



17 February 2012

Caroline Anderson  
Clerk to the Rules Committee  
Auckland High Court  
PO Box 60  
**Auckland 1010**

By email: [caroline.anderson@justice.govt.nz](mailto:caroline.anderson@justice.govt.nz)

Dear Caroline

### **Proposed revision of default judgment and formal proof rules**

The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Rules Committee's consultation paper *Proposed revision of default judgment and formal proof rules*. The Law Society understands that the Rules Committee seeks to modernise the default judgment procedure, but is concerned that the proposed amendments would result in additional expense and the removal of certain rights.

The current rules operate on the basis that a defendant who does not file a statement of defence is presumed to have no opposition to the entry of judgment. The reasoning behind the proposed rules erodes this presumption, and imposes on the court the role of protector of the defendant. That is a significant shift in the theory behind the default procedures. The Law Society does not consider that a basis has been advanced to justify this change in stance. While there may be a need to improve the statement of procedures in the rules, it does not seem necessary to go any further than this.

#### *Definition of "liquidated demand"*

The proposed new rules contain a definition of liquidated demand which appears to have drawn from the case law, particularly *Paterson v Wellington Free Kindergarten Assn Inc* [1966] NZLR 975 (CA). The proposed definition is, however, narrower than that in *Wing v Leeder* [1961] NZLR 30, where it was held to include something that is settled, in the sense that it is not, on the pleadings, open to any real dispute or doubt. It is not clear to the Law Society whether this is a deliberate narrowing of the concept and, if so, why that should be seen as necessary.

#### *Condensing of rules*

The current High Court Rules process provides for separate rules relating to:

- liquidated sums (default judgment not exceeding sum sought in statement of claim);
- recovery of land (default judgment for possession);
- recovery of chattels (default judgment for possession, or for the value of the chattels (including the ability to apply to have the proceeding tried to assess that value));
- unliquidated demand in money (proceeding must be tried to assess damages); and
- other proceedings (which would include injunctions, declarations and specific performance (default judgment given by court for relief to which plaintiff is entitled)).

The proposed rules condense these into two rules:

- liquidated demands; and
- other claims.

Applications for default judgment in respect of liquidated demands would be dealt with in much the same way as under the current rules, and there does not appear to be any need for change.

In theory, combining the other types of default judgment into "other claims" does simplify the process. However, the proposed conflation has imposed additional requirements in the case of judgment for delivery of land and chattels. The current rules 15.8 and 15.9 do not require a formal proof hearing before the entry of judgment. This is presumably because there is no need for such proof where the claim has not been denied and there is no dispute as to the identity of the items in question.

Although there is little authority on these rules, the need for a formal proof hearing in such cases has not been demonstrated. Nor is it clear what such a hearing would entail. It seems as if the Rules Committee is envisaging what would amount to briefs of evidence followed by a "mini-trial" in order to satisfy the Court that judgment should be granted. That derogates substantially from the current position where a defendant is required to state its position or suffer the consequences. The Law Society considers that claims of this type ought to be treated in the same way as those for liquidated demands.

### *Formal proof hearing*

The current rules require a formal proof hearing only where the amount to be awarded has to be determined by the Court. The current rules also provide for a hearing where relief is claimed of a type that requires the Court to exercise some judgment. In such cases, it is clear that judgment cannot be granted without the involvement of the Court, and that a hearing of some type will be necessary.

Where the only question to be resolved is one of quantum, the Court must be satisfied that there is a basis for the amount claimed. It is not in any way a trial as to liability. The Law Society considers that it is unduly onerous to require the plaintiff to have witnesses attend a formal proof hearing in circumstances where the defendant is in default.

Where a particular remedy is claimed, the Court may have to exercise a discretion, and in such cases may well need to hear from counsel. Once again, however, the need to have witnesses attend as a matter of course is not obvious.

If an interlocutory application without notice can be dealt with on the basis of the papers and submissions from counsel, the Law Society considers that a routine default judgment situation should be dealt with similarly. If, on rare occasions, a Judge requires to hear from a witness the matter could be adjourned to allow for this. This would seem preferable to the alternative of requiring all deponents to attend on the off chance they might be needed. The additional costs of arranging for such a mini-trial where the matter is undisputed do not appear to be justified.

The high cost of litigation has been the subject of much criticism. The proposed amendments to the default judgment procedures will undoubtedly result in additional cost which seems unjustified. The Law Society is unaware of any dissatisfaction with the current procedures, and would be loath to see a further layer of costs imposed for no good reason. The Law Society considers that the default position should be that judgment be granted on the papers unless the Court requires otherwise. Where some hearing is needed, then there would need to be appropriate provision in the schedule of costs to allow for the additional time required.

*Evidence by defendants*

The current rules allow for the defendant in a formal proof hearing to file affidavit evidence in mitigation as of right and other evidence with leave. This appears to have been omitted in the proposed new rules. It would seem sensible to include a similar provision. There does not appear to be any justification for removing such rights altogether.

The Law Society hopes that the above comments are of assistance to the Rules Committee. If you wish to discuss any matters raised in this letter please contact the Civil Litigation and Tribunals Committee convenor, Andrew Beck, through the Civil Litigation and Tribunals Committee secretary, Rhyn Visser (phone (04) 463 2962 or email [rhyn.visser@lawsociety.org.nz](mailto:rhyn.visser@lawsociety.org.nz)).

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jonathan Temm', written in a cursive style.

Jonathan Temm  
**President**