The Rules Committee

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26 June 2017
Minutes 03/17

Circular 31 of 2017

Minutes of meeting held on 12 June 2017

The meeting called by Agenda 03/17 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 12 June 2017.

1. Preliminary

In Attendance

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

Ms Alice Orsman, outgoing Secretary to the Rules Committee
Ms Regan Nathan, incoming Secretary to the Rules Committee
Mr Daniel McGivern, Clerk to the Rules Committee

Apologies

Rt Hon Dame Sian Elias GNZM, Chief Justice of New Zealand
Judge Doogue, Chief District Court Judge
Hon Christopher Finlayson QC, Attorney-General
Judge Kellar
Mr Bruce Gray QC, New Zealand Law Society representative

Incoming secretary

Mr Chhana introduced Ms Nathan, who will be taking over from Ms Orsman as Secretary to the Rules Committee.

Confirmation of minutes

The minutes of 3 April 2017 were confirmed.

2. Commercial Panel

Section 19 of the Senior Courts Act 2016 provides for the establishment of a Commercial Panel. At its last meeting the Committee discussed some draft rules to deal with nominations made by parties for cases to be heard by a Judge on the Commercial Panel. The outcome of that discussion was an agreement to implement changes to the draft rules to reflect the Committee's discussion.

Ms Giacometti explained that those changes remain a work-in-progress and will be prepared for the Committee's next meeting, after review by Venning J.

Venning J inquired as to the administrative status of the Order in Council, which is envisaged by s 19(2) of the Senior Courts Act 2016. The Order is necessary to confirm the criteria for and start date of the Panel. As time progresses, the start date will change. The terms of the Order had been agreed on at a meeting between Venning J, the Chief Justice, and the Attorney-General. Ms Giacometti agreed to follow up on its progress.

Action point: Ms Giacometti to make agreed changes to the draft rules and send them to Venning J for review, and follow up on the progress of the Order in Council.

3. Rejection of documents by Registrars

Mr William McCartney published an article in the December edition of LawTalk questioning the practices of Registrars in rejecting documents because they are formally non-compliant. Mr Barker explained that there is a concern that registries may have adopted an unduly technical approach to rejecting documents. His initial suggestion was to gather feedback from registries as to what their approaches have been. Perceptively this is a bigger problem at the District Court than the High Court. Commenting on the approach taken by the District Court, Judge Gibson said that most issues have been identified and resolved following the implementation of the Central Processing Unit.

As Mr Chhana explained, the Ministry of Justice has prepared an abundance of material to train and guide registries as to when documents should be rejected. The general practice is that documents should be accepted for filing, but formal defects should be brought to the attention of counsel so that they can be remedied; whereas substantially non-compliant documents should be rejected. If there are problems with the approach taken by registries then this can and should be remedied by having Judges promulgate further guidance material.

Mr Chhana further explained that some of the confusion among members of the profession may stem from misinterpretations over why documents are actually being rejected. Some documents are rejected because they are substantially deficient, but the Registrar may point out other minor defects that ought also to be fixed. In those cases, the person filing the document may think wrongly that their document was rejected simply due to those minor defects.

The Committee then turned to whether the Committee ought to respond to the matter. Courtney J suggested that the Chief Judges could prepare an explanatory response to inform the public as to the rules governing rejection of documents and the process followed by registries. She added that a pre-prepared checklist could be provided to registries, which would be based on the Rules and would inform counsel as to the reason(s) for rejection. Asher J considered that an article or publication could

be prepared by the Committee. He said there are no issues with r 5.2 of the Rules, which deals with non-complying documents. In light of this, it may be preferable simply to let the issue expire. Venning J agreed, adding that current practice does not seem to pose any real issues.

Venning J queried whether a public response was necessary, for example with reference to the guidance material that has been provided to registries. Mr Barker considered that it could be useful to point out that although there may be a perception that registries are rejecting documents for form on irregular bases, this is not what should generally be happening.

