The Rules Committee

PO Box 60
Auckland

Telephone: (09) 970 9584
Facsimile: (04) 494 9701
Email: rulescommittee@justice.govt.nz
Website: www.courtsofnz.govt.nz

20 December 2018
Minutes 04/18

Circular 58 of 2018

Minutes of meeting held on 26 November 2018

The meeting called by Agenda 04/18 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 26 November 2018.

1. Preliminary

In Attendance

Hon Justice Courtney, Chair
Hon Justice Venning, Chief High Court Judge
Hon Justice Asher
Hon Justice Dobson
Judge Gibson
Judge Kellar
Mr Andrew Beck, New Zealand Law Society representative
Ms Jessica Gorman, representative for the Solicitor-General (attended until 11.30 am)
Mr Andrew Barker QC, New Zealand Bar Association representative
Ms Fiona Leonard, Parliamentary Counsel Office
Mr Rajesh Chhana, Deputy Secretary of Policy, Ministry of Justice
Mr Jason McHerron, New Zealand Law Society representative
Mr Kieron McCarron, Chief Advisor Legal and Policy, Office of the Chief Justice
Ms Laura O'Gorman

Ms Alexandria Mark, Secretary to the Rules Committee
Mr Daniel McGivern, outgoing Clerk to the Rules Committee
Mr Sebastian Hartley, incoming Clerk to the Rules Committee

Apologies

Rt Hon Dame Sian Elias GNZM, Chief Justice of New Zealand
Hon David Parker, Attorney-General
Judge Doogue, Chief District Court Judge

Confirmation of minutes

The minutes of the Committee's meeting on 27 August 2018 were confirmed.

General business

The Chair welcomed the incoming clerk, Mr Sebastian Hartley, to the Committee, and thanked the outgoing clerk, Mr McGivern, for his service to the Committee over the last two years.

2. District Court Rule 20.88

In 2015 s 74(1) of the Construction Contracts Act 2002—which provides for a defendant's opposing the plaintiff's application to enforce an adjudicator's determination by entry as a judgment, and provides time limits within which a defendant can apply to do so—was amended to shorten the time limit faced by a defendant to five days from the date of service of the plaintiff's application. The Committee agreed to make consequential amendments to r 20.88 and Form 105 of the District Court Rules.

Action point: Ms Leonard to draft changes in accordance with Mr Chhana's memorandum.

3. High Court Rule 7.4

Rule 7.4 of the High Court Rules sets out a procedure for a Judge to direct a further case management conference and also sets out instructions for the filing of memoranda. Sub-rule (3) is currently as follows:

> (3) The parties must either file a joint memorandum addressing the Schedule 5 matters no later than 10 working days before the conference, or file separate memoranda addressing those matters in accordance with rule 7.3(5), and rule 7.3(6) to (8) applies accordingly, with any necessary modifications.

The Ministry of Justice sought the Committee's agreement to change the reference to r 7.3(5) so that it is instead a reference to r 7.3(3). The former sub-rule sets out the duties of a registrar after receiving memoranda; the latter describes the requirements for filing separate memoranda.

Mr McHerron queried whether the change is appropriate. Referring to r 7.3(3) will necessarily refer to r 7.3(3)(a) which contains a time limit that is inappropriate in this context: "the plaintiff must file the first memorandum not later than 15 working days after the statement of defence is filed". In contrast to r 7.3(3), r 7.4 deals only with further conferences. Mr McHerron proposed redrafting the rule to something along the lines of, "[t]he parties must either file a joint memorandum or file separate memoranda addressing the Schedule 5 matters no later than 10 working days before the conference, and rule 7.3(5) applies with any necessary modifications".

The Committee agreed to Mr McHerron working on his redraft and sending it to Mr Chhana for consideration. Venning J requested that he be copied in to discussions.

Action point: Mr McHerron to liaise with Mr Chhana and copy-in Venning J.

4. Time allocations

At the last meeting, the Committee agreed to further changes to its draft amendment to Schedule 3 of the High Court Rules. The amendment as drafted will introduce new time allocations for trial preparation—differing as between witness hearings and affidavit hearings—and is intended to tether the allocations more closely to the length of the hearing. The Committee distributed its agreed proposal to the New Zealand Law Society (Law Society), the New Zealand Bar Association (Bar Association), and the Auckland District Law Society (ADLS). The Bar Association agreed with the proposal; ADLS

did not provide feedback for this meeting but is expected to provide feedback at a later date; and the Law Society raised some concerns.

