The Rules Committee

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25 June 2018
Minutes 02/18

Circular 33 of 2018

Minutes of meeting held on 11 June 2018

The meeting called by Agenda 02/18 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 11 June 2018.

1. Preliminary

In Attendance

Rt Hon Dame Sian Elias GNZM, Chief Justice of New Zealand
Hon Justice Courtney, Chair
Hon Justice Venning, Chief High Court Judge
Hon Justice Kós, President of the Court of Appeal (attended until 10.45 am)
Hon Justice Asher
Hon Justice Dobson
Judge Kellar
Mr Andrew Beck, New Zealand Law Society representative
Ms Jessica Gorman, representative for the Solicitor-General
Mr Andrew Barker QC, New Zealand Bar Association representative
Mr Rajesh Chhana, Deputy Secretary of Policy, Ministry of Justice
Ms Suzanne Giacometti, Parliamentary Counsel Office (outgoing)
Ms Fiona Leonard, Parliamentary Counsel Office (incoming)
Mr Jason McHerron, New Zealand Law Society representative
Mr Kieron McCarron, Chief Advisor Legal and Policy, Office of the Chief Justice

Ms Regan Nathan, outgoing Secretary to the Rules Committee
Ms Alexandria Mark, incoming Secretary to the Rules Committee
Mr Daniel McGivern, Clerk to the Rules Committee

Apologies

Hon David Parker, Attorney-General
Judge Doogue, Chief District Court Judge
Judge Gibson
Ms Laura O'Gorman

Confirmation of minutes

The minutes of the Committee's meeting on 26 February 2018 were confirmed.

2. Court of Appeal (Civil) Amendment Rules

The Clerk had circulated a draft of the Court of Appeal (Civil) Amendment Rules 2018 to the Committee for comment. Feedback was received from the New Zealand Law Society, Crown Law, the Ministry of Justice and the New Zealand Bar Association. In response to some of the issues raised by that feedback, Kós P prepared a letter for the Committee and attended this portion of the meeting to discuss the rules.

One of the proposed rules — r 5A(1)(b) — would allow the Registrar to reject for filing a document on the grounds that, plainly, it is abusive or is an abuse of process, or the Court lacks jurisdiction in the matter to which the document relates. The Registrar's decision would be subject to a potential review by a Judge under proposed r 5A(3). Kós P explained that the Court of Appeal would prefer this model to the one recently adopted in rr 5.35A-5.35C of the High Court Rules 2016, under which the Registrar must accept the document for filing but can refer it to a Judge who can strike it out. There are already significant demands on Court of Appeal judges dealing with interlocutory matters, and requiring them to review abusive documents is unnecessary.

Kós P explained that the Registrar applies an accomodating approach to the filing of such documents, whereby an intending party is assisted as to what he or she needs to do to have his or her document filed. For efficiency, it is preferred that the Registrar do that rather than requiring the matter to go to a Judge at first instance. Seventy-six matters were rejected at the Court of Appeal registry last year. Two-thirds of those related to jurisdictional issues while one-third related to non-compliant or abusive documents.

Mr Barker QC had discussed this rule with a small group at the New Zealand Bar Association. It considered there to be no real concerns with the rule — the Registrar can refer matters to a Judge in any case, so this rule will capture only a limited range of circumstances. By contrast, Mr McHerron explained that the New Zealand Law Society opposed introduction of the rule. That is because the rule would require the Registrar to make substantive decisions as to whether a document was an abuse of process, and it would confer on Registrars substantive powers to determine whether — as a matter of law — the Court has jurisdiction in a particular matter. Mr McHerron also noted that the rule was possibly ultra vires the Senior Courts Act 2016. Although s 151 of the Senior Courts Act provides for powers to be conferred on Registrars, that only applies to decisions of a Judge in chambers conferred by the Act or any other Act. And there is no express provision in the Senior Courts Act dealing with matters of this kind. Section 49 requires two judges to deal with a contested matter and allows a single judge to deal only with uncontested matters, which might not cover this issue.

Mr Beck questioned how the rule would apply in a situation where there is a legal argument as to whether the Court has jurisdiction. He observed that it might not be right for the Registrar to be making these substantive decisions. Kós P pointed out that that would seldom be the case, but in any event it would be referred to a Judge as it would no longer be a "plain" case, as required by the rule.

