The Rules Committee

PO Box 180
Wellington

Telephone: (09) 970 9584
Facsimile: (04) 494 9701
Email: rulescommittee@justice.govt.nz
Website: www.courtsofnz.govt.nz

4 December 2014
Minutes 06/14

Circular 97 of 2014

Minutes of meeting held on 1 December 2014

The meeting called by Agenda 06/2014 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 1 December 2014.

1. Preliminary

In Attendance

Hon Justice Asher (the Chair)
Hon Justice Winkelmann, Chief High Court Judge
Judge Gibson
Judge Kellar
Ms Jessica Gorman, Crown Law
Mr Frank McLaughlin, Deputy Secretary, 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

Mr Bill Moore, Special Parliamentary Counsel, Parliamentary Counsel Office
Mr Kieron McCarron, Chief Advisor Legal and Policy

Ms Kate Frowein, Secretary to the Rules Committee
Mr Thomas Cleary, Clerk to the Rules Committee

Apologies

Rt Hon Dame Sian Elias, GNZM, Chief Justice of New Zealand
Hon Christopher Finlayson QC, Attorney-General
Hon Justice Gilbert
Judge Doogue, Chief District Court Judge

Confirmation of minutes

The minutes of 6 October 2014 were confirmed.

Matters arising

The Chair welcomed Ms Jessica Gorman back to the Committee, who had come to the meeting specially, and congratulated her for the arrival of her third child.

The Chair also noted that this meeting was Mr Frank McLaughlin's last meeting. On behalf of the Committee, the Chair thanked Mr McLaughlin for his extremely valuable contributions, his insightful comments and his splendid liaising between the Committee and the Ministry of Justice, all of which had added significant value to the Committee's discussions. The Chair wished him all the best for the future.

2. Case Management and Discovery Review

The High Court Amendment Rules (No 2) 2011 and the High Court Amendment Rules (No 2) 2012 had significantly amended the discovery and case management regimes in the High Court Rules. It had been three years since the discovery rules amendments came into effect and a year and a half since the case management reforms were implemented. At the request of the Chief High Court Judge, Justice Winkelmann, the Ministry of Justice had prepared a report on the effectiveness of these reforms and whether they were functioning as intended.

The Chair explained that this report, using statistical feedback and performance indicators, was a first for the Committee in evaluating the effectiveness of reforms to civil procedure rules. The Committee considered that similar statistical reports should be prepared following future significant reforms to enable the Committee to assess whether the reforms were working as intended or needed to be improved or altered.

In relation to the discovery reforms, these were intended to alter the scope of discovery from the *Peruvian Guano* standard to a more restricted adverse document standard, as well as increasing cooperation between parties in the discovery process in the hope of limiting discovery to what was essential to the proceeding. The report showed that both purposes were being achieved and that the profession perceived an improvement and tailored discovery was a success.

While the report showed that the discovery reforms were generally working as intended, the report also indicated that some lawyers considered initial disclosure to be inefficient and burdensome but others and the majority of judges considered it helpful. Justice Winkelmann recommended that the Committee look further at the issue of initial disclosure to see how this could be improved. Judge Gibson pointed out that in the District Court Rules 2014 parties were only required to list the documents relied on in their pleadings. He suggested that the Committee could review this alternative approach in a year or so and get feedback from the profession on whether this listing was a more useful step than initial disclosure. The Committee agreed.

Ms Gorman raised an issue about initial disclosure in relation to judicial review proceedings. In her experience, Ms Gorman found that applicants had a mixed practice with providing initial disclosure in judicial review proceedings; some provided it and others did not. This difference in practice was in part caused by the lack of clarity in the rules regarding whether the initial disclosure obligations applied to judicial review proceedings or not. Ms Laura O'Gorman pointed out that in the case management of judicial review memorandum discovery is required to be addressed but initial disclosure is not mentioned. The Chair replied that when initial disclosure was introduced it had been intended to apply to judicial review proceedings. The Committee asked the Clerk to look into whether initial disclosure for judicial review proceedings was required under the High Court Rules and whether the rules needed further clarification.

What the report did show was that the requirement to co-operate on discovery issues had been improved and statistics from the Ministry indicated that there were fewer defended discovery applications.

The Committee then turned to discuss the aspects of the report relating to the case management reforms. The reforms had been intended to reduce the time taken for parties to get to court by reducing the number of interlocutory applications and numbers of case management conferences

required. The Chair explained that the data indicated the reforms were working well but more time was required to see whether the intended outcomes were being achieved. Prior to the reforms, 2.56 case management conferences per proceeding were held prior to a hearing, while after the reforms only 1.81 conferences were held. Also, the number of interlocutory hearings had reduced from 0.35 to 0.25 per proceeding.

