Unbundling Litigation Services in New Zealand: Where to next?

University of Otago Legal Issues Centre*

1. Unbundling

'Unbundled legal services' and 'unbundling' are terms that can be used to describe the practice of providing a limited set of legal services in a litigation matter, accompanied by the expectation that the client will proceed on behalf of themselves on all other aspects of the matter.[1] The concept of unbundling can refer to a broader range of legal work, but we use it in this paper only in the sense that it refers to litigation/advocacy-related matters.

A. The relevance of unbundling to New Zealand's legal landscape

It is now well-established that there is a 'justice gap' in New Zealand.[2] Particularly relevant to considering the need for unbundling is the fact that the threshold at which individuals qualify for legal aid is low. There are many people who neither qualify for legal aid, nor who can afford private representation at the average lawyers' rates. In some regions, there is a lack of free or low-cost legal providers. Small businesses cannot access legal aid.[3]

One way in which individuals can attempt to bridge the justice gap is by litigating in person. While by no means all litigants in person lack the required competence to manage their proceedings, their active involvement can lead to delays and to intervention and assistance being required from court staff and the judiciary. The University of Otago Legal Issues Centre (UOLIC) is investigating initiatives which assist litigants to understand court procedure and which can help them obtain affordable advice and representation. Unbundled legal services are such an initiative.

Two fora in New Zealand where a type of unbundling is already commonly happening are the Family Court and the Disputes Tribunal. In the Family Court, parties are required to conduct some aspects of their cases themselves, including appearing in person in some hearings, but can seek

---

* Written by Allie Cunninghame and Dr Bridgette Toy-Cronin.

[1] Molly Jennings and James Greiner "Evolution of Unbundling in Litigation Matters: Three Case Studies and a Literature Review" (2011) 89 Denver University Law Review 825.

[2] Kayla Stewart and Bridgette Toy-Cronin *The New Zealand Legal Services Mapping Project: Finding Free and Low-Cost Legal Services Pilot Report* (University of Otago Legal Issues Centre, 2018); New Zealand Bar Association Working Group on Access to Justice *Access to Justice: Ahei ki te Ture* (New Zealand Bar Association, 2018); Helen Winkelmann "Access to Justice – Who Needs Lawyers?" (2014) 13(2) Otago Law Review 229.

[3] At present, of course, companies must be represented by lawyers in the higher courts unless leave is granted. We wonder whether increased unbundling would encourage the court to grant leave to a company to be represented by its director at stages of the proceeding.

advice as well as assistance with drafting documents. In the Disputes Tribunal, claimants are not permitted to be represented by lawyers, but they are able to avail themselves of legal oversight and assistance prior to the hearing. This practice is also occurring in the senior courts on occasion, particularly in circumstances where after previously being represented, a litigant continues with litigation in person for matters of cost.[4]

B. Degrees of unbundling

Litigation services can be unbundled in different ways. We envisage the term incorporating all of the following arrangements:

1. The litigant represents themselves in court and engages a lawyer for strategic advice or to assist in the preparation of documents; or
2. The litigant and the lawyer divide the tasks of litigation (possibly including some elements of the proceeding in court) between themselves; or
3. The lawyer is solicitor on record but the litigant conducts some elements of the work themselves, which could include preparing some documents and/or attending some appearances.

In the first scenario, the lawyer would not be on the record in terms of High Court Rule 5.38 but neither would the litigant be truly self-represented.[5]

C. Who are the stakeholders?

In addition to litigants and lawyers, we consider the following stakeholders to be relevant to the promotion of unbundling:

1. The judiciary;
2. The Rules Committee;
3. Ministry of Justice staff, some of whom spend significant time assisting litigants in person with their files;

[4] Bridgette Toy-Cronin "Just an hour of your time? Providing limited (unbundled) assistance to litigants in person" (24 March 2016) 884 LawTalk 20; Bridgette Toy-Cronin "Keeping Up Appearances: Accessing New Zealand's Civil Courts as a Litigant in Person" (PhD Thesis University of Otago, 2015). Assistance includes negotiation, drafting a pleading or letters (ghost writing), legal research, or (more rarely) appearing in court where the litigant has otherwise prepared the proceedings themselves.

