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Clerk to the Rules Committee
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Improving Access to Civil Justice – submission

In response to the invitation of the Committee (14 May 2021) to make a submission, I set out some personal views, and facts from my experience working in the law since 1960 (as a law office clerk), 1967 (in the public service as a legal officer), 1970-1991 (in a law firm), and 1991—2020 (barrister and QC). This period is a third of the post-treaty legal history of Aotearoa New Zealand.

Acknowledgement:

The work of the committee is very important and I acknowledge the extensive work which has been done, the detailed proposals that have been developed, the consultation and engagement undertaken, and the improvements now proposed. Nothing in this submission is presented as a criticism – I hope it may be of assistance.

The consultation document identifies that the extent of changes found to be needed may require action beyond the powers to the Committee. I have therefore looked at what I see as desirable, without regard to the scope of the Committee's powers.

Analysis, and response to the current world:

Our court system and the rules which apply in each Court has grown as a series of successive reforms of a model originally drawn from England. This process has, in the case of the Rules, almost entirely been undertaken by those in the system.

I am not aware of any time at which expert external process engineering has been applied to analyse the most just and cost-effective way of structuring our Courts.

Despite the objective being justice, the main analytical tool has been the monetary value of the matter in dispute. Treating legal disputes as being about money is not an effective or just modern approach.

Likewise, the win/lose; pass/fail; binary analysis ingrained in the system is in my view an historic element which needs to be changed.

The core issue in assessing any dispute is complexity. Very simple matters (unpaid debts for example) need very simple processes. Complex matters need the consideration of the best available judicial brains and processes.

Establishing jurisdictional limitations between Dispute Tribunals (DTs), District Courts (DCs) and the High Court (HCs) should be based on complexity, and the core rights of the parties; not on an assumed money value.

Obviously, some litigants will opt for the wrong tribunal/Court. Where lawyers are involved, they can reasonable be expected to make those decisions responsibly; and can fairly be penalised if they do not. Some level of tribunal/Court scrutiny may be needed for all claims, at least initially.

Access to law:

The current system is broken. To give some details:

- Civil legal aid (introduced in the 1970s) is now disconnected from both litigants and the profession. I undertook legal aid cases from the outset, until (after two major cases 20 years ago) my hourly rate was cut from $165 (GST inclusive) per hour to $158 (GST inclusive) per hour. I preferred to do cases for nothing, since the net income to me was at best about $40 per hour before tax. In my last two cases, the Crown recovered more in costs awards given to my aided clients than it paid me! In my legal career, no client has ever been unable to have their case dealt with by me because they cannot pay.

- There is no sign that I can see that the Crown has any intention of acting to fix the system. Costs of litigation have been driven up by more and more expensive process costs. Clients lose more and more of their time (unpaid) in pursuing their cases. Repeated conferences and adjournments stretch out time periods. Few qualify for legal aid. In the 1970s in both the (then) Magistrates Court and Supreme Court, my clients could pay nominal court fees, attend once for a hearing – usually within a few months – and get a decision. Not now.

- Now clients with good claims are frightened off proceeding or continuing because (a) they cannot fund the court fees (b) they fear an adverse award of costs that they cannot pay (c) they cannot fund the new technology imposed by Court Rules to meet pre-trial and trial commitments. The justice of their claims is defeated by the current system. As examples:

    - A mythology has grown up about risk exposure to ruinous costs. I have twice recently encountered persons (not clients) who were about to

abandon meritorious claims because the solicitor on the other side had told them they faced a massive costs award on losing. In both cases no costs award was possible under the relevant law even if they lost.

- As a related example, beneficiaries in an estate I acted for – three daughters grossly unjustly treated by the trustees – were told by the trustees that if they lost a court application for review of the trustees, they would have to pay the costs of the trustees. In fact, they were entitled to have their own costs met, and I applied for a pre-hearing confirmation of that, which the Court would not provide. They then abandoned their claim.

- One consequence has been attempts to move particular types of disputes (e.g., weathertight home claims) into their own separate systems. This vote of no confidence in the court system was then followed by failure of the new systems.

- In the 1970s we had generalist lawyers acting for clients, and widely experienced generalist magistrates and judges deciding cases. Now we have highly specialised lawyers (usually on the "powerful" side of the case), but still generalist judges. Statute law has less "black and white" and much more complex. Case law is often the key to winning, but often not adequately known by lawyers let alone lay people.

Disputes Tribunal:

I do not share the view of the Committee that these tribunals "reliably achieve justice".

My experience of being asked by baffled lay people to assist them with this process (which I undertake *pro bono*) is that some Tribunal referees are competent and even impressively so; but there are too many cases which miscarry. I attach a short summary of what is admittedly an extreme case; I have assisted others with serious problems with a DT.

If it is intended to upgrade their scope and powers, those who sit in them should be brought within the judicial conduct requirements and be open to complaint.

The stated total of cases (13,000) is frankly very small against the areas of law in which one would expect the DTs to be involved (even allowing for the specialist roles of the ERA, the Tenancy Tribunal, the Motor Vehicle Disputes Tribunal, etc). It is rate that I encounter anyone aware of them.

