



## **Court of Appeal (Civil) Amendment Rules (No 2) 2008**

Anand Satyanand, Governor-General

At Wellington this 26th day of May 2008

Present:

His Excellency the Governor-General in Council

Pursuant to section 51C of the Judicature Act 1908, 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 and at least 2 other members of the Rules Committee (of whom at least 1 was a Judge of the High Court), makes the following rules.

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## Rules

### 1 Title

These rules are the Court of Appeal (Civil) Amendment Rules (No 2) 2008.

### 2 Commencement

These rules come into force on 1 July 2008.

### 3 Principal rules amended

These rules amend the Court of Appeal (Civil) Rules 2005.

### 4 Time for making application for leave

(1) Rule 14 is amended by revoking subclauses (1) and (2) and substituting the following subclauses:

“(1) Whenever an enactment provides that the Court may grant leave to appeal against a decision, an application for that leave must be made to the Court within the appropriate period specified in subclause (2).

“(2) The appropriate period is,—

“(a) where leave may be given only by the Court, 20 working days after the decision is given:

“(b) where the Court may give leave only if the court appealed from refuses leave, 20 working days after that refusal:

“(c) where the Court or the court appealed from may give leave, 20 working days after the decision is given or, as the case requires, 20 working days after the court appealed from refuses leave.”

(2) Rule 14 is amended by revoking subclause (6) and substituting the following subclause:

“(6) This rule does not apply to an application for an extension of time under rule 29A.”

#### **5 Case for application for leave**

Rule 22 is amended by revoking subclause (4) and substituting the following subclause:

“(4) Subject to subclause (3), rules 40(3) to (5), 40B, 40C, and 40D apply, with all necessary modifications, to the case.”

#### **6 Time for appeal**

Rule 29(4) is revoked.

#### **7 New rule 29A inserted**

The following rule is inserted after rule 29:

##### **“29A Extension of time for appealing**

“(1) If the appeal period prescribed by an enactment or the period prescribed by rule 29(1) or (2) has expired, a party who wishes to appeal may apply for an extension of time in which to appeal.

“(2) If the other party consents to an extension of time and signifies that consent on an application to extend time, the Court or a Judge may—

“(a) grant an extension of time in which to appeal; or

“(b) direct that the application be dealt with as if it were an application for leave to appeal under Part 2 to which consent has been given in terms of rule 26.

“(3) If the Court or a Judge grants an extension of time under subclause (2)(a), the party wishing to appeal must bring the appeal—

- “(a) within the time specified by the Court or the Judge when granting the extension; or
  - “(b) if no time is specified by the Court or the Judge, within 20 working days after the day of the decision granting the extension of time.
- “(4) If the other party does not consent to an extension of time, the party wishing to appeal must apply under Part 2 for an extension of time in which to appeal.
- “(5) An application under subclause (4) must be made and treated as if it were an application under Part 2 for leave to appeal, and Part 2 applies with all necessary modifications.”

## **8 New rules 53 to 53J substituted**

Rule 53 is revoked and the following rules are substituted:

### **“53 Costs at discretion of Court**

The Court may, in its discretion, make any orders that seem just concerning the whole or any part of the costs and disbursements of—

- “(a) an appeal; or
- “(b) an application for leave to appeal.

### **“53A Principles applying to determination of costs**

Subject to the overriding discretion conferred on the Court by rule 53, in making awards of costs the Court should normally be guided by the following general principles:

- “(a) the party who fails with respect to an appeal should pay costs to the party who succeeds:
- “(b) an award of costs should reflect the complexity and significance of the appeal:
- “(c) costs should be assessed by applying the appropriate daily recovery rate to the time considered reasonable for each step reasonably required in relation to the appeal:
- “(d) an appropriate daily recovery rate should normally be two-thirds of the daily rate considered reasonable in relation to the appeal:
- “(e) what is an appropriate daily recovery rate and what is a reasonable time should not depend on the skill or experience of the actual solicitor or counsel involved, or on the time actually spent by the solicitor or counsel in-

involved, or on the costs actually incurred by the party claiming costs:

- “(f) an award of costs should not exceed the costs incurred by the party claiming costs:
- “(g) so far as possible, the determination of costs should be predictable and expeditious.

