Hi,

I set out below the points that I wish to make in respect of the paper date 14 May 2021.

1. The Disputes Tribunal jurisdiction amount should be lifted to $100k. The process and rights of appeal should stay the same though. Widening the rights of appeal would be the worst of all worlds. Effectively it would mean another District Court. It works reasonably well as it is and would fill a gap, as it is very difficult to economically litigate a claim for under $100k. The same name should be kept for the Tribunal. Any change would only confuse the public and would likely not achieve anything.

2. The District Court needs some serious money put into its civil system. It is terrible in Auckland. It takes weeks or even months for anything to happen, particularly after Steve McHugh passed away.

3. If the proposed reforms of the District Court are really going to have any chance of working, then the same Judge should be assigned to a proceeding at the outset for reasons set out below at 4.

4. Consideration should be given to the appointment of a High Court Judge to a proceeding from its filing. That Judge would be responsible for all interlocutory matters and would hear the matter. That would reduce the time and expense of any interlocutory applications. It would also ensure a more efficiently conducted hearing.

5. Discovery is a problem. I think that the discovery regime proposed at [69] of the paper could well work. The cost would still be high as a party would be required to do a trawl to ensure that any adverse documents are disclosed. That would, though, mean that the party with the most documents has to meet this cost. Presently, parties that have a lot of documents tend not to do a relevance check and just disclose anything open to the other side. That means the other side has to incur the expense of reviewing documents for relevance. Imposing the bulk of the cost on the party with the most documents is probably fair.

6. I think that affidavit evidence in a HC trial is an excellent idea. Briefs of evidence and reading them are one of the main reasons that trials take so long now. I had a case last year in front of van Bohemen J under Part 18 of the Rules. Evidence was by affidavit. I conferred with my counterpart and we agreed that the affidavits would not be read and the Judge was happy with that. A trial that we estimated would take 3 days took one and a half days. And that was with opening subs by both parties as well as closing subs. Having will say statements with oral evidence and documents then put in evidence would still take a lot of time. And it could surprise at trial. At least with affidavits the evidence and documents are known before the trial. This would also facilitate settlement. The only other alternative would be to have briefs of evidence taken as read.

7. I also favour cost sanctions against counsel for affidavits that breach the rules. I recently received one from my opponent for a hearing in October and the amount of submission, speculation, opinion and hearsay set a new low in my experience. Personal costs orders (published in Law Talk) would soon have solicitors and counsel ensuring that affidavits comply with the Rules.

8. The “proportionality” idea, with respect, seems a bit woolly to me. What is proportional to one Judge might not be proportional to another. Perhaps setting it in a framework of

different types of trial modes might make the concept more intelligible? The one good thing to come out of those awful DC rules in 2009 was different trial modes. I think having the same Judge assigned to a proceeding from the outset would result in a streamlining of the matter. If this was done, together with the in depth first conference proposed, then issues should be refined. It is horses for courses though. Building disputes are notorious for new issues emerging through the course of a proceeding. At least having the same Judge assigned would ensure that issues are dealt with as they arise as swiftly as possible.

Kind regards,
Michael

Michael Lenihan
Barrister