

18 September 2019

Sebastian Hartley
Clerk to the Rules Committee
c/- Auckland High Court
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Auckland 1010

By email: sebastian.hartley@justice.govt.nz

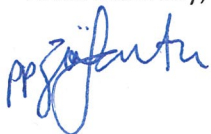
Dear Sebastian,

Re: Proposal for Reform to R.4.56 High Court Rules (and District Court Rules)

1. We suggest respectfully the Rules relating to Adding Parties be improved by clarification. R.4.56 of the High Court Rules (copy enclosed) (identical to R.4.56 in the District Court Rules) does not make it clear that a party or parties cannot be added without first obtaining an Order of Court.
2. The Rule makes it clear than an application for such an Order is not required. However, it does not state clearly an Order is (in fact) required. As worded R.4.56 is permissive: it states that a Judge 'may' make an Order adding a party but does not make it clear that a Court 'must' make an Order before there will be proper joinder or adding of any further parties, even though no application is required.
3. It has come to our attention that in some cases additional Court time has been required to resolve an interlocutory dispute between parties over whether an additional party has been added improperly and whether a formal Order is in fact required before the added party can in fact be added properly. An amended statement of claim and Notice of proceeding issued by the Court and served on an added party have been treated as 'drafts' by the Court until the 'proposed' adding has been approved in effect by formal Order. (Refer [27] *Smith & anor v Noble Investments Ltd* [2017] NZHC 477).

4. It is perhaps obvious an existing party cannot be struck out except by Order of the Court. It is also not in issue that, under R.4.56, a party cannot be added as a plaintiff without that party's consent.
5. However, it is not clear in the wording of R.4.56 itself that:
 - (a) adding a party as plaintiff even with that party's consent still requires a formal Order, and/or that an amended statement of claim adding a plaintiff even with such stated consent nevertheless requires a formal Order; nor
 - (b) that an amended statement of claim adding one or more defendants on the basis of the same set of facts and/or cause(s) of action, is improperly done unless done pursuant to a formal Order.
6. It is trite to say that no 'permission' of the Court is required to commence proceedings against defendants – the claimant needs only have and plead a cause of action or right to a remedy or relief. Proceedings can be issued without an Order. However, to add a party in connection with an existing cause of action or with a new cause of action connected with the same set of facts and/or other existing causes of action and/or other parties, has been held to require an Order under R.4.56 although the Rule does not state that clearly.
6. The issue over whether a formal Order is required was brought into clear focus in *Smith v. Noble Investments Ltd*. It is observed that if the meaning of the wording of R.4.56 was as clear as interpreted to be in that case then the discussion and contest argued in *Smith v Noble Investments Ltd* case would not have been required at all.
7. Our committee members are aware of other cases on R.4.56 relating to whether or not a party has been added correctly in the absence of a formal Order. However, *Smith v Noble Investments Ltd* has traced a line of cases and discussed the different arguments before deciding on the correct interpretation of R.4.56. *Smith v. Noble Investments Ltd* makes it clear that R.4.56 has been interpreted as requiring an Order before parties can be added as defendants.
8. In the circumstances we consider R.4.56 would benefit all from being clarified to coincide with its meaning as interpreted. It should state clearly that while a formal application may not be required for such an Order nevertheless a party cannot be added as a defendant without a formal Order of Court and a request by either application or memorandum to the Court for such an Order is first required to seek such an Order (unless ordered by the Court of its own motion) before any further parties can be added. Further, it should be clear that a party cannot be added as a plaintiff without both the consent of the party to be added and a formal Order to that effect.
9. A clarification of R.4.56 in both High Court and District Court Rules would assist all appearing before the Courts (including lay litigants) to understand that a formal Order is required before a party can be added. The current wording of Rule 4.56 does not make that clear.

Yours faithfully,

A handwritten signature in blue ink, appearing to read 'A. Steele', written in a cursive style.

Andrew Steele

Convenor

Civil Litigation Committee

Auckland District Law Society