In my own case, I recently took a claim in the DT against a telco after failing to stop it deducting monies unlawfully from my bank account, and the assurances of their Asian-based call centre that it would be stopped and fixed then proved untrue. A call from their New Zealand-based "Disputes Tribunal team" then fixed it – for me.

With private hearings and no obvious system for "follow up", I do not see this system as having an effective impact on commercial behaviours.

High Court claims:

In 1989 the Victoria University Law Review ((1989) 19 VUWLR), in an issue edited by (now) Hon Chris Finlayson QC, examined options for enhancing litigation processes.

One article by Ms Belinda Cheney on "micro trials" considered a process by which complex civil litigation might be put through an initial evaluation, with the high likelihood of simplification (at least) and in some cases resolution. A similar approach in the construction industry ("Early Neutral Evaluation") has (in my view) much wider potential. Some comparison may also be made with the Authority stage in employment law cases in New Zealand.

Apart from it being of general utility, I believe from my years in defamation practice that a requirement for immediate conferences would be a substantial improvement.

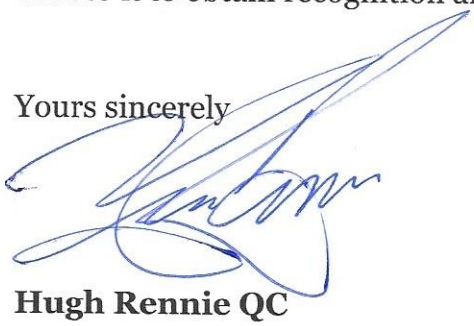
This may look like judicial settlement conferences; but that is a judicial-level intervention intended to achieve a settlement outcome. It may also resemble case management procedures, but that has become an arcane system of its own directed to planning a trial, not encouraging resolution.

Conclusion:

This letter offers some comments but is far from a comprehensive overview of our current system. There is value in what the Committee proposes, and I believe that these proposals are capable for further enhancement.

But I believe that those steps would be an interim measure and that there needs to be an entirely new look at what is needed for the decades ahead. That includes bringing into the New Zealand court system the insights which are now being found in Maori custom and law, and a better understanding of what really is "justice" for those who turn to it to obtain recognition and resolution of their claims.

Yours sincerely



Hugh Rennie QC

One couple's experience of the Disputes Tribunal

This is a brief summary of a matter which had more complex events, but is sufficient for the present purpose of illustrating a seriously deficient DT process for which there is no remedy. The events took place 2019-2020.

The husband and wife were engaged in building work and property ownership.

A DT claim took place before Referee "A". The events in that hearing and the outcome led them to complain against the referee.

Court staff confirmed to them that the complaint had been referred to the referee, but nothing happened.

Some time later, a customer of theirs made a claim against them and their company.

On attending the DT hearing, they found that they faced the same referee. They objected on the grounds that they had a legitimate complaint which had been notified and considered there was a conflict. The referee claimed not to know of it.

The husband advised that they knew this to be untrue, and they would be leaving the hearing. His wife delayed briefly and found that she was, on direction of the referee, prevented from leaving by security staff; while the husband (now outside) was prevented from entering. The wife became distressed,

The husband telephoned me for advice. After a while the referee agreed to the wife being allowed to leave; and then continued the hearing with the claimants only present. It later became known that the referee had identified that their claim lacked essential evidence, told them how to obtain it, and made other suggestions for actions adverse to the couple.

Having found that referees are not subject to the Judicial Complaints Commissioner, and in accordance with online information about DTs, I wrote to the Ministry to complain. After a lengthy delay, the Ministry responded to say there could not be a complaint and in addition stating that there had not been a false imprisonment of the wife.

The claimants returned to the Tribunal with the written evidence suggested by the referee, who awarded them the full sum claimed in the absence of the couple. Bailiff action to enforce the award then followed.

The couple instructed a local lawyer who obtained the transcript of the hearing, which confirmed the facts as above (including the false imprisonment). Application was made to the District Court to set aside the award on the grounds that the referee should not have continued to sit and decide the case. This was granted. However, the claimants were not required to refund the monies.

The case began again in the DT with a different referee. Meanwhile it had been found that the supporting evidence used by the claimants was from either one or two persons who falsely claimed to be licensed building practitioners. The couple participated and the referee this time did not require repayment of the award but did require the return of the joinery in dispute (which the claimants swore in evidence they had removed and stored in their garage).

The couple moved to Australia before the reserved decision was issued. Their subcontractor and his assistant arranged to uplift the joinery, but was refused access. He saw and stated in writing that he had seen the joinery still in place and in use at the claimant's house.

The claimants then said the joinery was able to be uplifted. It was then obtained by the subcontractor in a disassembled (and partly damaged) state and uplifted.

The couple applied for a rehearing on the basis of the evidence of the subcontractor tendered in writing that the evidence of the claimants to the referee had been false. The rehearing application was refused.

The couple have given up seeking justice.