The Rules Committee

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18 June 2014
Minutes 03/14

Circular 43 of 2014

Minutes of meeting held on 9 June 2014

The meeting called by Agenda 02/2014 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 9 June 2014.

1. Preliminary

In Attendance

Hon Justice Asher (the Chair)
Rt Hon Dame Sian Elias, GNZM, Chief Justice of New Zealand
Hon Justice Winkelmann, Chief High Court Judge
Hon Justice Gilbert
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, Judicial Administrator to the Chief Justice

Ms Jennie Marjoribanks, Outgoing Secretary to the Rules Committee
Ms Kate Frowein, Incoming Secretary to the Rules Committee
Mr Thomas Cleary, Clerk to the Rules Committee

Apologies

Hon Christopher Finlayson QC, Attorney-General
Judge Doogue, Chief District Court Judge

Confirmation of minutes

The minutes of 31 March 2014 were confirmed.

Matters arising

The Chair noted the apologies and then mentioned two changes in personnel.

Ms Cheryl Gwyn has been appointed the Inspector-General of Intelligence and will no longer be the Solicitor-General's nominee to the Rules Committee. The Chair expressed the Committee's gratitude to Ms Gwyn for her invaluable contributions to the Committee over the last.5 years. Replacing Ms Gwyn as the Solicitor-General's nominee is Ms Jessica Gorman. Ms Gorman is the Team Manager of the Revenue Team in the Crown Legal Risk group at Crown Law and is an author of *McGechan on Procedure*. The Committee welcomed Ms Gorman.

Also departing the Committee is Ms Marjoribanks who has been the Secretary to the Committee since April 2013. The Chair thanked Ms Marjoribanks for her excellent work as the Secretary which assisted the Committee greatly. The Chair welcomed the incoming Secretary, Ms Frowein. and wished her all the best in her role as Secretary.

2. Update on the District Court Rules 2014

Judge Gibson updated the Committee on the progress of the new District Court Rules 2014. As mentioned at the last meeting, the new District Court Rules received concurrence from the Rules Committee on 13 March 2014. Since then Cabinet has approved the Rules and the Rules were made by an Order in Council on 26 May 2014. The Rules have been *Gazetted* and will come into force on 1 July 2014.

The Committee has publicised the District Court Rules 2014 and the commencement date by issuing updates that have been published on the Committee's website, in *LawTalk* and in *Law News*. Judge Gibson has also organised a national road show on the Rules to be held in Auckland, Hamilton, Wellington, Christchurch and Dunedin in early August. This road show will explain the new Rules.

Action point: Details about the road show will be publicised on the Rules Committee's website and in LawTalk *and in* Law News in late June.

3. Case Management of Judicial Review Proceedings

At the last meeting the Committee provisionally agreed to the draft rules relating to case managing judicial review proceedings. However, the Committee had asked the working group to consider whether the proposed Schedule 10, setting out the matters to be addressed at the case management conference, was required or whether the existing Schedule 5 could be modified to incorporate these matters.

The Clerk prepared a paper examining this and recommended that the proposed Schedule 10 was necessary due to the different matters that case management for judicial review proceedings involved. Messrs Andrew Beck and Bruce Gray QC agreed that a separate schedule was necessary to provide clarity about the matters that needed to be addressed and this could not be done by modifying Schedule 5. Justice Winkelmann was of the same view and pointed out that judicial reviews often involved lay litigants. A separate schedule would better clarify what matters litigants needed to address. For these reasons, the Committee agreed that Schedule 10 should be adopted.

In relation to the matters referred to in Schedule 10, Ms Laura O'Gorman suggested that discovery should be specifically provided for. Ms O'Gorman explained that although one of the matters listed is obtaining the record of the decision-maker, occasionally obtaining discovery of documents relating to the decision-making process is also necessary. This had been agreed to at the last meeting. The Committee accepted that discovery was sometimes necessary but this could be addressed under item 6 relating to whether any other interlocutory applications are contemplated. The Committee preferred not to provide specifically for discovery because this would normally be unnecessary. Therefore the Committee decided not to amend Schedule 10.

Turning to the substantive rules for case managing judicial review proceedings, Mr Andrew Barker questioned whether the draft r 7.18 was required. Draft r 7.18(1) provides that a Judge must give

directions at the case management conference. Mr Barker considered that this goes without saying. Draft r 7.18(2) then sets out what the directions may be. Mr Barker considered that these matters were set out in the Schedule and so subclause (2) was unnecessary.

Mr Beck explained that the structure of draft r 7.18 copied the structure of r 7.15 for the case management of appeals. The rule simply explains that at the conference certain directions may be given.

The Chair considered that in r 7.15 there was a need to set out the directions that could be made. Some of these matters in r 7.15 were substantive and could not be addressed in Schedule 6. In relation to draft r 7.18(2), however, the matters were not substantive and were already addressed in the proposed Schedule 10. There was no need to list the directions that could be made. Justice Winkelmann agreed and suggested that the draft r 7.18(1) should be moved into draft r 7.17 and then draft r 7.18 deleted. The Committee agreed to this proposal.

