



11 May 2010

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By email: Sophie.Klinger@justice.govt.nz

Dear Sophie

Proposals for the reform of the law regarding the duty of parties to civil litigation to comply with the High Court Rules and the duty of lawyers to assist

Thank you for the opportunity to comment on the Rules Committee's consultation paper. The Society's Civil Litigation and Tribunals Committee has considered the consultation paper and has assisted me in the development of the following comments.

General comment

The proposed changes do not appear to effect a radical departure from the current practice in the High Court. There is therefore a question as to whether the proposed reform is necessary or desirable.

I appreciate that there may be some value in including a rule of this nature for educative purposes. The Society, however, is concerned about expressly linking the rule to the costs regime. This is likely to cause more problems than it solves. (This is addressed in more detail below). There should be no amendment to the costs rules.

The Society is also concerned that the proposed regime appears to be premised on the assumption that delays in litigation are the result of the conduct of litigants. This may be so in some cases, but there is a much larger problem surrounding the effective management of litigation by the Courts, particularly in Auckland. Until this systemic problem is addressed, there is unlikely to be any major improvement in the situation. That is more urgent than introducing the suggested regime.

Relevance of costs

The Society has reservations about the proposition in paragraph 28 "that a new rule be inserted in the High Court Rules to empower the court to order a party's lawyer who has breached the new express duty on lawyers to pay costs".

In particular:

- There is an existing costs provision enabling the court to grant increased or indemnity costs to deal with frivolous and vexatious cases and interlocutory applications and the like under High Court rule 14;
- The High Court has an existing jurisdiction to make an award of costs against a solicitor personally in appropriate cases (see para 27 of the consultation paper);
- There is a risk that these proposed changes could simply become another tool in the tactical arsenal of the litigator;
- The proposed changes could also lead to increased costs and delays if each side spends time threatening the other with application under the new rule;
- The proposed rule may increase the “personalising” of disputes between counsel instead of their clients;
- There is also a risk that this could simply become a tool for clients seeking to avoid paying counsel, or who wish to use this to attack a lawyer with whom they are unhappy. See for example, *Graham v Meares Williams* (High Court, Christchurch, Justice French, 16 November 2009, CIV 2009-409-001619);
- Such a rule could heighten the tension between the solicitor on record and the counsel appearing (particularly if the counsel appearing is an employee of the solicitor) as to the conduct of the case. If findings are made against counsel and costs are awarded, who pays? Would this place employed solicitors in a position where they may have to refuse to accept an instruction from a supervising partner to run an argument, cause of action or take a step in the proceeding which might breach this rule or risk the consequences of reputational and financial sanctions imposed by the court?
- The court already has power to and does, level criticism at counsel in its judgments (see *Vector Gas Ltd v Bay of Plenty Energy Limited* [2010] NZSC 5). This is a powerful tool, which is not to be dismissed lightly. Refer also to the judgment in *Victoria Key Limited v Kevin Bastin* (HC Tauranga, AJ Doogue 13 October 2009). It has jurisdiction to award costs against solicitors personally in appropriate cases. Does it need additional powers, or is it simply a matter of using the existing powers/jurisdiction more forcefully?
- The imposition of this obligation goes well beyond the current recognised duty of lawyers to the Court and has the potential to raise conflict with the obligations of lawyers to act in the best interests of their clients. Without clear and compelling policy reasons for doing so, this fundamental obligation should not be compromised.

With reference to the specific questions raised in paragraph 31 of the consultation paper:

(a) Should the rule permit a lawyer, advised of the possibility of a costs order against him/her personally, to file an affidavit?

An issue that will clearly present an area of difficulty concerns an application for costs against a lawyer for non-compliance under rule 14.24.

The rules do not appear to contemplate that an application for costs will necessarily always be made against a party and their lawyer jointly. There appears to be scope for an application for costs to be

pursued against the lawyer only. Consideration needs to be given to whether there should be an express provision allowing the lawyer to ensure that the party is included in any such application.

A lawyer who wishes to resist such an application will need to take formal steps to do so. Resisting such an application will involve an assertion that the lawyer has discharged his/her duty and it is the party who ought to be subject to any award of cost.

