

# Maintaining Relevancy in Statutes & Civil Procedure Rules

A tentative judicial perspective

by

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## Introduction

- 1 The observations in this paper are by their very nature tentative. I was asked to give this paper from the perspective of a judge. Given that my (possibly) illustrious judicial career has not yet lasted six months the dangers inherent in my providing a judicial perspective will, I hope, be obvious. Nevertheless, even in my limited time in judicial office in Fiji, there have been a number of aspects of the statute law and the Civil Procedure Rules which deserve to be looked at.

## The concept of relevancy

- 2 Before embarking on any form of textual analysis of civil procedure rules and statutes, it seems important to set up a few navigation beacons. The reason for this is that I do not believe that relevancy could ever be considered in a vacuum. The first thing that needs to be done is to define the objects of such rules and legislation. I offer the following considerations as worthy of at least some evaluation. They are:
  - (a) Fiji has been a part of the common law world for a long time. That is likely to continue. Although the Constitution does not specifically mandate a common law system, it is clearly one of the underlying assumptions of the Constitution. While it is common in these modern times to speak of the common law of Australia; a common law of New Zealand and even the common law of Hong Kong, it is important to take note of developments in the common law around the world.
  - (b) Fiji is a developing country both in an economic and a legal sense. While there will be some pressure (not all of that bad) for Fiji to develop in its own way, given the size of Fiji both in terms of population and in terms of economic strength, Fiji cannot afford to develop its legal system in isolation. It has neither the resources to do so nor, in the circumstances would it be wise.
  - (c) The legal system exists to serve the community of Fiji. (This may come as an absolute shock to many lawyers.) The law has to serve the social, economic and, conceivably, cultural components of the society. Just concentrating on

the economic aspect of this observation, Fiji's legal system has to provide a clear and predictable and just means of settling economic disputes. If Fiji is not capable of doing this, this will, in the long run, have a potent but bad impact on Fiji's economic interests. Thus, for example, those to set up businesses and who have come from other countries would hope to see a legal system and a dispute resolution system which is familiar to them and which does all the things that a legal system and a dispute resolution system should do. If that doesn't happen, there was always the risk that such business people will choose to go somewhere else. If that dispute resolution system is hopelessly inefficient, obvious conclusions follow.

- (d) Politics and law making and law-fixing is always the art of the possible. In terms of rule-making, some of this can be done without legislative intervention. Nevertheless, even in that context, when changes in rules are made, it is necessary for there to be consultation between and among the stakeholders.
- (e) Connected with concerns that lawmaking is the art of the possible, there are two additional considerations which need to be remembered. The first is the bigger the project the harder it is to get it finished. Second, there are other law reform or law improvement priorities and given the very scarce resources of government, the judiciary and, perhaps most importantly, the legal profession, there have to be priorities.
- (f) Finally, any changes have to be measured against a conservative imperative. That imperative is best expressed in the saying "If it ain't broke, don't fix it". Although it may be invidious that someone with my background to start quoting Margaret Thatcher, she often said "What is the case for change?" In simple language, if the people who propose changes cannot come up with a compelling answer to that question then nothing is going to happen.

## **Civil procedure**

- 3 In 1988, with a great deal of evident (and justifiable) pride the then Chief Justice of Fiji promulgated the High Court Rules. As is noted in the introduction, the rules replaced a shocking mishmash of law and procedure governing the conduct of litigation before the High Court. Those rules are profoundly based on the Rules of the Supreme Court of England. The numbering was such as to permit reasonably efficient navigation through successive editions of the White Book.
- 4 Nevertheless, the High Court rules might be said to be in something of a time warp. Indeed, there is a respectable argument that the rules are in not just one but two substantial time warps. The first is that the English Rules of the Supreme Court

continued their development over the years while Fiji's stayed still. As each new edition of the White Book came out the commentary became less and less relevant in some respects to the rules in Fiji. Second, and this is the second time warp the rules of civil procedure in England are now in many respects radically different to those in Fiji. Although in many respects the legal profession in England was dragged kicking and screaming into the roles which are the product of the Civil Justice Reform, that set of rules of procedure is now firmly entrenched and, for better or for worse, that is the English system. In many respects the introduction of the new system of civil procedure through the Civil Justice Reform is, for all practical purposes, the end of the use of new editions of the White Book. This is not just because the numbering of the Orders and the Rules is different. The whole system is different.

