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20 September 2021

Rules Committee
Improving Access to Civil Justice Project
PO Box 60
AUCKLAND

For Clerk to the Rules Committee (Sebastian Hartley)

By email to: RulesCommittee@justice.govt.nz

Dear Committee,

RE: Improving Access to Civil Justice Project

1. I write to make a submission for consideration by the subcommittee working on the Improving Access to Civil Justice Project.

Proposed changes to the administration of District Court Civil business

2. It is proposed to appoint a chief civil list Judge for the District Court, and to make use of part-time appointments of practicing litigators to hear specific cases.

3. These proposals seem likely to be very beneficial. Experience shows that it takes upwards of a year to get a short civil trial set down for hearing in the District Court in the Wellington cluster from the time the case is ready to be heard. There is plainly a shortage of resources available to dedicate to progressing the civil business of the District Court. Concentrating the resources available to progress civil business is likely to help, as is appointing a Chief Civil Judge to manage the business.

4. But it seems plain that it is also very important to increase the available resources overall. Using practitioners as part-time judges would seem likely to help. Increased numbers of experienced court staff would also be needed to support processing files and holding the necessary hearings.

5. These factors make it seem likely that it would also help to concentrate the civil business of the Court into a small number of urban registries. I would also suggest that some full-time District Court Judges would need to specialise in civil business.

6. Historically, New Zealand Judges have not specialised. However, in practice this is not a hard and fast rule as District Court Judges are warranted in various categories including family, youth and jury trials. Having said that however, none of these is exclusive. I understand that Family Court Judges are the most specialised, but nevertheless, Family Court Judges still spend approximately 25% of their time sitting in general civil matters or criminal matters for the District Court. It seems likely that the resource allocation problems could at least be isolated, and potentially better managed, if the civil business of the District Court were concentrated into the main urban registries, and processed by specialised teams of Registrars and Civil Judges.

7. Historically, District Court Registry staff have not specialised any more than the Judges have. For the District Court, staff ideally train across all the jurisdictions and tribunals so they can be reallocated to meet needs. However, I understand that one of the differences now from years past is that there has been a significant loss of more experienced people from the District Court registries and administration. In many cases there are few or no staff in a given registry at any one time who understand what is required to handle a civil file. I understand that at least part of the reason for this is that the Ministry of Justice is one of the lowest payers in the public service. That creates staff retention issues that need to be addressed.

8. Hand in hand with the use of part time judges to hear trials, it seems likely to be necessary to have full time Judicial or Quasi-Judicial officers available to process files to get them ready for hearing. Someone needs to handle the civil lists. This officer could be something like a District Court version of a Master or Associate Judge, or a senior, legally-qualified Registrar, with powers to determine the procedural matters that need to be dealt with in the course of preparing a case for hearing. This could free up more Judge time for hearings, and allow efficient use of the experienced civil practitioners it is anticipated may be used as part-time judges to hear cases and defended interlocutories.

9. Overall, both focussing and increasing the resources available to deal with District Court civil business would seem to be important to bring about improvements in access to civil justice for cases within the District Court's jurisdiction.

High Court Proposals

10. Among other things the changes proposed for the High Court involve more focussed case management. The current proposals include the concept that parties might be given a judicial steer on the issues at an early stage.

11. Early identification of the issues has been the goal of a number of reforms over the years. As a result, the current system already contains rules that are

designed to achieve the early case analysis that the new proposals are also aimed at achieving. These include First Case Management Conferences in the High Court, and compulsory Judicial Settlement Conferences in the District Court that are required to proceed as Directions Conferences if settlement is not achieved.

12. However, neither High Court First Case Management Conferences nor failed District Court Judicial Settlement Conferences actually operate in practice to provide judicially-guided narrowing of the issues.

13. This happens for a lot of reasons. The Judges do not like to analyse the case early. They prefer not to give firm views before the evidence has been heard. They do not normally feel equipped with enough understanding of the case to limit the issues. Judges commonly perceive there is a grave risk that one party may feel they have been disadvantaged and treated unfairly if something he or she wishes to pursue is removed from the table at an early stage by the Judge. As a result, despite early case management conferences under the High Court's current rules being designed to place some pressure on the parties to identify and narrow the issues, and to develop an economical route to resolving those issues that need judicial determination, this does not tend to happen in practice. Judges leave it to the parties to define the issues in exchanges of memoranda, and accept wide ranging differences and "putting the other party to the proof" as fulfilling the requirements of the Rules.