The Law Society's concerns were discussed by the Committee. First, the Law Society considered the proposal risked substantial under-compensation. To address these concerns the Law Society prepared its own proposal. The Committee agreed, however, that the Law Society's proposal was overly generous: for example, the proposal would provide for six days of preparation time in respect of a one-day affidavit hearing. The Committee agreed to address the Law Society's concern by increasing the time for preparation for the hearing (but not for preparation of evidence) to two days for the first day, one day per day for the rest of the week, and for subsequent days to remain unchanged from the Committee's circulated proposal. This change will address the risk of under-compensation in respect of short matters.

Secondly, the Law Society said the Committee's proposal to allow half-a-day for preparing the common bundle is inadequate for hearings of longer duration. The Committee felt this reflected a misunderstanding of the proposal. The half-a-day allocation is merely the differential for the party who puts the agreed bundle together into its final form.

Thirdly, the Law Society considered the time allocations, both currently and as proposed, are incongruous with the District Court time allocations. The Committee agreed this appears to be an anomaly which ought to be looked at.

Action point: Ms Leonard to make changes to proposal in accordance with Committee's discussion; the Chair to write to the Law Society; the Clerk to inform ADLS of the agreed changes and to arrange for the receiving of feedback.

5. Access to Justice in the District Court

At the last meeting, the Attorney-General raised for discussion the question of whether the rules in the District Court and the High Court should be as aligned as they are, and also whether it is appropriate from an access to justice perspective to have the formalities of the High Court Rules applied with the same rigour in the District Court. In particular, the interlocutory processes for litigating large claims may have no place in a smaller-claims context in respect of which extensive pre-trial matters may not be proportionate to what is at stake.

For the purposes of a background paper, Judge Kellar obtained data from the Ministry of Justice Analytics Team which reveals that filings of civil proceedings in the District Court have remained steady over the last five years. The vast majority of civil proceedings are debt collection proceedings. Only four per cent of proceedings go to trial. Judge Kellar expressed concern that he may be unable to obtain the further types of data sought by the Committee. Mr Barker recalled some research recently carried out by Dr Bridgette Toy-Cronin which concluded that the number of claims brought in the District Court represents something of a "dip" when contrasted with the tribunals and the High Court. The Committee asked the clerk to obtain this research for the next meeting.

Judge Kellar's view was that the District Court Rules do not inhibit access to justice. The rules are sufficiently flexible to enable a District Court Judge to observe only those interlocutory steps that are perceived as absolutely necessary for the proceeding. The real inhibitor is the cost of litigation, which is an entirely different matter and which the Committee agreed fell outside of the Committee's remit.

Venning J suggested that the issue may be one of proportionality, particularly for claims of up to $100,000, which the Committee ought to look at. The Committee does not, however, have data revealing the sums at stake in District Court claims that go to trial, nor what impact the increase in the District Court's jurisdiction (to claims of up to $350,000) has had on that. Judge Kellar responded that District Court Judges will usually apply the least interlocutory steps necessary, and the simplified trial process has the potential to reduce costs substantially. Judge Kellar indicated he may be able to obtain data on the extent to which claims settle, whether by judicial settlement conference or otherwise, but

may encounter difficulty obtaining data on the sums at stake in filed proceedings. Mr Chhana also indicated the Ministry of Justice may be able to provide some further data on associated issues.

Asher J considered the answer to the Attorney-General's concern involves a fundamental revision of the way this country operates in relation to small claims. The only way to solve the problem is to shift to a more inquisitorial system, which has been largely adopted in parts of Europe. The Chair considered the Committee could identify the problems for the Attorney-General and explain that they fall outside the Committee's remit.

The Committee left this issue on the basis that more data-digging would be done.

Action point: Chair to write to the Bar Association and the Law Society for comment; Clerk to dig-up Dr Bridgette Toy-Cronin's research; Judge Kellar to obtain further data; Mr Chhana to provide any further data that becomes available to the Ministry of Justice.

