The Rules Committee

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11 July 2016
Minutes 02/16

Circular 54 of 2016

Minutes of meeting held on 13 June 2016

The meeting called by Agenda 03/16 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 13 June 2016.

1. Preliminary

In Attendance

Rt Hon Dame Sian Elias GNZM, Chief Justice of New Zealand
Hon Justice Asher, the Chair
Hon Justice Venning, Chief High Court Judge
Hon Justice Gilbert
Judge Gibson
Judge Kellar
Ms Jessica Gorman, representative for the Solicitor General
Mr Rajesh Chhana, Deputy Secretary of Policy, Ministry of Justice
Mr Bruce Gray QC, New Zealand Law Society representative
Mr Andrew Beck, New Zealand Law Society representative
Mr Andrew Barker, New Zealand Bar Association representative
Ms Laura O'Gorman
Ms Suzanne Giacometti, Parliamentary Counsel Office
Mr Kieron McCarron, Chief Advisor Legal and Policy, Office of the Chief Justice

Mr Ross Cargill, Secretary to the Rules Committee
Ms Alice Orsman, Incoming Secretary to the Rules Committee
Ms Harriet Bush, Clerk to the Rules Committee

Apologies

Hon Christopher Finlayson QC, Attorney-General

Judge Doogue, Chief District Court Judge

Confirmation of minutes

The minutes of 15 February 2016 were confirmed.

Matters Arising

The Chair noted the apologies and welcomed Ms Alice Orsman to the Rules Committee, who will be taking over the role of Secretary from Mr Ross Cargill. The Chair thanked Mr Cargill for his work for the Committee.

2. Judicature Modernisation Bill

Mr Chhana addressed the Committee on the progress of the Judicature Modernisation Bill. The Ministry hoped that a supplementary order paper would be completed towards the end of June and the Bill would, at the earliest, be before Parliament by August with its passage in September.

Ms Giacometti informed the Committee that the supplementary order paper made a change which will allow the High Court Rules to be published as if they were a regulatory instrument, meaning that the Rules will not have to be published as a schedule to the Judicature Act but can be published separately. This will make the Rules much easier to navigate on the Parliamentary Counsel Office website. There will be no difference to the process of passing amendment rules or to the status of the Rules.

3. High Court (Access to Court Documents) Rules 2016

The Committee has been reviewing the Access to Court Documents Rules for the last two years. At the February meeting the Committee had agreed in principle that it would be beneficial to have a single composite set of Rules for the High Court, Court of Appeal and Supreme Court ("the Senior Courts (Access to Court Documents) Rules"). Since that meeting the Chair had discussed this with Court of Appeal and Supreme Court Judges, who had agreed to have a composite set of rules. There will be a separate identical set of Rules for the District Court. The Court of Appeal and Supreme Court Judges had considered the draft Senior Courts Rules and had made some suggestions. This had resulted in some tweaks but no major changes. The Chair noted that there were some minor points made by Randerson J which still needed to be considered by Ms Giacometti.

The Chair stated that at the last meeting the Committee had indicated it was happy with the Rules. He asked whether the Committee was happy to leave the Rules as they were subject to the minor drafting changes.

Mr Beck raised the issue of the definition of "substantive hearing" in relation to an appeal set out in r 4 of the Senior Courts Rules. This had been raised by Randerson J. "Substantive Hearing" is defined, in relation to an appeal (see paragraph (c)) as being the close of the 20th working day after the court has given the final judgment on appeal. The definition of substantive hearing in relation to a civil hearing (see paragraph (a)) is a hearing at which issues that will decide the ultimate outcome of the proceeding are determined. The definition in relation to a criminal proceeding (see paragraph (b)) is from the start of the trial until the end of the trial, or, if the defendant pleads or is found guilty, the sentence hearing until the Judge finishes sentencing the offender. The only relevance of the substantive hearing in the new rules is r 11 which states that before the substantive hearing, protection of privacy and confidentiality may require access to be limited, during the substantive hearing open justice has greater weight than at other stages of the proceedings and greater weight in relation to documents relied on in the hearing, and after the substantive hearing open justice has greater weight in relation to documents relied on in the determination.

