



25 October 2011

Hon Justice Chambers
Court of Appeal
PO Box 1606
Wellington 6140

Dear Judge

Proposed amendments to Court of Appeal (Civil) Rules 2005

Thank you for your letter of 30 September 2011 seeking the views of the New Zealand Law Society and the New Zealand Bar Association on possible reforms to civil procedure in the Court of Appeal. Your letter was referred to the Law Society's Civil Litigation and Tribunals Committee.

The Law Society makes the following comments:

Rule 43

The Law Society agrees with the proposal in general. However, the following points are raised for consideration:

The Law Society considers that the proposed rule should state that the grounds upon which the discretion is exercised are whether there are genuine and legitimate reasons for the extension of time. This should not present too difficult a hurdle for applicants who are committed to the appeal and appropriately addresses the nature of the issue to be determined.

Given that the application will sometimes be opposed, it would be useful to impose a short time limit for the filing and service of a notice of opposition to the application so that the application can be considered expeditiously by the Court.

While it would be ideal if a decision on an extension of time could be made by a single judge, there is a question as to whether this is permissible in light of s 61A of the Judicature Act. Should an extension of time be refused, that could be regarded as determining the appeal. Making a decision on the papers is likely to be a key aspect of an effective system, because it is the need for an oral hearing that frequently delays applications of this type.

Rule 41- Style Guide

The Law Society supports the proposal that authorities should be cited in accordance with the current edition of the New Zealand Law Style Guide. It would, however, not favour an approach that could result in rejection of documents for non-compliance.

Rule 41- Page limit for written submissions

The Law Society believes that the current 30 page limit should be retained. A 20 page limit would be inadequate to cover all the issues that have to be addressed in more complex appeals. NZLS seminars on appeals have made it clear that it is the quality and not the quantity of the submission that will prevail. If the page limit were to be reduced to 20, the Court is likely to be inundated with

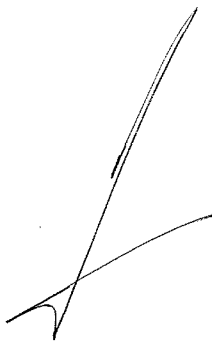
applications to exceed that limit (thereby unnecessarily increasing the Court's 'administrative' workload). In addition, uniformity with the Supreme Court on this matter would be desirable.

Electronic filing

The Law Society supports the electronic filing proposal.

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

A handwritten signature in black ink, consisting of a large, stylized 'A' followed by a horizontal line and a small flourish at the end.

Andrew Gilchrist
Vice President

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



COURT OF APPEAL OF NEW ZEALAND

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30 September 2011

Ms Miriam Dean CNZM QC
President
New Zealand Bar Association

Mr Jonathan Temm
President
New Zealand Law Society

Dear Miriam and Jonathan

Court of Appeal (Civil) Rules 2005 – proposed amendments

Many thanks for your feedback on the reforms I previously raised with you. Those reforms concerned (a) r 43 of the Court of Appeal (Civil) Rules 2005 and (b) the proposal for fast track civil appeals. The latter does not involve a rule change, at least at this stage, as what we intend to introduce is a pilot scheme, which will be dealt with by way of practice note. A draft practice note is being prepared and will be considered by the Court of Appeal judges at their October meeting. Before it is finalised, it will be sent to you for comment. I don't deal with that aspect further in this letter.

What I cover in this letter is the r 43 issue again and three new matters. Justice Fogarty, the Chair of the Rules Committee, has asked the Court of Appeal to undertake consultation itself as to these proposed changes. This will obviate the need for the Rules Committee to consult once we have sorted out our views on the matters raised. We will not be formulating our definitive views until we have considered the views of your organisations.

Rule 43

As you will recall, we have suggested that r 43 should be amended by providing that the appellant had to file the case on appeal within three months of bringing the appeal. Both law organisations supported that reform.

When this matter came before the Rules Committee, Andrew Beck, a practitioner member of the Rules Committee, queried whether it was appropriate that the standard test currently applicable in r 43 cases should always apply if the current six month period was reduced to three months. He made the point that, currently on an application to extend time, the Court usually takes into account the merits of the appeal. Andrew asked whether that was appropriate in those cases where, before the suggested three

month period had expired, the appellant had applied for an extension. He made the point that applications of this sort would be likely to increase in number, as in some cases a three month period will be insufficient for genuine and legitimate reasons. We have considered that point and think it has merit. Our current thinking is that r 43 should be recast along the following lines.

