



The Rules Committee

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25 March 2019
Minutes 01/20

Circular 10 of 2020

Minutes of Meeting of 23 March 2020

The meeting called by Agenda 01/20 (C 1 of 2020) began at 10:02 am on Monday 23 March 2020 by means of teleconference as a result of New Zealand Covid-19 Alert Level 2 being in effect.

Present (In Person)

The Hon Justice Dobson, Chair and High Court Judge

Present (By Telephone)

The Honourable Justice Venning, Chief High Court Judge

His Honour Judge Kellar, Special Purposes Appointee and Judge of the District Court

Ms Jessica Gorman, Crown Law (Representative for Ms Una Jagose, Solicitor-General)

Mr Andrew Beck, New Zealand Law Society (NZLS) Representative

Mr Jason McHerron, NZLS Representative

Ms Laura O’Gorman, Special Purposes Appointee

Ms Kate Davenport QC, Special Purposes Appointee and New Zealand Bar Association (NZBA) President

In Attendance (By Telephone)

Mr Kieron McCarron, Chief Advisor Legal and Policy in the Office of the Chief Justice and Registrar of the Supreme Court

Ms Alexandria Mark, Secretary to the Rules Committee

Mr Sebastian Hartley, Clerk to the Rules Committee

Apologies

Right Honourable Dame Helen Winkelmann GNZM, Chief Justice of New Zealand

The Honourable Justice Kós, Special Purposes Appointee and President of the Court of Appeal

His Honour Judge Taumaunu, Chief District Court Judge

The Honourable David Parker, Attorney-General

The Honourable Justice Cooke, Special Purposes Appointee and Judge of the High Court

His Honour Judge Gibson, Judge of the District Court

Mr Rajesh Chhana, Deputy Secretary (Policy) in the Ministry of Justice (Representative for Mr Andrew Kibblewhite, Chief Executive of the Ministry of Justice and the Secretary of Justice)

Ms Fiona Leonard, Chief Parliamentary Counsel

Ms Jessica Kruger, Parliamentary Counsel Office Representative

1. Minutes of Previous Meeting

The minutes of the Committee's meeting of 25 November 2019 (C 67 of 2019) were confirmed.

2. Extraordinary Matter Arising: Covid-19 Response (Authorising Urgent Progression of Amendments to the High Court Rules 2016)

Justice Dobson started the meeting by requesting, as an urgent matter arising, that the Committee grant him authority to finalise the form of emergency amendments to the High Court Rules 2016 to allow the civil business of the High Court to continue on a modified footing during the period of the Covid-19 epidemic, so as to allow amendment rules go forward to concurrence at the earliest possible opportunity. This is in anticipation of the New Zealand Covid-19 Alert Level being raised to Level 3 or Level 4 in the near future. Even under those circumstances, Justice Venning relayed on behalf of the Chief Justice, the Courts must still be able to operate.

The Judge outlined the essential points these rules will cover as being the need to provide for the electronic filing of documents, including the payment of filing fees by alternative means to those presently in use; granting Judges clear powers to make directions as to how parties, witnesses, and counsel should participate in trials at hearings to allow for remote attendances; and allowing for reliance on unsworn affidavits under certain circumstances.

In response to a question from Mr Beck, Justice Venning explained that the provisions of the Courts (Remote Participation) Act 2010 are predicated on the use of audiovisual link facilities, the provision of which is inadequate to allow them to be used as the primary means of appearances in Court.

Another important issue identified by Mr Beck and Justice Dobson is the need to consider the position in respect of lay-litigants, who cannot be assumed to have access to internet and email facilities on demand.

Concern was also expressed as to the position in the District Court. Justice Dobson advised that the research and drafting facilities of the Committee would be made available to the District Court in order to help facilitate any response promoted by the Chief District Court Judge.

The Committee was mindful of the importance of consultation being undertaken with the profession and the other bodies represented on the Committee. Equally, appreciating the urgency inherent in the situation, the Committee undertook to provide any feedback on the draft rules to be circulated by Justice Dobson and the Clerk within an unusually compressed timeframe.