14. Chances seem high that this element of the proposed reforms will likewise be very hard to implement. Whatever the rules say, the pressures on the participants in the process make it very difficult for the Judge to take control at an early stage, and impose limits on the case, to ensure it remains economical to progress.

15. The study of models of civil procedure generally shows that systems grapple with tensions between party control of proceedings and achieving swift and economic resolution of a dispute.

16. The English/Common Law model of civil procedure has generally favoured party control. Under Common Law adversarial procedures, it is the parties who are in charge of their own cases. In the classic model, the Judge does not have a role to play in deciding what is and is not presented and argued. Shaping the case is party business. By contrast, the European/Civil Law model of civil procedure favours judicial control. Under Civil Law inquisitorial procedures, it is for the Judge to decide what evidence shall be heard and what arguments are relevant to the final determination of the case. Parties can suggest, but they do not decide. Shaping the case is judicial business.

17. One of the key problems with implementing procedural reforms designed to increase judicial case management like those discussed, is that judicial control of the early stages of the proceeding is at odds with the rest of the structure of the Rules and the adversarial procedures within which New Zealand Judges operate. Common Law adversarial procedures are designed to culminate in a single, one-off trial event, that represents the only chance the parties have to prove or fail to prove their case. The stakes are very high.

18. If a Common Law Judge at an early stage is to say that a particular argument is not in the scope of the case, there may be no comeback for the party affected. If a mistake is made as to the issues, the party's best/only/winning argument could be ruled out of the case at an early stage, and cannot come back in. It is no surprise that Judges are reluctant to impose their views as to the issues to be argued and the evidence to be allowed at an early stage. A Common Law Judge is conscious he or she has seen the parties for a morning, has only skim-read the papers filed, and has no reliable understanding what else might lie beneath the surface of what he or she has seen.

19. By contrast, Civil Law Judges can impose a framework on a case, because that imposition comes in developing stages during an inquisition. All the evidence is not heard at once. All the issues do not need to be brought out in one stage. The process does not necessarily culminate in a single, one-off trial event. Judicial control is a reality, as it is slowly developing over many more individual interactions with the file and the parties, and their evidence. Civil law systems enable judicial control much more generally, but also, famously take much, much longer to resolve a given case, and require many more working judges to operate the system.

20. To enable the proposed reforms aimed at increased case management to succeed this time, where they have petered-out in the past, I submit that two things are likely to be required. First, the Judicial resources available need to be vastly increased. To manage a case effectively, the Judges doing the management need time to be able to become familiar with the case at a much more intimate level, so they can have confidence making directions that will improve the outcome for the parties, without alienating any party, and without distorting the just determination of the case. A modest form of inquisition is needed before the Judge will be familiar enough with the file to make robust and helpful case management directions.

21. Secondly, there needs to be scope to hear a matter in stages, so that, if it transpires that further issues are identified in the course of the limited hearing that does take place, and the Judge accepts that they are legitimate matters that should affect the outcome, there needs to be scope to convene a further hearing, or undertake additional stages, including discovery, and

hearing further evidence and argument, to make sure justice can be done, despite the earlier limitations put on the file.

22. It seems logical that, if the Judge is armed with a clearer understanding of the file as a result of having spent significant time reading into it, and if the case management directions made are not the high-stakes matters they are in a system with a single trial event, then the Judge would feel empowered to make much more robust case management decisions, to limit the scope of the issues and the evidence to be argued. Under these conditions, it seems that the evident reluctance to use case management rules and procedures to their full potential to limit the scope of a case might well be overcome.

23. This thinking leads me to suggest that the "first look" at every civil file should take place in the form of an investigation like that which the alternative disputes resolution schemes for financial disputes undertake, or which Disputes Tribunal Referees can do with two parties in a room. This needs a lot of resource. The existing roster of High Court Judges is unlikely to be sufficient. I submit that to make the proposed reforms work to produce robust and effective case management this time, the system needs the support of a new form of Judicial Officer to take the first look at the file and do the deep dig/investigation that effective case management requires, not unlike an investigating magistrate in the Civil Law inquisitorial system.

24. Once case management procedures were established for a file by a much deeper "first look" than currently takes place, a single Judge should be responsible for managing the file through to trial. That Judge would determine all interlocutories, and all separate questions that might emerge as appropriate stages in the determination. There would no longer be a strong presumption that the case be managed to a single trial event.

Difficult parties

25. Design of civil procedure reform tends to start from the assumption that parties have a dispute that both parties in good faith want to see resolved. It is assumed that both parties will see it as a problem, if the case takes too long and costs too much to get to trial. The real-life experience of legal practice suggests this is often not the case. Where a dispute does involve two parties who each want to bring the core of their dispute to Court and resolve it, and both parties want their dispute resolved economically and promptly, then it is likely they can achieve that under current procedures. Experience suggests in fact that most disputes of this sort settle.

