

2 July 2021

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

By email:
RulesCommittee@justice.govt.nz

Attention: Clerk to the Rules Committee

Submission: Improving access to civil justice further consultation

- 1 We are pleased to make this submission as part of the consultation being carried out by the Rules Committee into proposed changes to the Disputes Tribunal, District Court and High Court to address barriers to accessing civil justice. We support a number of the proposals made by the Committee in its consultation document.
- 2 This submissions provides some context to who we are and our interest in these reforms. We then provide a submission under the three main areas identified for consultation:
 - a. Increasing the jurisdiction of the Disputes Tribunal;
 - b. Reforming the District Court; and
 - c. Streamlining the High Court.
- 3 We support the recommendations that the Rules Committee is seeking further consultation on and the direction that the Rules Committee is taking with these changes, in particular the barriers to access to civil justice.
- 4 We provide specific comments as part of the current consultation, which are focussed on aspects that will help make the changes work in practice and to highlight practical considerations that must be addressed as part of implementing these changes.

About Reflective Construction Law

- 5 Reflective Construction Law is a boutique law firm that was established in 2018. We provide specialised construction law advice in relation to all aspects of projects, from contract negotiations to resolution of various disputes that can arise on projects.
- 6 Our approach is to reflect the client's business, project and issue in providing our services. In particular we do not consider that a formulaic approach presents value for clients, particularly where they are facing significant and complex disputes. Being a small and innovative law firm means we can take flexible approaches that truly understand clients position and the issues in dispute.



- 7 We regularly engage in the disputes process, from dispute strategies, to filing and managing claims in a range of forum, from traditional courts, to alternative dispute resolution, particularly specialised construction adjudication, and mediation.

Increasing the jurisdiction of the Disputes Tribunal

- 8 We generally agree that the jurisdiction of the Disputes Tribunal should be increased and see it is a good forum for resolving simple disputes between parties. We are aware of parties who will choose to reduce their claims to the level of the Disputes Tribunal's jurisdiction rather than pursuing the full value in the District Court. This is driven by the time and cost disadvantages of the District Court.

- 9 **Proposal: Increase the Tribunal's jurisdiction from \$30,000 to \$50,000 or higher.**

We support the value increase of the jurisdiction from \$30,000 to \$50,000, or even as high as \$75,000. We have three points to make on this proposal.

- a. First, the proposal does not outline exactly how the Disputes Tribunal will be able to allocate additional resources to ensure that this efficiency in resolving matters can be maintained. In areas such as building and construction disputes, an increase in the value of dispute is likely directly related to an additional number of items in dispute, particularly for disputes around this value.

Our concern is that additional resourcing (either in the number of referees, or through provision of specialist referees) will be required to cope with the increased complexity and volume of cases.

The proposal does not outline what resources would be affected and what provisions could be made to adjust them to meet the increased demand. For example, the increase in case numbers alone from the increased value of jurisdiction would likely result in a number of additional claims being filed, let alone when the additional complexity is considered. This will require more referees and resourcing for the Disputes Tribunal, while the Rules Committee appreciates some changes might be required to address this (such as increasing the daily fee for Referees), it is important this aspect is properly considered, including wider approaches to flexible working, or further support / 'chambers' time to ensure that additional Referees can be found and have appropriate support to complete their works.

- b. Second, the Rules Committee writes about early issue identification in the High Court as a streamlining tool. We agree with this and consider that, in light of the jurisdictional increase, this would be a useful and necessary step in the Disputes Tribunal also.

As we set out above, cases valued at \$50,000 (and above) will have more issues in greater complexity than what the Disputes Tribunal currently deals with. Further, we often see claims and responses that raise a number of issues or disputes, rather than focussing on the key underlying reasons for the dispute.

To maintain efficiency in the process, a mechanism to identify issues early in the process should be implemented. As the consultation paper acknowledges, many current matters



require multiple hearings before they can be resolved, this is likely to significantly increase if the value of disputes is increased as suggested.

