CHRISTOPHER
LLB (Well), MA (Hons) (Massey), LLM (Cantab) GRIGGS
BARRISTER

2 July 2021

Clerk to the Rules Committee
C/- Auckland High Court
AUCKLAND

By e-mail: RulesCommittee@justice.govt.nz

Dear Sir or Madam,

Improving Access to Civil Justice

I thank the Rules Committee for the opportunity to comment on its corrected consultation paper, *Improving Access to Civil Justice* and for the informative webinar led by Cooke J under the auspices of the New Zealand Bar Association. I agree with the sentiment that this is the most important piece of law reform in the civil jurisdiction in a generation.

There is little doubt that civil justice is too expensive and slow in New Zealand, to the point that it inhibits access to civil justice. The purpose of the Committee's proposals is to reduce these barriers, and that is laudable. However, I submit that we must be careful in our assessment of what is a financially significant dispute for ordinary New Zealanders that we do not demonstrate a lack of awareness of the disparity between the wealth and incomes of many of us in the law, as compared to the wealth and incomes of the vast majority of our compatriots. We must ask ourselves whether it is appropriate to reduce standards of due process and rigour in disputes which, from the perspective of an ordinary New Zealander, may be truly momentous, even on an objective view. That does not of course mean that we should not strive for more efficient and streamlined processes, where that can be done without sacrificing justice.

In short, I submit that increasing the jurisdiction of the Disputes Tribunal is inappropriate. However, I support reform of the District Court to improve its structural ability to deal with civil claims. I submit that the process of civil justice would be substantially more effective if the courts introduced and implemented a proper online case management portal.

Disputes Tribunal

The nature and jurisdiction of the Disputes Tribunal is well-known to the Committee, so I will not traverse that here.

The disadvantage with the Disputes Tribunal is that it does not have to apply the law. While that may be appropriate for small claims, New Zealanders have a right to expect that the law will be properly applied when the value of the dispute is significant. While the determination of what constitutes a significant dispute has a degree of subjectivity, it is easy to forget that $30,000 is a significant amount of money for most New Zealanders. In my submission that strongly suggests that increasing the monetary jurisdiction of the Disputes Tribunal to $50,000 is inappropriate. This proposal has an undertone of "abandoning" civil justice in the District Court because it is too slow and expensive, rather than dealing with the root causes of that perception.

One of the features of the Disputes Tribunal which is worthy of consideration in a broader range of civil disputes is the inquisitorial model. However, as I submit below, that model should be imported into the District Court for use where civil disputes are to be determined which exceed the current jurisdiction of the Disputes Tribunal, rather than having those disputes resolved in the Tribunal.

I do not agree that it would be appropriate to re-name the Disputes Tribunal the "Small Claims Court" or the "Community Court". Simply put, a court must be presided over by a Judge. Under article 10 of the United Nations *Basic Principles on the Independence of the Judiciary*, "persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law".[1] It is open to the Governor-General to appoint a person as a referee under section 7(2)(a) of the Disputes Tribunal Act 1988 who is not qualified in law. I do not think New Zealanders should be misled as to the nature of the Tribunal by any attempt to make it appear something which it is not.

District Court

It has been recognised that the civil jurisdiction of the District Court is not working well and that practitioners lack confidence in the District Court as a civil court. I agree that it is important to bolster the role of this court in the overall civil justice system.

I agree that the proposal to appoint a Principal Civil Judge is logical and appropriate. There is force in the argument that Judges should be allocated to civil matters from a designated civil panel to foster the concentration of judicial expertise in this area. Now that the District Court is one court, that could and should be done at a supra-regional level. Under the current model, civil disputes are dwarfed by the criminal case load of most District Court Judges, with the inevitable and unfortunate outcome that expertise in judging civil disputes may dissipate over time, assuming that the Judge had that expertise to begin with. That is no criticism of the calibre of the District Court bench; simply a reflection of the current flawed structure.

I agree that the appointment of part-time Deputy Judges or Recorders may be a valuable way to boost the availability of civil expertise on the District Court bench. However, the structure of such a system would need to be managed very carefully to preserve judicial independence, presuming that the part-time Judges will continue in practice at the bar. I submit that a panel of such Judges could be created for designated regions and that the part-time Judges would then be precluded from appearing in any matter arising in that region, but not elsewhere.

The consultation paper alludes to the benefits of adopting a more inquisitorial approach to civil justice. I agree with that and submit that the Committee should look at introducing an inquisitorial model for civil disputes in the District Court. I suggest that the Committee look at

[1] Adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

the models provided by major civil law jurisdictions, such as Germany, which manage their civil disputes in a much more timely and cost-effective manner than we do in New Zealand. Having worked with lawyers in Germany on transnational disputes, I have not observed a diminution in the quality of their justice and at times have found it difficult to defend the overly adversarial and procedurally complex process we follow here.

High Court

I agree with the proposal for issues conferences, along the lines of "judicial triage". This reform would improve efficiency by identifying which avenue a particular case should go down from the outset. I also support the proposal to dispose of interlocutories on the papers. However, this highlights the need for the High Court to adopt a proper document management portal that is intuitive and accessible by all key stakeholders.

An online portal should be introduced where any Judge, plaintiff or defendant can enter, see the case and relevant documents, submit documents, record decisions and the like. Such systems are now available in a number of comparable jurisdictions, which suggests that an "off-the-shelf" solution may be available. For example, all but three of the 120 circuit courts in the Commonwealth of Virginia use such a system.[2]

This approach is by no means limited to the United States. For example, last year the Kenyan court system adopted a virtual court and paperless court case management system.[3] This system allows electronic filing of documents, payment, receipting and request for extraction of orders.[4] Law firms, organisations, self-represented parties and the State can register to use the portal.[5] The intended aim of the reform was to use technology to assist efficient electronic filing and service of documents.[6] Observers note that time, resources and costs are spared with this system.[7] It also makes it easier for judicial officers to access court files.[8] So long as the appropriate regulatory framework is put in place to ensure it can function appropriately, the Kenyan experience suggests that such a system will be a great tool for improving efficiency and access to justice.[9]

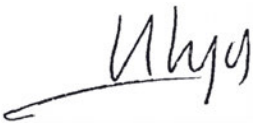
In my submission, it cannot be the case that in 2021 such a system similar to the ones adopted in Kenya and Virginia cannot be developed and implemented in New Zealand. However, it would need to be properly funded by the Ministry of Justice. The guiding principles for the design of a civil justice system of ensuring that Judges have sufficient time to deliver quality decisions, proportionality and accessibility[10] would not only be upheld but would be advanced by an online system, in turn improving equal access to justice.

---

[2] Prince William Virginia "Court Case Information" <https://www.pwcva.gov/department/circuit-court/court-case-information />.
[3] Juma Gilbert "Embracing electronic court case management systems: Lessons from the Kenyan experience during COVID-19" (2020) 5 Africa Connected 1 at 26.
[4] At 26.
[5] At 26.
[6] At 27.
[7] At 27
[8] At 27.
[9] At 28.
[10] Corrected consultation paper at [37].

Overall, I support the Committee's initiative to reform New Zealand's civil justice system and hope that the foregoing submissions will be of assistance in designing those reforms.

Yours sincerely,



Christopher Griggs
Barrister