Civil Procedure

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I Introduction

This review of civil procedure deals with the topical issue of self-represented litigants in civil cases from a procedural perspective. It then discusses the issue of *in camera* or restricted hearings in New Zealand in the context of two significant recent cases. Finally the review considers the recent legislation relating to the modernisation of the courts, with particular reference to the Senior Courts Act 2016, and the District Court Act 2016. It discusses how the new legislation affects matters of civil procedure.

II Procedural Issues Relating to Self-represented Litigants

A *An outline of the issue*

This part of the review deals with the issue of self-represented litigants in civil cases from the perspective of the procedural issues which can arise.

By way of introduction, this issue is topical in part because it forms a significant part of the current focus on the broader issue of access to justice in New Zealand, which arises in both civil and criminal cases.[1] There is no

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1 For New Zealand commentary in this area over the past few years see W Fotherby "Taking Self-Represented Litigants Seriously" (2010) 2 NZ Law St J 353; Justice Helen Winkelmann "The New Zealand Law Foundation Ethel Benjamin Commemorative Address 2014: Access to Justice — Who Needs Lawyers?" (2014) 13 Otago LR 229 at 235–241; Frances Joychild "Continuing the conversation … the fading star of the rule of law" (5 February 2015) Auckland District Law Society <http://www.adls.org.nz>; Judge SJ Maude and L Kearns "Self-Represented Persons: Problems and Solutions — Family Law" ADLS webinar, 18 February 2015; "Self-represented litigants — continuing the dialogue" (13 March 2015) Auckland District Law Society <http://www.adls.org.nz>; Sasha Borissenko "Does self-representation provide access to justice?" (2015) 860 LawTalk 7 at 7; Chris Gallavin "The self-represented litigant" (2015) 860 LawTalk 24 at 24; Letter from Darryn Aitchison to the Editor "Access to

doubt that the proportion of cases involving self-represented litigants is on the rise in both the civil and criminal areas, not only in New Zealand[2] but also in other common law jurisdictions.[3] In part this is a reflection of the increasing cost of providing legal services in the litigation area, coupled with the reduced availability of legal aid,[4] although the underlying causes may well run deeper than that. As Heath J recently observed in *Brown v Sinclair*:[5]

> [4] At the risk of over-simplification, there are, in general, three categories of people who represent themselves in Court. The first are those who cannot afford a lawyer because they do not qualify for legal aid. The second are those who think they can do a better job than a lawyer. The third comprises people who have become obsessed with a particular dispute, for whatever reason. Into whichever of those categories a particular litigant falls, it is likely that he or she will struggle to comply with detailed rules of Court. In particular, there will often be problems with the preparation and content of documents that he or she is required to file in accordance with those rules. Rules of evidence tend to be observed in the breach.

One of the reasons for the increasing popularity of self-representation in the courts is thought to be the growing availability of internet-based guides and online "how to do it" material which provide assistance to intending

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justice"" (2015) 863 LawTalk 32 ; Louise Grey "Not for the Faint of Heart: The Right to Self-Representation in New Zealand" (2017) 7(21) VUWSALRP and N Pender and B Toy-Cronin "Practitioners and Self-Represented Litigants" NZLS webinar, July 2017.

2 See Winkelmann, above n 1, at 235 for some illuminating, if not alarming, statistics on the extent of self-representation in the New Zealand court system in 2014.

3 For the position in England as at June 2011 see Kim Williams *Litigants in person: a literature review* (Ministry of Justice, United Kingdom, Research Summary 2/11, June 2011), where the author notes at 3: "Civil cases had high levels of non-representation, particularly among defendants; 85% of individual defendants in County Court cases and 52% of High Court defendants were unrepresented at some stage during their case". See also *Access to Justice for Litigants in Person (or self-represented litigants): A Report and Series of Recommendations to the Lord Chancellor and to the Lord Chief Justice* (Civil Justice Council, November 2011).

4 See Winkelmann, above n 1, at 236. For a summary of the position in England in relation to cuts in legal aid see "Austerity and the law: Justice in a cold climate" *The Economist* (online ed, London, 1 November 2014).

5 *Brown v Sinclair* [2016] NZHC 3196. Occasionally of course litigants in person, against the general run of experience, achieve distinctive success. One such example is the classic case of *Wintle v Nye* [1959] 1 WLR 284 (HL), where the appellant in a probate case before the House of Lords, appearing in person, succeeded in overturning the decisions of both of the courts below.

litigants on how to run their own legal cases.[6] The issue of the cost of pursuing civil litigation is of course not a new concern,[7] but it is certainly one which is generating increasing levels of attention.

There has been much commentary in recent times focusing on the extent to which the legal system ought to adapt to and cater for the rise of the self-represented litigant.[8] This necessarily also involves consideration of the extent to which existing procedural and substantive rules of law should be rendered more accessible and user-friendly for the litigant in person.

Two potentially conflicting principles lie at the heart of the theoretical treatment of this issue. The first, and indisputably laudable, principle is that civil justice should be available to all litigants regardless of their means, expertise or access to competent and experienced counsel.[9] The second principle recognises that the administration of justice in contemporary Western societies is not attended with infinite resources. The maintenance of an orderly and coherent court system, coupled with the need for prudent utilisation of valuable and increasingly scarce judicial time and energy, accordingly leads more or less inevitably to a requirement that civil cases be conducted in a productive and efficient fashion and with an increasing focus on the essential matters at issue in the dispute.[10]

There is little doubt that, in general terms, self-represented litigants who are not legally trained or experienced tend to place a significant degree of strain on the efficient working of the court system and also that they increase the demands on both judges and court staff.[11] These difficulties can be

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6 Matt Stewart "Cash-strapped, web-savvy litigants pushing rise of legal self-representation" (18 January 2016) Stuff <www.stuff.co.nz>; and Elliot Sim "A warning to the profession" (2015) 860 LawTalk 9 at 9. Two prominent examples of such online resources are LawSpot <www.lawspot.org.nz> and JustAnswer NZ Law <www.justanswer.com/sip/New-Zealand-Law>.

7 As an Irish judge, Sir James Mathew, put it in 1897 in his often-quoted aphorism, "In England, justice is open to all — like the Ritz Hotel", quoted in RE Megarry *Miscellany-at-Law* (Stevens, London, 1955) at 254, although this aphorism is also attributed to several English judges.

8 See the commentary set out at n 1 above.

9 As the New Zealand Court of Appeal affirmed in *Re GJ Mannix Ltd* [1984] 1 NZLR 309 at 312: "a natural person of sufficient age and capacity cannot be denied the right to present his case in person".

10 This sentiment is expressed in the High Court Rules 2016, r 1.2: "The objective of these rules is to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application." It is interesting to note that the previous version of this rule referred to a requirement that the rules be "construed" so as to achieve these objectives, but the wording now expresses these goals as being the objective of the rules (see Judicature Act 1908, sch 2, r 4).

11 See Williams, above n 3, at 5, where the author notes: "A number of sources noted the extra burden that unrepresented litigants create for court staff and judges. Dewar

avoided or minimised by the availability of competent legal representation.[12] On the other hand, it would certainly be a draconian (not to mention unconstitutional) step indeed to curtail or severely limit the fundamental right of access of self-represented litigants to the court.

The High Court of Australia made some pertinent observations to this effect on the status of litigants in person in the leading case of *Cachia v Hanes*.[13] All five judges expressed the view, in their joint judgment, that:[14]

> Whilst the right of a litigant to appear in person is fundamental, it would be disregarding the obvious to fail to recognize that the presence of litigants in person in increasing numbers is creating a problem for the courts. It would be mere pretence to regard the work done by most litigants in person in the preparation and conduct of their cases as the equivalent of work done by qualified legal representatives. All too frequently, the burden of ensuring that the necessary work of a litigant in person is done falls on the court administration or the court itself.

A recent English defamation case, *Mole v Hunter*, concerned allegedly defamatory comments posted by the defendant tenant on a tenants' protection website.[15] The plaintiff claimed that the defendant had made defamatory references to the plaintiff's performance as landlord and to the plaintiff's allegedly wrongful refusal to return the defendant's tenancy security bond. Tugendhat J observed that claims such as these, based on online defamation situations, were ones which tended to give rise to self-representation situations.[16] Both parties appeared in person (the plaintiff was accompanied

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et al. (2000) pointed to the stress and frustration that they experienced in dealing with unrepresented litigants. … Moorhead and Sefton (2005) noted that while unrepresented litigants participated at a lower intensity (e.g. were less likely to defend cases, file documents or attend hearings) than represented parties, more mistakes were made."