“Compare: High Court Rules r 47

### “53B Categorisation of appeals

“(1) For the purposes of rule 53A(b), appeals may be classified as falling within 1 of the following 2 categories:

- “(a) standard appeals, which are appeals of average complexity requiring counsel of skill and experience considered average in the Court of Appeal:
- “(b) complex appeals, which are appeals that because of their complexity or significance require senior counsel.

“(2) The Court or a Judge may at any time determine in advance the applicable category in relation to an appeal.

“Compare: High Court Rules r 48

### “53C Appropriate daily recovery rates

“(1) For the purposes of rule 53A(c), the following are the appropriate daily recovery rates for the categories of appeal referred to in rule 53B:

- “(a) for a standard appeal, the current rate for a category 2 proceeding in the High Court, as set out in Schedule 2 of the High Court Rules:
- “(b) for a complex appeal, the current rate for a category 3 proceeding in the High Court, as set out in Schedule 2 of the High Court Rules, together with any uplift of up to 50% that the Court considers appropriate.

“(2) If the rate for a category 2 or 3 proceeding in the High Court Rules is altered by amendment to the High Court Rules, the new rate applies under these rules on and from the date the alteration comes into force.

“(3) The appropriate daily recovery rates are calculated, in accordance with the principle referred to in rule 53A(d), on the basis

of being two-thirds of the actual daily rates referred to in that paragraph.

“Compare: High Court Rules r 48A

**“53D Determination of reasonable time**

“(1) For the purposes of rule 53A(c), a reasonable time for a step in an appeal is—

“(a) the time specified for it in Schedule 2; or

“(b) the time assessed as likely to be required for the particular step, if Schedule 2 does not apply.

“(2) A determination of what is a reasonable time for a step under subclause (1)(a) must be made by reference—

“(a) to band A, if a normal amount of time for the particular step is considered reasonable; or

“(b) to band B, if a comparatively large amount of time for the particular step is considered reasonable.

“Compare: High Court Rules r 48B

**“53E Increased costs and indemnity costs**

“(1) Despite rules 53A to 53D, the Court may make an order—

“(a) increasing costs otherwise payable under those rules (**increased costs**); or

“(b) that the costs payable are the actual costs and disbursements reasonably incurred by a party (**indemnity costs**).

“(2) The Court may order a party to pay increased costs if—

“(a) the nature of the appeal or the step in it is such that the time required by the party claiming costs would substantially exceed the time allocated under band B; or

“(b) the party opposing costs has contributed unnecessarily to the time or expense of the appeal or step in it by—

“(i) failing to comply with these rules or a direction of the Court; or

“(ii) taking or pursuing an unnecessary step or an argument that lacks merit; or

“(iii) failing, without reasonable justification, to accept a legal argument; or

“(iv) failing, without reasonable justification, to accept an offer to settle or dispose of the appeal; or

- “(c) the appeal concerned a matter of public interest and it was reasonably necessary for the party claiming costs to bring the appeal or participate in the appeal in the interests of the public or a section of the public; or
  - “(d) some other reason exists which justifies the Court making an order for increased costs despite the principle that the determination of costs should be predictable and expeditious.
- “(3) The Court may order a party to pay indemnity costs if—
- “(a) the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending an appeal or a step in an appeal; or
  - “(b) the party has ignored or disobeyed an order or direction of the Court or breached an undertaking given to the Court or another party; or
  - “(c) costs are payable from a fund, the party claiming costs is a necessary party to the appeal affecting the fund, and the party claiming costs has acted reasonably in the appeal; or
  - “(d) the person in whose favour the order of costs is made was not a party to the appeal and has acted reasonably in relation to it; or
  - “(e) the party claiming costs is entitled to indemnity costs under a contract or deed; or
  - “(f) some other reason exists which justifies the Court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious.
- “(4) If the Court makes an order that a party pay indemnity costs, it may order that the costs be subject to taxation (a **taxation order**).
- “(5) If the Court makes a taxation order, the taxation must be carried out by the Registrar.
- “(6) Rules 54 to 59 of the High Court Rules apply to any such taxation, with all necessary modifications.