[5] The High Court Rules do not provide for litigants in person except for the reference in 5.41(2)(b), which provides for the situation where a solicitor withdraws and the party acts in person henceforth.

4. The professional indemnity insurance industry. As we discuss below, concern about liability has been a factor in lawyers resisting offering unbundled services.

We are aware of a number of legal tech start-ups that are working on what they consider to be unbundling initiatives. We do not consider these to be stakeholders for our purposes. Some of these use the term unbundling in a much wider sense than we do, covering all types of lawyer-client relationship where tasks might be divided between the parties e.g. development of commercial contracts. Most of the start-ups are developing practice management software or document generators. While these may be useful to clients and lawyers and may reduce cost and create efficiencies, we are not yet aware of any initiatives which will have direct relevance to unbundling in the sense we use it in this paper.

2. Benefits & Barriers

A. What are the benefits of unbundling?

Unbundling allows litigants to rely on the skill and expertise of lawyers where it is necessary and also to manage some elements of their cases themselves. This reduces cost to the litigant, while ensuring that they do receive a degree of advice and assistance.

How well litigants in person manage proceedings depends a complex range of factors including their own skills, the opposing party, the type of case, and the forum. In some cases, the factors coalesce to create a situation where the litigant in person needs increased resources and time from the court and other parties. Legal assistance to the litigant in person would alleviate this as it provides the litigant in person with a resource for information, advice, drafting, and support rather than seeking this help from the court or opposing party.

In our report *The Wheels of Justice: Understanding the Pace of Civil High Court Cases*, it was observed that one factor in delays can be when litigants run out of funds, especially close to fixtures.[6] For some litigants, the risk of this problem can be reduced if they can agree at the outset to do some of the legal work themselves, saving their money to pay for the areas where they are most in need of advice or representation from their lawyer. As explained in a LawTalk article:[7]

[6] Bridgette Toy-Cronin and others *The Wheels of Justice: Understanding the Pace of Civil High Court Cases* (University of Otago Legal Issues Centre, 2017).
[7] Toy-Cronin, above n 4.

> Discrete task assistance is not, of course, suitable for all litigants or all cases. … There are [however] LiPs who have limited funds and the ability to carry out some steps independently, who would probably benefit from unbundled assistance. Many of the LiPs in my study had funds to be spend on their case but had exhausted them early in the proceeding on negotiating with the other party or preparing for court, but they had no money remaining to bring their case to a conclusion. Marshalling the resources they did have more strategically, by using discrete task assistance at important moments in their case, may have had considerable benefits for them, the opposing party and the court. The LiP would have access to legal assistance even though they cannot afford full representation, and engagement of a lawyer at strategic points might assist in the "just, speedy and efficient" disposition of cases, a benefit to both litigants and the court. This would require lawyers making a strategic plan with a litigant at the beginning of the case, identifying the amount in the litigant's "war chest" and then discussing how this can be used to greatest effect.

The *Wheels* report also identified the unavailability of lawyers as a factor for some delays.[8] The provision of unbundled services where lawyers are not required to attend court for all scheduled sittings may alleviate this issue. While we anticipate that most unbundled cases will require lawyers to be present at trials, many litigants have the ability to appear at case management conferences. Some longer multi-party trials and some interlocutories and cost applications can allow certain parties to take passive roles. If litigants are permitted to attend and take notes on days where their lawyer's input is not necessary, the risk of delay caused by lawyers' schedule clashes can be minimised.

B. What are the barriers to unbundling and how can they be overcome?

A number of factors have limited the uptake of unbundling to date. The extent to which these factors discourage unbundling may vary depending on the degree of lawyer involvement in a file.

1. Prejudice against litigants in person

When we look at the first type of unbundled retainer we have identified – where an individual self-represents with legal assistance provided in the 'background' – the traditional prejudices against litigants in person may result in this option being discouraged. Providing assistance to litigants in person to enable more effective self-representation may be perceived as encouraging litigation in person. If there are widely available resources then there is a fear more people will self-represent, undermining the legal services market and putting a burden on the court.