12 See Winkelmann, above n 1, at 237: "Most judges and counsel would tell you that a trial with an unrepresented litigant will take far longer to hear than a trial where all parties are represented. Judges regard themselves as under a duty to do what they can to ensure that the unrepresented party understands what is going on in court and has a good and fair opportunity to present their case. Legal representation allows the hearing to proceed without this level of judicial intervention and also allows for more focused and direct production of evidence and argument of legal principle."

13 *Cachia v Hanes* (1994) 179 CLR 403.

14 At 415 (footnotes omitted).

15 *Mole v Hunter* [2014] EWHC 658 (QB).

16 As Tugendhat J stated at [110]: "One of the reasons why claimants bring actions in person is that it is easy for disgruntled individuals to post defamatory allegations on the internet. These publications can be very damaging if the person making the allegation succeeds in attracting any viewers."

by her father as a McKenzie friend). The judge noted, in a similar vein, that "litigation between two litigants in person places great demands upon the court".[17] In that case, the trial papers had been presented in four bundles which were not in chronological order and which omitted various documents which the judge then had to locate personally from the court file.

The judge went on to state that if the necessary preparatory work in such cases to enable a just trial "is not done at the expense of the litigants, then it must be done, if at all, at the expense of the state".[18] There would then be:[19]

> … significant budgetary and resource implications if the courts are to provide, free of charge to the litigant, and through the costly time of Masters or Judges services to those who cannot, or who choose not to, [engage lawyers] that they would receive at a small fraction of the cost from lawyers of the junior level appropriate for such work.

From a procedural standpoint, the other issue which needs to be borne in mind is that the practical functioning of a common law system of civil justice depends to a considerable extent on the court being able to rely on the diligent and competent performance of solicitors and counsel of various procedural tasks and their adherence to accepted standards of professional responsibility.[20] Ultimately of course, litigation lawyers and counsel are answerable both to the court and in a professional disciplinary context for the proper performance of those responsibilities. These considerations do not apply in the same way to those self-represented litigants who do not also happen to be qualified legal professionals. This aspect of the matter is discussed further below.

The focus of this part of the review is on procedural aspects of the issue of self-represented litigants in the context of civil cases. Some understanding, however, of the theoretical basis underpinning this topic is necessary in order to appreciate the matters at issue.

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17 At [114].

18 At [116].

19 At [117].

20 As Somers J expressed the principle in *Re GJ Mannix Limited*, above n 9, at 316: "The barrister has the duty to advance his clients' case fully and fearlessly and is equipped by training with the skills necessary to do that. But even more importantly he has an overriding duty to the Court and to the public and, what is essentially the same thing, to the standards of the profession."

B *Procedural challenges for litigants in person*

From the perspective of civil procedure, an important point to bear in mind is that self-represented litigants not only have to deal with formal procedural rules in the applicable tribunal, such as the High Court, the District Court, the more specialised tribunals or the appellate courts, but also with practical requirements in other areas. These include the many and varied usual litigation tasks, such as drafting pleadings, attending to case management requirements, organising witnesses for trial and issuing subpoenas, identifying trial issues, preparing bundles of documents[21] and written briefs of evidence[22] and organising topics for the cross-examination of witnesses. These tasks also have to be accomplished in accordance with deadlines and timetables set by the court as part of the case management process.

These are of course specialised tasks which can often tax the skill and expertise of competent counsel in civil cases involving even moderately complex legal or factual issues. It is unrealistic (and some would say unreasonable) to expect self-represented litigants to be able to attend to tasks such as separating out privileged and non-privileged documents in the course of discovery and responding to or objecting to interrogatories. Litigants in person are also expected to be able to draft and present written briefs of evidence which contain only admissible evidence and which exclude material such as hearsay, argumentative content, purported lay or expert evidence which is in the nature of legal submissions and other objectionable elements. It is not difficult to locate recent instances where judges have been critical of the way in which even experienced counsel have dealt with these issues.[23]

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21 As was noted in the case of *Mole v Hunter*, above n 15, even the task of preparing comprehensive, indexed bundles of trial documents in chronological order can prove daunting for the average litigant in person. A review of rr 9.1–9.9 of the High Court Rules 2016, in relation to the documents required for trial, and in particular r 9.4(5) setting out the provisions applicable to preparing the common bundle of documents, shows that these requirements are not to be taken lightly.

22 Under r 9.11 of the High Court Rules, written briefs of evidence must contain admissible evidence in terms of the Evidence Act 2006 or face an admissibility challenge, which is in itself no mean hurdle for a self-represented litigant to have to jump.

23 See, for example, the criticisms of Blanchard J in the Supreme Court in *Penny v CIR* [2011] NZSC 95, [2012] 1 NZLR 433 at [32], where the Court disregarded expert evidence which amounted to legal submission or advocacy by the expert on the client's behalf.

Apart from these pre-trial procedural requirements, a litigant in person also needs to cope with courtroom etiquette, layout and procedures.[24] There is then the need to contend with the actual advocacy demands of a trial.

C *Issues arising from the role of lawyers as officers of the court*

Some of the foregoing examples serve to illustrate the extent to which the court relies on the proper performance by lawyers of their duties as officers of the court. There are various examples of this obligation reflected in the High Court Rules,[25] which are themselves expressly made subject to a lawyer's obligations to the court.[26]

Other examples are found in the applicable regulatory requirements relating to lawyers practising in the courts.[27] Some of these requirements may appear counter-intuitive to a self-represented litigant, who might consider that his or her case ought to be run with the sole objective of maximising the prospects of success. Such requirements include, for example, the obligation not to attack a person's reputation without good cause in court or in court documents,[28] the obligation not to put unsupported or unfounded matters to

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24 For a recent discussion of this issue see Bridgette Toy-Cronin "Counsel's tables? Seating counsel and litigants-in-person in the courtroom" [2016] NZLJ 148.

25 One example is as follows. Rule 7.23(2) and form G 32 of the High Court Rules 2016 require that an interlocutory application without notice be certified by the lawyer for the applicant as to compliance with the court rules. Rule 7.23(5) provides that: "Despite subclause (2), a Judge may dispense with the certificate if the applicant is unrepresented and justice so requires, and if dispensation is sought, the applicant must state the reasons for the absence of a lawyer's certificate." Counsel for an applicant without notice also owes the court a duty to disclose fully all relevant facts relating to the application, including those facts which the respondent might have raised if present: *United Peoples' Organisation (World Wide) Inc v Rakino Farms Ltd (No 1)* [1964] NZLR 737 (SC); and *Digital Equipment Corp v Darkcrest Ltd* [1984] 3 WLR 617 (Ch). Given that this duty is owed by counsel as an officer of the court it does not translate readily to the obligations of a litigant in person.

26 Rule 1.20(1) of the High Court Rules 2016 states: "The duties imposed by these rules on lawyers do not limit a lawyer's obligations to a client or another lawyer or the court under the rules of conduct and client care for lawyers in New Zealand or other applicable ethical rules or guidelines."

27 See the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, Chapters 13 and 14. In particular, r 13.1 provides that: "A lawyer has an absolute duty of honesty to the court and must not mislead or deceive the court." Under r 13.3 a lawyer's obligation to obtain and follow a client's instructions in relation to the conduct of litigation is "[s]ubject to the lawyer's overriding duty to the court".

28 Rule 13.8.

a witness in cross-examination,[29] the obligation to preserve the independence of expert witnesses[30] and the obligation to put all relevant and significant law before the court, whether or not it supports the case being advanced.[31]

In the area of discovery of documents, particular complications may arise. The proper disclosure of documentary evidence which a party to a civil case wishes to rely on at trial and which is relevant to the allegations raised in that party's pleaded case is a fundamental element of a common law system. Indeed it is one of the central features which distinguishes a common law from a civil law system of dispute resolution.[32] The classic statement of a lawyer's obligation to the court in respect of discovery is found in the case of *Myers v Elman*.[33] The well-known passage from the judgment of Lord Wright in the House of Lords in that case is worth reproducing in full here:[34]

> The order of discovery requires the client to give information in writing and on oath of all documents which are or have been in his corporeal possession or power, whether he is bound to produce them or not. A client cannot be expected to realize the whole scope of that obligation without the aid and advice of his solicitor, who therefore has a peculiar duty in these matters as an officer of the Court carefully to investigate the position and as far as possible see that the order is complied with. A client left to himself could not know what is relevant, nor is he likely to realize that it is his obligation to disclose every relevant document, even a document which would establish, or go far to establish, against him his opponent's case. The solicitor cannot simply allow the client to make whatever affidavit of documents he thinks fit nor can he escape the responsibility of careful investigation or supervision.