“Compare: High Court Rules r 48C

**“53F Refusal of, or reduction in, costs**

Despite rules 53A to 53D, the Court may refuse to make an order for costs or may reduce the costs otherwise payable under those rules if—

- “(a) the nature of the appeal or the step in the appeal is such that the time required by the party claiming costs will be substantially less than the time allocated under band A; or
- “(b) the property or interests at stake in the appeal were of exceptionally low value; or
- “(c) the issues at stake were of little significance; or
- “(d) although the party claiming costs has succeeded overall, that party has failed in relation to an issue which significantly increased the costs of the party opposing costs; or
- “(e) the appeal concerned a matter of public interest and the party opposing costs acted reasonably in the conduct of the appeal; or
- “(f) the party claiming costs has contributed unnecessarily to the time or expense of the appeal or step in it by—
  - “(i) failing to comply with these rules or a direction of the Court; or
  - “(ii) taking or pursuing an unnecessary step or an argument that lacks merit; or
  - “(iii) failing, without reasonable justification, to accept a legal argument; or
  - “(iv) failing, without reasonable justification, to accept an offer to settle or dispose of the appeal; or
- “(g) some other reason exists which justifies the Court refusing costs or reducing costs despite the principle that the determination of costs should be predictable and expeditious.

“Compare: High Court Rules r 48D

**“53G Principles applying to costs on application for leave to appeal**

- “(1) If the Court refuses to give leave to appeal, the applicant will normally be liable for costs in accordance with the principle stated in rule 53A(a).

- “(2) If the need for an application for leave to appeal arises from a default on the applicant’s part, the respondent will normally be entitled to costs with respect to the application at the time it is determined, unless the respondent’s opposition to it was in the circumstances unreasonable, in which case there will normally be no order as to costs.
- “(3) If the need for an application for leave to appeal does not arise from a default on the applicant’s part and the Court gives leave to appeal, the Court will normally reserve costs pending the outcome of the appeal.
- “(4) If the Court gives leave to appeal but the appeal is subsequently dismissed, the respondent will normally be entitled to costs with respect to the application for leave to appeal (if reserved).
- “(5) The following provisions apply where an appeal is allowed following a determination by the Court to give leave and to reserve costs with respect to the application for leave to appeal (**the application**):
- “(a) if the respondent consented to the application, the respondent will normally be entitled to costs with respect to the application:
  - “(b) if the respondent opposed the application, there will normally be no award of costs with respect to the application, unless the respondent’s opposition was in the circumstances unreasonable, in which case the respondent will normally be liable for costs with respect to the application.
- “(6) In this rule, an **application for leave to appeal** includes an application for an extension of time under rule 29A.

“**53H Disbursements**

- “(1) The Court may direct the Registrar to exercise the Court’s powers to order a party (**party A**) to pay another party (**party B**) disbursements.
- “(2) If the Court orders party A to pay party B usual disbursements, the order—
- “(a) encompasses—

- “(i) party B’s disbursements as defined in rule 48H(1) of the High Court Rules; and
- “(ii) party B’s counsel’s reasonable travelling and accommodation expenses; and
- “(b) is taken to empower the Registrar to fix the types and amounts of disbursements if the parties are unable to agree on them.

**“53I Joint and several liability for costs**

The liability of each of 2 or more parties ordered to pay costs is joint and several, unless the Court otherwise directs.

“Compare: High Court Rules r 50

**“53J Costs in Court appealed from**

Nothing in rules 53 to 53I affects the Court’s powers with respect to quashing or varying any orders for costs made in the Court appealed from.”

**9 Transitional provision**

- (1) Rules 53 to 53J of the principal rules as substituted by rule 8 of these rules apply to any costs determination made after the commencement of these rules, regardless of whether the step in respect of which costs are determined occurred before that commencement.
- (2) Despite subclause (1), if after the commencement of these rules the Court makes an order as to costs in respect of an appeal wholly heard before that commencement, the order must be made as if rule 8 had not been made.