Accordingly, the Committee resolved to authorise Justice Dobson to proceed with drafting and circulating emergency rules addressing these and related issues, subject to the circulation of the draft rules for a necessarily brief period for comment to Committee members. Justice Dobson directed that Committee members are not to circulate the draft rules beyond the Committee without permission, so as not to pre-empt official announcements by the judiciary.

3. Improving Access to Civil Justice Consultation (Expanding Consultation)

The New Zealand Law Society (NZLS) representatives reported that their members have enthusiastically received the Committee's proposals to improve access to civil justice by modifying the rules of court,

and that the NZLS is working towards providing a considered response to the paper. Similarly, Ms Gorman reported that members of the Crown Law Office are enthused about the proposals and look forward to having the opportunity to contribute meaningful feedback. The Clerk reported that limited engagement has been received from the profession and public at large to date, but that he understands a number of large law firms are interested in submitting and intend to do so at a later date.

Ms Davenport, for the New Zealand Bar Association (NZBA), noted a more muted response amongst her members, and stated the NZBA remains supportive of an abridged form of adjudication procedure for the High Court as part of this response.

On the basis of the reports received, the Committee identified that it may well be prudent to extend the deadline for consultation so as to allow fuller engagement with the proposals, especially given the present disruption associated with Covid-19. The Committee decided that the best way to achieve this will be to extend the deadline once the current 1 May 2020 deadline has passed, and that the NZBA and NZLS should contact Justice Dobson in May to determine an appropriate length for that extension. Similarly, at that point in time, assuming the situation related to Covid-19 allows, the Committee may consider other means of promoting engagement with the profession on this topic, such as meetings with chambers and Law Society branches.

4. Costs for Litigants-in-Person (Consultation as to Options for Reform)

The Committee received and adopted as its paper for release for consultation **C 3 of 2020**, the paper considered at its meeting of 25 November 2019 as revised by the Clerk with the assistance of Justices Kós, Venning, and Dobson.

In light of the situation with Covid-19, as discussed in the previous item, and given the logical connection between the subject matter of this paper and the Access to Justice consultation paper, the Committee thought it prudent to delay the release of this consultation paper until May, so as to promote broader engagement and cross-fertilisation of ideas.

On behalf of the Solicitor-General, Ms Gorman expressed that Crown Law's view, as a matter of substance, is that the primary rule preventing the award of costs to lay-litigants should be abrogated. If that is not the case, Crown Law believes that the exception for in-house (employed) counsel should be maintained and that this is maintainable as a matter of principle separately from the exception for lawyer-litigants in person. She advised that Crown Law will be able to provide the committee with information regarding the provision of legal services to the government, which may be of use in considering whether to maintain the in-house (employed) lawyer exception. For now, however, Crown Law supports the release of the paper for consultation, subject to the delay recommended by the Committee.

5. *Beddoe* Applications (Clarifying Manner of Bringing)

The Committee received Mr McHerron's suggested amendments to the High Court Rules intended to clarify and codify the proper manner of the bringing of *Beddoe* applications (**C 4 of 2020**), which he has refined since the Committee's last meeting in consultation with Justice Kós. The Committee was generally very supportive of Mr McHerron's suggestions.

Ms Davenport queried the deletion of the words “evidence of the following matters” from the proposed r 19.4A(1). Mr McHerron explained this is because some of the matters listed in r 19.4A(1) as having to accompany an application are not matters in respect of which evidence needs to be given. While this was accepted to be a desirable simplification of the drafting of the section, members of the Committee were concerned the deletion of the reference to evidence being required of these matters might mean that applicants are not adequately informed of the importance of providing the Court with all available evidence of relevant matters on a *Beddoe* application, as is presently well understood. The Committee agreed that the proposed amendments should be drafted to ensure a reference to evidence being required of those matters listed in r 19.4A(1) of which evidence can be given are the subject of evidence.

