The Rules Committee

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8 August 2014
Minutes 04/14

Circular 60 of 2014

Minutes of meeting held on 4 August 2014

The meeting called by Agenda 03/2014 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 4 August 2014.

1. Preliminary

In Attendance

Hon Justice Asher (the Chair)
Judge Gibson
Mr Frank McLaughlin, Deputy Secretary, Ministry of Justice
Mr Bruce Gray QC, 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, Judicial Administrator to the Chief Justice
Ms Sophie Klinger, Ministry of Justice (in relation to item 3)

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 Winkelmann, Chief High Court Judge
Hon Justice Gilbert
Judge Doogue, Chief District Court Judge
Judge Kellar
Mr Andrew Beck, New Zealand Law Society representative
Ms Jessica Gorman, Crown Law

Confirmation of minutes

The minutes of 9 June 2014 were confirmed.

2. Update on and amendments of the District Court Rules 2014

Seminars on the District Court Rules 2014

Judge Gibson updated the Committee on the District Court Rules 2014. These Rules came into force on 1 July 2014. To help educate the profession about the changes introduced by the Rules, Judge Gibson along with the New Zealand Law Society had organised seminars on the Rules to be held in Auckland, Hamilton, Wellington, Christchurch and Dunedin. Registrations for the seminars were good and this indicated a high interest in the Rules.

Technical amendments

Since the introduction of the Rules, the Ministry of Justice had identified four technical amendments. The first involved removing the duplication of Forms 1 and 3. Judge Gibson explained that the two forms reflected the forms for starting the proceeding in the District Court Rules 2009 and the High Court notice of proceeding. This duplication was unnecessary and could easily be amended by adding the signature block from Form 3 to Form 1 and deleting Form 3. The Committee agreed to these changes..

The second proposed change was providing a separate notice of proceeding form for applications for summary judgment that are filed at the same time as the proceeding is filed. Form 1 of the Rules does not inform the defendant that they must file and serve a notice of opposition and affidavit at least three working days before the hearing in order to oppose the application for summary judgment. Judge Gibson proposed that a form modelled on Form G13 of the High Court Rules should be inserted into the Rules. The Committee agreed to add this form.

The third proposed change involved inserting transitional provisions for proceedings under the 1992 Rules. Judge Gibson explained that it was assumed that there would be no proceedings under the 1992 Rules still active. However, there are still approximately 40 cases under the 1992 Rules. To provide clarity, Judge Gibson proposed inserting transitional provisions to make it clear that these proceedings should be continue to be dealt with under the 1992 Rules. The Committee agreed.

The final proposed change related to the r 7.2 dealing with when a first case management conference should be held. Some registrars were setting down case management conferences when notices of appearance were filed on the basis that a notice of appearance was a "response prescribed or otherwise required by the rules". However, r 7.2(2) makes no mention of a notice of appearance and only of statements of defence and this caused some confusion.

Ms Laura O'Gorman considered that a notice of appearance is not a response prescribed or required by the rules. An appearance normally only preserves rights or allows the party to appear. A notice of appearance does not act as a defence and so issues like discovery and other interlocutory matters would not arise. For this reason a case management is not necessary because these issues do not need to be determined. Therefore, no case management conference should be directed. The Committee agreed with Ms O'Gorman's analysis.

Mr Andrew Barker pointed out that for protests to jurisdiction an appearance prevents the proceeding from advancing until the party seeks to have the proceeding dismissed for want of jurisdiction or the other party seeks to have the protest set aside. This could result in the proceeding becoming stagnated unless either party takes a further step. The Chair questioned whether the proceeding should remain paused potentially indefinitely on the basis that an appearance has been filed or whether a protest to jurisdiction should be case managed. Mr Bruce Gray QC considered that it was inappropriate for a Court to case manage a protest to jurisdiction until a party had taken a further step in either seeking to have the proceeding dismissed for want of jurisdiction or to have the protest set aside. This was on the basis that where the Court's jurisdiction was at issue, the Court could not require the parties to actively pursue the protest point because potentially the Court lacked jurisdiction and so the parties' autonomy should be respected.

Parties often may choose to not pursue the protest to jurisdiction application. Ms O'Gorman explained that it was useful for a party to file an appearance and not have the protest to jurisdiction determined until later. For example, often there may be other proceedings overseas involving the parties.

Following the determination of those proceedings the protest point can be resolved if need be. This approach avoids unnecessary costs.