Ms Giacometti asked whether something needs to be done if it is found that the guidelines are being applied inconsistently across registries. Mr Chhana explained that while that is not presently the case, that issue would be dealt with by reviewing that particular registry's practice, as the case may be.

The Committee agreed that the only necessary action at this stage was for Mr Barker to draft a letter to the New Zealand Bar Association, who had requested that the issue be raised with the Committee. The Committee's position is that this does not appear to pose a significant problem warranting the Committee's immediate attention. The Committee may, however, publish an item in the future explaining how registries have been guided in reaching their decisions to reject documents for filing. Venning J concluded that nothing beyond a letter is necessary at this stage.

Action point: Mr Barker to draft a letter to the New Zealand Bar Association, and send it to the Chair and Mr Chhana for review.

4. Civil practice notes

At its last meeting the Committee had worked through several of the civil practice notes and had decided that some of them ought to revoked and/or put into the Rules. The Committee had agreed to defer discussion of some notes. In light of a memorandum prepared by Ms Gorman, the Committee was now in a position to review those notes.

Practice Note 9 – Service on Grandchildren

Practice Note 9 sets out that where you have to serve grandchildren in relation to a claim under the Family Protection Act 1955, you ought to consider the costs associated with serving every grandchild and having separate representation by counsel for each grandchild; and whether a parent could be appointed to represent them, or a solicitor to represent a class of beneficiaries who might have the same interest.

On this matter, Venning J and Mr Beck agreed that rr 18.7 and 18.8 of the High Court Rules are capable of capturing the essence of this note. Those rules govern directions as to service. In particular, r 18.8 provides that for service on a minor you do not need a litigation guardian. The Rules therefore contemplate that orders will be made for directions as to service, which might be that a mother or father is to represent infant children or minors.

The Committee agreed that this practice note was no longer necessary, and an amendment to the Rules is unnecessary.

Practice Note 11 – Executors and administrators: powers before grant and substituted appointment after grant

Practice Note 11 deals with situations where the Public Trust is appointed as administrator of an estate because the appointed or nominated executor in the will does not wish to carry out his or her obligations. Venning J was unsure as to whether this position was covered by the Rules. The note may offer useful guidance, but the question was whether it ought to be included expressly in the Rules (along with necessary modifications to reflect existing practice).

The Committee agreed to refer this matter to Mr John Earles, who has knowledge in this area.

Notes of Evidence

Venning J explained that the current practice note governing the Notes of Evidence (NOE) is out of date, because it was promulgated at a time when Judges' associates were recording the evidence manually. A new system is now in place. He referred to a Ministry of Justice Joint Operational Circular regarding the verification and filing of amended NOE, which sets out a formalised process for confirming NOE/transcripts as the official record. In light of this, a practice note is no longer required to deal with NOE.

Ms Gorman queried whether this information needs to be publicised so that the public are aware of how the process is undertaken. Mr Beck did not think so, because this is largely an operational matter rather than something the profession is directly concerned with. Issues may arise as to how NOE are corrected, but that issue can be resolved between the parties and the Judge when it arises.

The Committee agreed that this practice note should be revoked, and no amendment to the Rules is necessary.

Court of Appeal Fast-Track

Asher J explained that the Court of Appeal rules are currently being reviewed. A draft set of those rules will be presented to the Committee at a later date.

Action point: Practice Notes 9 and 25 to be revoked, Practice Note 11 to be referred to Mr Earles, and Asher J to obtain and provide to the Committee a draft version of the Court of Appeal rules when available.

5. Supreme Court Rules

O'Regan J had provided a draft set of rules that the Committee considered at its last meeting. Ms Giacometti explained that changes to those are currently a work-in-progress.

The Chair asked the Committee whether it saw any glaring issues in the current draft. Mr Beck directed the Committee's attention to r 31, which deals with security for costs in a civil appeal. That rule is under review by the Supreme Court. Ms O'Gorman considered that r 31(4), which treats as abandoned an appeal in which an appellant fails to comply with the rule or any condition or direction in relation to security for costs, is problematic. The reason is that the application to strike out due to failure to comply with an order for security for costs is scheduled alongside the substantive appeal, which defeats its purpose. Mr McCarron considered that security for costs has not been an issue for the Supreme Court Judges, particularly given the very low quantum that security is set at in the Supreme Court.