Answer:

This argument ignores the fact that we are in a situation of legal market failure where there are a large number of people who cannot afford full service representation or access free assistance.

[8] Toy-Cronin and others, above n 6.

Maintaining the status quo of providing either full representation or no representation is not working; self-representation is increasing.

It is very rare that litigants would prefer to go to court without a lawyer; it is likely only to be in cases where money is an issue that unbundling will explored. Rather than losing work to 'do it yourself' clients, we consider that it is more likely that lawyers will find an increase in work, as litigants who currently choose to self-represent will instruct a lawyer for the technical aspects of their case. This view is shared by the NZLS in its practice briefing.[9]

2. Liability concerns

Lawyers have traditionally been hesitant to cede control of files out of a concern about complaints should a client act in a way that is averse to the outcome of their case, but then seek to hold the lawyer liable. This concern was considered by the United Kingdom Court of Appeal in *Minkin v Lesley Landsberg*[10] which was about a divorce settlement where the client had negotiated a settlement and had asked her lawyer to submit a draft consent order which was approved. The client subsequently regretted the terms of the settlement and brought a claim for professional negligence against her lawyer. The Court of Appeal agreed that the terms of the retainer were "strictly limited" to preparing the draft agreement, and that the lawyer was not instructed to advise on the merits of the agreement. Giving the Court's judgment, Lord Justice Jackson recognised that "there are many situations in which the client cannot afford to pay for all of the relevant research and advice that the solicitor would be competent to provide. In those situations, the choice may be between a limited retainer or no retainer at all. He considered the relevant principles relating to retainers, which include:

> A solicitor's contractual duty is to carry out the tasks which the client has instructed and the solicitor has agreed to undertake
>
> …
>
> The solicitor and client may, by agreement, limit the duties which would otherwise form part of the solicitor's retainer. As a matter of good practice the solicitor should confirm such agreement in writing. If the solicitor does not do so, the court may not accept that any such restriction was agreed.

[9] New Zealand Law Society "Practice Briefing: Guidance to Lawyers Considering Acting Under a Limited Retainer" (December 2017) <www.lawsociety.org.nz> at 3-4.
[10] [2015] EWCA Civ 1152.

Minkin and two Australian cases - *Robert Bax and Associates v Cavenham Pty Ltd*[11] and *Trust Co of Australia v Perpeutal Trustees WA Ltd*[12] - are addressed by the NZLS in its 2017 practice briefing.[13] The briefing offers guidance to lawyers considering acting under a limited retainer. The practice briefing also refers to the rules of conduct for lawyers in British Columbia, one rule of which relates to limited retainers and states: "the lawyer should ensure that the client is fully informed of the nature of the arrangement and clearly understands the scope and limitation of the services".

Answer:

This is a matter of ensuring lawyers have a clear understanding of how to draft retainers for unbundled services. This understanding can be developed thought lawyer education and sample documents.

Some professional indemnity insurers may be interested in being involved with initiatives which will encourage all lawyers, not just those acting on unbundled litigation files, to draft clearer terms of engagement. The involvement of the insurance industry might also allay concerns about providing unbundled services.

3. Representation and Ceasing to act

Another barrier to unbundling in New Zealand may be the rigid rules around being the solicitor on the record and the absence of any reference to retaining a lawyer for a limited purpose. The right to litigate in person is expressly protected in s 27 of the Lawyers and Conveyancers Act 2006. The Rules otherwise contemplate a solicitor acting on behalf of a party for a whole matter. Rules 5.36-5.43 are concerned with solicitors' authority to act, and the procedure when they cease to do so. The common practice currently is that the lawyer will act until the client runs out of funds. The lawyer then files a notice of ceasing to act but may later be reinstructed by the client if they come into more funds, an occurrence that is often confusing to the court and opposing party.

The court can however benefit from intervention of a lawyer, particularly at important moments. For example, it would be ideal from the courts' perspective to have a lawyer appear to argue an interlocutory application, even though the litigant's limited funds means they have managed the

[11] [2013] 1 Qd R 476 [490].
[12] [1997] 42 NSWLR 237 [247].
[13] New Zealand Law Society "Practice Briefing: Guidance to Lawyers Considering Acting Under a Limited Retainer" (December 2017) <www.lawsociety.org.nz>.

rest of the file themselves and will continue to do so afterwards. Similarly, a lawyer's assistance is particularly valuable for witness examination and settlement discussions.