Mr McHerron observed that many of the issues falling within the purview of r 5A(1)(b) would in any event be captured by r 6, which allows for the rejection of non-compliant documents. He suggested that if there is a need to clarify this then it should be done in a targeted way rather than by referring to the more general concepts currently proposed, such as abuse of process. Kós P explained that r 5A is an attempt to more clearly articulate the bases for rejection. Mr McHerron said the proposed rule is too broad and deals with too many matters of substance.

The Chair observed that whether a document is abusive or not is not a substantive issue. If there is a genuine legal issue obscured by abuse then the abusive aspects can be deleted by the filing party or,

alternatively, the filing party can seek review by a judge. The Chair agreed that in principle a Registrar should be able to reject patently abusive documents, but she questioned whether abuse of process, which is a legal issue, should be treated similarly. The Committee agreed to consider limiting the Registrar's power to "abusive" documents (i.e. documents couched in abusive language) and to require documents that may constitute an "abuse of process" to be referred to a Judge. In essence, the rule will deal with abusive communications and applications without jurisdiction. The Chair suggested that the rule be recast so as not to be a power to decline for filing but a power to require the document to be recast so that it is not abusive.

The Chief Justice queried the effect the rule would have on time limits. Kós P pointed out that there is power in the rules to extend time limits.

The Chief Justice suggested splitting the rule so that one rule will deal with abusive documents while the other will deal with jurisdictional issues. She observed that the Committee may not be able to come up with a formula that captures the abusive documents, but it may be useful to have a rule that captures the jurisdictional issues as relying on r 6 is too vague.

The Committee agreed that this issue, and others in the rules, would be taken on by a sub-committee consisting of Asher J, Randerson J, Mr McHerron and the Clerk.

Turning to a different matter, Mr Barker observed that there is a reference in the explanatory note to a formal response to a notice of appeal. However, the rules themselves only refer to an appearance-type document being filed. He wondered whether it would be worth having a formal response to a notice of appeal. The respondent is not presently disciplined in terms of the extent of any cross-appeal, for instance. Kós P explained that it is for the appellant to define precisely what is challenged, and the respondent should be given latitude to attack those grounds on appeal. It was agreed this issue would be considered by the sub-committee.

Asher J addressed a point raised in the New Zealand Bar Association's written feedback regarding the removal of an oral hearing right in applications for leave to appeal. The proposed rules provide for such applications to be on the papers unless otherwise directed by a Judge. That outcome is dictated by s 49 of the Senior Courts Act, not by the rules.

Mr Barker raised a final point regarding the limitation in the proposed rules on the evidence that can be included in the case on appeal. Proposed r 40B(1) states that the evidence taken in the court below must not be included in the case on appeal unless the notice of appeal identifies a challenge to a material question of fact. If there is a challenge to a material question of fact, the evidence in the court below must be included but limited to material relevant to the determination of the challenge. Mr Barker observed that this is too constrained. At a practical level, factual issues weave into the appeal as legal matters are heard against particular factual contexts. The Committee agreed to put this matter to the sub-committee.

Action point: Sub-committee to review draft.

3. Electronic matters

Marian Hinde, a barrister, had written to the Committee to express concern about the lack of people in the legal profession who have the time, or the expertise, to contribute any input as to the appropriateness of the draft rules affecting electronic casebooks. The proposed changes might be better informed by taking into account the input of those most closely concerned with the practical task of complying with the Senior Courts Civil Electronic Document Protocol and the Electronic Document Practice Note 2017.

The Committee agreed it would be a good idea to welcome comment from experts in this area, as such persons are in the best position to identify the practical glitches that are likely to be encountered. It was agreed a sub-committee would be set up to review the rules and see what issues they might raise in

connection with electronic documents. Mr Barker will be in charge of this sub-committee. The Chair will write to Ms Hinde to explain the Committee's decision.

Action point: Mr Barker to oversee sub-committee; the Chair to write to Ms Hinde.

4. Costs for in-house counsel

The Committee discussed the recent decision of Associate Judge Matthews in *Commissioner of Inland Revenue v New Orleans Hotel (2011) Ltd*, which is being appealed to the Court of Appeal. The Judge in that case disallowed costs to the Commissioner of Inland Revenue because she was represented in the proceedings by in-house counsel. This result is based on interpretation of the word "incurred" in the High Court Rules, as interpreted by the Court of Appeal in *Joint Action Funding Ltd v Eichelbaum* and *McGuire v Secretary for Justice*.

The Committee questioned whether it should consider this issue while the appellate process is underway. It was agreed the Committee should not halt its processes for the sake of awaiting judicial resolution. The result of the appeal will clarify the interpretation of the word "incurred" in Part 14 of the High Court Rules, whereas the Committee's work will be focused on what the rules should provide. These are distinct issues.