The Committee also discussed the use of the phrase “the costs likely to be incurred by the trust, directly or indirectly” as a result of the proceeding. Mr McHerron explained this was an addition by Justice Kós, the idea being to allow for the Court being as best informed as possible as to all of the potential consequences for the trust as a result of the proceeding. The Committee, particularly Ms Davenport QC, expressed concern as to whether the word “costs” might be readily too narrowly, and whether a formulation such as “costs or other impact, directly or indirectly”, or instead a reference to “other adverse consequences” might be more appropriate. The Committee also considered whether “costs” and “direct or indirect matters” might be separated out as articles of the list in r 19.4A(1). Mr McHerron and Justice Kós are to consider this further.

The matter was left on the basis that Mr McHerron and Justice Kós would further refine the proposals and, having obtained the assent of the NZLS and NZBA representatives, would send the proposed amendments on to Justice Dobson and the Clerk for forwarding to the Parliamentary Counsel Office for inclusion in the next omnibus High Court Amendment Rules.

6. High Court Rules 2016, r 31.15 (Potential Implications of Requirement to Bring Proceeding Under Part 16 of the Companies Act 1993 By Way of Originating Application)

The Committee considered the decision in *Commissioner of Inland Revenue v Livingspace Properties Ltd* [2019] NZHC 2213 at [1]-[40] (C 5 of 2020), which Justice Cooke referred to the Committee as illustrating potential implications of r 31.15 of the High Court Rules 2016 requiring many applicants under Part 16 of the Companies Act 1996 to bring their applications by way of interlocutory application in the relevant company liquidation proceeding.

As Justice Cooke was not present at the meeting, the Committee took the view that fuller discussion ought to be deferred. Mr Beck noted that the policy behind r 31.15 is to avoid factually related applications from being filed in a number of registries and the connection between them being unclear by keeping all of the files together. His view was that this does not produce any issues in practice, and that *Livingspace* shows a sensible approach being taken to the requirement.

The matter was left on the basis that, when next in attendance at the Committee, Cooke J should be asked to further elaborate on his concerns as to the operation of r 31.15.

7. District Court Rules 2014, r 12.2(1) (District Court Judges' Jurisdiction to Grant Summary Judgment on Part of a Claim)

The Committee considered **C 6 of 2020**, a memorandum from Ms Maslin, a Judges' Clerk at the Wellington District Court concerning r 12.2(1) of the District Court Rules 2016, which Judge Kellar referred to the Committee.

The Committee agreed that r 12.2(1) does not presently allow a District Court Judge to grant summary judgment on a part of a claim only, unlike in the High Court, that there is no reason for the rules not be aligned in this respect, and that while this issue does not appear to arise often there is no reason for it not to be rectified by aligning the position in the District Court with that in the High Court.

The Clerk was instructed to communicate to the Parliamentary Counsel Office instructions to include an amendment embodying the Committee's decision in the next omnibus District Court Amendment Rules.

8. District Court Rules 2014, sch 4 item 23 (Costs for Case Management on Appeals to the District Court)

The Committee considered **C 7 of 2020**, a copy of the decision in *Marwick v Accident Compensation Corporation* [2019] NZACC 144. The Committee agreed the decision indicates that, contrary to the view taken at its November 2019 meeting, the appearance of figures in the columns for band A, B, and C steps against item of sch 4 of the District Court Rules 2014 meant that, unlike in the High Court, costs for case management on appeals to the District Court are not being awarded "as for ordinary proceedings".

The Committee agreed that the time allocation for this step should be amended to align with that in the High Court by deleting the figures in the columns against item 23 of sch 4 and inserting the words "as for ordinary proceedings" to stretch across the columns (on the High Court model).

The Clerk was instructed to communicate to the Parliamentary Counsel Office instructions to include an amendment embodying the Committee's decision in the next omnibus District Court Amendment Rules.

9. High Court (Personal Property Securities) Amendment Rules 2020

Owing to the absence of any Parliamentary Counsel Office representatives at the meeting, discussion of the progress of these amendment rules was deferred to the next meeting.

