NEW ZEALAND LAW SOCIETY
NZLS EST 1869

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28 July 2016

Rules Committee
Auckland High Court
PO BOX 60
Auckland 1010

Attention: Ms Harriet Bush, Clerk to the Committee

Email: harriet.bush@courts.govt.nz

Striking out statements of claim before service

Thank you for your letter of 1 July 2016 and email of 25 July 2016, confirming the Rules Committee's decision:

- to proceed with High Court rules to allow statements of claim that Registry staff consider to be "plainly frivolous, vexatious, or an abuse of the process of the court" to be referred to a judge for possible strike-out before service;
- to extend the rules to originating applications; and
- to include identical rules in the District Court Rules.

The New Zealand Law Society appreciates the opportunity to comment on these proposals.

General comments

The Law Society welcomes the proposal to remove the reference to rule 15.1 from proposed rule 5.35A. We appreciate the clarification that the rules are not intended to include pleadings to which rule 15.1(1)(a) and (b) apply (i.e., those that disclose no reasonably arguable cause of action, defence or case appropriate to the nature of the pleading, or are likely to cause prejudice or delay).

However, the Law Society remains of the view that the proposed rules 5.35A to 5.35C should not be introduced, for the reasons set out in our letter of 12 February 2016 (attached). The Law Society considers that the issue of vexatious litigants should be dealt with as part of a wider review of the current procedure, rather than by introducing a separate procedure which lacks the same level of safeguards for those whose rights are affected. The concerns expressed in our letter of 12 February about the proposed appeal process also do not appear to have been addressed.

The objective of protecting defendants from vexatious litigation is appreciated, but the Law Society questions whether new rules are necessary to deal with the small number of applications (an estimated 10 to 12 per year) the Rules Committee anticipates.

The Law Society considers that the proposed rules conflict with the fundamental rights enshrined in section 27(1) of the New Zealand Bill of Rights Act 1990. The Law Society is firmly opposed to the

proposed rules. As already noted, the Law Society considers that practical difficulties faced by the courts as a result of the rise in self-represented litigants require a systemic rather than piecemeal approach.

District Court Rules

The Law Society has even stronger reservations about the introduction of identical rules in the District Court Rules.

There are additional difficulties surrounding District Court processes. There are more self-represented litigants at the District Court level, and a greater likelihood of claims being poorly and emotively drafted, which may lead to the (potentially erroneous) conclusion that a claim meets the criteria in the proposed rule.

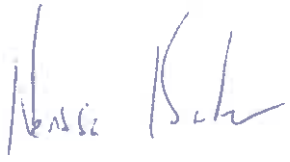
The assessment of claims is likely to be undertaken in the first instance by the Central Processing Unit (CPU). The Law Society has previously expressed its concerns about the way in which documents are handled by the CPU. Many of those concerns remain.

The delays currently experienced in the issuing of documents by the CPU are likely to increase with the requirement for an additional assessment of claims under proposed rule 5.35A. The Law Society also believes that the CPU is not equipped to deal with assessments – even preliminary assessments – of the type that would be required under the proposed rule. There is a risk that rule 5.35A may be applied in a way that is inconsistent with access to justice.

Conclusion

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 faithfully,



Nerissa Barber
Vice President

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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