Justice Winkelmann congratulated the Committee on these results that indicated the reforms were working. While it was too early to state conclusively that the reforms were a success and that the improvements were down to the rule changes alone, the rule changes had been part of a whole package aimed at improving cooperation between counsel and giving the profession more control over proceedings. The early indications in the report indicated the reforms were helping.

Action points: Clerk to look at whether initial disclosure is required for judicial review proceedings and whether further clarification is required. The Chair to write an article for publication summarising the report.

3. Case management conference memoranda

Mr Tony Mortimer wrote to the Committee suggesting that r 7.3 of the High Court Rules be amended to specify that case management memoranda can be filed by email or fax and that r 7.4 should require case management memoranda for further case management conferences ordered under r 7.4.

In his email Mr Mortimer explained that r 7.3 needed to be amended because there was some confusion about methods of filing case management memoranda. Lawyers often called the Registry to see if they could email or fax their joint memorandum or separate memoranda. Prior to the case management reforms, the rules specifically allowed filing case management memoranda by fax and email. The Chair was of the view that in passing the reforms the Committee had not intended to remove these methods of filing.

Mr Bruce Gray QC favoured re-incorporating a rule permitting filing by email or fax. Mr Gray explained that often counsel will be discussing matters prior to the case management conference and it was best to allow filing by email or fax to ensure more flexibility in the discussions. The Committee agreed that r 7.3 should be amended to permit filing by email or fax.

The Committee turned to consider Mr Mortimer's second suggestion, that case management memoranda should be required for further case management conferences. The Chair pointed out that when a further case management conference was ordered, the Judge would specify what was going to be covered. Counsel would normally address these matters, and others if relevant, and then file memoranda addressing those matters. The Chair considered there was little need to require parties to file further memoranda and also to specify in the rules the matters the memoranda should cover. Mr Andrew Beck agreed that counsel would normally file memoranda and thought the only advantage of having this requirement in the rules would be for timing.

On the basis of this discussion, the Committee was reluctant to amend r 7.4 without a clear need. It was decided that the Committee would ask Mr Mortimer to clarify whether there was a specific problem that needed to be addressed. If there was then the matter would be discussed at the next meeting in February 2015.

Action point: amend r 7.3 to provide that case management memoranda can be filed by email or fax. Consult with Mr Mortimer regarding the need to require case management memoranda for further case management conferences.

4. Access to Court documents rules

The working group presented draft access to court document rules that regulated access to both civil and criminal documents. These draft rules, Justice Winkelmann explained, were shorter and more succinct than the existing access to court document rules. The purpose of the reforms was to simplify the access rules and make it easier for lay persons and the media to understand how to apply and also what documents they were likely to receive if they made an application. The reason that the

rules applied to documents in both criminal and civil proceedings was because granting access to both types of documents was a civil determination.

Mr Beck agreed in principle with having a single set of rules regulating access to both civil and criminal documents. However, Mr Beck did not want to see the rules removed from the High Court Rules and placed in a separate set of regulations, as was proposed. Mr Bill Moore explained that the purpose of having a single set of rules covering access requests to documents held by all the courts was to have a single source that people would use rather than disparate sets of rules setting out similar rules.

Judge Gibson thought that having the same rules applying to the District Court and the High Court was preferable. That would assist with the interpretation and application of the rules. This could occur by having a single set of rules governing access in both the High Court and District Court or different sets of rules in the District Court Rules and High Court Rules that were substantively the same.

The Chair considered that the rules were more appropriately placed into both the District Court Rules and High Court Rules as the Committee was trying to avoid the proliferation of different sets of rules. While having a single set of rules covering different courts may in theory be attractive, in practice having the relevant rules for accessing court documents in the relevant rules of the particular court would provide clarity. While comments on this could be sought in the consultation paper, the Committee should not hold up getting the rules out for consultation. The Committee agreed that a single set of rules just covering the High Court should be put out for consultation, although their scope would be raised in the consultation document accompanying the draft rules.

Mr Andrew Barker raised a question about the requirement in r 6(3) of the draft rules that the parties or lawyers serve any objection on the applicant who made the request. Mr Barker considered that in some cases this would be difficult and the parties may legitimately not wish to have contact with the applicant who may be vexatious. Mr Barker suggested that the objection should simply be given to the Registrar. The Committee agreed.