10. Use of Macrons in English Translations of High Court Registry Names

*Owing to the limited time available for the Committee to meet; the absence of Mr Chhana; and the fact that this matter, while important, is not time-sensitive, consideration of this matter and associated **C 8 of 2020** was deferred to the next meeting.*

11. Late Paper and Matter Arising: Contempt of Court Amendment Rules and Rules Committee Decision-Making and Concurrence Processes

The Committee considered **C 9 of 2020**, containing the draft High Court (Contempt of Court) Amendment Rules 2020 (PCO 22429/4.0) and District Court (Contempt of Court) Amendment Rules 2020 (PCO 22430/4.0).

These amendment rules had returned to the Committee for consideration as the Ministry of Justice, while undertaking ministerial consultation on the Cabinet papers covering these rules and the High Court Amendment Rules 2020. Ministerial and agency consultation is required as part of the Cabinet process undertaken by the Ministry of Justice following the receipt of formal concurrence in respect of the amendment rules pursuant to s 148 of the Senior Courts Act 2016 and s 228 of the District Court Act 2016. Feedback was received from Crown Law as part of this process as to the terms of the Amendment Rules themselves.

The majority of the proposed amendments were determined by the Ministry of Justice and the Parliamentary Counsel Office to be minor and cosmetic changes that could, had the rules proceeded to promulgation, been corrected by the Chief Parliamentary Counsel pursuant to her correction power. One issue however, the need to add the words “a sequestration order” to the list in r 7.48 of the High Court Rules 2016, which words were accidentally omitted though obviously should have been included, was felt to be more substantive and a matter requiring further attention by the Committee.

The Committee was agreed that change should be made. The Committee was also of the view that, in the circumstances, it was not necessary to recirculate the revised amendment rule including these words for formal concurrence and that, subject to the extent Cabinet processes remain operative during the Covid-19 epidemic, the amendments can proceed to Cabinet on that basis.

More generally, Crown Law apologised for having raised an issue as to the substance of the amendment rules during the concurrence stage, agreeing with the Chair and the Committee that the appropriate juncture at which such comments should be made by individuals and organisations represented on the Committee is while the papers are before the Committee before the concurrence stage. As it is, Ms Mark advised for the Ministry of Justice, the progression of the rules has not been delayed.

That matter was left on the basis that Parliamentary Counsel Office will provide Justice Dobson and the Clerk with a copy of the revised amendment rules for circulation to the Committee.

Mr McHerron expressed concern that the formal concurrence papers had not been circulated to all members of the Committee. The Clerk advised that the amendment rules had been circulated for formal concurrence in December 2019. Because of a perceived urgency to obtain concurrence in terms of those provisions to the Rules before the Christmas vacation, the Clerk advised he had taken the decision to forward the concurrence papers to judicial members of the Committee only in order to expedite the obtaining of concurrences. This, the Clerk accepted, was not the Committee’s usual practice, but explained that as the amendment rules provided for concurrence were those that had been considered and approved by the Committee at its November 2019 meeting as **CC 62, 62A, and 62B of 2019**, all members of the Committee and their organisations had had an opportunity to review and comment on the rules before concurrence. Justice Venning noted that the formal concurrence

procedure is a technical requirement under the Senior Courts Act 2016 and District Court Act 2016 and does not form a stage of the Committee's decision-taking procedure.

Mr McHerron requested the recirculation of the contempt amendment rules to all members of the Committee. The Chair advised that, given the preceding discussion, and the minor nature of the change involved, he did not propose to do so. Mr McHerron noted his acceptance of that decision.

In respect of NZLS's expressed concern to have a definitive record of the rules sent to Cabinet for promulgation, the Chair advised, and the Clerk undertook, that except in circumstances of urgency all members of the Committee will receive copies of the formal concurrence papers for future rules changes.

The meeting closed at 11:33 am.

The next meeting of the Committee is scheduled to begin at 10:00 am on Monday 22 June 2020. The location of that meeting will be notified at a later date based on developments associated with Covid-19.

Justice Robert Dobson
Chair