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30 June 2011

Hon Justice Chambers
Court of Appeal
PO Box 1606
Wellington 6140

Dear Judge

Possible reforms

Thank you for your letter of 16 June seeking the views of the Society and the New Zealand Bar Association on possible reforms to civil procedure in the Court of Appeal.

Your letter was referred to the Society's Civil Litigation and Tribunals Committee. I can now advise that the Society supports the reforms. The Society makes the following comments:

Reform 1
The Society agrees that it would be sensible to reduce the time period in r 43(1) to three months. We are of the view, however, that two months would be too short a period.

Reform 2
The Society supports this proposal, although there is some concern that there may still be a need to prioritise interlocutory appeals. It would seem appropriate to have input from the respondent (and any other parties) as well as the appellant, although this should not be determinative. In the end, there may be sound reasons for not having a swift track appeal and the parties should be able to put these before the court.

There should also be a process for allowing a respondent to apply for a swift track appeal. Where there is concern that an appellant may be delaying processes by appeal, the Court might consider that it is proper to require the matter to be dealt with on this basis.

We appreciate the opportunity to comment on the reforms, and hope the above comments are helpful. If you wish to discuss the matter further, Andrew Beck, convenor of the Civil Litigation and Tribunals Committee, can be contacted through the committee secretary Rhyn Visser (ph (04) 472 7837 or email rhyn.visser@lawsociety.org.nz).

Yours sincerely

Jonathan Temm
President

Cc: Ms Miriam Dean CNZM QC, New Zealand Bar Association

COURT OF APPEAL OF NEW ZEALAND

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16 June 2011

Ms Miriam Dean CNZM QC
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Mr Jonathan Temm
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Dear Miriam and Jonathan

Re: Possible reforms

Miriam, you wrote to the President on 23 May. One of the matters you raised in that letter was whether there might be merit "in some sort of special track for interlocutory matters to enable them to be dealt with more quickly so that cases are not held up pending long delays in the hearing of interlocutory matters and the issue of subsequent judgments". Your letter was timely as the judges already have under consideration two possible reforms to our civil procedures. I am writing to you both now, on behalf of the judges, to gauge your reaction to the reforms we have in mind.

Reform 1

Currently, under r 43 of the Court of Appeal (Civil) Rules 2005, appellants are given six months in which to apply for the allocation of a hearing date and file the case on appeal. The first of those steps takes no time at all, of course. Preparing the case on appeal can take longer, although it would be a rare case where the case on appeal takes longer than a day. In that regard, you will note that the standard time allocation for preparation of a case on appeal is one day: see Schedule 2, item 10.

What we find, however, is that many appellants – or rather their lawyers – leave this task to the fifth or sixth month after filing. We suspect the task gets put off because it can be a rather laborious chore and, because of the leisurely time scale, other work always seems more important. Leaving the task to the fifth or sixth month, however, means that the time between the High Court judgment under appeal and a fixture in this court can often be a year or even longer.

What we are considering is reducing the time period in r 43(1) to two months or three months. We would still have the three month grace period provided by r 43(3). If we made this reform, I think we would probably cut, on average, about three months off the period between High Court judgment and Court of Appeal fixture.

We do not think a period shorter than two months is desirable. Sometimes appellants are still sorting out legal aid. There can be disputes about security for costs and the like. Also, we realise that lawyers do have other clients and there has to be a reasonable period in which to carry out this task (even if it is usually a one day task we are talking about). We certainly don't think, however, that more than three months should be allocated, particularly given the extra grace period which would continue to apply.

We would be grateful to know what your organisations think of this idea. If you support it, do you have a preference for two months or three months?

Reform 2

The other reform we have in mind does not require any rule change. We are contemplating offering a fast track for civil appeals expected to take one day or less. We envisage that appellants could apply to have their appeals go on a fast track. If an appellant asked to go on a fast track, the appellant would have to undertake:

(a) To apply for a fixture and to prepare the case on appeal within 20 working days of filing the notice of appeal;

(b) To file and serve his or her submissions within 20 working days of filing the case.

The Court would retain a discretion as to whether to accept a fast track application. Such a discretion is necessary because of possible resourcing difficulties within the Court. If the case were accepted onto the fast track, however, then the Court would undertake to offer a fixture date within, say, two months of a fixture being applied for and the case on appeal filed.

Under this proposal, an appellant with wings on its feet could potentially have its appeal heard within three months of the High Court judgment. This would obviously be particularly useful for appeals from interlocutory decisions – not that we get that many of them.

We would be interested in your thoughts on this idea. Do you support it in principle? Can you think of improvements? To what extent should respondents have a say in whether appeals go on the fast track?

We look forward to learning your views.

Yours sincerely