Action point: Ms Giacometti to finalise changes to the draft.

6. Time allocations

A sub-committee comprising Mr Barker, Ms O'Gorman, Mr Beck and Mr Gray had at the February meeting presented their proposed reform to the time allowance for trial preparation under Schedule 3 of the High Court Rules. Their broad solution was to return to an allocation for trial preparation based on the length of the hearing rather than a fixed allocation. The Committee was ready for this proposal to go for consultation. However, the outcome of the discussion was an agreement to engage NZLS, ADLS, and NZBA on the question of whether the Committee ought to be looking at other time allocations as part of their review. Since then, the Committee has received feedback from all three.

NZLS said originating applications and applications for judicial review require separate treatment through separate categories. Additionally they consider that declaratory judgments ought to be consulted on. As well, the time allocations for interlocutory judgments appear to them to be quite light.

ADLS said there is merit in judicial review having its own category. For both originating applications and judicial review proceedings, a significant portion of the work is incurred at the outset when the affidavits containing the relevant evidence are filed. Additionally, consideration ought to be given to including attendances in relation to dispute resolution and counsel preparation for and/or attendance at conferences of expert witnesses.

NZBA said it would be sensible for the Committee's review to extend to time allocations for preparation for, and hearing of, interlocutory and originating applications, appeals, judicial review proceedings and declaratory judgment proceedings. At present, time allocations are made for originating applications and appeals, and no particular provision is made for judicial review and declaratory judgment. They consider that specific provision for judicial review and declaratory judgment proceedings might be helpful, because they have more in common with appeals than with witness-based trials.

Mr Barker questioned whether the Committee ought to start creating a multiplicity of categories in the costs schedule. If hearing time is used to determine preparation, there will always be a group of cases that are not adequately reflected. The solution may be simply to leave those cases to the discretion of the court. Mr Barker was sceptical over whether new categories should be created, because there are all sorts of cases (for example, Family Protection Act claims) that are usually heard by way of affidavit evidence. As such, it would be a difficult task for the Committee to draw the line as to which cases ought to be given separate categories: why stop at judicial review? The Committee could possibly indicate that the trial preparation allocation is not appropriate when evidence is not given orally, otherwise it ought to be left to the discretion of the court.

Asher J acknowledged that there are good reasons not to have various sub-categories, but considered judicial review to be rather exceptional. Often there will be one or two-day judicial review applications that have had vast amounts of work put into them. Whether that is best left to the discretion of the court is a question for the Committee to consider.

Mr Beck considered there is a good case for a separate judicial review category. This is because the underlying philosophy of the proposed change – that trial time is a good indicator of preparation time – simply does not apply. It would not necessarily lead to a multiplicity of categories, because it would be addressing very specific cases where you have a trial on affidavit evidence, which ought to be recognised in the Rules. Courtney J added that judicial review and declaratory judgment proceedings do not fit into the proposed category, yet raise difficult legal issues with some involving voluminous evidence.

Venning J noted that the schedule already has a number of categories anyway. Those categories include originating applications, bankruptcy and appeals. He agreed with Courtney J and Mr Beck on judicial review as a separate category, because it is a certainly a distinct proceeding. A lot of the work in judicial review applications is front-loaded, in that an affidavit is prepared at the outset. It also occupies a large chunk of the court's work. The court already deals with appeals, judicial review and summary judgments on separate lists. It is thus recognised that they ought to be dealt with differently.

The Committee agreed that the sub-committee comprising Mr Barker, Ms O'Gorman, Mr Beck and Mr Gray would convene before the next meeting and come up with a new schedule. Mr Beck added that interlocutory appeals ought to be considered alongside the other matters raised.

Action point: Sub-committee to prepare a schedule for the next meeting.