Mr Gray also suggested that the word "must" currently in draft r 7.18(1), relating to a Judge giving directions, should be changed to "will". In rr 7.14 and 7.15 the word "will" is used and for the sake of consistency "will" should be used in r 7.17. This change would also make it clearer that it is up to judges what directions should be given. The Committee agreed and so the amended r 7.17(6) will used "will" rather than "must".

The final matter that the Committee discussed in relation to the rules for case managing judicial review proceedings was whether the rules should refer to the Judicature Amendment Act 1972/the proposed Judicial Review Act, or to proceedings under Part 30 of the High Court Rules. Mr Bill Moore was of the view that the draft rules should refer back to the statute to provide sufficient linkage between the statute that sets out the powers and the rules that provide the specifics.

Mr Beck accepted that linkage was important, but considered that the linkage is already provided in Part 30 where specific reference is made to proceedings under the Judicature Amendment Act 1972. For this reason, Mr Beck proposed that the rules should refer to Part 30 rather than a specific statute. The Committee agreed.

Following these changes, the Committee approved the rules relating to the case management of judicial review.

Action Points: The draft rules will be amended by amending r 7.17(1) to refer to proceedings under Part 30. Subclause (1) of r 7.18 will be moved to become r 7.17(6) and the remainder of r 7.18 will be deleted. The word "must" in r 7.17(6) will be replaced by the word "will". Mr Moore will amend the rules and liaise with Mr Beck. Following this, the rules will be sent around for concurrence.

4. Applications to Declare Wills Valid and Correct a Will

Presently there is no procedure specified for applications to declare wills valid under s 14 of the Wills Act 2007 and applications to correct a will under s 31 of the Wills Act 2007. At the last meeting the Committee had formed the view that applications could be made under Part 19 of the High Court Rules. This proposal was sent to Justice MacKenzie for feedback. Justice MacKenzie suggested that uncontested applications could be dealt with under Part 19, but contested applications would be better dealt with under Part 18.

Ms Annie Cao, a Judges' Clerk at the Auckland High Court, had prepared a memorandum looking at whether different procedures were required for contested and uncontested applications. Ms Cao's memorandum suggested that different procedures were required and that the distinction should be drawn on the basis of whether or not the application was with notice or not. This suggestion had been sent to Justice MacKenzie, Messrs John Earles and Tony Mortimer for comment. All three had supported Ms Cao's proposal.

Justice Winkelmann explained that one rationale for separating out applications into Part 18 and Part 19 based on whether they were contested was that it was artificial for contested applications to be made as originating application. Contested applications were more suited to statements of claim and defence found in Part 18. However, Justice Winkelmann did not consider that this rationale

necessarily justified two different procedures. Mr Gray thought that a statement of claim procedure could sometimes create problems for these types of proceedings because the statement of claim and statement of defence procedures can create unnecessary conflict. Mr Barker agreed and considered that the statement of claim procedure is inherently adversarial whereas the originating application procedure is aimed at seeking directions to resolve a problem including where there is conflict.

In discussing Part 18, Mr Beck pointed out that Part 18 was somewhat incongruous. As noted in *McGechan on Procedure* Part 18 is hard to justify and indeed the Committee had looked at whether or not to remove Part 18. The Chief Justice suggested that the Committee look at Part 18 and whether it was necessary to retain this Part. The Committee agreed. On this basis it was agreed to undertake a review of Part 18 and to park the issue of how applications for declaring a will valid and correcting a will should be dealt with until the next meeting.

Action points: The Chair will speak with Justice MacKenzie and Mr Beck about whether Part 19 could be used for all applications under ss 14 and 31 of the Wills Act 2007. The Clerk will prepare a memorandum on Parts 18 and 19. Following this the Chair, Ms O'Gorman, Mssrs Barker and Beck will have a telephone conference to discuss how to proceed.

5. Form PR 1 and the Use of "Personal Representatives" in Wills

Justice Fogarty had raised the issue about whether someone named as a "personal representative" was a "named executor" or an "executor in tenor" in relation to Form PR 1. Some applications for grant of probate have been rejected on the basis that a person named as a "personal representative" had applied for a grant of probate and had selected the Statement A in Form PR 1 that they are the named executor. Some Registry staff consider that the applicants are not named executors but executors in tenor and so should have selected Statement C.

Following the last meeting a memorandum addressing whether a "personal representative" was an executor or an executor in tenor was sent to Messrs Earles and Mortimer for comment. The memorandum suggested that a "personal representative" was an executor in tenor, but recommended no rule change was required because the issue was one of interpretation. While Messrs Earles and Mortimer disagreed on whether a "personal representative" was an executor in tenor or a named executor, both agreed that the issue was one of interpretation and not a matter requiring a change to the High Court Rules.

The Chief Justice questioned why Form PR 1 needed to maintain the distinction between a named executor and an executor in tenor. Form PR 1 is administrative and an application should not be rejected on a technicality. Justice Winkelmann suggested that Form PR 1 be amended to only require the applicant to state that he or she is "the executor under the will". This would stop applications being rejected on a technicality.