- 5 Leaving aside public law for the moment, the rules of civil procedure as part of the system of justice in connection with civil law exists for the resolution of disputes between citizen and citizen. Citizens (and this includes corporate citizens) are usually not terribly interested an interesting debate as to the appropriate means of commencing proceedings in a court. When ordinary people and ordinary corporations have a dispute with other ordinary people all other ordinary corporations they want that dispute could be resolved as quickly and efficiently as possible. It will come as a terrible shock to many lawyers but these people incorporations are not anxious to spend money on us for our own sake. And yet, under the current model of civil litigation as appears in Fiji, it seems to me that vast amounts of time and money and, consequently, vast amounts of scarce resources, spent on messing about with procedure and very little gets done. Given the appalling delays in getting civil justice in Fiji, that can no longer be acceptable.
- 6 The whole system is predicated on the assumption that for the most part the parties to a proceeding will control the pace of litigation in civil proceedings. The time when this could conceivably be considered an acceptable approach passed into history just as the hula hoop, platform shoes and flared trousers went out of fashion. The time for a much more court-driven aggressive management of litigation has

now arrived. Indeed, some would argue it arrived a long time ago. The underlying assumptions of the present model is that the parties (often through their lawyers) are the best judges of what is in their interest and can be left to determine the pace and style of litigation. If the other side doesn't like it, then their opponent can come to court and seek to change the approach.

7 That model overlooks some obvious facts. The first is that the court system is paid for by the community and every mind-numbing little piece of interlocutory litigation takes up valuable judicial time. That time could be spent elsewhere. Secondly, if the theory is that all of this can be left to the litigants, how is it that the system is so slow and so fundamentally reactive? I am far from saying that this means that we should import the whole of the English Civil Justice Reform package into Fiji. There are at least four (some practitioners would save 4 million) reasons why this would be doomed to failure:

- (a) The package is too big and brings about too big a change to quickly;
- (b) (I mean this with no disrespect) the package is far too complicated for a legal system which has to serve something of the order of 900,000 people.
- (c) It is very difficult to explain the case for change.
- (d) There is very little evidence of such a system would actually improve things - not least because the system takes such a large amount of energy to drive, there is little left over for the cases themselves.

8 Having defined what is unacceptable both in terms of the model and in terms of the consequences of the model, it seems to me that with some very modest changes in the current rules we can do a lot. It seems to me that a lot of change can be achieved simply by moving to a managed litigation model, giving judges and Registrars real power to implement strict timetables with real sanctions if those timetables are not met. In order to do this, there would need to be some changes to the Rules of the High Court. Those changes need only be minimal. The real changes would be changes in culture and some changes in the structure of civil proceedings. The Rules already provide some elements of a timetable. Once a Writ of Summons is served, the statement of claim has to be filed in a certain time, on the balance of the proceedings had to be filed within particular times. It seems

to me that the court ought to be in charge of insisting that matters are filed in time and, without reference to the parties, require the parties to explain any delays. Once the pleadings have closed, there should be a hearing to define with precision where the matter is headed.

- 9 Evidence and cross-examination can be interminable. At the moment, there is a tendency to let these things be left into the hands of the practitioners. A degree of ruthlessness is probably called for here.
- 10 Before any of these changes could be contemplated in real terms there will need to be a partnership between the legal profession and the judiciary with some clearly defined goals. I say that despite the fact that the rule making (and thus rule changing) authority is the Chief Justice. Both judges and lawyers talk a lot about serving the community. Frankly, a lot of that talk is precisely that: talk. It seems to me that there is an urgent need for the profession and the courts to get together to see what can be done to improving the system under which we now operate. Certainly there are matters of detail which can be attended to in the improvement of the Rules of the High Court. However, unless there is an agreement to move forward with something more in the way of managed litigation, those changes would not meet the fundamental criterion of this paper: relevancy.
- 11 There is an easy way to test the propositions that I make. Look at what happens in arbitration. In other words, look at any judicial system where the parties are directly paying for the judge. In such a system, you don't see the parties sitting around reactively. You see the arbitrator (the judge) taking charge to make sure that things are brought to a conclusion with reasonable vigour.

