



The Rules Committee

CONSULTATION ON STRIKING OUT STATEMENTS OF CLAIM BEFORE SERVICE

Date of issue: 4 December 2015

Date submissions are due: 29 January 2015

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Introduction

1. The Rules Committee (the Committee) is seeking feedback on a proposed amendment to the High Court Rules (HCR) to provide a process for quickly dealing with a statement of claim identified by Registry staff as being potentially abusive or falling within one of the grounds for strike out in r 15.1. The amendment sets out a procedure for the statement of claim to be referred to a Judge before the statement of claim is served on the other party. The Judge may then decide to strike out the statement of claim or make other orders disposing of the proceedings or ensuring that the proceedings continue in the normal manner. Although it may be possible for a Judge to do this under the HCR and use of the Court's inherent jurisdiction, the Committee considers that the HCR do not adequately provide a clear process to deal with a patently abusive statement of claim which complies with the formal requirements of the HCR. The Committee envisages that this procedure would be exercised sparingly and only in clear cases.
2. The proposed amendment is contained in the High Court Amendment Rules (No 3) 2015, which are attached to this consultation paper.
3. The Committee invites submissions on the desirability and effectiveness of the proposed amendment. Please provide submissions or comments to Harriet Bush, the Clerk to the Committee, by 29 January 2016.

Reasons for the Amendment

4. The Committee's aim is to specify a process for a claim which clearly should be struck out to be dealt with before the party against whom the claim is made becomes involved.
5. The Committee considers that specifying such a procedure is desirable for a number of reasons:
 - a. Allowing proceedings which constitute a misuse of the Court's process to proceed may bring the administration of justice into disrepute;
 - b. Allowing these proceeding to proceed would waste Court resources and may prevent access to justice for genuine litigants;
 - c. Striking out a claim before service would save the proposed defendant the costs of preparing a statement of defence and applying for strike-out or summary judgment;
 - d. Civil procedure rules in comparable jurisdictions provide a process for dealing with patently abusive statements of claim without a hearing or involving the other party;
 - e. Given the potential impact on the claimant's right to access the court, the procedure should be clearly specified in the rules; and
 - f. Specifying a procedure would be consistent with the HCR's objective to secure the just, speedy, and inexpensive determination of proceedings.
6. Presently, a Registrar has the power to refuse documents for filing which fail to comply with the formal requirements in the HCR. This decision is amenable to review by a Judge.¹ However, the Court's power is less clear where a document complies with the formal requirements of the HCR but is nevertheless vexatious or an abuse of process.
7. The HCR do not provide a clear basis for a Registrar to refer a statement of claim which formally complies with the HCR to a Judge,² or how the statement of claim should ultimately be dealt with.
8. It is well recognised that the High Court has the inherent jurisdiction to strike out pleadings which are frivolous, vexatious or an abuse of process.³ However, the Law Commission has concluded that the Court does not have inherent jurisdiction to prevent a person from commencing proceedings that appear to be vexatious:⁴

... while the High Court has inherent jurisdiction to restrain a plaintiff from making applications within an existing proceeding (on the basis that they are vexatious), without the leave of the Courts, it does not have the power under its inherent jurisdiction to prevent a person from commencing proceedings that appear to be vexatious.
9. Under r 5.25, a proceeding is commenced by filing a statement of claim in the proper registry.

¹ *Te Toki v Pratt* (2002) 16 PRNZ 160 (HC) at [18]; and *Haden v Wells* [2012] NZHC 31 at [7] applying rr 5.2 and 2.11(1)(b).

² Arguably, ss 51F(3) or 28 of the Judicature Act 1908 provides a basis for referral.

³ See for example *Te Toki v Pratt*, above n 1, at [24]; and *Seimer v Stiassny* [2011] NZCA 1 at [15].

⁴ Law Commission *Review of the Judicature Act 1908: Towards a Consolidated Courts Act* (NZLC IP29, 2012) at [16.2].

