THE RULES COMMITTEE
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7 August 2012
Minutes/04/12

Circular No. 65 of 2012

Minutes of meeting held on 6 August 2012

The meeting called by Agenda/04/12 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 6 August 2012 at 9:45 am.

1. Preliminary

In Attendance

Hon Justice Fogarty (the Chair)
Rt Hon Dame Sian Elias, GNZM, Chief Justice of New Zealand
Hon Justice Winkelmann
Hon Justice Asher
Judge Gibson
Judge S Thomas
Mr Andrew Beck, New Zealand Law Society representative
Mr Brendan Brown QC
Ms Phoebe Dengate-Thrush, Private Secretary to the Attorney-General
Mr Bruce Gray QC, New Zealand Law Society representative
Ms Cheryl Gwyn, Crown Law
Dr Don Mathieson QC, Special Parliamentary Counsel, Parliamentary Counsel Office
Mr Kieron McCarron, Judicial Administrator to the Chief Justice
Ms Paula Tesoriero, General Manager Higher Courts, Ministry of Justice

Ms Rita Lowe, Secretary to the Rules Committee
Dr Caroline Anderson, Clerk to the Rules Committee

Apologies

Hon Christopher Finlayson, Attorney-General
Judge Doogue, Chief District Court Judge
Judge Doherty
Mr Stephen Mills QC, New Zealand Bar Association representative
Mr Rajesh Chhana, Ministry of Justice

Matters arising

Justice Fogarty noted the apologies and welcomed back Paula Tesoriero to the Committee, who was standing in for Mr Chhana for today.

Confirmation of minutes

The minutes of 11 June 2012 were confirmed.

2. District Courts Rules 2009 Reform

Judge Thomas spoke to the Committee about the progress made on reviewing the Rules. Since the June meeting, the DCR sub-committee (consisting of herself and Judges Gibson and Kellar) has met to discuss the results of the initial consultation on the Rules and what are the next steps in reviewing the Rules. The sub-committee has established three options for a review: (1) to address only minor technical deficiencies in the Rules; (2) to conduct a substantive review of the Rules that would encompass concerns raised by the profession about the forms, the lack of early judicial input, third party claims, affirmative defences and information capsules; (3) to abolish the Rules and adopt the High Court Rules. The sub-committee favoured the second approach but was concerned to get the Committee's feedback on these options.

Judge Thomas also expressed concern about the current lack of meaningful statistical data on civil claims in the District Courts and how that impacts on our understanding and analysis of the Rules. She noted that the previous figure quoted of 64% of all notices of claim being filed by self-represented litigants is misleading, as this number includes debt collecting agencies and the Commissioner for Inland Revenue. In fact, the real number of notices of claims being filed by lay litigants is likely to be closer to 6%. The Judge further observed that the current statistics are limited in that statements of defence are not filed, so the issue of how and whether a claim is defended cannot be properly assessed. In respect of this issue, Judge Thomas sought feedback from the Committee on whether it wished to instruct the Legal Issues Centre in Otago to evaluate the Rules.

The Committee discussed whether it should instruct the Legal Issues Centre. The Committee's preference was for any research and analysis to be undertaken by the Ministry. However, Ms Tesoriero explained that the Ministry has limited resources and does not

currently have the capacity to help with such a task although it would be actively involved in any review and has protocols in place to deal with outside parties accessing Ministry data. After some discussion, a consensus emerged that it was not appropriate for the Committee to instruct the Legal Issues Centre to undertake any research on the DCR on its behalf. The prevailing view was that it should be left to the Chief District Courts Judge whether she personally wished to instruct the Centre. Notwithstanding this decision, the Chief Justice stressed that it was very important to have accurate figures to analyse the nature of claims made in the District Courts and whether people's needs were being met. She also noted that any research must be targeted and focussed. Her Honour wondered whether the Ministry could not conduct a simple audit of the classifications currently being used for data collection in order to aid the analysis of how the Rules function in practice.