Answer:

While the Rules were drafted with traditional full brief retainers in mind, they could be amended to explicitly encompass the situation where a lawyer is acting on a limited retainer and to provide some flexibility around being lawyer on the record. An example is the Saskatchewan Queen's Bench Rules introduced in 2013, which includes a rule regarding retaining a lawyer for limited purposes.[14] Other amendments could include provision for intituling stating whether: a) a lawyer is acting; b) the litigant is self-represented; or c) the litigant is being assisted on a limited retainer. There could also be provision made in case management rules for the conferences to consider:

1. Who is responsible for appearing at particular court hearings or teleconferences.
2. Who is responsible for filing and serving key documents and ensuring deadlines are met.
3. Whether there are any elements of the case where legal advice or representation is preferred, for example considering issues of privilege on discovery; conducting cross-examination; or advising on settlement.

There will always be situations where a lawyer ceases to act for a client because the relationship has broken down or where there is no longer certainty of payment. In these situations, the lawyers will be able to advise the Court that they are withdrawing, in the same way that they have always done. A lawyer who withdraws fully from a retainer should have no concerns about ongoing involvement if they have followed the Rules in terms of giving notice. In circumstances where it is appropriate for a lawyer to withdraw, they will need to be confident that neither the Court nor the other party will pressure them to continue on a limited retainer so as to minimise delays.

4. Ghost writing and certifying pleadings

In his 2016 address to AMINZ, Justice Kós considered a system whereby all litigants in person are required to have their initial pleadings certified by a lawyer.[15] He considered this to be an innovation which would assist litigants in person, the other party, and the Court, in elucidating the

[14] Saskatchewan Queen's Bench Rule 2-39 states that the lawyer retained for a limited purpose must file a copy of the retainer (other than the fees and disbursements) so the court is aware of the limits of the retainer.
[15] Justice Kos "Civil Justice: Haves, Have-nots and What to Do About Them" (Paper presented at the Arbitrators' & Mediators' Institute of New Zealand and International Academy of Mediators Conference, Queenstown, March 2016).

cause of action, and "setting the direction of the case and the issues to be tried or determined". There may be merit in this approach, although we are concerned about the implications for litigants who cannot afford to pay for this assistance but who do not have access to free assistance. There is, however, significant merit in the commencing pleadings either being prepared and filed by the lawyer, or the lawyer confirming that they have had some oversight over the drafting. This could be a task performed by a lawyer acting on an unbundled retainer where the litigant was otherwise self-represented. Normalising unbundled assistance for this purpose and putting rules around the practice could be helpful.

Answer:

Rules can be developed that set out the procedure for certifying pleadings and/or acknowledging involvement in assisting preparation of pleadings and other documents. Jurisidictions have taken various approaches to this issue and a decision can be taken about which model would best suit New Zealand.[16]

5. Costs

Unbundling does have implications for the court's calculations of costs. There is inconsistency in the case law as to whether these fees are recoverable. In *Reekie v Attorney General*[17] Wylie J allowed "the sum of $1,000 on account of counsel's fee for the preparation and filing of the original statement of claim" where Mr Reekie was otherwise unrepresented. This seemed to be an exercise of the Court's general discretion to award costs.[18] Similarly, in *Re Working Capital Solutions Holdings Ltd, ex parte Pezaro*[19] Associate Judge Osborne awarded costs on a 2B basis and then reduced the amount to that of the billed costs by a lawyer who assisted the successful LiP. In contrast, the High Court disallowed costs in *Sax v Simpson & Anor*, finding that a litigant who had spent funds on representation for some of his case was not entitled to recover costs because he was a litigant in person.[20] Justice Duffy found that:

> … there can be no half way house form of representation where counsel simply remains in the background giving advice on legal argument and even preparing it. This may occur in fact, but when it does I do not consider it qualifies as a form of legal representation that can form the basis of a costs award.