**10 New Schedule 2 added**

The schedule set out in the Schedule of these rules is added as Schedule 2.

**11 Consequential amendments**

Rules 15, 30, and 51(2) are amended by omitting “the Schedule” and substituting “Schedule 1”.

**Schedule**  
**New Schedule 2 added**  
**Schedule 2**  
**Time allocations**

r 10

r 53D

Steps	Allocated days or part days	
	A	B
<i>Applications for leave to appeal*</i>		
1 Commencement of application for leave to appeal	1.0	1.5
2 Commencement of application for leave to cross-appeal	0.4	0.6
3 Preparation of memorandum of opposition to item 1 or 2	0.2	0.5
4 Preparation for hearing of defended application	1.0	2.0
5 Appearance at hearing of defended application	Appearance in Court measured in half days	
6 Second and subsequent counsel if allowed by Court	50% of allowance for appearance for principal counsel	
<i>Applications for extension of time where application granted under rule 29A(2)(a)</i>		
7 Preparation of application	0.2	0.5
8 Consent to application	0.2	0.2
<i>Appeals</i>		
9 Commencement of appeal—		
(a) as of right	1.5	2.0
(b) following giving of leave	0.5	0.5
10 Preparation of case on appeal	1.0	2.0
11 Preparation for and attendance at pre-hearing or case management conference	0.3	0.3
12 Preparation for hearing of appeal	3.0	6.0
13 Appearance at hearing of appeal	Appearance in Court measured in days	
14 Second and subsequent counsel if allowed by Court	50% of allowance for appearance for principal counsel	

\*Including applications for extension of time not granted under rule 29A(2)(a)

Martin Bell,  
for 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 1 July 2008, amend the Court of Appeal (Civil) Amendment Rules 2005 (the **principal rules**).

*Rule 4* amends rule 14 of the principal rules, which sets time limits for applications for leave to appeal. The amendment deals with enactments that, in requiring leave for an appeal, allow a party to seek that leave from the Court of Appeal or from the lower court. The amended rule requires an application for leave by a party who is affected by such an enactment to be made within 20 working days after the lower court's decision is given, if the party wishes to go straight to the Court of Appeal for leave. However, if the party first applies to the lower court and is refused leave, the application to the Court of Appeal must be brought within 20 working days after that refusal.

*Rule 5* updates a cross-reference in rule 22 of the principal rules.

*Rule 6* is consequential on *rule 7*.

*Rule 7* inserts *new rule 29A* into the principal rules to deal with applications for extension of time in which to appeal. The new rule provides that if the other party consents to the application, the Court or a Judge may grant the application or direct that it be dealt with like an application for leave to appeal consented to by the other party. If the other party does not consent to an extension, the party wishing to appeal must apply for the extension under the provisions governing applications for leave to appeal.

*Rule 8* sets out *new rules 53 to 53J* for the recovery of costs. The new provisions re-enact the discretion of the Court of Appeal under the existing rules to make any orders that seem just concerning the costs and disbursements of an appeal or an application for leave to appeal. The new rules provide that the discretion of the Court of Appeal should normally be guided by principles that correspond, with

modifications, to the rules that apply to awards of costs in the High Court. Significant characteristics of those principles are—

- the classification of appeals into 2 categories, namely, standard appeals and complex appeals:
- the linkage of the daily recovery rate for a standard appeal to category 2 proceedings in the High Court (currently \$1,600):
- the linkage of the daily recovery rate for a complex appeal to category 3 proceedings in the High Court (currently \$2,370) with a discretion in the Court of Appeal to increase that rate by up to 50% in particular cases:
- the assessment of costs allowed for completing a step in a proceeding by reference to the time considered reasonable for the step by applying the appropriate time allocations set out in *new Schedule 2*, which are stated in 2 bands, ranked according to the complexity of the particular step.

*New rule 53G* sets out specific provisions for costs awarded for applications for leave to appeal.

*Rule 9* provides that the new rules on cost recovery also apply to steps taken before the commencement of these rules. However, in appeals wholly heard before that commencement, orders as to costs will continue to be made under the old rules.

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These rules are administered by the Ministry of Justice.

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