Mr Beck suggested r 8(2)(c)(ii) should make it clear that confidential information as well as privacy interests should be protected. This could be achieved by making r 8(2)(c)(ii) consistent with r 8(1)(c) and inserting confidentiality before “privacy interests”. The Committee agreed to this change.

The Committee then turned to discuss r 8(2)(d) that provided that a court should consider the principle that the courts receive documents for the purpose of resolving disputes and that the disclosure of information unnecessarily affecting the private lives of persons may discourage the public from bringing civil proceedings to the court. There was some discussion about whether the word “unnecessary” should be deleted as it was unclear from the rule as to what purpose the disclosure would be unnecessary. The Committee decided that “unnecessary” should be deleted.

Ms Gorman suggested that the rule get moved into r 8(1) as it should be one of the principles considered when granting access. Its current position indicated that it was independent of the principles in r 8(1) and this positioning could be interpreted as elevating this principle to some degree. If this principle was moved to r 8(1) it could be stated shortly that “disclosure of information affecting the private lives of persons may discourage the public from bringing civil proceedings in the courts.” The Committee agreed to moving the principle and also shortening its form.

Mr Barker considered that the principle should be broadened and refer not only to private information but also commercially sensitive information. Mr Barker explained that many commercial parties chose to go to arbitration to avoid the release of documents that contain commercially sensitive information. However this should not dissuade commercial parties from litigating in the courts and modifying this principle would give greater recognition to the need to protect such information. However, Mr Barker stressed that it would only be one of the principles and could be outweighed. The Committee agreed to this proposal.

On this basis the Committee agreed to the draft rules and the Chief Justice would be consulted on her return from overseas. The draft rules and the consultation paper will be issued to the public, the profession and certain stakeholders soon.

Action points: The rules issued will only be for the High Court Rules, r 6(3) will be amended to only require providing a written objection to the Registrar, "confidentiality" will be inserted into r 8(2)(c)(ii, and r 8(2)(d) will be modified to become a principle, moved to r 8(1) and broadened to include commercially sensitive information.

5. Insolvency rule amendments

At the last meeting, the ADLSi Civil Litigation Committee had raised two apparent conflicts relating to the timing for opposing the discharge of a bankrupt and whether permission is required under r 19.5 to commence an application under Part 6 of the Insolvency Act 2006 by way of originating application. Ms O'Gorman had been asked to lead a working group to look at these issues.

In relation to the timing for opposing the discharge, Ms O'Gorman explained that there was an inconsistency between the Insolvency (Personal Insolvency) Regulations 2007, requiring a notice under s 297 of the Insolvency Act to be given five working days before the hearing and r 24.39 of the High Court Rules requiring a notice to be filed and served the day before the hearing. The Rules Committee were unable to amend the Regulations but the time frames in rr 24.37–24.39 could be amended to remedy this problem. Ms O'Gorman recommended that r 24.37 specify 20 working days before the hearing for an application for discharge of bankruptcy to be filed, r 24.38 specify 10 working days before the hearing for the Assignee to file and serve his or her report, and r 23.39 to specify that the notice of intended opposition be filed and served not less than five days prior to the hearing.

Ms O'Gorman had consulted with a working group on these suggested changes, which was composed of Mr David Chisholm QC, Mr Gareth Neil, and the Official Assignee's solicitor in Auckland, Mr Guy Caro. All had endorsed Ms O'Gorman's analysis and proposed amendments. The Committee agreed to these changes.

Turning to the second issue identified by the ADLSi, this related to whether leave to file an originating application to administer the estate of a deceased debtor was required. Under r 24.4 such an application must be made by way of an originating application. However, r 19.2 does not allow for an originating application for such proceedings to be used as of right. Ms O'Gorman suggested that r 19.2(y) be amended to include applications under r 24.4. Mr Neil had raised a further issue about applications by the Assignee to cancel irregular transactions or the retransfer of property or the payment of value. Rule 24.35 requires these applications to be made by originating application but r 19.2 does not provide for this either. The Committee agreed to both these changes.

Action points: Rules 24.37–24.39 will be amended to specify periods of 20, 10 and 5 working days respectively. Rule 19.2(y) will be amended to also refer to rr 24.4 and 24.35.

6. Costs on costs

Messrs David Bullock and Julian Long had written an article, "Costs of costs applications" [014] NZLJ 248. In this excellent article, Messrs Bullock and Long had argued that costs should be obtainable as of right for costs applications.

Judge Gibson agreed that there can be some argument on indemnity or increased costs applications and that, if there is a hearing then, like an interlocutory application, costs should follow. However the Judge was of the view that costs should be up to the individual judge and the amount should not be prescribed in the rules.