6. Strike-out before service

Wylie J had written to the Committee to query whether it would be sensible to extend r 5.35A so that it covers interlocutory applications as well as proceedings. The Judge had dealt with lengthy interlocutory applications that were improper and an abuse of process.

The Committee agreed not to change the rule. The rule was never intended to apply to interlocutory applications. To the contrary, it was brought in to address a lack of firmness around the jurisdiction to refuse to accept proceedings and around how judges deal with these proceedings. The rule allows the court to take in a document, create a file, and follow a process before the document is served on the opposing party, which means a decision can be made on the proceeding. Nothing in the rule's background suggests it was intended to apply to interlocutory applications.

Action point: The Chair to write to Wylie J.

7. Civil practice notes

Since the last meeting, the Chair and the clerk, in liaison with Ms Leonard, had prepared a redraft of proposed r 11.8A, which is intended by the Committee to replace Practice Note 3 which provides for parties to apply to make further submissions following a hearing but prior to judgment.

Ms Gorman questioned whether it might be useful to include in the rule what the parties ought to include in the memorandum applying for leave. The Committee agreed not to particularise that detail as it will necessarily differ between cases.

Action point: Rule to be included in amendment rules.

8. Expert evidence

The Law Commission wrote to the Committee to raise the prospect of making specific provision for an expert evidence code in criminal matters. Currently the code in the High Court Rules only specifically relates to civil proceedings, although it has in practice been referred to in criminal cases. The Chair's view was that it would be better for there to be something specific for criminal proceedings, but appreciated that there are difficult issues associated with that.

Dobson J suggested a criminal code might create a lot of problems for the management of criminal trials. Much expert evidence is given by people who are properly regarded as partisan, such as police officers giving evidence about the meaning of decoded text messages, document examiners who receive the bulk of their work from the police, and pathologists. A criminal code might lead to further challenges being made during the course of the trial which will distract the jury. Dobson J suggested that there will frequently be partisan experts on either side of a criminal trial and that juries will

appreciate that. Judge Gibson agreed, adding that many of the police witnesses and document examiners will in practice refer to the civil code as part of their preambles in any event.

The Chair's view was that to the extent the Court of Appeal has indicated there is a gap in the oversight of the obligation on experts in criminal cases, and the only way to remedy that gap is to refer to aspects of the civil code as a benchmark, that is a situation that ought to be rectified. Dobson J did not think the issues that arose in those appeals would be cured by applying the duties of experts in civil proceedings. The context in which the appeals were heard, and in which the Court of Appeal has made reference to the civil code, is that the Court has seen the trial has gone wrong due to lack of objective expert evidence.

Venning J agreed with the Chair. Experts should, by definition, be impartial and independent — they are there to assist the Court. Although a criminal code would need to be tweaked from the civil code, expert witnesses in criminal cases should acknowledge they are independent to the extent they are giving their professional opinion. Venning J added that deciding not to implement a criminal code, in circumstances where expert witnesses in criminal trials are referring to the civil code, would send a message that such standards are not needed in criminal cases.

Asher J agreed that the points raised by Dobson J were a cause for concern. A criminal code prescribing a standard of impartiality might lead to arguments being raised by defence counsel that in-house experts cannot give evidence in a criminal trial, which would exclude police witnesses from giving expert evidence. Asher J observed that the Court of Appeal has not indicated there should be a code, but has simply laid down standards some of which are to be found in the civil code.

The Chair observed that if expert witnesses in criminal trials are acknowledging that they are independent then they ought to be given a proper context in which to make that acknowledgement (i.e. by providing them with a tailored criminal code). The Chair further acknowledged that a criminal code would not introduce a substantive change to the nature of evidence given by expert witnesses — willingness to comply with the code does not make a witness an expert, and conversely not referring to the code does not make an expert a non-expert.

The Committee agreed that a duty to confer would be inappropriate and unfair in the criminal context, notwithstanding such joint evidence is received by consent.

The Chair agreed to write back to the Commission to express the Committee's division of opinion on whether there ought to be a criminal code, and to point out the issues raised in the Committee's discussion.