Mr Beck stated that the idea of the "substantive hearing" governing the "open justice period" was something that the Committee had moved away from in the new Rules.

The Committee agreed that the effect of the definition was that the position on appeal was not consistent with the definition for civil and criminal proceedings. The Chair considered that (c) could be the same as (a) or refer back to (a). This would be consistent. Venning J noted that in the High Court of District Court the hearing may take a couple of weeks, whereas in the Court of Appeal or Supreme Court the hearing might only last half a day.

The Chair stated that it wasn't intended that an application lodged after a half day appeal hearing is dealt with as if it were submitted after the substantive hearing. The Chair queried whether what was actually intended was for the substantive hearing period to last right up until judgment was delivered. The Committee agreed. Accordingly, it was agreed that (a) should be extended to make it clear that the period runs from the start of the hearing until the delivery of the judgment.

Action points: Ms Giacometti and the Chair to finalise the changes to the Rules and to circulate them to the Court of Appeal and Supreme Court Judges and all Committee members for a final check and comment.

4. Access to Court Documents by Service Providers

Last year, the Ministry of Justice asked the Committee to consider amendment to the Criminal Procedure Rules to allow service providers to access certain court documents. The proposal had been discussed at several meetings. Since the February meeting Chief Judge Doogue had set out her view of the proposal in a letter dated 9 June 2016. Judge Gibson noted that he was not convinced that change to the Rules was necessary. He was not aware of any problems in practice with what was happening at the moment. Judge Kellar also noted that Rules might cut across the specific provisions in the Victims' Rights Act. The Chair considered these concerns were consistent with Judge Doogue's view.

Mr Chhana stated that the exercise had been useful from the point of the Ministry and that the Ministry was happy to progress the matter at a practical level with the District Court Judges rather than through the mechanism of Rules.

Judge Kellar informed the Committee that a new remand stamp had been developed for District Court Judges which would specifically direct a judge as to whether the victim impact statement, caption summary, history at other matters should be released to the provider. This would be before the Judge every time remand is considered. Judge Kellar considered that at a practical level, this would be useful in addressing the Ministry's concerns.

Action point: The Committee noted that the process had been constructive; however, the issues were to be dealt with at a practical level rather than through a rule change.

5. Striking out before service

The Committee has been considering a rule to provide a procedure for a statement of claim which is clearly vexatious to be referred to a Judge after filing but before it is served on the intended defendant. Consultation on the proposed rule finished in February. Gilbert J addressed the Committee. He noted at the outset that it was important to remember that the rule was directed to claims that were obviously on their face vexatious. The rule was not intended to be a substitute for the strike out procedure. The idea behind the rule is that the court has a responsibility to ensure that its processes are not abused. There were only likely to be about 10 to 12 such applications a year.

The Committee discussed the submissions it had received during the consultation period.

Gilbert J noted that the Law Society was not in favour of the proposed rule. In addition, the Law Society considered that the Registrar's powers in the proposed new rule were too wide. Gilbert J disagreed: the Registrar had the power to refer such statements to a Judge. This was simply the mechanism for getting the claim in front of a Judge.

Ms Gorman discussed the response from Crown Law which collated comments received from Crown Counsel. Crown Law received a lot of these types of claims and was supportive of the Rule, but had made some general comments about the amendments. Crown Counsel had raised questions about

refunding the filling fee, whether service should take place, and whether the intended defendant should be notified. The Committee considered that the filing fee should be paid as the Court is still dealing with and processing the claim.

Venning J noted that if the Judge struck out the claim the Judge could direct that the decision be served on the intended defendant. Ms Gorman asked how soon you would know what had happened. Venning J stated that the claim would be likely to go before a Judge within a day and a decision made very quickly. In comparison, strike-out could take up to a year. The rule sets up a truncated procedure to deal with claims that are on their face vexatious.

The next response was from the Inland Revenue Department. The IRD had suggested that there would be a resourcing impact. The Committee disagreed; this would only affect a very small number of claims. IRD also queried whether the procedure could apply to other documents. The Chair noted that there was no reason why it shouldn't apply to an originating application. Gilbert J agreed. However, it would not be appropriate for an appeal, as there already is a reasoned judgment of the court on the matter. It should not apply to statements of defence or counterclaims.