The Chair considered that there needed to be an end to argument at some point. Ms O'Gorman considered that costs for costs applications should be available but should not be prescribed in the rules. This is the current position under the rules and there is jurisdiction to seek costs in appropriate cases. Mr Beck considered as the article set out, the current position is that costs for costs applications are discretionary and should only be imposed when appropriate. Mr Beck was of the view that this current position should continue.

After further discussion the Committee decided not to amend the rules to provide a time allocation for costs for costs applications, as this would make costs for costs applications standard. The Committee was of the view that where appropriate, the time allocations for costs for costs applications should be determined by analogy to a defended application determined on the papers. If a memorandum is filed seeking costs on costs the time involved was similar. If a hearing was involved then the time allocation should be analogous to an interlocutory hearing.

Action points: No change to the rules is required. The Committee to write to Messrs Bullock and Long thanking them for their article.

7. Lawyer for the Child in the High Court

The Family Law Section of the New Zealand Law Society had asked the Committee to consider inserting a definition of Lawyer for the Child into the High Court. In some proceedings on appeal from the Family Court there is often a need for a Lawyer for the Child to be appointed in the High Court. In the High Court there is no equivalent to s 9B of the Family Court Act 1980 defining the role of the Lawyer for the Child.

The Chair explained that on appeal where a lawyer was required to be appointed to represent the interests of the child/children this was done by appointing them as an amicus curiae under r 10.22. Unlike the Family Court, which has a statutory jurisdiction, the High Court has inherent jurisdiction and can appoint such a lawyer if required. The question was whether specifying this in the Rules was necessary.

The Committee decided to consult with Justice Ellis in Auckland, who was in charge of the civil list, to see whether a change was required.

Action points: Write a letter to the Family Law Section explaining the current position and consult with Justice Ellis to see if any change is required.

8. Granting leave to appeal on a second appeal

Mr Beck raised the issue of the same judge who had determined an appeal then deciding whether to grant leave to appeal that decision to the Court of Appeal. Mr Beck expressed concerns about the appearance of bias caused by this practice. It was difficult to explain to clients how judges would not be biased in determining whether to grant leave to appeal against their own decisions. While an applicant could then apply to the Court of Appeal for leave, the Court of Appeal had adopted a more restrictive approach where the High Court had refused leave.

The Chair was not aware of any groundswell of discontent to this established practice. The Chair considered that there were many practical advantages of the same judge determining whether to grant leave as they were familiar with the facts, know the law and could efficiently determine whether the proceeding was the type that deserved to get leave. This efficiency had to be balanced against any appearance of bias, but the Chair did not consider there was generally a perception of bias.

Mr Gray questioned whether the issue was able to be determined by the Committee. As the practice of what judge does what is determined by the Head of each Bench, it was up to the Head of Bench to change the practice if any change was considered necessary. While Mr Gray accepted that the Court of Appeal had in the past adopted a more restrictive approach to granting leave where the High Court had refused it, he considered that this could not be maintained given the Supreme Court's decision in *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141. Ms O'Gorman and Mr Barker each agreed that the Court of Appeal's determination had to be the ordinary test and not a higher test just because the High Court had not granted leave.

Mr Beck pointed out that the Supreme Court was to determine whether to grant leave against the Court of Appeal's decision regarding a refusal to grant leave and that if leave was granted the Supreme Court's decision may clarify the correct approach. The Chair suggested that this matter should be left until the Supreme Court's decision whether to grant leave is given. If leave is granted

then the Committee would wait the Court's decision, and if leave is refused the Committee would consider the matter at the next meeting. The Committee agreed to this course.

9. Amending the definition of liquidated demand

Mr Moore explained that when the District Court Rules 2014 came into effect the formal proof regime did not include a tax debt as a liquidated demand. Therefore tax debts needed to be proved by formal proof. The draft rules remedied this by amending the definition of a liquidated demand to include a statutory debt. This would allow tax debts to be recovered as liquidated sums and thus avoid the need for formal proof.

The Chair was worried that a statutory debt would encompass much more than a tax debt, such as Accident Compensation Corporation overpayments, and other such debts calculated on the basis of an enactment. Mr Gray explained that for money sums the courts would not enforce judgments for tax debts but would for other money judgments. He questioned why this was. The Committee was not sure and Mr Barker volunteered to write a background paper for the next meeting on this area and would seek the views of tax specialists.

Action point: Mr Barker to write background paper exploring the issues of allowing statutory debts, like tax debts, to be liquidated demands.

The meeting closed at 12.45 pm.