The Chair asked what would happen where no further steps were taken to set aside or determine the protest to jurisdiction. Would the proceeding simply exist in the ether? The Chair considered that it was undesirable to have proceedings paused indefinitely and not pursued or dismissed. Ms O'Gorman suggested that if any change was to happen it should be that the claim should be struck out if no application to set aside the protest to jurisdiction application was made within a certain time period. The Chair recommended that the Committee consider this matter at the next meeting and asked the Clerk to research how the Auckland High Court Registry deals with protest to jurisdiction applications.

Following on from this discussion, Mr Frank McLaughlin asked whether there was a process to deal with proceedings that had been stayed to allow for settlement or had otherwise fallen into abeyance. The Chair was of the view that staying a proceeding to allow the parties to settle the dispute was appropriate but that there should be a mechanism to deal with proceedings that had been settled rather than simply allow the proceedings to sit and become stagnant. Mr Barker pointed out that normally the Court requires parties to submit memoranda every six month to update the Court as to the progress of the proceeding. While useful in ensuring that proceedings are pursued, this adds unnecessary cost when the parties know that the settlement would take a certain time to complete (for instance where a payment schedule was involved). Mr Barker considered it could be useful to issue directions stating that the proceeding is stayed for a certain amount of time and after that certain amount of time, if no response had been received, the proceeding will be dismissed. The Committee considered that this was useful. However further thought needed to be given to allowing proceedings to be adjourned without an end point. Mr Barker will prepare a memorandum on this.

Action points:

1) *The proposed changes to the District Court Rules relating to the forms and transitional provisions were agreed to. The change to r 7.2 was not agreed to.*
2) *The Committee will consider how protests to jurisdiction are dealt with by Registry staff at the next meeting. The Clerk will prepare a paper setting out the process for dealing with protests to jurisdiction.*
3) *The Committee will consider how best to deal with adjournments sine die and Mr Barker will prepare a paper considering the issues arising from adjournments sine die.*

3. Rules for proceedings under the Victims' Orders Against Violent Offenders Act 2014

The Victims' Orders Against Violent Offenders Act 2014 has been enacted and will come into force on 30 December 2014. Under the Act, victims of serious violent and sexual offences can apply to the District Court for a non-contact order to protect themselves. Ms Sophie Klinger, from the Ministry of Justice, spoke to the item. Ms Klinger explained that specialised court rules are required to provide a mechanism for applying for these non-contact orders. These rules would be similar to the rules allowing for restraining orders under the Harassment Act 1997 and protection orders under the Domestic Violence Act 1995. As the Act will come into force by January 2015 there was some urgency in getting procedural rules in place.

The Committee agreed to provide input on the draft rules and will establish a working group comprising Judge Gibson, Mr Bill Moore, Kathy Pooke (the Parliamentary Counsel who is drafting the rules), Justice Asher, and a member of the profession. The Ministry of Justice will provide support to the working group. Draft rules will be prepared and provided to the Rules Committee as soon as they are ready and the working group will report back to the Committee at the next meeting in October.

The Committee also questioned whether it would be helpful to have a single procedure for applications for orders under the Domestic Violence Act 1995, the Harassment Act 1997, the Victims' Orders Against Violent Offenders Act 2014 and future similar legislation. Mr McLaughlin accepted that it may be best to have a single process and further discussions needed to be had in relation to whether the Committee should provide oversight in relation to the procedures under these statutes. Mr McCarron said that discussions were ongoing and he would update the Committee at the next meeting if the discussions progressed further.

Action Points:

1) *Mr Kieron McCarron will follow up in relation to the Rules Committee overseeing rules of court procedure;*
2) *The working group, chaired by Judge Gibson, will consider draft rules when available and report back to the Committee at the next meeting.*

4. Dispensing with security for costs under the Court of Appeal (Civil) Rules 2005

On 29 May 2014 the Supreme Court released its decision in *Reekie v Attorney–General* [2014] NZSC 63. This decision dealt with, among other matters, dispensing with security for costs in the Court of Appeal. Presently, under the Court of Appeal (Civil) Rules 2005 registrars determine whether security should be dispensed with. At [22] of the judgement, the Supreme Court recommended that the Rules Committee reconsider whether deciding whether applications to dispense with security for costs should be dealt with by registrars or judges.

The Chair considered that judges were in a better place to assess whether to dispense with security for costs. The Committee agreed. Draft rules providing that decisions to dispense with security for costs are made by judges will be prepared by Mr Moore and discussed at the next meeting.

Action point: Mr Moore to draft rules providing that decisions to dispense with security for costs will be made by judges rather than registrars.

5. Access to Court Documents

The Chair presented the draft civil and criminal access to court document rules. These rules simplified the existing rules in procedure and organisation and provided guidance as to what documents may be obtained before, during and after a substantive hearing. The Chair proposed that the next step was to refine the draft rules and to prepare a draft consultation paper setting out the rationale for revising the rules and seeking feedback from the profession and the public.

