Clerk to the Rules Committee
c/- Auckland High Court
CX10222
Auckland

By email: RulesCommittee@justice.govt.nz

2 July 2021

Attention: Clerk to the Rules Committee

Submission on improving access to civil justice

1 About Dentons Kensington Swan

1.1 Dentons Kensington Swan is one of New Zealand's leading law firms. We are a full service firm that employs over 100 lawyers between our offices in Wellington and Auckland.

1.2 We have a wide spectrum of clients – multinational corporate entities through to private individuals – for whom we appear for at all levels of the New Zealand court system.

1.3 Given the range of experience we have with the civil justice system, we are well placed to comment on how the proposed changes might affect the way litigants exercise their civil rights.

1.4 This submission is made on behalf of the firm, not on behalf of any of our clients.

1.5 The golden thread of our submission is the notion that there is an important balance to be struck between vindicating civil rights, and the costs that will accrue to stakeholders in maintaining a court system that tries to do too much.

2 General comments

2.1 We are generally supportive of the reforms proposed in the 14 May 2021 report published by the Rules Committee ('**Report**'), but are of the view that the proposals do not go far enough in some areas and lack consistency in others. There are also issues presented by the proposals suggested in the Report.

2.2 In particular, we agree that there is a need to streamline processes in the District Court and High Court, where existing processes cause undue delay to proceedings and additional expense to litigants, while adding little value to the actual resolution of disputes.

2.3 We agree that the cost of civil litigation has become prohibitive for many claimants. The report highlights 'defensive lawyering' and the disproportionate approach taken by practitioners as factors

contributing to this problem. It is difficult to see how these things can be avoided given the impact of *Chamberlains v Lai* and the abolition of barristerial immunity.[1] There will need to be management of advocate liability if meaningful steps towards proportionality are to be taken.

2.4 The Report is litigation focused and makes only passing comments on the non-adversarial resolution of disputes. This undervalues mediation as an effective, cost-efficient tool for resolving civil disputes.

2.5 Finally, close attention was paid in the Report to the costs incurred by litigants in pursuing a dispute, but it glosses over costs that would be met by taxpayers and members of the profession were some of its proposals implemented.

3 Discussion of proposals by the Rules Committee

3.1 Below, we address each of the proposals set out in paragraph 77 of the Report.

Disputes Tribunal level

3.2 We support raising the jurisdiction of the Disputes Tribunal ('**DT**'), but we would go further than the Report and suggest that its jurisdiction be increased to $200,000. A jurisdiction of $50,000 is still insufficient to cater for claims that do not merit litigation. Further, a jurisdiction of $200,000 reflects the reality that the costs of taking a proceeding through even the District Court ('**DC**'), are still substantial and often of a similar magnitude to the costs of a High Court proceeding. We would also recommend enabling the DT to deal with undefended claims (for example, undefended debt recovery matters).

3.3 We support changing the right of appeal from a DT decision. The expanded jurisdiction will require a more comprehensive right of appeal, and we agree with the proposal of a graduated right of appeal. It may be desirable to enable parties to contract out, or around, this graduated appeal right. This might assist in limiting at least some proceedings from being appealed while still being consistent with the parties' rights to justice and autonomy.

3.4 We support re-naming the DT to the Small Claims Court. This would bring it into line with other jurisdictions, however, we do not think that the name of the body is of any real significance. The Report discusses the concept of whakamā and the shame and alienation felt by some members of the community when dealing with the legal system. Measures to ensure that the DT is accessible to claimants, especially those who feel alienated, will be more effective than renaming decision making bodies.

3.5 As the Committee will appreciate, a re-purposed DT will require a substantial increase in resourcing, both in terms of referees and facilities.

District Court level

3.6 We support appointing a Principal Civil Judge of the DC.

3.7 We support increasing the civil expertise in the DC. There is a dearth of judges in the District Court holding civil warrants, the Report does not contain any information around plans to increase the number of judges holding civil warrants at the DC level.

[1] *Chamberlains v Lai* [2006] NZSC 70.