Regarding the three options for reviewing the Rules, most Committee members expressed support for the second option. Mr Beck believed that a comprehensive review of the Rules would be useful but that the beneficial aspects of the original reforms (e.g. the different trial options) should be retained. Mr Gray QC had a similar view and noted that colleagues with a District Courts practice consistently expressed concern about the front-loading of costs and the inefficiencies resulting from the current forms. He did not believe that a wholesale adaptation of the High Court Rules would be appropriate in a District Courts context, as the particularities of the Courts need to be taken into account. Similarly, Ms Gwyn believed that while having the HCR and DCR correspond exactly may appear an attractive solution, there was a real risk of throwing out the benefits of the new Rules. Asher J stated that the current rules applying the HCR (e.g. rr 2.38, 2.54, Part 5 and Part 7) could be rewritten to allow easier access to High Court procedures where desired.

The Committee also agreed with the sub-committee to bring practitioners from Christchurch, Wellington and Auckland into the group and noted that this could be done via AVL. Mr Beck is happy to be involved and represent Wellington practitioners while Daisy Williams was suggested as a possibility for the Auckland Bar. Judge Thomas is to speak to the NZLS and confirm the appointees.

Judge Thomas will report in full to the Committee at its December meeting and provide an interim report in October. The Chair thanked Judge Thomas and the sub-committee for their work on this issue.

3. Review of Rules Relating to Registry Venue: High Court Rules 5.1 and 10.1

The Chair introduced this topic by recalling that it was subject introduced by the Attorney-General with the aim of facilitating the easier transferral of cases for trial to another registry in order to allow an earlier hearing. Ms Dengate-Thrush explained that the Attorney-General believed it sensible to look at the country as one judicial resource to take pressure off oversubscribed registries. From her understanding he was of the view that technological changes would help facilitate this and that it could be instructive to look at r 30.5 of the Civil Procedure Rules. She noted that at present a decision to change venue can only be made on application by the parties and that there is no current mechanism to offer parties an earlier time at a different registry.

While Mr Beck conceded that the Attorney's proposal makes sense from the point of view of using judicial/ court resources sensibly, Mr Beck was very concerned about forcing a change of venue onto parties that do not want it. He believed that this topic involved important access to justice and cost shifting issues that need to be addressed.

The Chief Justice was adamant that the decision to impose a change of venue must be judicially controlled if there is not complete agreement by parties. She also stated that she did not have a problem with the considerations set out in CPR 30.5. Justice Fogarty agreed with the first point made by the Chief Justice, he was of the view that it is essential for constitutional reasons that any decision is made by a judge as it goes to fair trial issues. Justice Asher was concerned that cost is a major factor for individuals in litigation and that the Court must be alert to this and not force unwilling parties to move if they are to bear the resulting costs of transferral.

Justice Winkelmann noted that at present Registries could not easily or quickly tell people where there is an earlier date at different centres. She is currently involved in trying to set up a national roster system to remedy this but it is technically difficult to equalise rosters throughout the country. Ms Tesoriero stated that the Ministry can help facilitate this and will work with the Judge on this issue.

In respect of the CPR 30.5, Dr Mathieson QC expressed a concern that adopting a similarly detailed rule may result in collateral litigation. Ms Dengate-Thrush noted that the Attorney-General was similarly worried about this and as a result preferred less criteria and more focussed ones than those listed in r 30.5. Dr Mathieson believed that fettering the High Court's discretion with any criteria of mandatory considerations may be unnecessarily complicated. Justice Fogarty noted that it was undesirable that parties had full rights of appeal over a judicial decision to transfer venue as decisions if these rights were used for further tactical delay.