The presumptions at different stages

Mr Barker questioned whether there should be a presumption for granting access to the pleadings prior to trial. This presumption would be going further than the existing regime. The Committee agreed that in the civil rules this should be restricted and the presumption would generally be against access to any documents prior to the substantive hearing stage.

In relation to the criminal access to court documents rules, Mr McLaughlin asked whether this should apply also or whether there should be a presumption for accessing charging documents, These documents provided information from the State alleging that a person had committed certain actions constituting an offence. The State, rather than an individual, had brought the proceedings and Mr McLaughlin thought that the public should be able to see details regarding the exercise of State power. The Committee agreed that there should normally be a presumption in favour of accessing charging documents.

The enactments where access is restricted

Judge Gibson suggested that the Committee consider whether other proceedings should be included under the list of enactments subject to the presumption of non-disclosure. Judge Gibson suggested that proceedings under the Law Reform (Testamentary Promises) Act 1949 might warrant inclusion because often these proceedings involved personal matters. The Committee agreed that the list of enactments should be reconsidered. On this basis, the consultation document will ask for feedback on whether there were any other enactments that should be included in the list where a presumption against access existed.

Should the freedom to seek, receive and impart information be a factor to consider?

Mr Gray raised an issue about whether the "freedom to seek, receive and impart information" should be a factor to be considered in deciding whether to allow access to court documents. This was currently a factor under the existing rules and was drawn from s 14 of the New Zealand Bill of Rights Act 1990. Mr Gray considered that the court documents were not the type of information that this right attached to. Court documents were provided to enable a dispute to be resolved, whereas s 14 of the New Zealand Bill of Rights was directed towards information that shaped identity, including one's beliefs, attitudes and assumptions. For this reason, Mr Gray considered the freedom to seek, receive and impart information had little relevance when determining whether to grant access and so should be removed. Mr Barker agreed.

The Chair explained that this factor was broader than open justice. It encompassed access to a range of information that may be of general importance or to a general area of concern or interest. While often insufficient by itself, when coupled with open justice, the freedom to seek, receive and impart information had value. If this factor was removed, the only factor favouring granting access would be open justice. For this reason the Chair was of the view that this factor should be retained. However, further thought needed to be given to how it would apply.

The Committee agreed that the applicability of the freedom to seek, receive and impart information in relation to accessing court documents was an important issue to continue to discuss and to receive feedback. While the Committee formed the preliminary view that this criterion should be retained, the Committee wanted to see what other interested parties thought. It was agreed that the consultation document should ask for feedback on whether the freedom to seek, receive and impart information should continue to be a factor.

Should the interests of victims be a factor?

Mr Gray asked whether the proposed criminal access to court document rules captured the interests of victims in the release or retention of court documents. The Committee agreed that victims' interests should be taken into account as they are in relation to suppression under the Criminal Procedure Act 2011.

Mr McLaughlin suggested that under the criminal access rules, personal safety should be expressly provided for as part of a factor in determining whether to grant access. Unlike the civil court documents where privacy was largely about protection of reputation, in relation to criminal court documents the focus was broader and included protecting victims and witnesses. This was not properly captured in the draft rules. The Committee agreed that personal safety was a relevant factor and should be provided for.

To provide for these two matters, the Committee agreed that draft r 6.8(1)(c) should be amended to include reference to the interests of victims and personal safety.

Action points:

1) *Draft civil rules to be amended to remove the presumption of accessing pleadings prior to the hearing.*
2) *Draft criminal rules to include victims' interests and personal safety in r 6.8(1)(c).*
3) *Consultation paper to be prepared by the Clerk with input from Mr Moore and Mr Gray on the draft rules. This will ask whether the enactments where access was automatically restricted should be added to and whether the freedom to seek, receive and impart information should be retained as a factor. This will be presented at the next meeting.*

6. Form PR 1 and the use of "personal representatives" in wills

The Clerk provided a paper looking at the history of the statements in Form PR 1. The different statements existed to assist registry staff with assessing whether the application for grant of probate was made on a correct footing. Merging the statements would avoid the problem of selecting the wrong statement when a person was named as "personal representative" but would make it more difficult to assess whether the application is made on the correct footing. Therefore the Clerk suggested that Form PR 1 remain unchanged.

The Committee agreed that Form PR 1 remain unchanged. As discussed at the previous meeting, whether or not a person named as the "personal representative" was a named executor or an executor in tenor was a matter of interpretation and one that could not be solved by an amendment to Form PR 1 without causing unintended consequences.