The Chair felt that the Committee could not ignore this issue now that it has been raised. Although the *New Orleans* case involved the Commissioner of Inland Revenue, other bodies — government departments, insurers and banks, for example — are affected by it. The Committee also noted that it is now common for parties to undertake some of the work associated with litigation. For example, a firm might instruct a barrister directly and undertake much of the discovery themselves. On this interpretation of the High Court Rules, the work undertaken by the firm might not fit within the current framework. Dobson J raised the point that the current costs schedule does not provide a distinction that recognises the lower cost of engaging in-house counsel as against the costs of instructing external counsel. The Chair observed that in-house counsel are used to save costs and the current scale does not appropriately take this into account. Mr Beck said the scale is simply an objective way of assessing costs.

The Chief Justice felt that an attempt by the Committee to look into this issue may prompt a thorough reconsideration of the basis for costs in the High Court Rules. Our costs rules have been developed against a background of assumptions as to how costs have been administered for a long time, which might not be right in light of the way in which legal services is provided has changed. Mr Beck agreed, noting that much of this discussion is a reflection of the fact there is uncertainty as to what the principle ought to be governing an award of costs for in-house counsel. There will be no quick fix to the in-house costs issue. And, more broadly on the issue of costs, depending on the scope of any costs review it might be a matter better left for Parliament to resolve

The Committee agreed to defer discussion of this issue until the next meeting.

Action point: Item to be kept on the agenda.

5. Representative actions

Since the last meeting the draft of the representative proceedings rules have undergone modest stylistic change. Most significantly, r 4.70 now says:

> **4.70 When representative proceedings are commenced**
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> For the purposes of these rules, a representative proceeding is commenced by the following persons at the time the statement of claim is filed:
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> (a) the person named in the statement of claim as the plaintiff suing in a representative capacity; and

(b) all named and unnamed persons ultimately determined to comprise the class represented at the time the statement of claim is filed.

The Committee agreed to this change.

The next matter was the appropriate scope of consultation. The Committee agreed that a public consultation would be appropriate. The Chair noted that the Courts of New Zealand website would be a good place to start. Mr Chhana said he could coordinate a process for consulting government departments, and can work with Cate Brett to facilitate publication of this consultation. The Committee observed that many organisations — litigation funders, iwi, construction firms, insurers, banks — will want to provide input on this. The Chief Justice added that the Committee should consult with the Law Commission, including by ensuring that the Law Commission is content with the terms of the Committee's consultation.

Dobson J observed that consultation on these rules might trigger feedback that the rules should go further than they currently do. It was agreed that the consultation should be on terms that the Law Commission is undertaking a wider review of this area and that the Committee's rules merely capture the current process.

Action point: Mr Chhana to consult with Cate Brett on media consultation; Clerk to assist in contacting the Law Commission and publicising consultation on the Courts of New Zealand website.

6. Daily recovery rates

At the last meeting, the Committee agreed in principle to increasing the daily recovery rates by about seven per cent. Consultation was sought. The New Zealand Law Society, New Zealand Bar Association, and University of Otago Legal Issues Centre all agreed with the proposed rate increases.

The Auckland District Law Society expressed concern about the use of the Producer-Price Index (PPI) as a basis for the daily recovery rates. It said the PPI is not an appropriate measure of the cost paid by a client for litigation. It suggests the Committee conduct a survey of the costs of the profession every 10 years, plus an intermediate adjustment twice in between, so that the scale is updated about every three years. It proposed a survey of daily rates charged by counsel for a day in Court, by counsel who "self-report" as to whether their attendances should be considered as rates A, B or C.

The Chair and Venning J agreed that such a survey would not be accurate, as it would simply be an indication given by those who respond. The Committee agreed not to depart from its current proposal.

Action point: Daily recovery rates to be amended.

7. Civil practice notes

The Clerk identified three practice notes that the Committee did not address in its review of the civil practice notes: Practice Note 29 (Commercial List); Practice Note 31 (Supreme Court Application for Leave to Appeal); and Practice Note 39 (Court of Appeal Fast Track). The Committee agreed that Practice Note 29 and Practice Note 31 should be revoked.

The Committee considered whether the Court of Appeal's Fast Track procedure ought to be put into the Court of Appeal (Civil) Rules 2005. One issue with having such procedures in practice notes is that many people, including lawyers, do not know about them. Asher J observed that Practice Note 39 is not very prescriptive.

