



CODE OF CIVIL PROCEDURE AMENDMENT 2008

Sir F. Goodwin, KBE

Queen's Representative

ORDER IN EXECUTIVE COUNCIL

At Avarua, Rarotonga, this 24th day of June 2008

Present:

**HIS EXCELLENCY THE QUEEN'S REPRESENTATIVE
IN EXECUTIVE COUNCIL**

PURSUANT to Section 102 of the Judicature Act 1980-81 and with the concurrence of the Rules Committee, the Queen's Representative, acting by and with the advice and consent of the Executive Council, makes the following Rules:

ANALYSIS

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| 1. Title | 3. Order for discovery against non-party |
| 2. Appearance under protest to jurisdiction | 4. Application of this Part to Crown proceedings |

RULES

1. Title – These rules may be cited as the Code of Civil Procedure Amendment 2008 and shall be read together with and deemed part of the Code of Civil Procedure of the High Court 1981 (herein referred to as “the Code”).

Price \$1.50

2. Appearance under protest to jurisdiction – The Code is amended by inserting after rule 102, the following rules –

- “102A. Appearance under protest to jurisdiction - (1) A defendant who objects to the jurisdiction of the Court to hear and determine the proceeding in which the defendant has been served may, within the time prescribed by these rules for the filing of a statement of defence and instead of so doing, file and serve an appearance stating the defendant’s objection and the grounds for such objection.
- (2) The filing and serving of an appearance under subclause (1) shall not be or be deemed to be a submission to the jurisdiction of the Court in the proceeding.
- (3) A defendant who has filed an appearance under subclause (1) may apply to dismiss the proceeding on the ground that the Court has no jurisdiction to hear and determine the proceeding.
- (4) On the hearing of an application under subclause (3) the Court–
- (a) if it is satisfied that it has no jurisdiction to hear and determine the proceeding, shall dismiss the proceeding; but
- (b) if it is satisfied that it has jurisdiction to hear and determine the proceeding, shall dismiss the application and set aside the appearance.
- (5) At any time after an appearance has been filed under subclause (1), the plaintiff may apply to the Court by interlocutory application to set aside the appearance.
- (6) On hearing the application under subclause (5) the Court -
- (a) if it is satisfied that it has jurisdiction to hear and determine the proceeding, shall set aside the appearance; but
- (b) if it is satisfied that it has no jurisdiction to hear and determine the proceeding, shall dismiss both the application and the proceeding.
- (7) The Court in exercising its powers under this rule may do so on such terms and conditions as may be just and in particular, on setting aside the appearance may enlarge the time within which the defendant may file and serve a statement of defence and may give such directions as may appear necessary regarding any further steps in the proceeding in all respects as though the application were an application for directions under rule 128.”

“102B. Appearance for ancillary purposes – A defendant who does not oppose the plaintiff’s claim but who desires to be heard on any ancillary matter including costs may, without filing a statement of defence, file and serve an appearance setting forth those matters and thereafter no matter therein specified shall be determined except on notice to that defendant.”

“102C. Appearance reserving rights – (1) A defendant who does not oppose the plaintiff’s claim but who desires to reserve his or her rights in the event that any other person may become a party to the proceeding or that any person already a party may take some steps in the proceeding adverse to the defendant’s interests, may without filing a statement of defence, file and serve an appearance reserving those rights, and thereafter that defendant shall be entitled to be served with all documents relevant to the rights so reserved that may be filed in the proceeding by any person who is or may become a party thereto.

(2) A defendant who has filed an appearance under subclause (1) may at any time by leave of the Court, file and serve a statement of defence and any other document within such time and upon such terms and conditions as may be prescribed by the Court when granting such leave.”

3. Order for discovery against non-party - The Code is amended by inserting after rule 139, the following rule:

“139A. Order for discovery against non-party - (1) This rule applies if it appears to the Court that a person who is not a party to a proceeding (“the person”) may be or may have been in the control of one or more documents or group of documents that the person would have had to discover, if the person were a party to the proceedings.

- (2) The Court may on application order the person to –
- (a) file an affidavit stating –
 - (i) whether the documents are or have been in the person’s control; and
 - (ii) if they have been, but are no longer in the person’s control, the person’s best knowledge and belief as to when they ceased to be in the person’s control and who now has control of them; and
 - (b) to serve the affidavit on a party or parties specified in the order.

(3) An application for an order under subclause (2) must be made on notice to the person and to every other party who has filed an address for service.

(4) The Court may not make an order under this rule unless satisfied that the order is necessary at the time when the order is made.

(5) The Court may when making an order under subclause (2) or at any time thereafter make such further orders as it thinks fit as to production and inspection of documents.

(6) If an order is made under subclause (2) the Court may if it thinks fit order the applicant to pay to the person the person’s expenses (including reasonable solicitor and client costs) of and incidental to the application and in complying with any order made on the application.”

4. Application of this Part to Crown proceedings – Rule 147 of the Code is amended by –

- (a) inserting in paragraph (b) after the words “Rule 139”, the words “Rule 139A”; and
- (b) inserting in paragraph (c) after the words “ An order for inspection under”, the words “Rule 139A,”.

G.L. Harmon
Clerk of the Executive Council

These Rules are administered by the Ministry of Justice

BY AUTHORITY:
Cook Islands Government - 2008