10. Statutory power to prevent a person from commencing proceedings is provided in s 88B of the Judicature Act 1908. This is commonly known as the vexatious litigant procedure. The Attorney-General can apply to the High Court for an order that the person cannot bring civil proceedings without the leave of a High Court Judge. The Court must be satisfied that the person has persistently and without reasonable ground instituted vexatious legal proceedings.⁵ The s 88B jurisdiction does not address the one-off or first time plainly frivolous or vexatious proceeding.
11. The current version of the Judicature Modernisation Bill provides for a graduated civil restraint order regime. Clause 162 provides for a High Court Judge to make three types of orders which restrict a person from commencing or continuing a civil proceeding: a limited order, an extended order and a general order.⁶ An order may be made, only if, in at least two proceedings, the Judge considers that the proceedings are totally without merit.
12. The Committee intends the proposed new rule dealing with abusive and vexatious statements of claim to sit alongside and link into the civil restraint order regime for vexatious litigants.⁷

Possible Approaches

13. Commonwealth jurisdictions differ in the approach taken to clearly abusive statements of claim.⁸ One approach is for the document to be rejected before it is filed in the Court. This may be done by a Registrar or a Judge. The other approach is to accept the document for filing but defer service until the matter is considered by a Judge. The Committee considered the approaches taken in United Kingdom and Australia when drafting the proposed rule.

United Kingdom Approach

14. The United Kingdom Civil Procedure Rules 1998 currently provide for a statement of claim to be struck out before it is served. Practice Direction 3A provides:

2.1 If a court officer is asked to issue a claim form which he believes may fall within r 3.4(2)(a) or (b) he should issue it, but may then consult a Judge before returning the claim form to the claimant or taking any other steps to serve the defendant. The judge may on his own initiative make an immediate order designed to ensure that the claim is disposed or (as the case may be) proceeds in a way that accords with the rules.
15. Rule 3.4(2) gives the Court the power to strike out the claim on the basis that it discloses no reasonable grounds for bringing the claim or is an abuse of process or otherwise likely to obstruct the just disposal of proceedings. In addition, r 3.2 provides for a court officer to

⁵ The Court of Appeal in *Heenan v Attorney-General* found that s 88B was a reasonable limit on a person's right of access to the Courts as it allows for a person to obtain leave to bring proceedings: *Heenan v Attorney-General* [2011] NZCA 9, [2011] NZAR 200 at [22].

⁶ A limited order restrains a party from continuing or commencing civil proceedings on a particular matter in a senior court, another court, or a tribunal. An extended order restrains a party from continuing or commencing civil proceedings on a particular or related matter, and a general order restrains a party from continuing or commencing civil proceedings in a senior court, another court, or a tribunal.

⁷ See below at [24].

⁸ Examples are r 2.26 of the Federal Court Rules 2011, Court Procedures Rules 2006, reg 6142 (ACT); Supreme Court (General Civil Procedure) Rules 2005, reg 27.06 (Vic); Supreme Court Rule, r 27.08 (NT); Supreme Court Civil Rules 2006, r 53 (SA); Supreme Court Rules 2000, r 82A (TAS); Rules of the Supreme Court 1971, Order 67, r 5 (WA); High Court Rules 2004, r 6.07 (Cth); Uniform Civil Procedure Rules 2005, reg 13.4 (NSW); Rules of Civil Procedure RRO 1990, r 25.11; and Supreme Court Civil Rules of British Columbia, r 9.5.

consult with a Judge before taking any step required of them. Rule 3.3 allows a Judge to strike out a claim on his or her own initiative and without a hearing. However, the Court may give a person likely to be affected the opportunity to make representations. Where the order is made without a hearing, the Court must inform the affected party of their right to apply to have the order set aside or stayed. Finally, where the Court considers that a claim is totally without merit the Court's order must record this fact.

Australian Approach

16. In Australia the Federal Court Rules 2011 provide for a Registrar to refuse to accept a document for filing if satisfied that the document is an abuse of process or is frivolous or vexatious. Another approach is taken by the Uniform Civil Procedure Rules 1999, which provide for a Registrar to refer an originating process to the Court before issuing it where it appears to be frivolous, vexatious or an abuse of process. In this case the Court may direct the Registrar to issue the originating process or refuse to issue the originating process without the leave of the court. A full bench of the Federal Court of Australia has held that the direction to refuse the document for filing is an administrative act rather than a judgment able to be appealed.⁹

