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Clerk to the Rules Committee
c/- Auckland High Court

BY E-MAIL

Dear Committee Members

IMPROVING ACCESS TO CIVIL JUSTICE

1. This submission refers to the consultation paper dated 14 May 2020.

2. I undertake civil litigation before both the District and High Courts, and have assisted clients through the Disputes Tribunal process. From 2012-2018 I was at the VUW School of Law, and retain a research fellowship there.

Disputes Tribunal

3. As previous submissions have suggested, the Tribunal works well. It accepts claims for hearing via an online form, sets a hearing date, and gets to work. Parties write down their side of the story, what they want out of the process, and attach the documents they rely on. The registry staff are responsive to matters such as time extensions and changes to the hearing location. The finality of Tribunal decisions is a major advantage: the merits of the claim are soon determined, and the unsuccessful party has no realistic prospect of appealing.

4. The recommendations in the discussion paper are essentially laying the foundations for the Tribunal to emerge as a replacement to the District Court's general civil claims jurisdiction, with the financial limit increasing, and disputes resolved in accordance with law by legally qualified adjudicators (who can exercise enough inquisitorial initiative to compensate for the absence of advocates for the parties). That is all to be encouraged: the Tribunal is an institution that is already motivated to perform this role efficiently. In relation to some specific points:

    a. If other protections are being brought in, do not stop at $50,000 for the jurisdictional limit. Recommend the highest amount the Committee can feasibly recommend – at least $100,000.

    b. Spend resources that would otherwise go to the District Court recorders idea on good lawyers who can assist the Tribunal on cases within their area of specialisation at a relatively low fee per file. In this way barristers and solicitors at a mid-to-senior career level could assist with files as part time or ad hoc adjudicators, and help the institution adapt to a higher workload.

c. It would make no substantive difference to go to the expense of "rebranding" the Tribunal as a Court: both words are used in New Zealand for decision-making bodies that resolve disputes. On the other hand, the change from "referee" to "adjudicator" would send a better signal to parties that the person they are dealing with has decision-making powers, as opposed to someone who is trying to help them collaboratively reach a fair outcome.

d. The Tribunal should have flexible powers to waive fees, and award parties their out-of-pocket expenses, but a costs jurisdiction should be avoided. The concept of costs is inextricably tied up with lawyers (whose absence seems to have made the Tribunal the most efficient of jurisdictions). Parties should not be dissuaded from taking small but meritorious claims out of fear of a costs award in favour of the retailer or service provider they have a dispute with. Having costs lie where they fall is the more proportionate approach in this jurisdiction.

5. At over $30,000 it becomes necessary to protect parties from the occasional decision that is procedurally unfair or legally incorrect by way of a right of appeal. However, this right should be carefully circumscribed. No matter how narrowly the right is framed (error of law, manifestly unjust, etc), there is too great a risk of unmeritorious claims being pursued by parties of a litigious disposition, or a misguided estimation of their own cause. Any appeal right to the District Court throws parties back into delay and expense of that Court's civil jurisdiction, and if appeals become too prevalent the procedure will undermine the Tribunal's reputation for providing swift and lasting resolution.

6. To guard against the inevitable incorrect decision, while saving parties costs, a leave procedure should apply for all appeals. This should act as a sort of mandatory screening process: all requests for an appeal would be considered by a senior Adjudicator/District Court Judge whose decision on whether to let them through to the next stage or not is final. To prevent the procedure escalating into a de facto appeal, this process should proceed on the papers, with a short, optional submission from the would-be respondent.

District Court

7. The idea of a Principal Civil Judge of the District Court is a worthy one, especially if that person had a dedicated registry team.

8. The idea of Deputy Judges or recorders seems less promising. If more judicial resources are required to hear civil matters where there is a major backlog (such as in the case of ACC appeals), then it seems that would be best addressed from within the institution. Judges receive dedicated training and support in their role, and grow to have the benefit of many years' experience on the bench. Court timetables shift and change frequently. Having a practising lawyer undertake this role on a part time basis seems inefficient, in contrast to the Tribunal where that person can "run the show".

9. Given the largest body of civil work is in the form of (usually undefended) debt collection, the more effective intervention would surely be in streamlining that process?

10. At present a debt collection action requires the following properly formatted and intituled documents, along with evidence of court fees having been paid:

    a. Notice of proceeding

    b. Statement of claim

    c. Application for summary judgment

d. Affidavit in support

e. List of documents relied on

11. That is a disproportionate amount of paperwork for alleging "person A owes person B money based on this contract and unpaid invoice". Debt collection should be started by way of an online form, and serviced by a centralised, specialised registry who can organise telephone or online hearings. Cases can be referred back to local registries for management and hearing where necessary, for example where a case ends up being defended or is more complex than initially anticipated. If the registry coordinated the service of the initiating documents, as is the case in the Tribunal, that would add a layer of security for the defendant.

High Court Rules

12. In terms of quick efficiency gains, permitting more procedures to begin by way of originating application would be helpful. A rule setting out a list of factors to identify appropriate cases for this procedure could be used to filter appropriate cases down this path, as opposed to the current list of specific sections. At present such guidance is only available by way of an expensive application for permission to proceed in this manner, but the case law is settled enough to provide sufficient guidance, and case management is still available where the procedure is/becomes unsuitable.

13. An early issues conference is a good idea. The sooner a Judge gets to review the scope of a case, and focus the parties' minds on what they are seeking/resisting, the better. It would also be helpful if the Rules provided an expectation (as in the District Court) that a settlement conference would take place – or at least be considered. Rather than having Judges invariably preside over these, the work could also be allocated to QCs or senior mediators.

14. In terms of interlocutory applications, the Rules could contain more guidance on what should be requested via an application, and what can be sought via memorandum. The Rules could increase the range of issues that can be addressed via exchange of memoranda, rather than a full-blown application – with a Judge directing an application to be filed where necessary.

15. The Committee's suggestions in relation to trials are sensible – with the exception of the part on experts. Parties should be allowed to select and put forward the expert witnesses they think will best advance their case. The Rules should instead focus on pre-trial mechanisms to get experts to agree to as many points as possible before trial, narrowing the issues in dispute.

Yours sincerely

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