Mr Gray questioned whether the aims behind this review could be achieved on a consensual basis. Mr Brown QC wondered whether this issue could be addressed with greater integrity by examining where proceedings are filed in the first place. At present the HCR enable plaintiffs to pick and choose where they file by simply ordering the defendants on the statement of claim according to residence. He called for a fresh look at r 5.1 that also takes into account the original identification of registry. The Chair noted that the original basis for the rule of identification of registry was the writ of summons whereby defendants were summoned to their nearest court. It was still the Judge's belief that for lay litigants that is how it should be, although a different approach could be taken with corporate bodies. Mr Brown agreed that the present rule does not address the distinctions between corporate and personal bodies and that a more nuanced approach would be preferable. Mr Brown agreed to write a paper investigating these concerns that would be circulated before the next meeting.

The Chief Justice asked the Chief High Court Judge to look at this issue and see whether there are better mechanisms for establishing where the earliest free dates are. The Committee will discuss the issue further in October.

4. Developing a Protocol for Electronic Files

Asher J spoke to the Committee about this topic and its genesis in a suggestion by Justice Clifford, Chair of the High Court's IBIT Committee. As parties in civil litigation are already supplying the Court with memory sticks/ I-Pads to be used as electronic case files, the aim behind this protocol is to provide a uniform method for how this should be done. Justice Asher explained that this is essentially a joint initiative between the Bar and the Bench and one that does not involve any rule change. As the Ministry does not presently have an adequate document management system, this protocol was a relatively modest and interim voluntary measure that enabled parties to bypass Registry. His Honour believed that such a protocol would help accelerate and manage the culture change already taking place. A sub-committee on this topic has been formed and at the suggestion of the Rules Committee, a senior criminal lawyer, David Jones QC, had been invited to join. The Judge noted that the sub-committee met in the middle of June to discuss the protocol and as a result he had written a draft one. The draft protocol was distributed for discussion, with Asher J emphasizing that this was a very preliminary draft that required amendment and addition. Asher J recorded that he had received feedback from Mr Gray, which he agreed with and would amend the draft accordingly.

Members of the Committee noted the current limitations with the Ministry's operating system and agreed that this proposal was a very useful and sensible step. Ms Tesoriero observed that the Ministry was keen to be involved and would try and support the proposal from a practical point of view. She noted that the issue ties in to the Ministry's future work transformation programme. The Committee asked to be briefed about this programme at its next meeting.

Justice Winkelmann asked Asher J about the default format for electronic case files in the protocol. Justice Asher explained that the preferred approach is to simply adopt the electronic format for discovery. In response to the Chief Justice's question regarding the Court of Appeal and Supreme Court, Justice Asher stated that the Court of Appeal's access to electronic copies was at issue in the proposed amendments to the Court of Appeal (Civil) Rules 2005, which Stevens J was to present on shortly. The Committee commended Justice Asher and the sub-committee on their work and looked forward to seeing a revised draft.

5. Court of Appeal (Civil) Rules 2005

Justice Stevens outlined the proposed amendments sought by the Court of Appeal to the Rules. The Judge explained that the proposed new rr 41A and 41B are to require parties to file electronically two categories of documents: submissions and "key documents", which are those to which counsel refer in their written or oral submissions. These documents are to be filed in an electronically searchable format, although r 41B gives judges a large degree of discretion in respect of this issue and also expressly allows the court to develop and publish protocols regulating the electronic filing of copies of documents. Justice Stevens clarified that the modest aims behind these two draft rules were to familiarise Registry with electronic processes and keep up with current practice. Lastly, Stevens J noted that the

reference to “Microsoft word” will be deleted from proposed r 41A(1) to keep the rules future proofed and consistent with the discovery protocol.

As the proposals will have implications for the Supreme Court, the Chief Justice queried why the Court was not requiring the case transcript as part of the bundle to be filed electronically. She believed that it may be unnecessarily limiting to rely on the documents that the parties deem as key. Her Honour also felt it would be preferable to require the parties to hyperlink the documents and authorities to which they refer. Mr Brown raised the distinction between “key documents” and “core bundles” and believed that it was important that the Court and the Profession had the same understanding as to what constituted “key documents” and whether its definition was sufficiently limited. The Chief Justice believed that any reference to “key documents” was outdated thinking as we have the technology to contain and filter a wide array of documents easily.