Comparison and discussion of potential approaches

17. The Committee considers that the approach taken by the United Kingdom Civil Procedure Rules is preferable for several reasons. First, the Committee believes that the power should be reserved for a Judge because a Registrar is not well-placed to determine when a document is frivolous, vexatious or an abuse of process. In addition, it is more consistent with justice appearing to be done for the decision to be made by a Judge.
18. The Committee also considers that the statement of claim should be accepted for filing before being referred to a Judge. As noted above, the Court does not have the power to prevent a person from commencing a proceeding by refusing to accept a statement of claim for filing. Accordingly, providing for this in the HCR could be ultra vires. Additionally, first accepting a statement of claim for filing ensures that the statement of claim is allocated a Court number and that there is a proper record of the proceeding and subsequent decision.
19. Finally, the Committee is of the view that it is necessary for there to be a right of an appeal from this decision. To cut the court process off in these situations without an appeal would be inconsistent with access to justice rights. Although this risks there being appeals from the decision the procedure still has the advantage of a summary consideration of the issue, and allowing the case to be considered without the potential defendant having to take part.

Proposed Rule

20. Accordingly, the Committee has drafted a proposed new rule to be inserted into the HCR as r 5.35A. The rule is modelled on the process contained in r 3.4 of the United Kingdom Civil Procedure Rules 1998 and Practice Direction 2.1 to 2.6.

⁹ *Bizuneh v Minister for Immigration & Multicultural & Indigenous Affairs* 128 FCR 353 (FC) at [15] to [19]; this decision was then affirmed by a full sitting of the Federal Court of Australia in *Manolakis v District Registrar, South Australia District Registry, Federal Court of Australia* (2008) 170 FCR 426 (FCA). This case concerned r 7A and O46 of the Federal Court Rules which at the time provided the power for a Registrar to refer a document to a Judge for a direction.

21. The proposed rule provides the ability for a Registrar to refer a statement of claim to a Judge if the Registrar believes that the claim may fall within one of the grounds specified for striking out the claim in r 15.1. The Registrar must accept the document for filing if it meets the formal requirements in the HCR but may decline to endorse the statement of proceeding for service and refer the statement of claim to a Judge.
22. Where a statement of claim is referred to the Judge, the Judge may, on his or her own initiative, order that the statement of claim is disposed of or, as the case may be proceeds in a way that complies with the Rules. The Judge may do any of the things listed in r 15.1, including making an order that the claim be struck out, stayed until further order, the documents for service be kept by the court and not served until the stay is lifted, or that no application to lift the stay is heard until the claimant files further documents specified in the order. The Judge may do this without hearing from the claimant.
23. The rule also provides that the Judge must inform the claimant of their right to appeal.
24. Where the Judge considers a claim is wholly without merit and strikes it out, the Judge's order must state this fact. This requirement is intended to link the process into the vexatious litigant procedure, so that a statement of claim struck out at this stage will count as one of the two proceedings necessary for a litigant to be considered a vexatious litigant.
25. The Rules Committee invites submissions on the proposed rule.

Return of Submissions

26. Please return submissions or comments on the proposed changes to Harriet Bush, the Clerk to the Rules Committee, by **29 January 2016** by post to:

Ms Harriet Bush
Clerk to the Rules Committee
Auckland High Court
PO Box 60
Auckland 1010

Or by emailing the submissions to: harriet.bush@justice.govt.nz

27. Submissions that are received may be posted on the Rules Committee website.

The Rules Committee would like to take the opportunity to remind members of the profession that feedback from the profession is a valuable way of ensuring that the rules are working well. If you have any concerns about a particular rule or its application, please raise this with the Committee by emailing RulesCommittee@courts.govt.nz

High Court Amendment Rules (No 3) 2015

Governor-General

Order in Council

At Wellington this day of 20

Present:
in Council

Pursuant to section 51 of the Judicature Act 2015, His Excellency the Governor-General, acting on the advice and with the consent of the Executive Council, and with the concurrence of the Right Honourable the Chief Justice, the Chief District Court Judge, and at least 2 other members of the Rules Committee established under section 51B of the Judicature Act 1908 (of whom at least 1 was a Judge of the High Court and at least 1 was a District Court Judge), makes the following rules.

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Rules

1 Title

These rules are the High Court Amendment Rules (No 3) 2105.

2 Commencement

These rules come into force on [*to come*].

3 Principal rules

These rules amend the High Court Rules set out in Schedule 2 of the Judicature Act 1908 (the **principal rules**).

