2 July 2021

The Rules Committee
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Tēnā koutou Committee Members

FURTHER CONSULTATION BY RULES COMMITTEE ON IMPROVING ACCESS TO CIVIL JUSTICE
OUR FILE REF: 326496-52

WRMK Lawyers ("WRMK") thanks the Rules Committee ("the Committee") for its further consultation report dated 14 May 2021, and the opportunity to make submissions on its proposals.

WRMK appreciates the considerable amount of work the Committee has undertaken to address the current issues with access to justice in the civil jurisdiction.

The Committee has acknowledged that its earlier consultation paper focussed largely on the position in the High Court. WRMK considers the sector of society who will benefit most from procedural change are the individuals with modest wealth and claims falling within the District Court jurisdiction. This bracket of individuals are considerably affected by the current burdensome procedural requirements simply because of the economics involved. The Committee's proposed changes do not adequately address that sector, which we note is society's largest in number.

In light of the above, WRMK's response to the Committee's proposals are set out below.

The Disputes Tribunal ("the Tribunal")

1. The Committee has proposed an increase to the Disputes Tribunal's jurisdiction from $30,000 to $50,000.

2. We consider a jurisdictional increase from $30,000 to $50,000 will provide little practical impact, and particularly if the District Court Rules 2014 ("the DCR") procedure remains unchanged.

3. Raising the Tribunal's jurisdiction to $50,000 will result in a significant number of litigants with claims between $50,000 and $100,000 who remain unable to access justice due to the economics of bringing a claim in the District Court. The short and simplified trial processes under the DCR (discussed further below) generally come at a cost of no less than $25,000 for a legally represented litigant, and likely even more if a disengaged oppositional party is involved. As a result, there remains little point in pursuing a claim of between $50,000 and $100,000 in the District Court. The cost and inherent litigation risk is simply too great.

4. The proposed increase will also do little to assist the heavy caseload of the District Court and the issues involved with self-represented litigants in that jurisdiction.

5. WRMK supports a Tribunal jurisdiction increase to $100,000, aligning with the Motor Vehicle Disputes Tribunal, with altered procedural rules for claims over $50,000, as discussed below:

   (a) As the Committee acknowledges, an increase in the jurisdiction of the Tribunal will likely require a higher level of legal expertise required by its referees. Although it is noted that many of the Tribunal's referees are legally trained, we agree it is appropriate to require a certain threshold of experience for claims above $50,000.

   (b) An increase in the Tribunal's jurisdiction will also likely increase the workload of referees, and we consider this should be reflected in the daily fee. WRMK supports an increase in the daily fee paid to referees so as to attract referees with adequate experience.

   (c) We agree Tribunal hearings and decisions on claims over $50,000 should be conducted publicly, and giving effect to the law in all cases. As the Committee rightly acknowledges, this is consistent with principles of open justice and would improve transparency of decision making going forward.

   (d) Parties should also be able to engage legal representation for claims over $50,000. Although lawyers' involvement at the Tribunal level may have the unintended effect of claims and witness statements being overly complicated (as was noted occurred with the Employment Relations Authority) the inability to engage legal representation for a hearing may create barriers for the many individuals who struggle with oral communication, particularly in stressful and foreign environments. Barring legal representation for claims over $50,000 may, in itself, be a denial of access to justice. We consider the Tribunal should have jurisdiction to allow legal representation for claims over $50,000 based on the nature and complexity of the issues involved, which we note is similar to the threshold in the Tenancy Tribunal.[1]

   (e) In light of the above, we also support the Tribunal having a costs jurisdiction, however limited to a capped amount. This would provide litigants with certainty around costs awards and potential adverse cost consequences at the outset, and allow recovery of properly incurred expenses arising from an unsuccessful claim.

   (f) WRMK also supports graduated rights of appeal proportionate to the amount of each claim, as with the Motor Vehicle Disputes Tribunal. WRMK supports the appeal rights contained in Schedule 1, clause 16 of the Motor Vehicle Sales Act 2003 applying to claims over $50,000.

6. As recognised by the Committee, the District Court civil jurisdiction is overrun with debt collection claims, which are generally straightforward and procedural in nature, and not requiring significant judicial attention. We are concerned these claims take judicial consideration away from factually complex proceedings, resulting in delay.

7. WRMK supports the Tribunal having jurisdiction to hear undisputed debt collection claims, and issue judgment on those claims. This would not only significantly reduce the caseload

[1] Residential Tenancies Act 1986, s 93.

on the District Court, but perhaps encourage debtors and creditors to resolve payment of the debt through the Tribunal's processes, i.e. via conciliation if possible.

8. If the Tribunal were granted jurisdiction to deal with undisputed debts, we support pre-action protocols being required before judgment is issued, as suggested by the Committee. The protocols do not need to be extensive, and we suggest may be limited to strict and timely notice of the debt, service of the claim for judgment, and a clear notice advising of the consequences of non-attendance/non-payment. This would address the issues noted at paragraph 61 of the Committee's report and give referees confidence in making orders following hearings where there is no appearance by the debtor. It would also give the High Court confidence in its own proceedings in the event it is called upon for insolvency purposes.

9. WRMK supports the Tribunal being able to certify monetary judgments so that they may be directly dealt with by the High Court in the event of insolvency, but otherwise considers enforcement processes should remain within the jurisdiction of the District Court. The District Court's enforcement processes are well established. There would likely be a significant amount of training, time and expense required to establish adequate enforcement protocols in the Tribunal. To increase the Tribunal's jurisdiction and include additional enforcement roles would simply be shifting the problem from one jurisdiction to another.