Subsequent cases have reinforced the onerous obligations imposed on lawyers by the discovery process. These include the obligation to ensure that the client is fully aware of the scope of discovery and the duty of making

29 Rule 13.10.2.

30 Rule 13.10.9.

31 Rule 13.11.

32 For a general discussion of this topic see JA Jolowicz "Adversarial and Inquisitorial Models of Civil Procedure" (2003) 52 ICLQ 281. Denning LJ expressed the matter pithily in *Jones v National Coal Board* [1957] 2 QB 55 at 63: "In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries."

33 *Myers v Elman* [1940] AC 282 (HL).

34 At 322.

full disclosure and also the importance of preserving documents which may have to be discovered.[35]

This obligation also extends to not counselling or encouraging a client to conceal or destroy documents, which is a matter of increasing significance in the age of social media.[36] A rather spectacular US decision from the Supreme Court of Virginia in 2013, where the plaintiff's attorney had urged the plaintiff to "clean up" his Facebook page to avoid "any blow-ups of this stuff at trial", resulted in the attorney in question being ordered to pay a massive costs award of US$542,000 to the defendants by way of wasted costs.[37]

In terms of other discovery obligations, lawyers must also carefully check documents given to them by the client and ensure that there are no omissions from the documents to be discovered. The lawyer is not permitted simply to leave the responsibility for making proper discovery to the client.[38] Discovered documents may only be used for the purposes of the proceeding in which they have been discovered.[39] In New Zealand, the nature of the obligations on lawyers in relation to the process of discovery is set out both in the High Court Rules 2016[40] and in the applicable regulatory requirements.[41]

The foregoing discussion shows that a viable regime for discovery in a common law system depends to a significant degree on the dual role of lawyers as advocates for their client's cause and as officers of the court, with the latter responsibility being pre-eminent. It may well be expecting far too much of litigants in person that they will have either the ability or the inclination to adhere scrupulously to the onerous discovery obligations

35 *Rockwell Machine Tool Co Ltd v EP Barrus (Concessionaires) Ltd* [1968] 1 WLR 693 (Ch) at 694 ; and *Infabrics Ltd v Jaytex* [1985] FSR 75.

36 See Evelyn Young and Louise Fairbairn "Netiquette in Aladdin's cave" (2014) 88 LIJ 42 at 44: "Thus, lawyers are urged to take extreme care when advising their clients as to their social media use, and should not be counselling clients to clean up their social media pages where it is likely that legal proceedings may be started and those pages may be relevant."

37 *Allied Concrete Co v Lester* 736 SE 2d 699 (Va 2013) at 702.

38 *Woods v Martins Bank Ltd* [1959] 1 QB 55; and *Powerco Ltd v The Commerce Commission* HC Wellington CIV-2005-485-1066, 10 March 2006 at [5].

39 *Harman v Secretary of State for the Home Department* [1983] AC 280 (HL); and *Clear Communications Ltd v Telecom Corporation of New Zealand Ltd* (1999) 14 PRNZ 477 (HC).

40 See, for example, r 8.13: "… the solicitor who acts for the party in the proceeding must take reasonable care to ensure that the party— (a) understands the party's obligations under the [discovery] order; and (b) fulfils those obligations"; sch 9 (discovery checklist and the listing and exchange protocol); and form G 37 (form of affidavit of documents, separating out discoverable, confidential and privileged documents).

41 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules, r 13.9.

prescribed by the court rules of procedure without any form of third party oversight or supervision.

Some courts have taken a dim view of the lack of compliance on the part of litigants in person with pre-trial discovery orders. The Court of Appeal of the Family Court of Australia considered this issue in the case of *In the Marriage of JRD and MT Tate*.[42] That case concerned a husband who had failed to comply with orders for discovery over a period of some four years, resulting in at least 25 court appearances, in most of which the parties were unrepresented. The judge at first instance made orders dismissing the husband's application to reinstate his response to the wife's application for property settlement and spousal maintenance and refusing to allow the husband to cross-examine the wife on her evidence in the undefended hearing which then ensued.

On appeal, the Court noted that "[t]o eliminate or at least greatly reduce unacceptable delays, within the resources available, is a constant goal of the court" and that "it is fundamental that case management directions and orders of the court in preparation for trial (or settlement) must be respected and obeyed".[43] In dismissing the husband's appeal, the Court held that while the remedy imposed necessarily excluded the husband from further participation in the proceedings, that course was necessary in order to ensure the attainment of justice in that case. To put it colloquially, while a litigant always has the right to a fair trial, there comes a point at which a court is entitled to say that a litigant, in person or otherwise, has had a fair crack of the whip. As the Court observed:[44]

> Whilst such cases are "exceptional", and indeed unusual, no litigant, whether legally represented or not, should harbour any doubt that manipulation of the court processes, (as was attempted and indeed partially achieved in this instance), through disregard of and deliberate non-compliance with its orders and directions will attract other than the strongest measures from the court. In doing justice to both parties, the exclusion of a defaulter, whose

42 *In the Marriage of JRD and MT Tate* (2000) 26 Fam LR 731. For a similar New Zealand example see the decision of the Court of Appeal in *Coxhead v Hubbard* CA181/01, 20 February 2002, in which the Court of Appeal upheld the decision of the Court below to strike out the claim of a lay litigant for failing to provide further particulars after having been given ample opportunity to do so. The Court of Appeal stated at [19]: "As has been made clear to the appellant on various occasions he was obligated to provide detail and he has refused to do so. Mr Coxhead had extended to him a sympathetic and liberal approach which recognised the fact that he was not legally represented."

43 *In the Marriage of JRD and MT Tate*, above n 42, at [104].

44 At [108].

> defaults threaten the achievement of justice, is not only an option, but, in such circumstances, becomes a regrettable necessity.

The above discussion identifies the nature of the problem but the solutions are less easy to discern. If the default position of relying entirely on a litigant in person to make proper discovery (or indeed to comply with pre-trial case management or interlocutory orders in general) is not considered to be a universally satisfactory answer to the problem then some form of third party involvement would seem to be inevitable. This would need to be provided by lawyers or maybe by law students (perhaps on a pro bono, limited brief or voluntary basis), by court staff or ultimately by judicial supervision. These aspects are discussed further below.

D *The implications on the neutrality of the court arising from self-represented litigants*

As various commentators have noted, the issue of self-represented litigants poses potential challenges to the neutrality and impartiality of the court.[45] The experienced English county court judge HC Leon, writing in 1970 on the English judiciary under his pen name of Henry Cecil,[46] was alive to this potential difficulty, even though when viewed from a modern perspective he might be considered to have approached the issue in relatively conservative terms. He stated:[47]

> I think that if a judge sees someone who needs help, he should try to arrange for him to have it, provided this can be done without affecting the other party to the litigation. … I think this ought to be done in every county court. A number of others have adopted it, but I feel sure that there are judges who consider it unnecessary or wrong. Those who think it unnecessary must suffer severely from lack of imagination but I fully see the argument of those who think it wrong. It certainly would be wrong if the judge himself became involved. Equally it would be wrong if the other party to the litigation felt that his opponent, because he was poor or unhappy, had the ear of the judge or was being helped unfairly.

In terms of interlocutory procedures, a judge may observe that a litigant in person has inadvertently discovered privileged material, such as

45 See, for example, Richard Moorhead "The Passive Arbiter: Litigants in Person and the Challenge to Neutrality" (2007) 16 Social & Legal Studies 405.

46 Henry Cecil *The English Judge* (Stevens & Sons, London, 1970).

47 At 162–163.

previous legal advice or documents relating to without prejudice discussions or negotiations. In the course of responding to interrogatories or drafting written briefs of evidence similar issues may arise.

Other such problematic issues may arise in the course of a trial. In order to ensure that a fair trial occurs a judge may feel under an obligation to give some form of direction to a litigant in person. For example, a judge may see, in the course of a trial, that a litigant in person has failed to put his or her case to the opposing witnesses in cross-examination, as the law requires. To what extent should a judge consider that there is an obligation to point this out to a litigant in person or to make suggestions as to how the course of that litigant's cross-examination should proceed? Similarly, a litigant in person may fail to lead crucial evidence supporting his or her claim, so that an otherwise meritorious claim might be defeated on purely technical grounds. It may also appear that a litigant in person has drawn up the pleadings in the case inexpertly so that a promising claim has not been properly presented to the court.

