NEW ZEALAND LAW SOCIETY
NZLS EST 1869

Law Society Building, 26 Waring Taylor Street, Wellington,
DX SP20202, Wellington or PO Box 5041, Lambton Quay,
Wellington 6145, New Zealand

TEL +64 4 472 7837 • FAX +64 4 473 7909
E inquiries@lawsociety.org.nz
www.lawsociety.org.nz • my.lawsociety.org.nz

12 February 2016

Ms Harriet Bush
Clerk to the Rules Committee
Auckland High Court
PO BOX 60
Auckland 1010

Email: harriet.bush@courts.govt.nz

Dear Harriet

Striking out statements of claim before service

The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Rules Committee's paper *Consultation on Striking out Statements of Claim before Service* (consultation paper).

The Law Society appreciates the difficulties (for judges and defendants) that can be presented by statements of claim of the type described in the consultation paper, but is concerned about the potential adverse effects of the proposed amendments, and the potential implications for access to justice. In particular, the Law Society is concerned that the proposal may:

- impose a responsibility on registrars which they are not equipped to carry out;
- deny plaintiffs the opportunity to be heard and result in potentially meritorious claims being struck out; and
- create greater difficulties at the appellate level than it resolves at first instance.

The first concern is that the powers proposed to be conferred on registrars are too wide. The registrar would be empowered by proposed r 5.35A(1) to make an initial assessment of the merits of the claim, namely that it falls within 1 or more of the grounds for striking out a pleading set out in r 15.1(1). Rule 15.1(1) provides that:

> The court may strike out all or part of a pleading if it –
>
> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
>
> (b) is likely to cause prejudice or delay; or
>
> (c) is frivolous or vexatious; or
>
> (d) is otherwise an abuse of the process of the court.

Whether a pleading meets these criteria is a matter of legal judgment, the initial assessment of which should not rest with a registrar.

The Law Society also has concerns regarding the lack of opportunity to present a case, and does not consider that there is a good reason to exclude the operation of r 7.43(3). It is an extreme step to deny a claimant the opportunity to be heard at all in these circumstances.

There is a real risk that a potentially meritorious but novel or inelegantly expressed statement of claim may be rejected as a result of the proposed rule change, thus unfairly denying a prospective claimant access to justice. There could also be irreversible consequences where limitation periods apply. A litigant whose claim had been struck out (without any opportunity to be heard) might not be able to recommence proceedings within the limitation period, and the court might be unaware of such consequences.

Thirdly, it is unclear how the proposed appeal procedure would operate in practice. Although (under the current rules) there would be a right of appeal to the Court of Appeal, any appeal in these circumstances would represent a departure from New Zealand's adversarial court system. The Court of Appeal would have no reasoned decision from the High Court nor any submissions from the defendant. In cases in which the plaintiff/appellant was self-represented, the Court of Appeal would have no assistance from counsel at all. In these circumstances it is likely the Court would have to attempt to identify and articulate the basis for any arguable claim that the plaintiff may have, to the potential disadvantage of the prospective defendant. It is also not clear what the consequences of a successful appeal would be for any subsequent strike-out application by the defendant – if the Court of Appeal had already determined (in the absence of the defendant) that the plaintiff had an arguable claim, it is difficult to see how a defendant could then successfully argue that the claim should be struck out.

If this proposed rule is aimed at vexatious litigants and is motivated by a perception that the current procedure for managing such litigants is inadequate, the appropriate course would be a review of that procedure, rather than introducing a separate procedure which lacks the same level of safeguards for those whose rights are affected.

If a rule to address "one-off" examples of pleadings that are vexatious or an abuse of process is considered necessary, despite the concerns expressed above, the Law Society recommends that the registrar's role be narrowed to consideration only of statements of claim that the registrar considers to be frivolous, vexatious or an abuse of process (i.e., that appear to meet the criteria in r 15.1(c) or (d) only). Further, any decision to deny the right to serve a statement of claim should only be made after the claimant has been afforded the opportunity to be heard by the judge dealing with the claim.

Many of the claimants who could be affected by the proposed rule change are likely to be self-represented. It would seem that the problem the proposed rule change is attempting to address is part of a wider issue of the practical difficulties faced by the courts as a result of the rise in self-represented litigants. This issue is a major concern that requires a systemic approach, rather than a piecemeal one.

If you wish to discuss this further, please contact the convenor of the Law Society's Civil Litigation and Tribunals Committee, Andrew Beck, via the committee secretary Jo Holland (jo.holland@lawsociety.org.nz / 04 463 2967).

Yours sincerely

Chris Moore
President