26. However, some cases do go all the way to Court. These cases are more typically of a different type, a type where both parties are not trying in good faith to identify the core issues and the differences between them, and find an economical way to have those differnces resolved. The typical pattern for a dispute that has to go all the way to hearing involves one party who wants

something from another party who is unwilling to give it. The party who may be required to give something up is quite likely not actually to want the dispute to be resolved promptly or at all. A defendant may perceive that he or she has nothing to gain and much potentially to lose from reaching the end of the case. Party control inherent in our common law adversarial civil procedure provides a party who wants to extend the dispute and avoid having it resolved with a vast array of options to add cost, complexity and delay to a file. It is far from unusual to see this happen.

27. Our system relies on adverse costs awards as the available incentive to good procedural behaviour. But such awards are ineffective to incentivise co-operation. They are remote from the day-to-day decisions that are made in the conduct of litigation. They also follow only on a substantive determination of the dispute. A party that is determined to avoid substantive determination of a claim against it will not regard the potential that an adverse costs award might follow that determination as a persuasive reason to co-operate. Indeed, the potential for an adverse costs award on top of an adverse substantive award could logically increase incentives to delay. In particular, if the delaying party already considers a substantive determination against them would be ruinous, they will not feel further incentivised either way by the prospect that the award will be more ruinous by the amount of an adverse costs award or by an increased adverse costs award reflecting the Court's sanction for their procedural misbehaviour.

28. Choices have to be made in any procedural system. In broad terms, the basic choices tend to be between party control (the English Common Law system) which is attended by the problems of increased costs and the potential for parties to evade justice and Court control (the European Civil Law system) which tends to be characterised by very, very long delays, problematic issues with state resourcing of judicial investigations, and feelings of disempowerment as the parties cannot control their own cases.

29. Judicial case management is offered as the way to limit party misconduct within the framework of what is to remain essentially an adversarial system. To be effective, Judges conducting case management have to be willing to exercise control to ensure a case moves forward, even although it will often frustrate one of the parties.

30. It also seems important that the Judge who has worked with the parties at the relevant case management conferences to identify the issues ought to be the one who runs the hearing. Under our present system, a new Judge normally hears the case, after someone else has run the case management. This means that the benefits of narrowing the issues at an initial conference are lost if the hearing Judge happens to have a different view as to what the principal issues are, or should be.

The Disputes Tribunal

31. The proposed changes for the Disputes Tribunal seem likely to be positive.

32. The Disputes Tribunal seems to be providing a very good service at the moment and the proposals to expand its reach are welcomed. However, appeal rights should probably be wider, especially once an issue is before the Disputes Tribunal at a value of $50,000 or more. The process that the Disputes Tribunal goes through, in investigating a case, is somewhat like that which would seem to be required to have truly effective First Case Management Conferences in the High Court or for Directions Conferences following on from failed Judicial Settlement Conferences in the District Court.

A single point of entry

33. Our system uses the value at stake in a case to identify in which Court it belongs. However, high value cases are not necessarily the most complex or important.

34. Neither is it necessarily clear at the start which cases will become complex. Experience shows that it is extremely difficult to identify cases that will develop into difficult ones. In my own practice, cases that have proven to be the most complicated, have often actually been fairly simple cases at heart, but have been made difficult and complex by the attitude of one or other of the parties. Such cases do not necessarily have any obvious identifying characteristics that would allow them to be identified and managed under a more streamlined procedure.

35. This gives rise to the thought that the process of analysing a case and identifying what it really to be resolved could be a unified process carried out via a single point of entry to the judicial system. Whatever the value of the case, it needs to be analysed, understood and triaged to the procedure that suits it best. It is not necessarily the case that it is possible to triage cases between the Disputes Tribunal, District Court or the High Court based solely on the amount at stake, and the process of taking a first look at any given case and conferencing with the parties to determine the directions it requires to prepare for hearing is not obviously any different depending on where cases might ultimately be heard.

Appeals

36. The place of appeals also has a role to play. If the issues in a hearing are limited, then the appeal has to be limited to those issues too. If this does not happen, then the system will simply regenerate the current difficulties with

over-resourcing cases, but on appeal, and following a wasted first instance hearing. In this regard, the *Austin Nicholls* "full rehearing" approach to appeals seems likely to need to be revisited.

Yours faithfully

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