Those who take a strict view of the adversarial process might claim (with some logical justification) that a litigant in person who for one reason or another does not engage legal counsel to present the case takes the risk that his or her claim may fail through technical deficiencies or through inadequacies in presentation. In the not-too-distant past such a view may well have been the accepted wisdom in terms of perceptions of the proper judicial role.[48]

A more modern approach might lend itself to greater judicial intervention and supervision of the course of a trial involving self-represented litigants, combined with a more lenient approach to litigants in person.[49] Of course such an approach involves potential dangers to the need to preserve the impartiality of the tribunal. If the judge is seen to be providing excessive assistance, or even legal advice, to litigants in person then the opposing party may well perceive a potential ground of appeal.

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48 For an instructive discussion of decisions to this effect from US State courts see Russell Engler "And Justice for All — Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks" (1999) 67 Fordham L Rev 1987 at 2013 (footnotes omitted): "In justifying their decisions involving unrepresented litigants, courts routinely recognize that unrepresented litigants generally must play by the same rules as represented litigants and can expect no special treatment. Some decisions emphasize that the judge may not play the role of advocate or attorney for the unrepresented litigant."

49 As Fogarty J expressed this principle in *Torbay Holdings Ltd v Napier* [2014] NZHC 2380 at [76]: "For very sound reasons, the Courts do give latitude and lenience to lay litigants. Litigants who have the advantage of solicitors and counsel are able to respond to the pre-trial requirements much faster and more efficiently. But that does not entitle them to better justice than lay litigants."

In this writer's view, a balanced view of this topic combined with long experience of legal practice and human nature, as it manifests itself in the litigation context, also requires it to be said that not all litigants in person (and indeed not all represented litigants) are beyond reproach in their motivations. This is an aspect which sometimes appears to escape some academic commentators in this area. Experience shows that some litigants in person can regrettably also be devious and manipulative and may not be above seeking to exploit their status as a litigant in person to attempt to gain a strategic advantage over the opposing party. Others are simply obsessive or vexatious.[50] In doing so they may indulge in conduct which would be totally unacceptable in the case of a lawyer.

An example of some of the difficulties which can arise in this area is well illustrated by the recent 2016 decision of the English Court of Appeal in *Agarwala v Agarwala*.[51] That case involved a dispute between two family members about an accounting for alleged loss of profits arising from the renting of a property.

The Court of Appeal stated that the litigation had "been running almost continuously now for seven years", it had "taken up countless court and judge hours as both parties, incapable of compromise, have bombarded the court with endless applications" and that:[52]

> [the] refusal of either party to accept any ruling or decision of the court has meant that the court staff and judge have been inundated with emails, which they have had to deal with as best they could, with limited time and even more limited resources.

King LJ stated:[53]

> In my view judges must be entitled, as part of their general case management powers, to put in place, where they feel it to be appropriate, strict directions regulating communications with the court and litigants should understand that failure to comply with such directions will mean that communications that they choose to send, notwithstanding those directions, will be neither responded to nor acted upon.

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50 In relation to the latter category, ss 166–169 of the Senior Courts Act 2016 now confer more comprehensive powers on the High Court to make a limited order, an extended order or a general order (depending upon the degree of vexation found to be applicable) to control the problem of the vexatious litigant.

51 *Agarwala v Agarwala* [2016] EWCA Civ 1252.

52 At [71].

53 At [72].

E *Possible solutions to the problem areas with self-represented litigants*

One solution which has been posited from time to time is for judges to play a more active role in assisting litigants in person, perhaps by adopting an inquisitorial approach to trials and defended matters. As Justice Winkelmann has pointed out, however, there are potentially some fundamental problems with this approach.[54]

As various common law judges and legal authors have pointed out, dating back at least to the time of *Blackstone's Commentaries* (first published in 1765) if not further,[55] the common law model of dispute resolution proceeds on the basis that, following the completion of pre-trial procedures including explicit pleadings, discovery and perhaps interrogatories, the individual parties present their cases to the judge as an impartial arbiter of the dispute. The parties are responsible for producing the evidence they wish to adduce through witnesses and those witnesses give evidence (generally) in open court[56] and are examined and cross-examined in that forum.

As Lord Dyson JSC, delivering his judgment as part of the majority in the United Kingdom Supreme Court in the 2012 case of *Al Rawi v Security Service*, put it:[57]

> [22] For example, it is surely not in doubt that a court cannot conduct a trial inquisitorially rather than by means of an adversarial process (at any rate, not without the consent of the parties) or hold a hearing from which one of the parties is excluded. These (admittedly extreme) examples show that the court's power to regulate its own procedures is subject to certain limitations.

The reference by Lord Dyson JSC in the foregoing passage to an inquisitorial process being allowable "with the consent of the parties" suggests that such a procedure might be best suited to a situation where

54 Winkelmann, above n 1, at 240: "However, as the above discussion I hope outlines, this approach is inconsistent with our present model of justice. It is significant I suggest, that European civil law systems which do depend upon an inquisitorial system, also require that parties be represented."

55 See, for example, William Blackstone *Commentaries on the Laws of England* (JB Lippincott, Philadelphia, 1900) vol 2 at 298; *Jones v National Coal Board*, above n 32; *Air Canada v Secretary of State for Trade* [1983] 2 AC 394 (HL) at 434; and *Chilton v Saga Holidays plc* [1986] 1 All ER 841 (CA) at 844: "… it is basically an adversarial system, and it is fundamental to that that each party shall be entitled to tender their own evidence and that the other party shall be entitled to ask questions designed to probe the accuracy or otherwise, or the completeness or otherwise, of the evidence which has been given".

56 This is a topic which will be examined in more detail in part III below.

57 *Al Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531.

both parties were unrepresented. Such a procedure was in fact adopted by Tugendhat J in the case of *Mole v Hunter*, referred to above, in which both parties were unrepresented.[58] The judge described the procedure as follows:[59]

> [111] Because both sides were litigants in person, I conducted the hearing by asking first Ms Hunter and then Ms Mole about each of the matters complained of in the counter claim. I then gave each of them an opportunity of asking questions of the other. Ms Mole chose to ask no questions. I then went through the chronology of events as I understood them to be, inviting each of them to correct or complement the understanding I had formed on my own reading of the papers and to make their submissions. Before doing this I invited each party for their consent to the procedure I proposed to adopt, although in my view CPR r.3.1(2)(m) is sufficiently wide to make such consent unnecessary.

The procedure adopted by Tugendhat J resembles that described by Sir John Donaldson MR in an earlier English case.[60] The position in England under the Civil Procedure Rules (CPR) possibly affords greater flexibility than in New Zealand as the CPR are less explicit than the High Court Rules 2016 as to the procedure at trial.[61] The New Zealand Rules detail the mode of trial in a case where both parties appear.[62] This is, however, subject to the court's powers to make directions at a case management conference[63] and pre-trial conference[64] "to secure the just, speedy, and inexpensive

58 *Mole v Hunter*, above n 15.

59 Tugendhat J went on to note that there have been judicial recommendations in England that CPR r 3.1 be amended to introduce a specific power allowing the court to direct that "…where at least one party is a litigant in person, the proceedings should be conducted by way of a more inquisitorial form of process …" (at [112]).

60 *Chilton v Saga Holidays plc*, above n 55, at 844, where Sir John Donaldson MR referred to "… the situation where, as so often happens, a litigant in person is quite incapable of cross-examining but is perfectly capable in the time available for cross-examination of putting his own case. The judge or the registrar then picks up the unrepresented party's complaints and puts them to the other side."

61 Rule 3.1(2)(m) of the Civil Procedure Rules 1998 (UK) provides that: "Except where these Rules provide otherwise, the court may — … (m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective." Rule 39.2(1) simply provides that "[t]he general rule is that a hearing is to be in public" subject to the exceptions in r 39.2(3).

62 Rule 10.10 of the High Court Rules 2016 sets out in some detail the mode of trial where both parties appear, though r 10.10(5) provides that this is subject to any directions given under rr 7.2 or 7.8. Rule 10.10 does not distinguish between parties appearing by counsel or in person.

63 Rule 7.2(3).

64 Rule 7.8(3).

determination of the proceeding" so this may afford a New Zealand court sufficient flexibility to follow the approach adopted by Tugendhat J.[65]

Another possible solution which has been suggested in this area is expanding the role and use of the McKenzie friend, being a person who is permitted by the court to assist a litigant in person by taking notes, offering advice and making suggestions as to how to run the case.[66] In England, McKenzie friends are subject to formal guidance through a practice note issued in 2010.[67] An important aspect of the guidance provided is that a McKenzie friend has no automatic right of audience before the court. If this is sought then application must be made at the commencement of the trial or hearing and the court will consider whether a litigant will not receive a fair hearing unless the right of audience is granted.[68]

Justice Winkelmann, in her 2014 Ethel Benjamin lecture, noted various potential difficulties with the use of McKenzie friends in place of qualified lawyers in court. The judge observed:[69]

> Whether or not the McKenzie friend is fee charging there are reasons to doubt the utility of the development of this role as a substitute for legal representation. The report writers identify a number of risks associated with the use of McKenzie friends: agenda driven McKenzie friends, poor quality advice, a lack of understanding of the limitation of the role and breach of privacy. McKenzie friends have none of the professional obligations of counsel — they have no obligation of confidentiality, or duties to the Court.