10. To encourage and align public expectations of the changing Tribunal, WRMK agrees that a name change from the Disputes Tribunal to the Small Claims Court would be worthwhile, indicating a more 'judicial' approach to resolving disputes. For that reason, WRMK also supports the name change from referee to adjudicator, to reflect, from the public's perspective, that the Tribunal's role is to issue a judicial decision, which can then be enforced.

11. If the Tribunal is to be granted an increase in jurisdiction, we support additional funding to allow the Tribunal's processes to be adequately streamlined for greatest effect.

The District Court

12. WRMK supports the proposed changes, namely:

    (a) Creating the role of a Principal Civil Judge;
    (b) Improving or restoring civil registry expertise;
    (c) The appointment of Queens Counsel and senior practitioners as "Deputy Judges";

    ("the DC proposed changes").

13. The appointment of Queens Counsel and senior practitioners will likely give rise to conflict issues, particularly in the regions. However, we do not consider this insurmountable, and suggest conflict could be managed by Deputy Judges from neighbouring regions being assigned to sitting days.

14. In general, however, WRMK considers the DCR are otherwise inadequate and are not performing as the committee suggests. The Committee has sought first-hand experience about the shortened trial and summary judgment formats, which we discuss below.

15. WRMK does not support any changes to the summary judgment procedure. The procedure is well known by practitioners and the Court Registry, and is consistent between the District Court and High Court jurisdictions. In saying that, however, the procedure remains uneconomic for claims below $80,000, particularly if the defendant has limited financial ability to meet a judgment debt and defends the proceedings simply to delay judgment and/or leverage his or her position. Again, we suggest the Tribunal having jurisdiction to hear and determine claims between $50,000 and $100,000 would address this issue, reducing the expense to prima facie successful plaintiffs, and providing timely judgment.

16. We expect the short and simplified trial processes will be assisted by the DC proposed changes, although it is difficult to say to what degree. To date, these processes have not worked. By way of example, WRMK had proceedings allocated to the simplified trial process at the first case management conference. Following discovery, the causes of action against its client increased (for leverage and strategic purposes), however the quantum of the claim did not, leading to proportionality issues. A two-day simplified trial proceeded, but with obvious time constraints. Unfortunately, the civil Judge scheduled to hear the trial was then ill and an alternative Judge (specialising in criminal law) was allocated, but without the benefit of having pre-read the affidavit evidence. As a result, the trial was not concluded within two days and a further three hearing days scheduled. What was meant to be a two day simplified trial is now an expensive and drawn out five day trial, out of all proportion to the quantum of the claim. The intended savings to the parties in both time and cost have not been realised. Early judicial identification and management of the issues would have greatly assisted in narrowing the substance of the dispute, saving the parties and the Court considerable time and expense.

17. We consider District Court Judges may also be hesitant to enforce the tight time restrictions on parties for the delivery of their submissions and witness evidence in short and simplified trials, and understandably so. By the time the parties get to Court they have already been put to a significant amount of time and expense. To deny the giving of evidence/submissions because of trial format restrictions under the DCR, which are set prior to discovery and subsequent narrowing of issues based on the evidence exchanged, is a denial of justice itself.

18. Again, we expect the DC proposed changes will improve management of the District Court trial procedures, however they are not performing as envisaged. WRMK considers the lack of early judicial engagement on the issues is causative. If the current DCR procedures remain, so too will the 'maximalist' culture.

19. For that reason, WRMK supports the proposed High Court changes extending to the District Court with the disposal of the short and simplified procedures. Early judicial identification of the issues and tailored directions proportionate to the dispute would be of greater benefit to parties than the current election formats. It will also give practitioners and the judiciary consistent case management parameters and expectations in both jurisdictions.

The High Court

20. WRMK supports the changes proposed by the Committee to the HCR, including:

    (a) The introduction of proportionality as a guiding purpose;
    (b) The introduction of disclosure rules;
    (c) The initial issues conference;

(d) A presumption that interlocutory applications be dealt with on the papers.

Trial

21. We consider assigning a presumption of truth of documents contained in a common bundle is potentially problematic, for the following reasons:

    (a) An opposing party having to identify and challenge documents in order to dispute their truthfulness may erode the evidential burden on a party;

    (b) Lawyers may be accused of not complying with their solicitor/client obligations if a challenge is not made, whether purposely or by omission;

    (c) Lawyers may feel obligated to challenge large numbers of documents so as to ensure their client's interests are protected;

    (d) The challenge process may be used for tactical reasons, resulting in delay and interlocutory argument, taking the focus from resolution of the substantive issues.

    We consider this proposal may result in unintended cost to parties, disproportionate to the benefit intended. We propose instead that documents referred to in affidavit evidence (referred to below) be given the presumption of truth (subject to challenge).

22. WRMK agrees with the Committee that there remains benefit in viva voce evidence, however supports evidence at trial initially being given by way of affidavit, with additional viva voce evidence on areas of significance, followed by cross-examination and re-examination. We note this is the process used in the District Court simplified trial format, and consider it should be the default procedure in both the District Court and High Court. We also agree that Judges should strictly monitor the content of affidavit evidence for disguised submissions, however reiterate our comments at paragraph 21 above in relation to admissible documents.

23. As noted above, we suggest any changes to the HCR are mirrored in the DCR.

Again, thank you for the opportunity to provide further feedback on the proposed changes. Please do not hesitate to contact the writer should you wish to discuss.

Yours faithfully
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