Justice Stevens agreed with the Chief Justice’s comments but reiterated that these proposals were deliberately modest and could be easily implemented. The Judge explained that he was not sitting in the Court of Appeal when these proposals were originally devised but he believed that they were a response to the issues the Court had recently experienced with Registry.

Justice Fogarty explained that the basis of the High Court’s development of a protocol on electronic case files was to circumvent issues with the document management limitations of Registry. As a result, parties do not have to electronically file case documents but can simply provide them to judges directly. Asher J picked up the Chair’s point and stated that the High Court had deliberately avoided a rule change to allow easier amendment and updating as well as ensure that the procedure was in addition to the normal paper-based filing system and therefore not dependent on Registry. The Chair asked whether the Court of Appeal could use a similar approach. The Chief Justice believed it was preferable to not make these changes through rules and that the Court would do better to issue a practice direction or note, requiring parties’ documents to be provided as an electronic casebook. Justice Stevens responded by saying that it was an option that the Court could look at but one that would need further consultation and discussion.

Justice Winkelmann considered that it would be desirable to create a tandem protocol for the High Court and the Court of Appeal, as it would provide a consistent and more flexible approach. The Chair suggested that Justice Stevens discuss the issue with his colleagues and liaise with Asher J, and come back to the Committee with its preferred approach in October.

The Committee then turned to the issue of the proposed amendments to r 43, which will reduce the timeframe to 3 months within which an appellant must apply for a hearing date to be allocated and file the case on appeal after the appeal is brought. The Committee considered a letter sent to it by ADLS on this proposal, in which the Society observed that as currently drafted the rule may cause problems if an appeal is commenced in late November or December. The Society suggested substituting a working day time frame to avoid any issues. Justice Stevens conceded that it was a fair point and that the rule would be redrafted to take into account the Court’s Christmas vacation.

Mr Beck commented that while he supported a shorter period he believed that it may cause issues for counsel when they are waiting to hear back from Legal Aid as to whether funding is approved or not. He felt that it could put practitioners in a difficult position and would be unfair. The Chief Justice believed that Mr Beck's point was valid and needs to be dealt with, especially as statutory rights of appeal are involved. Justice Stevens noted that the Court has discretion to grant an extension and will take a common sense approach, especially in cases involving the granting of legal aid. He explained that the goal of shortening the timeframe is part of a range of measures, like instigating the fast track appeal process, designed to make Court of Appeal processes more efficient. The Judge stated that the Court of Appeal's preference was to keep the proposed amendment and not replace it with a differential test given the inherent problems with such a test. Justice Asher supported the current drafting as r 43(2)and (3) sets out a detailed and fair process for applying for an extension. Justice Stevens argued that a change would disturb the existing and well-established jurisprudence on extensions of time.

The Chair considered that no one took issue with shortening the timeframe to 3 months. However, he wondered whether r 43(1) could be redrafted in such a way as to take into account Mr Beck's and the Chief Justice's concerns. If such a redraft was possible, it could be circulated to all members and, assuming that they were happy with the changes, go through to concurrence without the need for a further meeting. However, if members were unsure with the redrafting or preferred on balance the current proposed form of r 43(1), the issue would need to be brought back to the Committee at its October meeting.

6. Discovery Rules (Initial Disclosure)

Mr Beck talked to the Committee about his memorandum, which is aimed at reducing the unnecessary duplication of documents during initial disclosure. His proposal was to amend the current r 8.4 to allow that copies would only need to be served in cases where it could not reasonably be expected that other parties would have copies of those documents. In all other cases, parties would simply need to list the principal documents relied upon.

The comments received from ADLS regarding Mr Beck's proposed amendments were noted.