In a recent New Zealand defamation case in the High Court at Auckland involving two well-known protagonists, Justice Toogood considered an application by the plaintiff for permission to be assisted in court by a McKenzie friend who was a junior practising barrister.[70] The defendants did not object in principle to the appointment of a McKenzie friend to assist the plaintiff but opposed the particular candidate who was put forward. The Court granted permission for the barrister in question to act as the

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65 Perhaps the final word on this issue should go to Lord Clarke of Stone-cum-Ebony in his dissenting judgment in *Al Rawi*, above n 57, at [187]: "I respectfully doubt that the CPR require an adversarial process at every point. In the pursuit of the overriding principle of dealing with cases justly it may well be necessary to introduce inquisitorial elements … ."

66 A concept which originated from the case of *McKenzie v McKenzie* [1971] P 33 (CA). The concept was recognised in New Zealand in *Mihaka v Police* [1981] 1 NZLR 54.

67 *Practice Note (McKenzie Friends: Civil and Family Courts)* [2010] 1 WLR 1881.

68 *Re N (A Child) (McKenzie Friend: Rights of Audience)* [2008] 1 WLR 2743.

69 Winkelmann, above n 1, at 241. The report writers Winkelmann refers to are the Legal Services Consumer Panel in their report *Fee-charging McKenzie Friends* (April 2014).

70 *Craig v Slater* [2017] NZHC 874.

plaintiff's McKenzie friend subject to certain conditions.[71] The judge had earlier held that the case be tried as a judge alone matter without a jury given difficult legal and factual issues which were likely to arise. The barrister in question would be paid on an hourly rate basis and would receive suitable supervision through his barrister's chambers.[72] In assessing the merits of the application Justice Toogood considered possible ethical issues which might arise,[73] having regard to the reservations previously expressed by the Court of Appeal in *R v Hill*.[74] The judge stated:[75]

> [24] The question of what control the Court would have over a lawyer acting as a McKenzie friend rather than an advocate in the usual sense seems to me, with respect, generally to be straightforward. The Court would have the same powers to control the conduct of the McKenzie friend whether or not he or she was a practising lawyer, including the ability to ensure that the McKenzie friend did not step outside the boundaries of his or her responsibility as drawn by the Court.

While the use of a McKenzie friend may be helpful to an unrepresented litigant (and also to the court) it has obvious limitations and is not an optimal alternative compared with competent legal representation in court. The problem areas with self-represented litigants (apart, of course, from those that refuse to have lawyers involved in their cases) are therefore perhaps best addressed by considering how to make legal services better accessible to litigants in person.

One solution which has been suggested, with the endorsement of the New Zealand Law Society, is for lawyers to offer limited retainers (or "unbundled" legal services) to litigants in person, under which the lawyer would agree to carry out a defined part of the legal work involved in a civil litigation case.[76] Examples might be preparing pleadings, attending to discovery or cross examining certain witnesses at trial.

Some obvious areas of difficulty present themselves here. To what extent, for example, is it realistically possible to compartmentalise the work involved

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71 At [5]. These conditions included allowing the McKenzie friend to sit by the plaintiff in court, take notes, quietly make suggestions and give advice and propose questions and submissions for the plaintiff to use. The McKenzie friend would only be permitted to address the Court in rare circumstances and with leave and would not be permitted to question any witness.

72 At [13]–[14].

73 At [16]–[26].

74 *R v Hill* [2004] 2 NZLR 145 (CA) at [52].

75 *Craig v Slater*, above n 70.

76 See New Zealand Law Society "Practice Briefing: Guidance to Lawyers Acting Under a Limited Retainer" (4 February 2016) <www.lawsociety.org.nz>.

in even a moderately complicated civil litigation case? Experience shows that as a case progresses the need may arise for pleadings to be amended, further discovery is often required and unanticipated legal work can often arise from unexpected procedural steps taken by the opposing party, such as appeals against interlocutory decisions. Witnesses may die, disappear or refuse to provide written briefs of evidence, *Calderbank* settlement offers may need to be assessed in terms of their foreseeable costs implications at trial or a witness may turn hostile at trial or otherwise fail to come up to brief. All of these events may call out for critical legal input, often at extremely short notice.

Difficult professional liability issues may also arise and would necessitate very careful and detailed definition (preferably in writing) of the precise terms of a limited retainer.[77] For example, if a lawyer is engaged solely to draft pleadings does this retainer extend to giving advice on the need for subsequent amendments to the initial pleading? If a lawyer is engaged to separate out privileged and non-privileged documents for discovery purposes does that responsibility extend to reassessing the classification of the documents in question if privilege has subsequently been waived or abandoned?[78] A lawyer who is engaged solely to draft a deed of settlement of litigation may end up in a precarious position if the lawyer perceives some fundamental legal difficulties with the underlying settlement deal which has already been reached.

The issue of awarding costs in favour of successful litigants in person is also problematic. The general rule in New Zealand, as in other common law jurisdictions in which costs awards are available, is that costs are not generally awarded to a successful litigant in person.[79] This general approach

77 Pender and Toy-Cronin, above n 1, identify some potential problem areas with the concept of unbundling, including the fact that objective judicial scrutiny of the terms of the lawyer's retainer may lead to an unsatisfactory degree of unpredictability in terms of the outcome for the lawyer (at 13–17).

78 See New Zealand Law Society, above n 76, at 2. It refers to the English case of *Minkin v Landsberg* [2015] EWCA Civ 1152, [2016] 1 WLR 1489 as authority for the proposition that a solicitor's duty of care to the client does not exceed the terms set out in a limited retainer. The solicitor was perhaps fortunate to succeed in that case as the limited nature of the retainer had not been confirmed to the client in writing.

79 The New Zealand cases in relation to claims for costs by litigants in person are helpfully set out in Fotherby, above n 1, at n 94 and the accompanying text. The general principle was recently restated by Venning J in *Nathans Finance NZ Ltd (In Receivership) v Doolan* HC Auckland CIV-2010-404-2360, 10 November 2011 at [8] and by the Court of Appeal in *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2010] NZCA 400 at [162].

is supported by the costs provisions in the High Court Rules.[80] There are recognised exceptions to that principle but they are strictly limited in scope.[81] The High Court has affirmed the applicable principles in two recent cases.[82]

From time to time there have been calls for a more liberal approach to allowing costs in relation to successful self-represented litigants to provide them with more adequate recompense for their time and trouble.[83] These suggestions may be worth further investigation but they do involve some difficult philosophical considerations. Common law courts have traditionally been reluctant to compensate litigants for expenses of an "opportunity cost" nature, where no actual third party liabilities (such as lawyer's costs) have been incurred.

There are of course good policy reasons underlying this concern. It may of course be being too uncharitable to self-represented litigants to take the view that if the existing costs regime is liberalised they will seek to run litigation in person as a money-making venture, but perceptions of this nature possibly underpin the existing common law approach. Even under the existing costs rules, the costs awarded to a successful party who is legally represented do not amount to full reimbursement of that party's legal costs (except in exceptional circumstances where indemnity costs are awarded).

Assuming, however, for one reason or another, that the current phenomenon of litigants in person is going to be a permanent and increasing feature of the legal landscape in New Zealand, the legal profession and those involved in litigation need to do more and to become more innovative in order to justify their privileged status in society.[84] These issues may need to be addressed at least in part by legislative intervention and through changes to the rules of professional conduct.

Ideally, for example, a prescribed form of limited retainer should be introduced. It should also be made clear by legislation or rule changes that a legal professional (or indeed any third party such as a McKenzie friend, law student or voluntary unqualified assistant) should not incur liability or be subject to professional sanctions provided the terms of that limited retainer and the agreed tasks in question are carried out diligently and with reasonable competence.

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80 See, for example, High Court Rules 2016, r 14.2(f): "an award of costs should not exceed the costs incurred by the party claiming costs".

81 See, for example, *Re Collier (A Bankrupt)* [1996] 2 NZLR 438 (CA) at 441–442, where the Court outlined an exception where the litigant involves themselves in an action for the good of the general public, without hope of personal gain.

82 *AR v Immigration and Protection Officer (Costs)* [2017] NZHC 978; and *Sax v Simpson (Costs)* [2017] NZHC 1128.