Action point:
The Committee has decided not to amend Form PR 1. The Chair will write a letter to Justice Fogarty setting out the Committee's reasons.

7. Reforming Parts 18 and 19 of the High Court Rules

The issue of whether Part 18 should be retained in the High Court Rules arose from the discussion at the last meeting regarding whether contested applications under ss 14 and 31 of the Wills Act 2007 should be provided for under Part 18 or Part 19 of the High Court Rules. It was observed that Part 18 was difficult to justify given that all it provided was that evidence would be given by way of affidavit and that directions for service and representation had to be sought at the commencement of proceedings.

The Clerk presented a paper looking at the place of Part 18. The Clerk recommended that Part 18 be retained as a distinct part. Parts 18 and 19 fulfilled different roles and merging Part 18 into the body of the High Court Rules could make the Rules more opaque. Mr Gray thought that Part 18 provided a useful signal that parties need to prepare evidence by affidavit and to be alert to who should be served.

Ms O'Gorman considered the procedure in Part 18 to be useful but wondered whether this could be incorporated into the main body of the Rules. Mr Barker agreed and thought that having a specific part in the Rules to in effect provide that for certain proceedings evidence should be given by affidavit and that an application for directions as to service and representation also had to be filed was not required. However, Mr Barker said that retaining Part 18 as a separate part did not cause any harm and there was no compelling need to merge Part 18 into the body of the Rules.

The Committee decided that Part 18 should be retained. Following the discussion about the purpose of Parts 18 and 19, the Committee decided that contested applications under ss 14 and 31 of the Wills Act 2007 be provided for under Part 19. It was preferable to deal with all applications under the same Part rather than providing that uncontested applications be dealt with under Part 19 and contested applications dealt with under Part 18. Part 19 was capable of dealing with contested applications and a statement of claim could be required if the Court thought that was appropriate.

Action point: Amend r 19.1 to include applications under ss 14 and 31 of the Wills Act 2007.

8. Initial disclosure

The Committee considered Associate Judge Osborne's decision in *Glaister v Harris* [2014] NZHC 1285. This decision dealt with whether initial disclosure was required in relation to an application for summary judgment. The Chair explained that this decision had been discussed extensively and that it was generally supported. While initial disclosure is not normally an issue for summary judgment, because all the evidence relied upon will normally be in the accompanying affidavits, there may be instances where it is not and this should be disclosed.

Ms O'Gorman questioned whether this might be extending the concept of initial disclosure too far. Initial disclosure is the initial step in discovery. In summary judgment applications discovery does not apply and so neither should the initial disclosure obligations. The Chair responded that initial disclosure is aimed at enabling parties to consider the strengths and weaknesses of the case at the outset and so it could apply to applications for summary judgment. There are no real problems with requiring initial disclosure because most times it will have already occurred and so there is normally no further burden imposed. As r 8.4(7) makes clear no additional bundle of documents is required where the documents are already introduced by way of affidavit.

After further discussion, the Committee agreed that initial disclosure obligations arose in relation to applications for summary judgment. However the Committee noted that normally this will not lead to further discovery in addition to the affidavits supporting the application for summary judgment.

Action point: the Committee agrees with the decision in Glaister v Harris *that initial disclosure obligations arise in relation to summary judgment applications.*

9. Admiralty Rules

The Auckland District Law Society's Civil Litigation Committee had suggested three changes to the admiralty rules: first, allowing for undertakings rather than full security to be paid to allow for a warrant of arrest; second, specifying what happens if additional security is requested but not paid; and, third, providing a mechanism for arranging the release of a ship after hours where parties have reached an agreement.

In relation to the first matter, Ms O'Gorman considered that actual security is the preferred option when dealing with the arrest of a ship. Considerable costs are incurred and the Sherriff can be liable for paying the Port Authority's fees and costs during the period of the arrest. Mr McLaughlin considered that an undertaking provided by a lawyer may be sufficient, so long as the lawyer is in the jurisdiction. The Committee decided that it would be best if comment from registrars dealing with admiralty issues was sought before proceeding with this issue.

In relation to the second matter, the Committee was of the view that it is not necessary to state what happens if additional security is not paid because the ship owner can apply for release of the ship.

In relation to the third matter, Ms O'Gorman agreed that this could be of benefit but questioned who would pay for the Court staff. The Committee agreed but again thought feedback from registrars could be useful.

The Chair expressed the Committee's gratitude to the Civil Litigation Committee for referring these matters.

Action points: Mr McLaughlin to seek comments on the proposals from registry staff who deal with admiralty issues.

The meeting closed at 12.45 pm.