Action point: The Chair to write to the Law Commission

9. Restoring companies to the register

At the last meeting Mr Beck had raised the possibility of extending r 19.2, which deals with originating applications, so that it included applications under s 329 of the Companies Act 1993 to restore companies to the Companies Register. At present, leave is required under r 19.5. For this meeting he and the clerk prepared a memorandum outlining the background to this issue. In particular, the Committee had agreed in 2004 to include such applications within the rule providing for originating applications, but no reason could be found as to why that change was not ultimately implemented. Many decisions have proceeded on the basis that such applications should be heard by originating application rather than by statement of claim. Mr Beck added that this is not the sort of application that works well in the format of a statement of claim, and there is no necessary contradictor.

The Committee agreed to the change. It makes sense for the default position to be that applications under s 329 of the Companies Act are to be brought by originating application, and the Judge in any given case can make orders for the filing of pleadings and the hearing of witnesses.

Action point: Ms Leonard to draft change.

10. Accessing neighbouring land

At the last meeting, the Committee discussed the possibility of extending r 19.2 so that included applications made under ss 319–320 of the Property Law Act 2007 to access neighbouring airspace. Under the predecessor provision—s 128 of the Property Law Act 1952—such applications were to be by originating application.

Judge Kellar and the clerk carried out research on why that position was not continued following enactment of the 2007 Act. No particular reason was found. It appears to have been an oversight. The Committee agreed to the proposed change.

Action point: Ms Leonard to draft change.

11. Secondary legislation

Ms Leonard briefed the Committee on minor legislative changes that empower or refer to court rules. The purpose of the changes is to define those instruments that are secondary legislation. No other change to the status or content of the rules is proposed.

A large element of the project, named the Access to Secondary Legislation Project, is to amend each provision on the statute book that empowers the making of instruments with legislative effect, by expressly stating that instruments made under them are secondary legislation.

The High Court Rules will continue to have the status of primary legislation and be published as if they were secondary legislation. Instruments that alter, add to, amend, or revoke the High Court Rules, and other rules regulating the practice and procedure of a court, will be secondary legislation.

12. Representative proceedings

Since the last meeting the Committee released a consultation paper on its proposed rules to clarify the procedure for commencing a representative proceeding. Some feedback had been received, and more was still to come.

The Committee agreed at the outset to defer discussion of feedback querying whether the rules ought to foreclose the possibility of commencing a representative proceeding on an opt-out basis. That issue has been recently argued before the High Court in *Ross v Southern Response Earthquake Services Ltd*, and the background to the issue suggests the law is uncertain on that issue. The Committee agreed to await the outcome of the High Court case before deciding what course of action to take.

Rule 4.66 — Numerosity requirement

The Committee begun by discussing the feedback received on r 4.66(a), which as drafted read:

> **4.66 Representative proceedings to which subpart applies**
>
> The rules in this subpart apply if—
>
> (a) the persons comprising the class that the plaintiff proposes to represent are so numerous that, having regard to the nature of the claim, joinder of all members of the class would be impractical; and
>
> (b) the plaintiff does not have the consent of all those persons to bring the proceeding in a representative capacity.

Gilbert Walker suggested removing r 4.66(a) as a threshold issue and instead treating it as a guiding principle. The Committee disagreed with that suggestion. Rule 4.66(a) is an important threshold, and removal would simply leave lack of consent as the threshold, which would be inappropriate. Parker & Associates suggested r 4.66(a) was too vague and would create argument over what it required. The Committee disagreed with that suggestion also. Sufficient numerosity is a question of fact for the Judge. The flexibility of the rule is preferable to specificity.

Rule 4.71 — Application for representation order and ancillary orders

The Committee agreed with Gilbert Walker's suggestion to amend r 4.71(2)(a) so that it includes the underlined parts:

> **4.71 Application for representation order**
>
> …
>
> (2) An application for a representation order may include applications for ancillary orders or directions concerning the proceeding, including—
>
> (a) orders or directions concerning steps that the plaintiff or defendant must take in order to identify or communicate with persons who are members of the class that the plaintiff seeks to represent;
>
> …

Rule 4.72 — The affidavit filed in support of the application

The Committee partially agreed with Gilbert Walker's suggestion to amend r 4.72(e) so that it includes the underlined part:

> **4.72 Affidavit in support of application for representative order**
>
> The affidavit in support of an application for a representation order must include the following information:
>
> …
>
> (e) whether the plaintiff's claim is wholly or partly funded for reward by a person who is not a party to the proceeding and, if so, the identity of that funder, whether the funder is subject to the jurisdiction of the New Zealand courts, the relevant detail of the funding arrangements and any other direct or indirect financial interest of the funder in the proceeds of the litigation.

