electronic documents is that some lawyers and judges are still technophobic, although it is less common than it used to be. Assuming we don't have a nuclear apocalypse, technology will continue to go through a 100% revolution every 3 years. This is not an insurmountable problem. The

profession already provides technology education and no doubt the Ministry of Justice can do this for judges.

6.11. Some well-heeled litigants can outsource preparation of the electronic casebooks. Most of my clients can't afford that, so a more user-friendly casebook format would be good.

7. CONCLUSION:

7.1. Thank you for reading this submission.

Andrew Holgate

Friday, 2 July 2021