[PHILIPSKELTON QC
BARRISTER

2 July 2021

Rules Committee
Auckland High Court
PO Box 60
Auckland 1010

Attention: Sebastian Hartley, Clerk to the Rules Committee
Email: RulesCommittee@justice.govt.nz

BY EMAIL

Dear Mr Hartley

SUBMISSION TO THE RULES COMMITTEE IN RESPONSE TO THE "IMPROVING ACCESS TO CIVIL JUSTICE" DISCUSSION PAPER

1. We welcome the opportunity to submit on the Rules Committee's discussion paper.

2. Philip Skelton QC is a barrister practicing in commercial litigation, employment and class-action law. Tim Wilkinson is a barrister employed by him, with experience as a litigation solicitor including for legally-aided clients. Philip Skelton wrote a submission with Tom McKenzie during the previous consultation, which for ease of reference we will call "our earlier submission".

PROPOSALS AND SUBMISSIONS

Institutional Reform of the District Court

3. We support institutional reform of the District Court by appointing specialist civil Recorders and a Principal Civil Judge. This should enhance the court's civil capabilities and status.

4. We endorse the title of 'Recorder' over Deputy District Court Judge. We think a civil-only title might help to build up a 'brand' of civil-specialism in the District Court. 'Recorder' is not a descriptive title but it may appeal to traditionalists in the profession.

District Court Rules Changes

5. We support setting cases down for trial on the basis of Initial Disclosure. In the Employment

Relations Authority, once the claim and reply have been filed, a case management conference is convened to define and summarise the issues in a Minute. This is particularly helpful for cases where the parties may not be legally represented or have been unable to clearly and succinctly plead their claim. A hearing date is allocated at this conference, with timetabled directions for filing briefs of evidence. This early intervention helps parties the most when it narrows the issues so they can focus their evidence on the important matters. A similar procedure may suit many District Court civil cases.

6. We are less sure about the merits of iterative hearings. It may create delays and repeated hearings, without the advantages that a single firm date has for focusing parties on preparation and settlement.

Disputes Tribunal Reforms

7. We comment below on raising the jurisdictional limit, introducing appeal rights and changing from 'having regard to the law' to a more demanding requirement to apply the law. We suggest that the Disputes Tribunal should permit representation as of right. We do not have any views on the matters at [51].

8. We suggest that there is a strong case for raising the Disputes Tribunal jurisdictional limit to $100,000. Even with more specialist civil judges, the economics of litigation in the District Court will not drastically change. This consultation is responding to the reality that $100,000 cases are often uneconomic to litigate. There may be a case for concurrent jurisdiction between $50,000 and $100,000 with the District Court civil division. But such cases will be heard more quickly and cheaply in the Disputes Tribunal, and the only question is if fairness or complexity demands a more formal process.

9. In our view representation should be permitted as of right in the Disputes Tribunal. The present system sees many professional "repeat players", such as insurance companies, bringing claims in the Disputes Tribunal against respondents who are not familiar with the process. This leads to an inequality of arms. Given this reality, a right to representation increases the fairness of the process.

10. We envisage that people will normally choose a friend or family-member over a lawyer as their representative. Legal representatives will likely be most helpful by preparing a chronology, bundle and outline of argument for the referee to review.

11. The Tenancy Tribunal permits representation for claims over $6,000, and the Employment Relations Authority permits lawyers and other representatives in all cases. There is no good reason why the Disputes Tribunal should, uniquely, continue to exclude representatives.

12. The proposed jurisdictional limit increase may make legal submissions both proportionate

and helpful. Even now, litigants can file and use professionally-drafted submissions. Thus allowing lawyers to attend may be more of a sensible step-change than a revolution in Disputes Tribunal procedure.

13. We are not convinced the 'regard to the law' rule should change. It is unclear how often referees use this rule to depart from the law. But New Zealand has no general anti-unfair contract terms law, and simply replaces them with the broad powers of the Disputes Tribunal. The Disputes Tribunal uniquely can decide ordinary civil cases according to "the substantial merits and justice", disregard any agreement's exclusion clauses, and set-aside or vary harsh contracts. Our concern is that "giving effect to the law" may undermine the current desirable flexibility the Disputes Tribunal has to decide according "substantial merits and justice".

Disputes Tribunal Appeals

14. The current appeal framework may be appropriate for very small claims, but not for an increased jurisdiction of potentially $50,000 to $100,000. Like the rule against representation, the appeal procedure from the Disputes Tribunal should be reviewed and amended. The current ability to challenge a Disputes Tribunal decision is narrow: unfairness that prejudiced the outcome. We suggest appeal rights proportionate to the sum at stake should be introduced.

15. In our view, there should be three grounds for appealing a Disputes Tribunal decision:

    (a) For unfairness, in all cases;

    (b) For error of law, for cases above a moderate threshold (say from $10,000);

    (c) De-novo appeals, for cases above a high threshold (say $50,000 to $100,000).

16. Appeals on questions of law are appropriate given the potential precedential importance of decisions. Appellate guidance should be helpful for referees and litigants. Some Disputes Tribunal fact-patterns recur often. For example, a finding that a consumer good should last a certain length of time may impact many cases. Without relitigating the facts, the cost of appeals should be proportionate to the amount at stake and the precedential value of the cases.

17. A de-novo rehearing in the District Court for claims for between $50,000 and $100,000 would be justified, to reflect the proposed increase to the Disputes Tribunal's jurisdictional limit. Under the Employment Relations Act there is a de-novo appeal right ("challenge") from the Employment Relations Authority to the Employment Court. There is no monetary limit to the size of awards the Authority can make within its jurisdiction. Only about 20% of

Employment Relations Authority decisions are challenged. Most people want to tell their story to an impartial judge and get a reasoned answer.

Changes to High Court Rules on Evidence in Chief

18. We support these changes. Our earlier submission highlighted the costs of briefs. Moving to will-say statements, with oral evidence on contested matters of fact, is likely to save money for the vast majority of cases that settle, even if it sometimes leads to slightly longer trials. The change regarding documents is likely to shorten witness's evidence.

19. The Rules Committee may be interested in the new English Business & Property Courts Practice Note 57AC on trial witness statements.[1] It prescribes how to draft witness statements in response to similar concerns to those raised in New Zealand over briefs. This could be used as a base for guidance in eliciting and drafting evidence-in-chief through open questions within the witness's knowledge.

Initial Disclosure

20. We support a move to expanding Initial Disclosure in place of discovery. This is likely to reduce costs in many cases.

Issues Conferences

21. We support the proposal for an early Issues Conference. As we discussed above, the similar case-management conference in the ERA procedure works well. We appreciate that, unlike Authority matters, many complex High Court matters may need further interlocutory steps, which can be organised at this conference.

Requiring Permission for Expert Evidence

22. We support this change, and recommend that many cases should have a court-appointed expert. The cost, proliferation and partisanship of expert witnesses can be a burden. Parties could share the costs of a court-appointed expert until costs are resolved.

Yours sincerely,

Philip Skelton QC / Tim Wilkinson

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1 https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part-57a-business-and-property-courts/practice-direction-57ac-trial-witness-statements-in-the-business-and-property-courts