3.8 We do not support the use of Deputy Judges/Recorders for civil cases. The Report suggests that members of the profession – in particular, those hoping to go to the bench – might be expected to serve as Deputy Judges. It is unclear whether practitioners would be paid for this service. If they were not paid, then we would struggle to support this recommendation.

3.9 We do not support the introduction of mandatory pre-action protocols. Our position is that these protocols would increase the complexity of proceedings while adding little value. Generally, where parties are responsive and cooperate with litigation procedure, there would be little added to the process by pre-action protocols. However, in many cases where parties to a litigation are either lay people or simply uncooperative, pre-action protocols would increase the burden on the court and the party seeking to advance proceedings. (In our experience, many defendants go to some lengths to avoid being found and/or communicating with the plaintiff. Mandatory pre-action protocols would not make any difference to these parties).

3.10 We support a more inquisitorial process in the DC. This approach is sensible especially given the number of self-represented litigants who appear in the DC.

High Court level

3.11 We support disclosure rules being introduced in place of the discovery regime. Discovery can be the most time consuming and expensive part of a litigation – the introduction of disclosure rules has the potential to significantly lower the cost of litigation.

3.12 We support early and comprehensive engagement by judges at issues conferences. Judicial involvement has the potential to greatly speed up proceedings and limit unnecessary steps that might be taken in litigation.

3.13 We support interlocutories presumptively being determined on the papers. The Report notes that oral hearings may be an option in cases of greater complexity. We suggest that the new regime allow for memoranda to be filed by counsel to request an oral hearing where they consider it necessary.

3.14 We support greater emphasis being placed on the documentary record to establish truth. There is often little point in witnesses having to read their briefs of evidence to the court. Relying on the documentary record could save the court considerable time. So long as cross-examination takes place, counsel will have the opportunity to establish the reliability of evidence.

3.15 We support greater controls on expert evidence. We consider that expert 'hot tubbing' has the potential to greatly assist the court and save judicial time. The court having greater control over expert evidence may also go some way to addressing potential power imbalances that might exist between parties.

3.16 We are sceptical about how greater proportionality can be successfully achieved. The impact of *Chamberlains v Lai* has been felt in the legal community. If proportionality is to be a guiding principle in civil proceedings, there will need to be a reassessment of how barristerial and solicitor immunity should function.

4 Specific comments

4.1 The Report makes little to no mention of mediation, or other methods of alternative dispute resolution ('**ADR**') as means of resolving civil disputes. These methods are not only cheaper and faster but

would assist in reducing the alienation of claimants from the justice system. ADR processes may have been omitted due to the Committee's concern with the rule of law, and cases contributing to the body of the common law. This is a mistaken approach: judgments in the DC are mostly unreported, and sometimes given orally, additionally, they are so fact based that they do little to develop the common law.

4.2 Mediation is a good, efficient way of resolving civil disputes. It is likely to be much more beneficial to claimants than the litigation process. A once in a generation change to the civil justice system would be to dispense with the notion that litigation has some special place in civil justice. In truth, it is the most stressful, costly and damaging form of dispute resolution.

4.3 There should be provision made for undefended proceedings to be moved through the process much more quickly and efficiently through the court system. In particular, debt recovery procedures should be much more streamlined.

4.4 In an electronic age, we would also like to see service, particularly on companies, be made easier and more cost-effective. For example, could companies not be served with documents at an email address provided on the Companies Office website?

4.5 It is not proper to attempt to fix the civil justice system by requiring practitioners to donate more time and services. If the legal system is to be robust, it must be able to function independently. Practitioners need to be properly rewarded.

5 Conclusions

5.1 The Report suggests some useful, important changes, but misses an opportunity to incorporate ADR into the civil justice system. This is a key gap. ADR has merit as a method of improving the civil justice system. It would be a mistake and a missed opportunity not to include systems incorporating ADR into the new regime.

5.2 The proposals around increasing use of the DT do not go far enough, and the Committee should seriously consider how the impact of DT with a much greater jurisdiction might affect the civil justice system.

5.3 We caution the Committee against relying on the goodwill or the profession to prop up the civil justice system by requiring senior practitioners to donate time and services, this structure would not be indicative of a healthy legal system.

Yours faithfully

Hayden Wilson

Chair & Partner
Dentons Kensington Swan