Mr Barker observed that if the Court of Appeal is to try to have the process done on the papers then there may need to be a procedure under which applicants are made aware of what must be included in their memorandum. The memorandum will in practice comprise the applicant's whole argument on priority.

The Committee agreed to have the Court of Appeal (Civil) Amendment Rules sub-committee look at the issue.

Action point: Sub-committee to look at whether Practice Note 39 should be revoked, retained, or revoked and put into the Court of Appeal (Civil) Rules.

8. Consultation on rules amendments

At the last meeting, the Committee discussed how government consultation can be done more efficiently and in ways that do not slow down the Committee's processes. In particular, it was agreed that government input should be sought earlier than when the rules have been agreed by the Committee.

Mr Chhana prepared a memorandum for the Committee outlining a draft process for consulting government departments on rules proposals. The proposal has 12 steps:

1. Ministry receives rules proposal and coordinates internal feedback
2. Committee considers the proposal for the first time
3. Parliamentary Counsel Office drafts the proposal and circulates the draft rules to Committee members out-of-session
4. Ministry circulates draft rules to relevant agencies for consultation, including Treasury and relevant government departments
5. Ministry advises the Chair of the outcome of consultation
6. Rules considered by Committee for the second time
7. Parliamentary Counsel Office amends draft rule to reflect Committee's discussion
8. Final version of rules provided to the Ministry to circulate for concurrence
9. Concurrence received from Committee members
10. Cabinet Paper prepared by Ministry
11. Rules and Cabinet Paper provided to the Associate Minister's office
12. Cabinet paper and final rules lodged with the Cabinet Office

Asher J raised a concern that this process appears highly formalistic and likely to change how the Committee operates. The Committee often deals with matters swiftly and informally. Mr Chhana explained that the intention behind the process was not to alter how the Committee operates, but rather to make clear to the Committee how the Ministry of Justice will manage departmental response to rules amendments. He also noted that the process will apply mainly to substantive amendments such as the Committee's current representative proceedings agenda item. The idea is simply to clarify the stages of development at which the Ministry of Justice will consult with other departments. He proposed softening the step-by-step nature of the process, and recasting this process as a memorandum as opposed to a more formalised procedure. The Chair noted that the Committee does not want to be constrained by any such process. Mr Chhana explained that in practice he will advise the Committee as to when certain amendments are to be circulated to other departments for comment.

Ms Giacometti noted that when amendments go to Cabinet it is a requirement that it be indicated who has been consulted and it may be decided that the amendments must go elsewhere for consultation. This process helps ensure that this departmental input is sought early in the process rather than at the last minute once the amendments have been agreed to by the Committee. The Cabinet Manual requirements apply to the Committee because its rules are enacted by Order in Council. The Committee agreed with Ms Giacometti's point that a rough process on paper can be helpful in the

public-sector context where there is frequent turnover of staff roles. Having a process set down makes it easier for assimilate new staff into that process.

Asher J observed a tension between the Committee's unique process and the need for that process to be accommodated within Parliamentary Counsel Office's work. Essentially the Committee is one of Judges dealing with their rules of court. Within reason the Committee should formalise its process to make things easier for Parliamentary Counsel Office, but the inherent flexibility of the Committee's unique process must be retained.

Ms Gorman noted that the process does not need to amount to a separate consultation but can rather be thought of as running alongside the Committee's ordinary consultation, with the Ministry of Justice coordinating the departmental responses.

The Chief Justice put to the Committee that there is no reason why governmental departments cannot feed into the Committee when it goes public with its proposals rather than Mr Chhana to coordinate departmental responses.

Dobson J raised the constitutional concern about government departments having additional input into how Judges govern the processes of their courts. The Chief Justice agreed, but she observed that in practice it never happens. Mr Chhana explained that the Committee always applies for an exemption from the regulatory impact statement requirements on a case-by-case basis. Dobson J observed that beyond potential fiscal impacts, there is no role for the government to play in overseeing how Judges write their rules of court.

Action point: Mr Chhana to recast proposed process.

8. General business

Mr Beck raised an issue with the consultation process undertaken in respect of the Court of Appeal (Civil) Amendment Rules 2018. In particular, the draft was received in confidence and there was uncertainty as to how much further within the New Zealand Law Society the rules could be distributed. The rules were circulated on the basis that they were to be agreed at this meeting, which made it difficult to coordinate responses to the rules. The Chair observed that given the number of comments received in respect of the Court of Appeal rules they should be circulated for consultation once the sub-committee has made changes to the draft.

The meeting finished at 12.00 pm.