83 See, for example, Fotherby, above n 1, at nn 93–146 and the accompanying text.

84 This point is well made by Winkelmann, above n 1, at 241–242.

This topic in the current review no doubt raises more questions than answers. The questions, however, are ones that will need to be addressed sooner rather than later.

III Closed and Restricted Hearings in Civil Cases in New Zealand

A *Two recent cases*

This section of the review considers two significant recent New Zealand cases concerning the concept of open justice in the courts. These cases approach this issue from two very different factual and legislative contexts. The two cases are the recent decision of the Supreme Court in *Erceg v Erceg [Publication restrictions]* (*Erceg*)[85] and the decision of the High Court, given on 13 April 2017, in *A v Minister of Internal Affairs* (*A v MIA*).[86]

In *Erceg*, there was an application by the trustees of certain family trusts made in the context of disputes between members of the family over how the trusts were being administered, which had led to the substantive litigation and eventually to a subsequent appeal to the Supreme Court. The trustees sought an order at the beginning of the appeal hearing to prevent the publication of certain private and sensitive family and trust matters which might be referred to in oral evidence in the substantive appeal on various grounds, as set out in the judgment.[87]

Arnold J, delivering the judgment of the Supreme Court on the application to prevent or restrict publication, observed that "[t]he principle of open justice is fundamental to the common law system of civil and criminal justice".[88] The judge went on to note, however, that:[89]

> … there are circumstances in which the interests of justice require that the general rule of open justice be departed from, but only to the extent necessary to serve the ends of justice.

85 *Erceg v Erceg [Publication restrictions]* [2016] NZSC 135, [2017] 1 NZLR 310. The substantive appeal by the appellant was dismissed in a judgment given by the Supreme Court on 8 March 2017: *Erceg v Erceg* [2017] NZSC 28, [2017] 1 NZLR 320.

86 *A v Minister of Internal Affairs* [2017] NZHC 746, [2017] 3 NZLR 247.

87 *Erceg v Erceg [Publication restrictions]*, above n 85, at [9].

88 At [2].

89 At [3].

The Court also observed that proceedings could be ordered to be heard *in camera* and evidence could also be heard in closed court in certain cases prescribed by legislation, as in the case of certain family and criminal proceedings.[90]

In declining to make the orders sought, the Court observed:[91]

> However, the courts have declined to make non-publication or confidentiality orders simply because the publicity associated with particular legal proceedings may, from the perspective of one or other party, be embarrassing (because, for example, it reveals that a person is under financial pressure) or unwelcome (because, for example, it involves the public airing of what are seen as private family matters). This has been put on the basis that the party seeking to justify a confidentiality order will have to show specific adverse consequences that are exceptional, and effects such as those just mentioned do not meet this standard. We prefer to say that the party seeking the order must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule, but agree that the standard is a high one.

In the case of *A v MIA*, the respondent (the Minister of Internal Affairs) had, in May 2016, first suspended and then cancelled the applicant's New Zealand passport acting in reliance on classified security information, leading to the applicant bringing an appeal under the Passports Act 1992, s 28. The applicant then dispensed with her counsel and, acting in person, brought an application for judicial review of the Minister's decision. She decided to pursue this application in place of the original appeal which she had brought.

The applicant then sought interlocutory relief in her judicial review application challenging the lawfulness of the Minister's reliance on ss 29AA to 29AC of the Passports Act 1992.[92] These sections incorporate special provisions into the Passports Act 1992 in proceedings involving matters of national security. In particular, s 29AB provides that if a proceeding under s 29AA involves classified security information, the court must "on a request for the purpose by the Attorney-General and if satisfied that it is desirable to do so for the protection of (either all or part of) the classified security information", receive or hear that information in the absence of the

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90 At [3]–[4].

91 At [13] (footnotes omitted). The Court had regard to Australian authority on the point: *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 (CA) at 476–477; and *Rinehart v Welker* [2011] NSWCA 403.

92 *A v Minister of Internal Affairs*, above n 86. The text of these sections is set out in Appendix A to the judgment.

person concerned, that person's lawyer and members of the public.[93] The court is required to approve a summary of the classified security information (except to the extent that disclosure of a summary would prejudice the interests referred to in ss 29AA(6) or (7)) and provide a copy to the person concerned.[94]

Dobson J stated that:[95]

> [41] A statutory provision that material and potentially decisive evidence in a court proceeding is to be presented to the Court and considered in the absence of the party adversely affected is as flagrant a breach of the fundamental right recognised in s 27 of NZBORA as could be contemplated. There is therefore a compelling case for applying an interpretation consistent with NZBORA to limit provisions that conflict with that right, unless the limitation on the right is a reasonable one prescribed by law that can be demonstrably justified in a free and democratic society.

The applicant advanced several challenges to the validity of the relevant provisions of the Passports Act 1992.[96] From a civil procedure perspective, one such challenge was whether the Minister was entitled to withhold discovery of classified security information.[97] In assessing this issue the Court considered the relevant provisions of the Evidence Act 2006, the Crown Proceedings Act 1950 and the High Court Rules. Having done so the Court held that the statutory scheme was paramount and that "[t]he statutory procedure recognises the priority to be attributed to protection of the secrecy of classified security information if it is deserving of that characterisation".[98]

The Court declined the declarations sought by the applicant but was prepared to allow the applicant a limited period in which to elect whether she wished to pursue her appeal as well as, or instead of, her application for judicial review.[99] The Court put in place timetable arrangements leading to a substantive fixture and made directions granting anonymity to the applicant.[100]

The hearing and substantive judgment in the *A v MIA* case will be of considerable interest if the full substantive hearing proceeds. So far as the writer's research has been able to ascertain, the substantive case will then be

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93 Passports Act 1992, s 29AB(1).
94 Section 29AB(2).
95 *A v Minister of Internal Affairs*, above n 86 (footnotes omitted).
96 At [40]–[66].
97 At [67]–[83].
98 At [76].
99 At [86]–[88].
100 At [89]–[97].

the only New Zealand defended civil hearing to date in which the evidence at the hearing to be presented against the party adversely affected will be withheld from that party, the party's lawyer and from the public, but will be made available to the court. (This assumes of course that the court rules at the substantive trial that the applicable provisions of the Passports Act 1992, on their proper interpretation, do in fact have that effect.)

In New Zealand, the *Zaoui* judicial review litigation bore some passing resemblance in principle to the preliminary stage of the *A v MIA* case, which was the subject of the judgment of Dobson J discussed above. In that case, Mr Zaoui, a national of Algeria, had sought refugee status in New Zealand and was the subject of a security risk certificate issued by the Director of Security to the Minister of Immigration stating that Mr Zaoui represented a threat to New Zealand's national security. The applicant applied to the Inspector-General of Intelligence and Security for a review of the certificate. The Inspector-General issued a preliminary decision setting out his view of how the review should proceed. Mr Zaoui challenged the validity of this preliminary decision by way of judicial review and was successful to some extent in the High Court,[101] on his cross-appeal to the Court of Appeal[102] and in the Supreme Court.[103] Following these judgments, the security risk certificate at issue was eventually revoked by the Director of the Security Intelligence Service in September 2007, so the matter did not proceed further.

As the *Erceg* and *A v MIA* cases illustrate, from very different factual contexts, the principle of open justice lies at the heart of both civil and criminal cases. In New Zealand, it is a product not only of the common law tradition[104] but also of legislation[105] and of the rules of procedure in the

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101 *Zaoui v Attorney-General* [2004] 2 NZLR 339 (HC). Williams J at [170] described the essence of the relief sought by the applicant as being "first, a summary of the allegations underlying the certificate without breaching a prohibition on the disclosure of 'classified information'" and "secondly, a declaration that the Inspector-General's view that the international human rights instruments and jurisprudence are irrelevant to the Inspector-General's function under s 114I was legally incorrect".

102 *Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 690 (CA).

103 *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289.

104 This tradition dates back at least as far as *Duke of Dorset v Girdler* (1720) Prec Ch 531, 24 ER 238: "the other side ought not to be deprived of the opportunity of confronting the witnesses, and examining them publicly, which has always been found the most effectual method for discovering of the truth". The case law on the principle of open justice and public access to the courts is summarised in Law Commission *Suppressing Names and Evidence* (Issues Paper 13, December 2008) at 3. For a discussion of the historical evolution of the principle of open justice in criminal trials see David Lusty "Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal Trials" (2002) 24 Syd LR 361.