4 Rule 2.1 amended (Jurisdiction and powers)

- (1) In rule 2.1(3)(b), replace “Act.” with “Act; or”
- (2) After rule 2.1(3)(b), insert:
- (c) rule 5.35A (relating to orders or directions that may be made or given in relation to a statement of claim before service).

5 New rule 5.35A inserted

After rule 5.35, insert:

5.35A Striking out statement of claim, etc before service

- (1) This rule applies if a Registrar believes that a statement of claim tendered for filing may fall within 1 or more of the grounds for striking out a pleading set out in rule 15.1(1).
- (2) The Registrar must accept the statement of claim for filing if it meets the formal requirements for documents set out in rules 5.3 to 5.16.
- (3) However, the Registrar may,—
 - (a) as soon as practicable after accepting the statement of claim for filing, refer it to a Judge for consideration under this rule; and
 - (b) decline to sign and release the notice of proceeding and attached memorandum for the plaintiff to effect service until—
 - (i) a Judge has considered the statement of claim under this rule; and
 - (ii) such time as (if at all) the Judge makes an order or gives a direction authorising the Registrar to sign and release the notice of proceeding and memorandum for service.
- (4) A Judge to whom a statement of claim is referred under this rule may, on his or her own initiative, make an order or give directions to ensure that the claim is disposed of or, as the case may be, proceeds in a way that complies with these rules, including (without limitation) an order under rule 15.1 that—
 - (a) the claim be struck out (for example, if the pleading is incoherent or makes no sense, or sets out no facts indicating what the claim is about, or contains a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim);
 - (b) the claim be stayed until further order:

- (c) documents for service be kept by the court and not be served until the stay is lifted:
 - (d) no application to lift the stay be heard until the claimant files further documents as specified in the order (for example, a witness statement, amended statement of claim or particulars of claim).
- (5) Rule 7.43(3) does not apply. However, if a Judge makes an order on his or her own initiative without giving the claimant an opportunity to be heard, the order must contain a statement of that person's right to appeal against the decision.
- (6) If the Judge makes an order striking out the statement of claim and considers the claim to be wholly without merit, the Judge's order must state that fact.
- (7) (*See* rule 2.1(3)(c) concerning the exclusion of the jurisdiction and powers of a Judge under this rule from the jurisdiction and powers of an Associate Judge).

Clerk of the Executive Council.

Explanatory note

This note is not part of the rules, but is intended to indicate their general effect.

These rules, which come into force on [to come] insert new rule 5.35A into the High Court Rules (the **principal rules**) to provide a process for a Judge to intervene in proceedings that may be an abuse of process of the court and, if appropriate, dispose of them before the proceedings are served and unnecessary costs are incurred.

The rules also make a consequential amendment to rule 2.1, which relates to the jurisdiction and powers of Associate Judges, so that only Judges have the jurisdiction and powers conferred by the new rule.

Under new rule 5.35A, a Registrar who believes that a statement of claim presented for filing may be an abuse of process of the court may refer the claim to a Judge for consideration as soon as it is accepted for filing. The Registrar may decline to sign and release the documents that would enable the claimant to serve the proceedings on any defendant until the Judge considers the claim and (if at all) makes an order or gives directions that authorise the documents to be signed and released for service.

The Judge to whom a statement of claim is referred may exercise powers to make orders or give directions under any of the principal rules, as appropriate, for the purpose of ensuring that the claim is either disposed of or proceeds in a way that complies with the principal rules. The new rule gives examples of the sorts of orders that may be made, including an order striking out the statement of claim under rule 15.1 where it is incoherent, sets out no facts indicating what the claim is about, or contains a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim.

The new rule provides for a Judge to make an order on his or her own initiative, without hearing from the claimant. However, the order must then contain a statement of the person's right to appeal against the decision.

The new rule also requires a Judge who strikes out a statement of claim and considers it to be wholly without merit to record that fact in the order. The reason for this requirement is that the information may be relevant to a court in determining whether the person should be treated as a vexatious litigant, should action need to be taken against the claimant at some future time to prevent him or her from filing further abusive proceedings.

Issued under the authority of the Legislation Act 2012.

Date of notification in *Gazette*:

These rules are administered by the Ministry of Justice.