If the issues and likely hearing time could be determined earlier, these prolonged delays could be avoided.

We also note that this proposal aligns with the Committee's overall objective of bringing the resources spent on a case in line with its complexity, and identifying early the most efficient way to manage a dispute.

- c. Lastly, with higher value claims, it is the more likely the parties will seek legal advice. As part of an increase in the value of the jurisdiction, the efficiency of the Disputes Tribunal could be improved by allowing parties to include short written submissions from lawyers to assist the Referee.

We consider that there should still be a limit on lawyers appearing for clients at a hearing in the Disputes Tribunal, but having written submissions can assist with our previous point to identify the disputes at issue early in a dispute process.

District Court reform

- 10 We agree with the proposals to strengthen the institutional competency of the District Court's civil jurisdiction.
- 11 **Proposal: Adopting the UK's pre-action protocols.**
- 12 We support adopting these protocols. We agree that they would go towards redressing inequality of arms in disputes by requiring steps to be taken before proceedings are filed. We specifically support the adoption of the Pre-Action Debt Protocol as seen in the UK.
- 13 This protocol aims to encourage early engagement and communication between the parties with a view to clarifying issues in dispute. It also provides parties an opportunity to engage about whether the dispute can be solved through ADR. Before proceedings can be started, the creditor is required to send a letter to the debtor outlining the amount of debt, its basis and how it can be paid.
- 14 The Committee writes about various inequalities that create barriers to justice for certain groups. Pre-action protocols like the one described prevents parties from being blindsided by the commencement of proceedings that can become long and expensive, without being given the opportunity to settle outside of court. We believe the incorporation of such protocols will not only reduce these barriers but would also reduce the amount of litigation actually being filed and reduce the animosity that occurs where parties feel outmanoeuvred.
- 15 Another useful example to consider is the requirement for Notices of Adjudication under the Construction Contracts Act 2002 to be served between 3 and 5 working days before an adjudicator can be appointed. In our experience that period facilitates useful discussion between the parties prior to the adjudication process actually commencing.
- 16 Similar pre-action protocols could also be considered in the High Court.



Streamlining the High Court

- 17 We agree with the proposed new framework for the High Court. We especially agree that proportionality must be a guiding principle in all litigation.
- 18 **Proposal: All operations carried out under the principle of proportionality**
- 19 We support adopting this proposal as a concept. However, the Rules Committee is vague as to the parameters for considering proportionality. Value, complexity and nature of the disputes are mentioned as parameters but no actual values/criteria have been suggested.
- 20 We agree that value, complexity and nature are relevant considerations, but it is a question of clearly assessing them in a transparent way for both the judiciary and legal profession. For example, it cannot be as simple as stating that a case with '\$x' value is allotted 'y' amount of hearing days.
- 21 While we agree that proportionality is desirable, it must be implemented on a case by case basis, also reflecting the individual parties' interests. We appreciate that the above suggested level of specific guidance may not be easily prepared, but it is important because it will also be used by parties and their lawyers in considering advice on the likely conduct of the proceeding before it gets to the stage of actually filing proceedings.
- 22 We also strongly support the proposal to expand the current case management framework to include an initial issues conference early in the proceeding. For the same reasons raised above, we consider this will help in determining the appropriate level of proportionality.
- 23 **Proposal: Greater emphasis placed on the documentary record to establish facts.**
- 24 We agree that this proposal will go far in reducing stress on court resources and reduce the time required for hearings. There should also be greater use of timeframes for evidence in chief and cross examination even on such a targeted approach, this can be useful to focus the parties on the key factual issues when witnesses are under examination.

Conclusion

- 25 As we said at the start, we generally support all of the proposals that have been suggested, and consider the above areas could result in further improvements.
- 26 We would be happy to provide any further information or speak to our submission in person if that was useful.

Yours faithfully,

Arie Moore

Reflective Construction Law Limited