105 New Zealand Bill of Rights Act 1990, ss 25(a) and 27.

High Court Rules 2016.[106] There are of course statutory exceptions to this principle in non-criminal cases. In New Zealand the most common example is probably s 151 of the Immigration Act 2009, which requires confidentiality to be maintained in respect of claimants, refugees and protected persons[107] unless the person concerned has expressly or impliedly waived his or her right to confidentiality.[108]

In England both the case law[109] and the Civil Procedure Rules 1998[110] provide for public hearings, subject to defined exceptions.[111] These include national security grounds.[112]

B *Exceptions to the open justice principle*

The general rule is that civil hearings in New Zealand are to be conducted openly and in public with full disclosure of documents and witness evidence, media reports on the hearing and publication of the result of the hearing.[113] The courts have, however, been prepared to recognise exceptions to this principle in civil cases.

As discussed above, the court does have power to make confidentiality orders in a suitably compelling case,[114] as is also the case in England.[115] However, the earlier New Zealand cases on confidentiality in court proceedings show that such orders are rarely granted by the court.[116] Cases

106 Rules 7.36 (application for summary judgment to be heard in open court) and 9.51 ("disputed questions of fact arising at the trial of any proceeding must be determined on evidence given by means of witnesses examined orally in open court").

107 Section 151(1). For a recent example of a case where confidentiality was imposed in terms of s 151 see *AR v Immigration and Protection Officer* [2017] NZHC 132 on appeal by way of judicial review from the decision of the Immigration and Protection Tribunal in *BY (India)* [2015] NZIPT 800819.

108 Section 151(6).

109 See, for example, *Scott v Scott* [1913] AC 417 (HL); and *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 (HL).

110 Rule 39.2(1) provides that: "The general rule is that a hearing is to be in public."

111 Rule 39.2(3).

112 *Al Rawi*, above n 57.

113 *Erceg v Erceg [Publication restrictions]*, above n 85, at [2].

114 At [3].

115 See *British Sky Broadcasting Group plc v Competition Commission* [2010] 2 All ER 907 (CA) at [6]: "Some of the material seen and discussed by the commission, and in turn by the tribunal and by this court, including material provided by ITV, is commercially confidential, and was protected from general disclosure by orders at each stage. Part of the hearing was held in private, for this reason."

116 *Surrey v Speedy* (1999) 13 PRNZ 397 (HC) (suppression application by defendant in defamation proceeding not granted); *Elworthy-Jones v Counties Trustee Company Ltd*

dealing with trade secrets or intellectual property, where publication of the judgment would effectively imperil the trade secret or matter at issue, are another exception.[117]

The thorny issue of the uneasy relationship between open justice and national security considerations in civil cases has been touched on above. A more detailed discussion of this issue is somewhat beyond the scope of this review, but the competing principles which arise, and differing judicial approaches to them in the Supreme Court of the United Kingdom, are dealt with in detail in the judgments of the Supreme Court in *Al Rawi v Security Service*.[118]

Finally, some mention of name suppression and suppression of identifying details in civil cases should be made for the sake of completeness. In England the concept of the super-injunction has proved to be highly controversial.[119] This is a form of injunction, now apparently losing popularity,[120] in which the court restrains publication of the matter at issue in the proceedings and also prevents the fact that the injunction has been granted at all from being reported.[121]

[2002] NZAR 855 (HC) (application by defendant that documents on court file be treated as confidential not granted); *Muir v Commissioner of Inland Revenue* (2004) 17 PRNZ 365 (CA); and leave to appeal to Supreme Court refused: *Muir v Commissioner of Inland Revenue* (2004) 17 PRNZ 376 (SC) (no special confidentiality arrangements applicable to tax cases).

117 *Erceg v Erceg [Publication restrictions]*, above n 85, at [13]; and *Al Rawi*, above n 57, at [64].

118 *Al Rawi*, above n 57. In England see also *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269; *Tariq v Home Office* [2011] UKSC 35, [2012] 1 AC 452; *Bank Mellat v Her Majesty's Treasury* [2010] EWCA Civ 483, [2012] QB 91; and Adrian Zuckerman "Editor's Note: Closed Material Procedure — Denial of Natural Justice" (2011) 30 CJQ 345.

119 See Adrian Zuckerman "Editor's Note: Common Law Repelling Super Injunctions, Limiting Anonymity and Banning Trial by Stealth" (2011) 30 CJQ 223.

120 This is due in part to the expense involved in obtaining a super-injunction and also the ease with which it can be circumvented in the internet age by overseas media publication, readily accessible online, of details of the case. See Adam Lusher "The injunction is dead … long live the super-injunction" *The Independent* (online ed, London, 18 April 2016).

121 For three examples see *John Terry (previously 'LNS') v Persons Unknown* [2010] EWHC 119 (QB) (super-injunction not granted to Premiership footballer to restrain tabloid reporting of his private life after the High Court ruled that the primary purpose of the injunction was to protect his commercial sponsorship interests); *DFT v TFD* [2010] EWHC 2335 (super-injunction granted initially against a blackmailer in a sexual extortion case but subsequently not pursued); and *Donald v Ntuli* [2010] EWCA Civ 1276, [2011] 1 WLR 294.

In New Zealand, name suppression in civil cases and in professional disciplinary decisions remains available.[122] In the professional disciplinary context, the courts have emphasised the case-specific and discretionary nature of decisions on name suppression.[123]

IV The New Judicature Modernisation Legislation from a Civil Procedure Perspective

A *Introduction*

As part of the legislative arrangements designed to bring about modernisation of the judicature several new Acts came into force on 1 March 2017. For the purposes of this review, the relevant enactments are the Senior Courts Act 2016, the District Court Act 2016 and the Judicial Review Procedure Act 2016.

The Electronic Courts and Tribunals Act 2016, dealing with the filing and use of electronic court documents (each such document being known as a "permitted document")[124] and related matters, also has procedural implications.[125] That Act has a Commencement Date of 1 March 2017 but will take effect when an Order in Council under s 6(1) of that Act applies it to particular courts or tribunals.[126]

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122 For a general discussion of the cases in this area see Andrew Beck "Litigation Section" [2015] NZLJ 295. The recent decision of the Court of Appeal in *Y v Attorney-General* [2016] NZCA 474, [2016] NZFLR 911 sets out the principles applicable to the granting of name suppression in civil cases (at [22]–[38]). There has been recent concern expressed in the family law context that if relationship property proceedings proceed beyond the Family Court on appeal the anonymity of the parties which is inherent in Family Court proceedings may be lost. See, for example, Jacinda Rennie and McKenzie Cox "The loss of anonymity in relationship property proceedings" (2017) 907 LawTalk 29 at 29–30, citing recent authority such as the decision of the Court of Appeal in *Greig v Hutchison* [2016] NZCA 479, [2016] NZFLR 905.

123 See, for example, *Zimmerman v Director of Proceedings* HC Wellington CIV-2006-485-761, 29 May 2007; *Hart v The Standards Committee (No 1) of the New Zealand Law Society* [2012] NZSC 4; and *ABC v Complaints Assessment Committee* [2012] NZHC 1901, [2012] NZAR 856.

124 The term "permitted document" is defined in s 4(1).

125 Sections 11–28 deal with the form and content of electronic documents and ss 30–31 deal with electronic filing of documents. Section 8 is also noteworthy and provides that "[a] person's consent to use, provide, or accept a permitted document may be inferred from the person's conduct", including providing to a court or tribunal an electronic address to which permitted documents may be sent.

126 This has not yet occurred as at the time of writing in early June 2017.

In addition, the Interest on Money Claims Act 2016, which has a Commencement Date of 1 January 2018,[127] introduces a new regime for calculating the rate of accrual of interest on judgment debts. The new regime provides for mandatory payment of interest both before and after judgment,[128] from the time the cause of action accrues until payment of the amount due is made. The applicable rate is based on the average, published, six-month retail term deposit rate from time to time plus a margin of 0.15 per cent, compounding annually.[129]

In relation to trans-Tasman Proceedings, the Trans-Tasman Proceedings Amendment Act 2016 came into force on 1 March 2017. It provides that the provisions in the Judicature Act 1908 dealing with trans-Tasman proceedings are to be moved to the Trans-Tasman Proceedings Act 2010,[130] so that all the applicable legislative provisions in that area are now contained in the 2010 Act.

This part of the review will now deal with those provisions of the Senior Courts Act 2016, the District Court Act 2016 and the Judicial Review Procedure Act 2016 which are of relevance from a civil procedure standpoint.