Asher J noted that some submitters considered the rule would create an unnecessary burden for the Court of Appeal. Mr Gray noted that last meeting the Committee considered that there was no way of avoiding a possible appeal. One way or another there would be an appeal; the rule would mean that any appeal would be dealt with in a truncated way.

IRD also questioned whether some proceedings needed to be dealt with differently. Gilbert J did not think that this was an issue as it was a substantive matter. IRD noted that the order should contain a statement of the plaintiff's right to appeal. This is provided for in proposed r 5.35A(5).

Mr Barker noted that some submitters considered defendants should know about any claims being brought against them. The Chair stated that defendants' involvement would be likely to slow the process down as they are likely to file a substantial defence. These are cases where the Court does not need any help from the defendant. Further, one element of the rule is about protecting defendants from a litigant pursuing them. However, the Committee agreed that the defendant should be informed if the claim is struck out. The rule should say something to the effect that "where practicable, a copy of any strike out decision shall be sent to the named defendant".

The Chair queried whether the rule should provide that the Judge had to give reasons. The Committee considered this was unnecessary: it was implicit from the rule and Judges are always required to give reasons.

Parker Cowan's submission appeared to consider that the rule was wider than it is.

ADLS did not support the rule. It also disagreed with the plaintiff not being given the right to be heard. Mr Beck was also concerned about not giving the plaintiff notice or the right to be heard by the Judge before the Judge decides to strike out the claim. Gilbert J considered that no one has the right to bring a proceeding which is truly vexatious and which discloses no cause of action. If Mr Beck's point was correct then there would be no rule at all. Mr Beck considered that making the decision that a claim was an abuse of process without hearing the plaintiff was contrary to the right to natural justice. The Chief Justice considered that the claimant's submission was what was in the statement of claim. Mr Beck might be right if there was any substantive right to be argued or if the rule was not only exercised when the claim was on its face untenable. But the rule would only apply in those cases. Mr Barker considered that these concerns were why the power would only be exercised sparingly in extreme cases. Venning J considered that this was a justifiable limitation on the right to a hearing as everything that could be said was in the document. The Chief Justice agreed these concerns meant judges need to be very restrained in their use of the rule.

Mr Beck stated that he would be happier if notice was given to the claimant with the opportunity to make any submission within any period of time. His main concern was that the plaintiff ought to have an opportunity to be heard. Venning J considered that this would not be worthwhile. If the situation was finally balanced then the proceeding would not be struck out in such a peremptory way.

Mr McCarron asked whether there could be some information, perhaps on the Ministry of Justice website about this jurisdiction, which makes the rule clear: it could provide a warning that filing these proceedings will risk r 5.35A being invoked.

The Chief Justice stated that there were two aspects: the rule was designed to provide a mechanism to use the court inherent jurisdiction in a truncated way: currently, it can only be unlocked where the proceedings come before a judge substantively or the defendant takes steps. She agreed there should be a way of having an immediate opportunity to get rid of something that should not be in the system at all. The second question was whether some sort of natural justice right should be built in. She was sensitive to the idea that the rules should not be promoting evasion of natural justice. She was relaxed about indicating that there was an opportunity to put in any submissions for why the proceedings should not be struck out.

After some discussion Mr Barker asked whether, if the Committee agreed that the rule was only to be used in extreme cases, the rule itself could make this clearer rather than just referring to the strike out criteria in r 15.1. Venning J considered that this was a good point. This could be clarified by adding "if the statement of claim is on its face plainly frivolous, vexatious or an abuse of process" to restrict the jurisdiction in subrule 1 and 4.

The Chair agreed that the rule as drafted hadn't spelt out that it was only for the extreme case. While this didn't address Mr Beck's concern it went some way to addressing what the rule was about. Mr Beck was content to move on.

Ms Giacometti agreed to draft the changes, and would liaise with Gilbert J and Mr Beck. The issue would come before the Committee one more time at the next meeting.