---

[16] For an outline of various approaches see Barbra Bailey "Unbundled Legal Services" Law Society of Saskatchewan, 22 October 2013 pp 14-15.

[17] *Reekie v Attorney General* [2012] NZHC 2786.

[18] It may have been the awarding of disbursements although note r 14.12(1)(c) says that disbursements do not include counsel's fee.

[19] *Re Working Capital Solutions Holdings Ltd, ex parte Pezaro* [2014] NZHC 2480.

[20] *Sax v Simpson & Anor* [2017] NZHC 1128.

Justice Duffy allowed the possibility of recovering these costs in an "exceptional case" "where the assistance is on a difficult area of law and it has largely contributed to the successful outcome of a lay litigant's case".[21] The uncertainty in the case law about whether costs are recoverable may act as a disincentive for providing unbundled legal services.

Answer:

In *McGuire v Secretary for Justice*[22] the Supreme Court suggested that the issue of litigant in person access to costs should be reviewed by the Rules Committee. It is important that a discussion on costs for unbundled assistance be folded into this Rules Committee review of the availability of costs for successful unrepresented parties. The UOLIC is in favour of all parties, regardless of representation, being awarded costs if successful. However, if only represented parties are to continue being allowed to recover costs, then provision needs to be made for recovery of legally assisted steps. This will support unbundled assistance become an accepted and economically viable practice.

3. Making Progress

We raised the issue of unbundling and the need for Rule changes with the Rules Committee in 2017. The Rules Committee's response was that we should seek the view of the NZLS. We have held informal discussions with the President of the NZLS and the Chief High Court Judge who have both expressed support in principal. We held a formal meeting with the NZLS on 22 November 2018[23] and raised the issue.

As discussed at the November meeting, to progress this matter we ask that NZLS considers responding to the Rules Committee, asking for it to investigate rule changes to support unbundling. We do not propose that we should make any specific recommendations to the Rules Committee at this point, but rather provide some indication or general guidance on what kind of rule changes might support unbundling. Some changes could be a substantially different practice (e.g. changes to the rules regarding the solicitor on the record), whereas as others may simply formalise a process that already exists and have the function of signalling that such practices are

[21] At [11].
[22] *McGuire v Secretary for Justice* [2018] NZSC 116.
[23] Ismail/Jones/Adlam/Toy-Cronin/Cunninghame.

supported by the judiciary and NZLS.[24] The Rules Committee could be invited to consider the following additions or amendments to the High Court Rules 2016:

1. Rules 5.38-5.41 regarding becoming a solicitor on the record;
2. Rules regarding intituling of documents and the memorandum at the end of the first document, directing how to record that a document has been ghost written e.g. "Prepared with the assistance of [lawyer name] in accordance with a limited scope retainer";
3. Rules with regards to Justice Kós's suggestion that pleadings should be certified;
4. Clarification on the availability of costs for unbundled assistance, a discussion that needs to be folded into reconsideration of the Rules as the result of *McGuire*.

In addition to preparing a response to the Rules Committee, we consider there are other steps NZLS could take to encourage unbundling:

1. The NZLS considers whether changes need to be made to the Client Care Rules to support unbundling;[25]
2. The NZLS and UOLIC hold discussions about strategies for increasing support for unbundling and how these strategies could be implemented;
3. Contact any other parties who are identified in these discussions as needing to be drawn into the development of a strategy.

The UOLIC would welcome the opportunity to support the NZLS in its exploration of unbundling legal services in New Zealand. We are happy to answer any questions or provide any further information you might need.

[24] For example, in British Columbia there has been an amendment to the Law Society's Code of Professional Conduct, introducing a provision on limited scope retainers. See Law Society of British Columbia's Code of Professional Conduct 3.1-2; and 3.2-1.1. While such a change is not strictly necessary in New Zealand, these types of changes can signal to the profession that the practice is acknowledged and supported as legitimate.

[25] In other jurisdictions, rules that have been changed have been equivalents to rule 10.2 (communicating with the clients of another lawyer), rule 5.4 (conflicting interests), and clarification re the meaning of "competence" in rule 3 where a limited retainer is involved e.g. it being acceptable to rely on the client's narration of the facts.