

SETTING THE BAR – A NEW DISPUTE RESOLUTION OPTION THAT PROVIDES ACCESS TO JUSTICE

1.0 INTRODUCTION

1.1 “It is for the profession to play its part, a critical part, in meeting the challenge to provide access to justice for all, in our society. To do this, the profession will have to innovate. It will have to be prepared to initiate and engage in debate about these issues and to question, and if necessary, change its current way of doing business.”

1.2 The above excerpt is taken from the address by Winkelmann J in her Ethel Benjamin address in 2014 entitled “Access to Justice – who needs lawyers?”.

2.0 PROBLEMS WITH OUR CIVIL JUSTICE SYSTEM

2.1 In 1996, Lord Woolf, then Master of the Rolls in UK, delivered his report on access to justice. The report was entitled “Access to Justice – Final Report”.

2.2 The report was based around those issues which impacted the civil justice system in the United Kingdom. The Woolf report (as it came to be known) identified 6 key limitations on access to justice in relation to the civil justice system. These were:

- (a) Expense in bringing claims.
- (b) Delay.
- (c) Inequality between the haves and have nots.
- (d) Uncertainty surrounding costs and the length of time for litigation.
- (e) Fragmentation and lack of clarity in administration of the civil justice system.
- (f) Adversarial nature of the system and the perceptions that the court did not enforce its own rules.

2.3 What has followed have been attempts by both UK and New Zealand to reform the civil justice system. These procedures, in New Zealand, have proved to be ineffective.

2.4 In 2015 the UK established the Bach Commission on Access to Justice. This commission produced its final report in September 2017. The report concluded that the system was in crisis.

2.5 The same concerns are being echoed in New Zealand. Setting the Bar was developed in recognition of the difficulties in our civil justice system.

3.0 SETTING THE BAR – WHO WE ARE

3.1 We, David O'Neill and Melanie O'Neill, are husband and wife barristers, working out of chambers, together, in Hamilton. In addition to our barristerial practices, David has been an arbitrator for 20 years and Melanie has been a mediator for 15 years. We are both very active in the alternative dispute resolution area, David in AMINZ and Melanie in Resolution Institute.

3.2 We wanted to develop a product that saw us combining our skills. We felt that litigants with disputes that fell outside the monetary limit of the Disputes Tribunal up to about \$100,000, experience difficulties in obtaining access to justice. The reality for these litigants is that our current justice system is too expensive to engage counsel, too slow to achieve a result and too complex to enable them to adequately represent themselves.

3.3 Setting the Bar is the result. We launched in August 2018 under the website www.settingthebar.co.nz.

4.0 SETTING THE BAR PROCESS – HOW IT WORKS

4.1 The Setting the Bar process is designed to be, online, simple, easy to understand and user-friendly. The claimant fills out their claim online and uploads documents they consider assist their claim. They provide names of witnesses and then submit their claim to Setting the Bar.

4.2 The website automatically delivers the completed form, copies of documents and list of witnesses to the party on the other side and to Setting the Bar.

4.3 The respondent replies and undertakes a similar process, namely setting out their response, uploading documents and the names of witnesses.

- 4.4 A date is then set where the parties and us, as mediator and arbitrator, are available for a day. Mediation with Melanie, over a 4 hour period, is compulsory. The parties choose to mediate face to face, via AVL links or a combination of both. If the parties cannot achieve a mediated solution, they move to a half day arbitration with David. As with mediation, the parties can choose to arbitrate face to face, via AVL links or a combination of both. An inquisitorial style arbitration is adopted by David and he makes a decision, which is final, within 2 weeks.
- 4.5 We undertake not to speak to each other about the mediation and/or arbitration until the decision is released. Each party pays a set fee of \$5000 plus GST for the process. Lawyers or representatives may assist the parties to prepare their case but are not permitted into the mediation and/or arbitration.
- 4.6 The Setting the Bar website has a series of frequently asked questions designed to assist each party to fully understand and prepare for the process.
- 4.7 The Setting the Bar process, we believe, provides access to justice for parties in a cost-effective, time efficient manner and gives the parties finality.

5.0 USE OF AVL LINKS

- 5.1 The online process is crucial in our opinion. Digital technology is increasingly our reality. The alternative dispute resolution area is beginning to recognise this. One only has to look at eBay which claims to have the largest amount of disputes worldwide, resolved online.
- 5.2 We also recognise that people may be reticent to utilise the face to face process. They can feel intimidated, shy, embarrassed or simply not in a good place. Having the ability to resolve their dispute via the internet is a choice we believe people should have if they would like it.

6.0 USE OF SCHOLARSHIP IF AWARDED

- 6.1 If we are awarded the scholarship, we would use it to research the means to develop and improve the online functionality of Setting the Bar. We want to travel to Singapore to observe the online systems that have recently been adopted in

Singapore's State Courts through its Community Justice and Tribunals system. We would meet with the people that administer and run these E-Services and observe how they work. Our travel would be timed to also include us attending relevant courses in Singapore at the Singapore Mediation Centre which is recognised as a training expert in the field of negotiation, mediation and conflict management and/or the Singapore Institute of Arbitrators. Both run a series of courses each year.

- 6.2 The scholarship money would be used to assist with airfares, accommodation and payment of course fees.
- 6.3 Our hope is that, as a result of this research, we could develop and improve the online functionality of Setting the Bar to enable it to become a truly NZ wide realistic option for parties in the alternative dispute resolution area.