The Committee agreed that the rule would apply to the District Court as well as the High Court. The Committee agreed that the Chair would write to the people who had submitted on the Rules, explaining the amendments and saying that an identical rule is proposed for the District Court.

Action point: Ms Giacometti to draft the changes to the rules in consultation with Gilbert J and Mr Beck. The Chair to write to the submitters.

6. Harmful Digital Communications Act 2015

At the Committee meeting in February the Committee established a group to consider whether new rules were necessary to implement the Harmful Digital Communications Act 2015 and, if so, to draft these Rules.

Judge Gibson updated the Committee on the working group's progress: the group had agreed that a set of rules were necessary, drafting instructions had been prepared and these were with Parliamentary Counsel Office. There could be some issue getting rules passed in the timeframe as ideally the rules would be in place by November. The rules should be finalised for the next meeting, which would mean that could come into force by November. However, if the new rules were not developed in time the existing rules could be used in the interim. The Ministry did not think that there would be many applications under the Act; it expected about 100 applications a year.

Action point: rules to be drafted by Ms Giacometti for the Committee to consider at the August meeting.

7. Applications without notice

The Chair addressed the Committee on this matter. The Committee had been making changes to r 7.23 in light of the increasing number of self-represented litigants. The amendments are now largely finalised. Mr Earles had suggested that without notice applications for probate have their own form as not all of the requirements in r 7.23 are relevant to without notice applications for probate. The Committee agreed. Ms Giacometti had drafted a new form "PR 1AA" to be used for without notice applications for probate. Mr Earles had seen this form and was happy with it.

Venning J then raised the amendment which had been agreed to r 27.10, stating that the amendment was only intended to apply to contested applications for probate, not uncontested applications. All uncontested applications would continue to be filed in the Wellington Registry.

The Chief Justice asked why there was a distinction between the two applications. The Committee confirmed that the probate registry had been centralised several years ago as this was considered to be much more efficient, at least in relation to uncontested applications. However, here had been confusion among members of the profession as to where contested applications should be filed and the Committee had agreed that contested applications should be filed in the relevant registry as they had to be considered by a Judge. The Committee did not consider that there would be any confusion caused by the amendment as there are different forms of application so it will be known whether the application is contested or uncontested.

Ms Giacometti agreed to finalise the amendments.

Action point: Ms Giacometti to finalise the without notice application and probate amendments.

8. Evidence given by subpoenaed witnesses

This agenda item had been raised by Dobson J in the course of his judgment in *NZX Ltd v Ralec Commodities Pty Ltd*. The issue is that there is no rule dealing with the situation where a civil witness is called by subpoena and there is no brief of evidence served on the other party. If this does happen it runs the risk of the other party being ambushed. This is inconsistent with the scheme of the rules. In the case before Dobson J there was a suggestion that there had been some gamesmanship. Dobson J took the view that this was contrary to the general anti-ambush regime in the rules and that something equivalent to a brief, or if the witness is uncooperative, a will say statement, should be provided where the witness is called by subpoena.

The Committee discussed whether an amendment should be made requiring a statement. The Chief Justice noted that it could be very damaging for the party calling the witness if they thought that the witness would have some information that they wanted to get out and took the risk of leading the information. The party would want to be careful about building the information up too much. The Chair noted that the party always runs this risk when they called a subpoenaed witness. Venning J noted that the will say statement would not be admissible itself, it would just be an indication to the other party. Ms O'Gorman stated that even knowing the subject matter that the witness would discuss would be useful. What would be required to be put in the statement would depend upon the party's degree of expectation. If there was extrinsic evidence that would give counsel a degree of confidence as to what the witness would say then they should be required to provide more information.

Mr Gray stated that in the criminal jurisdiction there is an obligation to disclose the scope of the evidence, or the nature of the evidence. Judge Kellar stated that the party will always know the purpose for which they are calling the witness. Mr Barker stated that given we have a system with briefs then people should not be able to game the system by calling witnesses by subpoena instead. The Chief Justice agreed but stated that people should not be discouraged from calling witnesses under subpoena where appropriate.