In appropriate cases this may require the lawyer to file affidavit evidence. This presents some difficulties with regard to privilege. It seems that the issues that will fall for consideration under a costs application against a lawyer will involve the nature of advice and assistance given to the party in discharge of the lawyer's obligation under r 1.2A(2). That advice will almost certainly be subject to privilege. In those circumstances the lawyer's affidavit evidence will be limited to a certification by the lawyer that s/he has discharged their obligation under the rule unless the party agrees to waive privilege.

Where a party refuses to waive privilege, caution is required as a lawyer is otherwise limited on the basis set out above. Consideration could be given to a provision in the nature of a rebuttable evidential presumption i.e. where an application is made against a lawyer and the lawyer files an affidavit deposing on oath to compliance with the rules, a presumption arises that the lawyer has discharged his/her obligations. With the incidence of costs falling back on the party, it would then be incumbent on the party to resist the costs application.

Practically speaking, a party who wishes to resist costs on the basis that they have not been properly advised under r 1.2A(2) will have to file appropriate evidence of their own; one expects that this must involve a waiver of privilege in respect of the issues the subject of the application.

The exception to the operation of the rebuttable presumption could be in those cases where the practitioner's conduct is obviously and objectively in breach of the rule.

Where a costs application is made before determination of a proceeding (for example on an interlocutory matter), a lawyer who opposes the application on the basis that s/he has discharged his duty may find themselves in a conflict situation with their client, particularly where the lawyer resists an application on the basis that the party has not followed advice. This may have significant consequences both for the party and the conduct of the litigation. Such a conflict may require the lawyer to withdraw in order to defend his or her position on the issue of costs.

(b) Should the court be permitted to act only in obvious cases which would not engage issues of privilege? If so, how should such a limitation be formally expressed?

See comments above.

(c) Should criteria for any such order be specified?

Given the nature of a costs application and the myriad of considerations for the Court, it is not seen as desirable that there be an attempt to set criteria for the granting of costs. However, if a rule is considered appropriate, the exceptional nature of any award should be emphasised.

(d) Should the lawyer's own client be entitled to ask the court to act?

In the event of a costs application against a party, if a party wishes to assert that their lawyer is responsible for costs as opposed to the client, there appears no reason why this cannot be addressed within the existing framework of a costs application against the party. To that extent, the alleged failings of the lawyer can be addressed in the context of the ordinary costs application without the ability of the party to initiate such a consideration.

It is not considered appropriate that a client should be able to invite an award of costs in their favour against their own lawyer (if that is what is suggested). The lawyer/client relationship is regulated by statute and the duties imposed on lawyers flow from the contract of retainer and general law. Issues relating to loss are more appropriately left to be dealt with through either RCCC complaints or a claim against the lawyer. For example, lawyers have professional obligations under rule 13 of the LCA (Lawyers: Conduct and Client Care) Rules 2008 as officers of the court and to use processes for a proper purpose (rule 2.3).

(e) When a party instructs a solicitor who engages counsel, does the distinction between solicitor and counsel raise any complications?

It is consistent with the conduct of litigation in accordance with the objectives of the rules that all involved in the conduct of the litigation assume responsibility for the discharge of the duty. Where an instructing solicitor has a substantive and active role in the conduct of the litigation there appears no reason why both counsel and the instructing solicitor should not have responsibility under the rules.

In the context of a costs application, the Court is able to apportion such responsibility where a breach is found to have occurred. Rule 14.24 creates a causative link between the lawyer's breach and the costs awarded in respect of that breach. This comment is subject to the issue of privilege discussed earlier.

(f) In the definition of "lawyer" (see r 1.2A(3)), is the inclusion of partners and employees inappropriate or potentially unjust?

The comments above are relevant to this consideration.

Assuming employees/partners are substantively involved in the litigation, if the duty is to be imposed, there seems no reason why they should not bear the duty prescribed. Rule 1.2A(3) may require amendment to clarify that the extended definition applies only to partners and employees actively involved in the conduct of the litigation.

The Society hopes that the above comments are of assistance. If you wish to discuss this submission further please contact me through the committee secretary, Rhyn Visser phone (04) 463 2962 or email 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