B *Senior Courts Act 2016*

This Act supplants the Supreme Court Act 2003 and most of the Judicature Act 1908.[131] It received the Royal assent on 17 October 2016 and had a Commencement Date of 1 March 2017.[132] The legislative provisions relating to the High Court, Court of Appeal and Supreme Court are now conveniently consolidated into one single enactment.[133]

One quite significant change which the Act makes from a civil procedure perspective relates to the High Court Rules. The previously existing High Court Rules set out in sch 2 of the Judicature Act 1908, in the form in which

127 Interest on Money Claims Act 2016, s 2. There are transitional provisions in sch 1, cl 1 of that Act which continue to apply s 87 of the Judicature Act 1908, notwithstanding its repeal, to every civil proceeding commenced before the Interest on Money Claims Act comes into force on 1 January 2018.

128 Section 9(1), as compared with interest from the time judgment was given under the previous regime in s 87(1) of the Judicature Act 1908.

129 Section 12. Under s 13 an internet site calculator is to be put in place.

130 Section 8.

131 With the exception of s 87, which was repealed by s 182(4) of the Senior Courts Act but continues to have transitional effect until 1 January 2018 as set out in the Interest on Money Claims Act, s 2.

132 Section 2(1). Under s 2(2)(a)(ii), ss 147–155 of the Act came into force on 18 October 2016, being the day after the Act received the Royal assent on 17 October 2016.

133 This consolidation is recorded in s 3(1)(a) as being one of the purposes of the Act.

they were in force as at the date of Royal assent, are to continue in force and are deemed to be part of the Senior Courts Act 2016.[134] However, the Rules no longer need to be published as part of the Senior Courts Act 2016.[135] They may now be published "under the Legislation Act 2012, as the High Court Rules 2016, as if they were a legislative instrument within the meaning of the Legislation Act 2012".[136] The practical effect of this provision is that the High Court Rules, which were previously contained in sch 2 of the Judicature Act 1908, will now be republished as the High Court Rules 2016 by way of a separate document on the NZ Legislation website, which should make it easier to search for online and to use the Rules.

In terms of innovations, the first point to note is that the existing provisions of the Judicature Act 1908 relating to the right to trial by jury in civil cases[137] have been repealed and narrowed in scope. Under s 16 of the Senior Courts Act 2016, the right to trial by jury in civil cases is now restricted to proceedings for defamation, false imprisonment or malicious prosecution[138] or a counterclaim in such proceedings.[139] Even in relation to these three types of proceeding, a trial by jury can be refused if the proceeding involves "mainly the consideration of difficult questions of law" or a "prolonged examination of documents or accounts" or "any investigation in which difficult questions in relation to scientific, technical, business, or professional matters are likely to arise".[140]

Section 16 was recently held to be a relevant factor in deciding on a choice of forum for a defamation proceeding as between the High Court and the District Court (where no civil jury trials are available). The High Court held that a defamation proceeding within the monetary jurisdiction of the District Court should more appropriately be tried in the District Court before a judge alone.[141]

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134 Section 147(1).

135 Section 147(2).

136 Section 154(1).

137 Judicature Act, s 19A(1)–(5).

138 Senior Courts Act, s 16(1).

139 Section 16(2).

140 Section 16(4), which is in similar terms to the previous provision in s 19A(5) of the Judicature Act.

141 *Craig v Stiekema* [2017] NZHC 614, in which the Court stated at [13]: "While it is understandable that jury trials may be in order for defamation proceedings where the damages claimed are more than $350,000, I regard it as disproportionate to require a jury to make findings of fact and fix damages in a defamation proceeding where the claim is within the jurisdiction of the District Court."

The Act also provides for panels of judges, including a commercial panel for commercial proceedings.[142] Part 29 of the High Court Rules relating to the Commercial List has been repealed[143] and the former provisions in ss 24A–24G of the Judicature Act 1908 establishing the Commercial List have not been replicated in the Senior Courts Act 2016. Other specialist judicial panels may be established for other kinds of proceedings.[144]

The powers of a single judge of the Court of Appeal are expanded, for example in relation to a review of a decision of a Registrar.[145] Appeals from interlocutory decisions of the High Court in civil cases now require leave of the High Court,[146] or of the Court of Appeal if leave is refused in the High Court,[147] except where the interlocutory decision finally determines the High Court proceeding. This occurs where the High Court proceeding is struck out or summary judgment is granted.[148] The Court of Appeal does not have to give reasons for granting leave to appeal[149] but must give reasons for refusing leave to appeal to the Court of Appeal.[150] Reasons may be stated briefly and in general terms.[151]

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142 Section 19(1). Section 19 sets out how panels of judges are to be established and administered. Under s 19(6) a party may request a panel judge and assigning such a judge is a matter within the discretion of the Chief High Court Judge. For an interesting recent study of the not uncontroversial subject of judicial specialisation in the High Court of New Zealand see William Steel "Judicial Specialisation in a Generalist Jurisdiction: Is Commercial Specialisation within the High Court Justified?" (2015) 46 VUWLR 307. The commercial panel will commence operation on 1 September 2017 and is subject to the Senior Courts (High Court Commercial Panel) Order 2017. In Auckland, the panel judges are Justices Venning, Heath, Courtney, Wylie, Katz and Muir and in Wellington, Justices Mallon and Dobson.

143 Section 183(a).

144 Section 19(3).

145 Section 49.

146 Section 56(3). The transitional provisions in cls 10 and 11 of sch 5 of the Senior Courts Act 2016, relating to proceedings pending or in progress when the Senior Courts Act 2016 came into force on 1 March 2017, were considered by the Court of Appeal in *Sutcliffe v Tarr* [2017] NZCA 360. The Court of Appeal held that, on the proper construction of the transitional provisions, an appeal against a decision of an Associate Judge given on 24 March 2017 on a striking-out application was subject to the previous provisions of s 26P of the Judicature Act 1908.

147 Section 56(5).

148 Section 56(4).

149 Section 61(1).

150 Section 61(2).

151 Section 61(3).

There are new provisions relating to vexatious litigants.[152] Orders against vexatious litigants may be made by way of a limited order (relating to a particular matter),[153] an extended order (relating to a particular or related matter)[154] or a general order (relating to any civil proceedings).[155] The Act specifies the grounds for making the various kinds of orders.[156] An order has effect for up to three years but a judge can specify a longer period (of up to five years) if the judge is satisfied that exceptional circumstances justify a longer period.[157] Only the Attorney-General is entitled to apply for a general order.[158] A party against whom an order is made may appeal that decision.[159]

The Act also introduces new provisions dealing with reserved judgments,[160] recusal guidelines for judges[161] and access to court, judicial or official information.[162] There are also various other provisions which do not strictly concern matters of civil procedure.[163]

C *District Court Act 2016*

The District Courts Act 1947 has been replaced by the District Court Act 2016. As the title of the Act suggests, the various individual District Courts under the 1947 Act have now been combined into one unitary District Court.[164] The Act describes the "District Court" in the singular, along with other related terms such as "Disputes Tribunal".

The civil jurisdiction limit of $200,000 put in place in 1992 has now been increased to $350,000.[165] The threshold figure at which a claim could

152 Sections 166–169. For a discussion of this topic in the context of these recent legislative changes see Pender and Toy-Cronin, above n 1, at 9–11; and Jacqui Thompson "Courts Modernisation — the Vexatious Litigant" (2017) At The Bar 12.

153 Section 166(3).

154 Section 166(4).

155 Section 166(5).

156 Section 167.

157 Section 168(2).

158 Section 169(2).

159 Section 169(8).

160 Section 170.

161 Section 171. Recusal guidelines have now been published on the Courts of New Zealand website.

162 Section 173.

163 See, for example, s 93, which deals with publication of information on the judicial appointment process, and s 143, which deals with setting protocols concerning employment which is consistent with holding judicial office.

164 Section 3.

165 Sections 74–78.

be transferred as of right from the District Court to the High Court has been increased from $50,000 to $90,000.[166] These changes are likely to increase the incidence of civil litigation in the District Court.

There are various other new provisions which correspond to those introduced into the Senior Courts Act 2016.[167]

D *Judicial Review Procedure Act 2016*

This Act re-enacts the existing legislation governing procedural aspects of judicial review applications, which was contained in pt 1 of the Judicature Amendment Act 1972.[168] The Act is not intended "to alter the interpretation or effect of those provisions as they appeared in the Judicature Amendment Act 1972".[169]

The above enactments should serve to streamline and modernise senior courts procedure well into the 21st century and provide a welcome update to the Judicature Act 1908.

166 Sections 86–87.

167 See, for example, s 18 (protocol concerning other employment of judges), s 217 (guidelines for recusal), s 218 (information on reserved judgments), ss 213–216 (vexatious litigants), and s 236 (access to court, judicial and official information). It is noteworthy that ss 213–216 do not contain a power to make a general order against a vexatious litigant, as is the case in the High Court.

168 Section 3(1).

169 Section 3(2).