7. Representative actions

On 24 July 2015 the Committee received a letter from Mr Robert Gapes, a partner at Simpson Grierson. In his letter, Mr Gapes expressed his personal view that the Committee ought to promulgate changes to the rules that reflect case law developments in the area of representative actions. Last year Ms Harriet Bush prepared a memorandum for the Committee, which tracked New Zealand case law in

the area. At the time, however, the Committee agreed that it was best to defer discussion on the issue until a later date.

At its meeting in February, the Chief Justice expressed her view that the Committee ought to turn its attention to representative actions. The Clerk was asked to have another look at what work has been done in New Zealand and in other jurisdictions. A memorandum was prepared for this meeting.

The Chair queried whether it was clear that no legislative change was on the horizon. Mr Chhana confirmed that the Ministry was not looking at the issue. However, he explained that the Law Commission has been considering its long term focus, which includes the possibility of revisiting representative actions. However, it is uncertain whether the issue will in fact be addressed.

A further issue raised by the Chair was the appropriateness of having the Committee make changes in this area. It would be preferable to have legislative reform. Mr Beck considered that the questions rests on whether the current approach is so unsatisfactory as to justify intervention by the Committee. The courts seem to be coping with the issue. Venning J noted that the issue is causing complications at the interlocutory phase. The Chair agreed, adding that the existing r 4.24 does not allow a lot of what is presently happening.

Asher J added some background to the Committee's discussion. One of the strong reasons for discontentment in the profession was the difficulty in advising overseas litigation funders. These funders have been discouraged by the lack of any recognition in the rules of modern representative action procedure. There is also the overhang of champerty and maintenance at common law. The current procedure, under which funders must ascertain the correct approach by analysing case law, is a disadvantage. As such, the question posed for the Committee was: if we cannot have an Act, can we have some rules to render some certainty in the area? The current r 4.24 emanates from Victorian times, which is not targeted at this new modern area of procedure.

In light of this discussion, the Chair considered that the Committee had reached the point where it ought to act. Courtney J asked whether the Law Commission would be incentivised to take on the issue if the Committee concluded that it was not going to make any changes in the area. Mr Chhana considered that possibility unlikely.

Ms Giacometti said she was particularly interested in the issue. Subject to other priorities over the election period, she will try to have a greater look at the issue.

The Committee then turned to the memorandums prepared by Ms Bush and the Clerk. Ms Bush had covered all of the case law, while the Clerk had developed the analysis into distinct sub-categories of procedure. Ms O'Gorman emphasised that the objective of the Committee's discussion is simply to articulate current law in the Rules. Mr Beck identified that the opt-in procedure and litigation funding are two areas that need to be regulated. Ms O'Gorman agreed, adding that the courts' flexibility ought to be preserved.

The Chair noted that this issue really does require legislation. The Committee was agreed, however, that r 4.24 is hopelessly inadequate for what is now a significant feature of the litigation landscape. In particular, the requirement that there be the "same interest" has now been stretched so as to permit a representative action on threshold issues, such as the existence of a duty of care, but with tailored issues such as actual reliance to be considered following the action. Courtney J considered whether it might be better to craft a new rule based on what the Supreme Court has said about the "same interest" requirement.

The Clerk pointed out another issue with r 4.24, which is that its wording does not envisage an opt-in or opt-out procedure. The issue of consent goes only to whether a direction by the court is needed. But the rule has as a requirement the representation of all persons with the same interest, not all persons with the same interest *who consent* to their representation. On this point, the Chair acknowledged that r 4.24 is far more limited than the case law currently permits.

It was concluded that Ms Giacometti would look at this issue and draft some rules for the Committee to consider. The Chair urged the Committee to proceed with caution, in response to concerns by Asher J that this is far more extensive and intrusive than the types of changes the Committee has made in the past. Courtney J considered that the task should simply be to provide rules to alleviate the concerns about the correct approach being scattered throughout the case law.

Action point: Ms Giacometti to look into drafting some rules for review by the Committee.

8. General business

The Committee thanked the Chair for his contribution to the work of the Committee, and congratulated him on his recent appointment to the Court of Appeal.

The meeting ended at 11.00 am.