The Committee agreed that the Clerk would draft a paper looking at what the rule used to be, and the approach in comparable jurisdictions. The Committee is after a rule that stops a party evading the general rule by using a subpoena. The question was whether the party should just have to give the subject matter or whether it must go further than that. If only the subject matter is required this might still allow gaming of the system somewhat. The paper would be circulated to Mr Gray, Ms O'Gorman, Judge Kellar and the Chair.

Action point: clerk to draft a paper looking at previous rules and rules in other jurisdictions.

9. Recovery of expert witness fees

Over the last few meetings the Committee had agreed to amend the Rules to clarify that lawyers' cost charged under a conditional fee agreement could be recovered under r 14.2. This led to an assessment of whether a party should be able to recover expert witness fees under a conditional fee agreement. The Committee agreed at the last meeting that these should be recovered as long as the fees were disclosed. Originally, amendment to 14.2 was proposed, however, this rule deals with costs recovery and disbursements are dealt with separately in r 14.12.

The issue now is whether there needs to be an amendment to r 14.12 to provide that expert witness fees can be recovered. Mr Barker didn't think that this needed to be amended as the rule refers to a disbursement "paid or incurred" and disbursements "paid or payable". Mr Barker considered these words were wide enough to cover a conditional fee. He considered that a fee that was conditional on success would be covered by the current wording; however, there might be some ambiguity if the fee was conditional, for example, on "an order made in your favour by the court". It would be relatively easy to amend the rule if there was concern over this. Finally, there was the Code of Conduct for expert witnesses. The Committee had agreed at the last meeting that this should be amended to say that the condition of recovery must be disclosed to the court. Mr Giacometti had drafted an amendment to sch 4 to reflect this.

The Chair stated that he thought that r 14.12 should be amended as the word "incurred" in r 14.2 had lead to the Committee making the change to r 14.12 as it had considered it ambiguous whether conditional fees fell within it. He considered that this doubt would mean that r 14.12 should be amended in the same was as r 14.2. Mr Barker was not averse to this.

The Committee agreed that Mr Barker and Ms Giacometti would finalise the changes for the Committee to approve at the next meeting.

Action Point: Mr Barker and Ms Giacometti to finalise the amendments for the next meeting.

10. Appearance and protests to jurisdiction

Ms O'Gorman noted that this matter had previously been considered by the Committee with a number of other suggestions made by Chris Chapman. When a party files an objection to jurisdiction r 5.49 applies allowing either party to file an application; subrule 3 allows a defendant to apply to dismiss the proceeding or subrule 5 allows the plaintiff to apply to set aside the appearance. Each subrule has a provision setting out how the application will be dealt with. The rule is somewhat repetitive. The applicant will have the onus of satisfying the court that there is or is not jurisdiction, which could lead to gaming.

Ms O'Gorman noted that this rule only applies where there has been service within New Zealand and would usually arise where someone argued that a specialist court had jurisdiction, or where the dispute had to go to arbitration.

The subcommittee had looked at the position in the UK and discovered that the rule is different; there the onus is always on the defendant. It is not clear why we chose a different path here, although the rule has been the same for 30 years. When it came to whether the rule should be amended, Ms O'Gorman considered that the current wording was difficult to justify. However, she liked the idea of not compelling an application to be made in a certain time period, as the UK rule does, if the parties wanted to wait. Ms O'Gorman's proposal was to simplify the rule so that when the claim is served within jurisdiction the onus is always on the defendant.

Venning J questioned whether there should be a time limit as these cases did sometimes sit in the Court. There could be a direction for the parties to file a memorandum agreeing to adjourn the matter. This would probably require a presumption that in the absence of an application being made the defendant is deemed to have submitted. Ms O'Gorman stated that in practice there would usually be one party who had an incentive to have the jurisdiction determined. Ms O'Gorman stated that she would not make this change: in practice the issue was dealt with by the court scheduling a case

management conference. Venning J was relaxed about having a time limit and content with the amendment as written.

The Committee agreed that the change would go forward for concurrence.