The Committee agreed but considered that further thought needed to be given to why we have the statements in Form PR 1 and the impact of any change needed to be considered. It was agreed that the Clerk would prepare a memorandum addressing these two matters and that this would be reported back on at the next meeting.

Action Points: The Clerk will prepare a memorandum on why there are the statements and whether this could be changed to only require an applicant to state that he or she is the executor under the will. The Chair will then discuss this issue with Justice Fogarty, who originally raised the issue, and Messrs Earles and Mortimer.

6. Access to Court Document Rules

Justice Winkelmann explained that this review of the access to court documents rules was initiated as the existing rules were dense and not well organised. The rules also fail to give an indication to people about what they are likely to receive upon making an application and the importance of the stages.

To achieve clarity and simplicity in organisation, as well as to provide an indication of what documents could be expected to obtained at different stages, a draft set of rules had been prepared and presented at the meeting. The Chair explained that these rules reflected the thinking that:

- Everyone has a right to access the formal court record;
- Parties have a general right to access court documents; and
- Non-parties do not have a right to access court documents other than the formal court record but have to seek the Court's permission.

The only significant change in the draft rules from the current rules was in relation to non-parties seeking permission. Under the old rules there were differences in the process for requesting documents and what documents would be released depending on at what stage of the proceeding the documents were requested. During the substantive hearing stage, requested documents have to be released unless a party objects at which point the request is referred to a judge. At all other stages the request is made to the Registrar and the Registrar or Judge determines whether to grant access based on balancing the relevant principles in r 3.16.

The draft rules remove this distinction. All requests would be referred to a Judge, not a Registrar, and the Judge would have to determine whether to grant the request, in part or full, or refuse the request by applying the principles taken from r 3.16.

The draft rules also provide some guidance as to the weight given to these principles and what documents are likely to be released depending on the stage when the request is made. Prior to the hearing, evidence has not yet been admitted and the case may settle prior to trial. The draft rules provide that the principle of privacy and confidentiality as well as the orderly and fair administration of justice are given more weight during this period and so it is likely that a person who requests documents would only receive the pleadings. At the hearing stage the principle of open justice applies more strongly. The draft rules indicate that this will usually mean that the pleadings and documents admitted into evidence will be available. Finally, the draft rules recognise that after the trial while the principle of open justice applies to documents admitted into evidence, the principle of privacy and confidentiality may have increased weight. The Chair explained that this guidance was not intended to limit judges' discretion in applying the principles but simply provides some indication of what documents may be obtained at the different stages.

The Chief Justice considered that the principles needed to make clearer the constitutional role of courts. Courts fulfil the role of resolving disputes according to the law and it is for this purpose that the courts receive documents. This purpose should colour the decision whether to release the documents. Mr Gray agreed and suggested the Committee consider amending draft r 3.10(1) to make this clearer. However there was no consensus about the amended wording and the Chief Justice proposed that the working group revisit draft r 3.10(1) and report back at the next meeting.

Mr Barker raised the issue of whether there should be a presumption against disclosure in the rules. Mr Barker considered that the publicity of a trial acts as a major incentive for settling a dispute prior to trial. Mr Beck agreed and considered that this incentive could be established by creating a reverse onus. The default position would be that most documents will not be made available unless the person requesting can satisfy the court that there are sufficient reasons leading the court to release the documents. This would be a change from the existing rules which have been interpreted as creating a presumption in favour of releasing the documents. Justice Winkelmann considered that that guidance in the draft rules makes an onus unnecessary. The guidance makes it clear where the presumption lies at different stages of the trial. Prior to trial the party requesting the documents will have to overcome the presumption against the release of documents. At trial there is a presumption for the release of documents admitted into evidence. After trial, the presumption is more weighted to protecting privacy but at the same time preserving the principle of open justice.

The Chair then questioned whether the Committee needed to also look at the criminal rules for access to court documents. The Chair was of the view that there should not be two different sets of rules with different schemes. The Committee agreed and so the criminal access to court document rules will also be reviewed at the next meeting.

Action points: The working group will meet to discuss further changes to the draft rules to make the role of the court clearer. Draft sets of rules for criminal and civil documents, along with a draft consultation document explaining the changes, will be prepared for discussion at the next meeting.

7. Insolvency Forms (Forms B1, B14 and B15)

Two issues were raised in relation to three insolvency forms.

Form B1 refers to the "district of this court" in relation to where the filing should be. Justice Faire considered that this phrase was outdated and should be replaced by the phrase "… which is nearest by the most practical route to this registry of this court.". The Committee agreed to this change.

The second issue had been raised by Mr Guy Caro, the Official Assignee's solicitor in Auckland. Mr Caro pointed out that Forms B14 and B15 referred to Part 18. However as r 24.35 makes clear the applications should be made under Part 19. The references in Forms B14 and B15 should be to Part 19 rather than Part 19. The Committee agreed and thanked Mr Caro for raising this with the Committee.

Action Points: Form B1 will be amended to delete reference to "district of this court" and replace with Justice Faire's suggested wording. The references to Part 18 in Forms B14 and B15 will be replaced by references to Part 19.

The meeting closed at 12.45 pm.