## **Public Law**

- 12 I have long believed that the current system of public law through judicial review of certain forms of executive action is a true measure of the faith that the community has in its system of justice. There is no small irony in the idea that

some people say that the judges are in the pocket of the government and yet judicial review of government action is brought by those self-same people. A cynic might suggest that the real object of those people is to lose such litigation so that they can then claim precisely what they have been saying all along: the judges are in the pocket of the government. Occasionally, a very disorienting thing happens for people like that: they win. And yet, judicial review of certain forms of executive action has a much more widespread impact on the community than the causes célèbre that we see relegated from time to time.

- 13 If ever there was one feature of the Rules of the High Court which screams out for modernisation, this is it. While I could identify a number of obvious textual improvements in Order 53 of the Rules of the High Court, I think we need to think about some more fundamental changes. Those changes are urgent. Not because we have an interim government that simply because the very nature of government is changing there will be greater challenge to its operations by way of judicial review. There is a real and existing risk that the courts will become swamped with this litigation. The idea that we have an application for leave to bring an action for judicial review followed by, if leave is granted, a full hearing seems to me more than passing strange. It seems to me that the first stage should be done almost invariably on the papers or, alternatively, that there be no first stage that if the government took the view that the case was not worth powder and shot (the astute reader will notice that I am trying to avoid phrases like vexatious or frivolous) then a proceeding should be instituted by the government instrumentality to have a judge look at the matter early on for termination. The judge is not to know whether an applicant has given all the facts in the matter. The respondent ought to be in a position to know that end, we are for example relevant facts had been withheld, and the absence or presence of certain facts would make a huge difference to the outcome, I think that there are compelling reasons why the respondent should be able to attempt to bring the matter to a swift conclusion. Other than that, why have two hearings? It seems to me to be far better to get on with the litigation. That said, this would require stringent requirements to ensure that the real issues are

identified in a rigorous fashion. At the moment, it seems to me that many judicial reviews of quite important issues are left to drift to a certain degree and these need to be brought under a good deal more control.

- 14 This is, of course, lawyer-law as opposed to law which directly affects people in their day-to-day lives. Again, possibly to the shock of many judges and lawyers, ordinary people speak little of the finer points of judicial review in their ordinary discourse. It seems to me that this is fortunate in the sense that substantial reforms can be made just as between the legal profession and the court and yet have a very positive effect on the efficiency of public law litigation. Some years ago we made a fine start in this area with some special rules which govern public Law litigation where the constitution was invoked in some specific way. Those rules need to be revamped. They could be very useful models to make the focus on an urgent and immediate defining of the real issues in any public Law proceeding.

### **Statutory reform**

- 15 In this area the only thing that I can provide is a shopping list of items on great and small which need to be looked at. These include:
- (a) removing the importation of English law. It seems to me that this renders the particular statutory topic a complete hostage to fortune. One fantastic example of that I recently noted in the context of civil proceedings conducted before a magistrate. There was a section in the legislation which imported the procedure in England. This section was probably inserted in colonial times. There was one possible construction of this section which might have imported the entire Civil Justice Reform into magistrates court proceedings. I have a strong suspicion that changes of this radical nature were not contemplated by the draughtsman.
  - (b) Another possible "big ticket" item which needs urgent examination the rules of evidence and procedure in criminal cases. It seems to me that without any realistic risk of losing some of our fundamental freedoms, we need to undertake some modernisation so far as the law of documentary evidence and the presentation of evidence generated by computers.
  - (c) At first blush, we need to look again at our entire regulatory framework in relation to banking, insurance and the marketing of securities. At the moment, the doctrine of caveat emptor would appear to reign supreme in areas where, particularly as Fiji develops into a more robust and complex

economic entity, some vigorous prudential regulation is probably called for.

- 16 Much of what could be done in this area requires legislation. That gets us into some vexed areas about the enactment of legislation. It is an area in respect of which I have some very strong views but, as a judge, the laws of prudence and commonsense demand that I keep those to myself. Nevertheless, in this area it will be far more important to recognize the complexity of the law reform task. There is so much to do and, as I have already indicated, there is much to be said for starting small rather than starting big. In slightly inaccurate paraphrase of Robert Frost, the words are a lovely dark and deep and I have miles and miles to go before my sleep.

(Andrew Bruce)