Action point: changes to be put forward for concurrence

11. Time Allocations

ADLS had written to the Committee raising two issues for the Committee to consider: first whether the time allocated for steps taken for trial preparation was sufficient; and secondly whether two further items should be added to sch 3: alternative dispute resolution and counsel preparation and/or attendance at expert witness conferences.

The Committee discussed the time allocations. Mr Barker agreed that the time allocated for preparation for the hearing had got out of sync. The previous rule had been that the party got two times the length of the hearing. This was roughly accurate for trials of up to one week. After this it was likely to be too much. Now the rule is three days preparation for all trials. Mr Beck agreed that three days did get out of kilter fairly quickly. Mr Barker queried whether the rule could be changed to provide for twice the length of trial for up to a week and after that 1.5 times the length of the trial. Gilbert J noted that the Court would always receive submissions on costs where there had been a really long trial and three days was plainly inadequate. Mr Barker considered that the problem was not with the extreme cases but general cases which took over a week.

In relation to the other matters raised, the Committee agreed that it would not want to incentivise lawyers turning up to expert conferences. The Committee did not consider it appropriate for the rules to deal with alternative dispute resolution.

Accordingly, the Committee agreed that there was just the one issue of trial preparation to consider. The four members of the profession, Mr Barker, Mr Beck, Mr Gray QC and Ms O'Gorman agreed to come up with a proposal for the next meeting. Mr Barker would chair the group.

Action point: Mr Barker, Mr Beck, Mr Gray QC and Ms O'Gorman to come up with a proposal for the next meeting

12. Case management

Mr Barker raised the issue of the allocation of case management conferences. Case management conferences are meant to be allocated within 25 to 50 working day of the filing of the statement of defence. This does not always happen. Where a conference is not allocated in this time it leads to delays as matters such as discovery are not progressed. In addition, it is unrealistic to expect that there is only one case management conference if discovery has not happened prior to the conference.

Mr Barker considered a number of options to address the issue: (1) encouraging parties to agree in the interim; (2) provide a default rule for what is meant to happen; (3) require the case management conference memorandum to be filed by a number of days after the statement of defence.

Venning J stated that there are a limited number of judicial resources. The idea of the rules is to have one conference that really matters and sets the case up for the hearing. Often this does not work if discovery has not been agreed upon or completed, or if third parties are to be joined. The idea was to restrict them but in practice many cases need more than one conference. Venning J liked the suggestion of having counsel filing the memorandum after the statement of defence. There is no reason why the memorandum could not be dealt with on the papers and a more meaningful conference could occur after discovery. The memorandum would set out a timetable rather than this having to be done at the conference.

Mr Gray stated that if there is a conflict about the pleadings then the scope of discovery cannot be determined until the conference with judicial oversight.

Venning J considered that it is important to have the case at a stage so that the conference is meaningful. The default memorandum would be helpful to progress things. If one of the parties says that pleadings need addressing then this will be resolved at the conference and the conference can be allocated earlier.

The Chair noted that he was wary of the advanced memorandum but could see a place for it. Venning J agreed to look at the resourcing and try to get some statistics on case management conferences to continue the discussion at the next meeting.

Action point: matter deferred until the next meeting. Venning J agreed to find some statistics about case management conferences.

13. Intituling in Māori

At the February meeting Venning J had informed the Committee that the Higher Courts had agreed to the use of Te Reo Māori in intituling. Following the meeting Joe Williams J had provided a list of Māori names for each High Court. The next step would be to draft the necessary changes to the Rules. Venning J considered that it would be necessary to amend the general form G1 and to set out the approved list of names in the schedule. Venning J and Ms Giacometti agreed to liaise to discuss the changes.

Action point: Ms Giacometti to draft the required changes in consultation with Venning J.

14. Close of pleadings date

The rules require a date for the close of pleadings to be set at the first case management conference. However, there is no default rule in the event that no date is set. The Committee agreed that default rules which had previously been in the rules were helpful. A number of them had disappeared.

Ms Gorman agreed to report back on the matter for the next meeting with a recommendation.

Action point: Ms Gorman to report back to the next meeting.

15. Summary judgment for defendants

This matter was deferred to be considered at the next meeting.

The meeting closed at 1:10 pm.