The Committee agreed that the rule ought to be amended to provide for whether the funder is subject to the jurisdiction of New Zealand, but did not agree to the other suggestions. The Committee considered that the rest of the proposal may be overstating what is presently required by appellate authority — the Committee arranged for the Clerk to check this.

Gilbert Walker also suggested adding in three further items of information into r 4.72:

> (g) any information provided to prospective class members to date;
>
> (h) evidence to establish the plaintiff's membership of the proposed class, the suitability of the plaintiff to act as a representative and any other information relevant to the court's assessment of whether it is for the benefit of the other members of the class that the plaintiff is appointed their representative;
>
> (i) whether the plaintiff is aware of any other person who has filed or intends to file an application to represent all or part of the class.

The Committee did not agree to (g) as that is something that could be appropriate in some cases but not all. The Committee also did not agree to (h) as membership of the class is already a pre-requisite under r 4.24, and the addition of (h) would essentially require evidence from the representative to establish his or her own claim.

The Committee agreed partially with Parker & Associates' concern about the requirement in r 4.72(b) that the affidavit in support include "an outline of the class claims, issues, and likely defences". The concern was that it is undesirable to require a mini-trial at the leave stage whereby the Court receives and reviews evidence on contested fact. The Committee agreed to remove "likely defences" and to keep-in claims and issues. The issue of defences ought to be raised by the prospective defendant, and the claimant should not be required by the rules to disclose what it thinks the defence will be.

Rule 4.74 — Principles guiding the application

The Committee did not agree with Gilbert Walker's concerns about r 4.74, which sets out a non-exhaustive list of principles to take into account when determining an application for a representation order. Gilbert Walker queried whether it was desirable for the rules to attempt to capture the substantive principles applicable to the court's determination of these applications. The Committee's view was that the rules are only expressed to be inclusive and that they should remain.

Representative defendants

The Committee agreed with Gilbert Walker's suggestion that the rules should also apply to a representative defendant. Mr Chhana suggested this can likely be dealt with in a light-handed way.

Rule 4.70 — Limitation

Parker & Associates raised a concern regarding r 4.70, which is currently drafted as follows:

> **4.70 When representative proceedings are commenced**
>
> For the purposes of these rules, a representative proceeding is commenced by the following persons at the time the statement of claim is filed:
>
> (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.

Parker & Associates considered that, as drafted, a literal application of the rule is likely to create uncertainty in practice. In particular, it says by stating that a representative proceeding is commenced, at the time of filing the statement of claim, on behalf of all named and unnamed persons "ultimately determined to comprise the class represented", the proposed rule appears to provide only for the situation where leave to proceed as a representative action is granted, thus leaving open the status of unnamed or intended represented persons if leave to bring a representative action is not granted. The Committee decided to keep the rule as it is. That is because the rules ought not to deprive the defendant of a limitation defence which might have been available but for the rules, which is one of the principles underlying the Committee's draft.

Miscellaneous

The Committee next considered two submissions made by LPF Group Funding, a litigation funder. It raised two issues. The first was that the issue of whether there is a "common interest" ought to be certified by an independent Queens Counsel. The Committee disagreed. That issue is to be determined by a Judge irrespective of whether an independent Queens Counsel says there is a common interest or

not. Its second concern was that defendants ought to identify whether they have insurance and the level of cover held. The Committee also disagreed with this suggestion. Insurance is not usually regarded as relevant in litigation. It may come out in discovery in a particular case, but if insurance is to be relevant in representative proceedings then that is something the Law Commission ought to review on a legislative basis.

The Committee agreed to consider the rest of the feedback, and other feedback to be received, at its next meeting. The Clerk agreed to prepare a table of the feedback for the Committee's use.

Action point: Further feedback to be considered at next meeting; clerk to summarise feedback into table.

General business

The Committee thanked Justice Asher and the Chief Justice (in absentia) for their contributions to the Committee's work and wished them well with their next endeavours.

The meeting finished at 12.10 pm.