First, we would provide that the general obligation is for the appellant to apply for the allocation of a hearing date and to file the case on appeal within three months after the appeal is brought.

If, before that three months, the appellant considers there will be difficulties in complying, either the appellant must obtain the respondent's consent to an extension or must apply to a judge for an extension. On such an application, the judge (a single judge) will be concerned only with whether there are reasonable grounds for an extension. The judge, who would normally deal with the application on the papers, will not consider the merits of the appeal. If an extension is granted, well and good. If an extension is not granted, then the appeal will be deemed abandoned (if the three month period has expired). A disappointed applicant's only recourse then would be, as at present, an application to bring a fresh appeal out of time.

If the three month period has expired without compliance with the general obligation and without an application for extension to be made, then the current position will apply. That is to say, the appeal will be deemed abandoned. In these circumstances, however, an appellant would have a further three months (as at present) in which to have that deemed abandonment reversed. On any such application, the Court (this time, three judges) would be able to consider all relevant circumstances, as at present.

What do you think of that suggestion?

Rule 41 – Style Guide

We want a new subclause as follows:

The parties' written submissions must comply with the current edition of the New Zealand Law Style Guide.

You will be aware that all six law schools, all the New Zealand law reports and journals, and all New Zealand legal texts are now written so as to comply with the NZLSG. The Supreme Court and the Court of Appeal both use it for their judgments. Most High Court judges already use it and I understand it will become the style guide for the High Court from 1 January 2012. Many other courts and tribunals have also committed to it. You will know that the NZLSG, despite the use of "Style" in its name, is essentially a guide as to correct citation. This change would not render compulsory the use of footnotes in submissions (even though the Court of Appeal uses footnotes), as the NZLSG does not make footnotes compulsory.

The Court of Appeal doesn't intend to be namby-pamby about compliance with the NZLSG. But it does save considerable time when writing and proofing judgments if one can simply pick up the written submissions and know that the citations can be lifted straight into the judgment without needing to be checked for NZLSG compliance. Many practitioners are already using the NZLSG, especially in civil appeals.

Rule 41 - page limit for written submissions

At present, there is a 30 page limit on written submissions, unless consent is obtained to increase the number of pages: see r 41. Some judges in the Court of Appeal consider the page limit should be reduced – say, to 20 pages. They think that putting a page limit in fact increases the length of submissions, as some counsel appear to think that, unless they file 30 pages, they have not done their job properly. Judges in this camp acknowledge there will be appeals where a 20 page maximum is too short. Such appeals can be dealt with, they say, by giving permission for longer submissions where a need for such is demonstrated.

Other judges on the court are content with the current page length. This camp also points to the symmetry with the position in the Supreme Court, where 30 pages is also the limit: see the Supreme Court Rules 2004, r 36.

The Court of Appeal would be interested in the views of those lawyers who appear in the Court of Appeal as to whether the current page limit should be retained or a shorter limit imposed.

Electronic filing

Full electronic filing is not yet possible in the Court of Appeal. The judges are keen, however, for certain documents to be sent to the Court of Appeal electronically so that judges can access the documents electronically if they wish. The documents we have in mind are:

- (a) The party's submissions;
- (b) Key volume of documents which counsel refer to in their written submissions or intend to refer to orally.

We envisage the key documents would usually be provided in PDF searchable form and the submissions in Microsoft Word format.

Presenting electronic documents in this way would be very advantageous to the judges. It means they would be able to read key documents on their computers at home or in other locations apart from the Wellington courthouse. Lawyers will be aware that some of the judges have maintained their principal homes other than in Wellington. This would obviate the need for carrying heavy paper files outside Wellington. As well, judges would be able to search documents electronically and cut and paste from them when drafting judgments.

Again, the judges would be interested in lawyers' views on this suggestion.

We look forward to hearing from you as soon as possible.

Yours sincerely



The Hon Justice Chambers