Justices Asher and Fogarty expressed deep reservations about such a radical change, especially given the policy aims underlying r 8.4 and the fact that widespread consultation had been undertaken on this rule. The Chair explained that the original purpose of initial disclosure was to provide a mechanism for parties to focus on the case's issues and impose a sense of responsibility on counsel in preparing pleadings. Justice Winkelmann voiced a similar reluctance to alter the rule as parties could contract out of it and the feedback received on it was positive. Justice Asher stated that he understood Mr Beck's point and respected it but that in practice Associate Judges were relaxed about initial disclosure. The Judge considered that the issue should be revisited in a year's time when the discovery rules are thoroughly reviewed.

Mr Beck agreed that there should be a general review of the rules as did the Chair, who also considered that the Committee needed to have a general policy of reviewing rules. The prevailing view of the Committee was to leave r 8.4 as it currently stands and revisit it in a year's time.

7. Case Management Rules

The Chief High Court Judge noted that the Committee had agreed to defer the case management rules until any issues were worked through with the Auckland and Wellington pilot schemes. She hoped to report back formally at the 1 October meeting on the draft rules. The aim is to have the rules signed off by the end of the year and come into force early 2013. The Clerk and the Secretary are to liaise as to dates.

Justice Asher suggested that practitioners should be advised once the date is finalised and that final feedback should also be gathered. Justice Winkelmann is to write an article about the pilots that will also request feedback from practitioners who have been involved in them.

8. Whiteboard Discussion – Canvassing Perspectives (Agenda item 9)

Mr Gray noted that this item arose out of a chance meeting with the Chair. He had observed that as specific bodies of work, such as case management and discovery, had come to an end or will soon end, it might be timely for members to ask themselves if there are any projects the Committee should take on or if there are any areas where improvements could be made. The Chief Justice agreed that it was a good idea to have a general discussion about the Committee's projects.

Justice Fogarty thanked Mr Gray and asked Judge Gibson his thoughts as a new member and whether there were any general policy issues that he believed the Committee should address. Judge Gibson said he would give the matter some thought. Mr Brown raised the issue of consistency between the Rules of the appellate courts and believed it would be useful to undertake some general "housekeeping" of the them.

Given the time limitations today it was agreed that this topic should be deferred until the next meeting.

9. Criminal Procedure Rules (Agenda item 10.1)

Justice Winkelmann reported back to the Committee on the sub-committee's progress. She stated that the sub-committee had met and discussed the submissions it received on the draft rules. Changes were made to the draft rules and the sub-committee is currently going through the redraft received back from PCO. A fuller report will be made at the October meeting.

10. Financial Markets Authority Act 2011 and repeal of Part 9A and Form 34AA of the DCR (Agenda item 10.3)

The Committee noted the letter from the Ministry on this issue and respected the fact that the District Courts Rules could be repealed pursuant to s 122(1A) of the District Courts Act 1947, without concurrence from the Rules Committee. However, the Committee expressed disquiet at the fact that the search warrant form will no longer be prescribed but "will be held administratively" by the Financial Markets Authority. Judges Thomas and Gibson also felt that such an approach was undesirable from the perspective of District Court Judges. The Chair is to write to Mr Malcolm Luey at the Ministry about this issue.

11. Other

The Secretary passed on an update in regards to the Trans-Tasman Proceedings Rules and Regulations from Ms Julie Nind. The Ministry is waiting for its Australian counterparts to finalise the rules but concurrence is expected shortly.

Lastly, the Clerk tabled a memorandum received from Associate Judge Abbott on the lack of transitional provisions for the time allocation and daily recovery rates amendments. The Chair noted that the Committee had made a deliberate policy decision not to have transitional provisions. This was implemented when the discovery rules were being developed and has been applied to all subsequent rule changes, including the costs regime. Justice Fogarty confirmed that otherwise Abbott AJ's approach in *FM Custodians Ltd v Pene Patie & Ors* was correct: the changes to Schedules 2 and 3 of the HCR are to operate prospectively, not retrospectively.

Meeting closed at 1:10 pm.