



The Rules Committee

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6 April 2018
Minutes 01/18

Circular 13 of 2018

Minutes of meeting held on 26 February 2018

The meeting called by Agenda 01/18 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 26 February 2018.

1. Preliminary

In Attendance

Rt Hon Dame Sian Elias GNZM, Chief Justice of New Zealand
Hon Justice Courtney, Chair
Hon Justice Venning, Chief High Court Judge
Hon Justice Asher
Hon Justice Dobson
Judge Gibson
Mr Andrew Beck, New Zealand Law Society representative
Ms Jessica Gorman, representative for the Solicitor-General
Mr Rajesh Chhana, Deputy Secretary of Policy, Ministry of Justice
Ms Suzanne Giacometti, Parliamentary Counsel Office
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 Regan Nathan, Secretary to the Rules Committee
Mr Daniel McGivern, Clerk to the Rules Committee

Apologies

Hon David Parker, Attorney-General
Judge Kellar
Mr Andrew Barker QC, New Zealand Bar Association representative
Judge Doogue, Chief District Court Judge

Confirmation of minutes

The minutes of the Committee's meetings on 2 October and 4 December 2017 were confirmed.

2. Representative actions

At its last meeting the Committee reviewed a concept draft of rules prepared by Ms Giacometti addressing procedural matters relating to representative actions. That draft has since been changed to reflect the Committee's suggestions at that meeting. The Committee discussed a number of aspects of the updated draft.

Rule 4.68 states that if any of the provisions of the new subpart are inconsistent with provisions of another enactment that provides for a person to bring a proceeding on behalf of a group of persons, the provisions of that other enactment prevail. The Committee agreed to the Clerk checking the extent to which other legislation provides for representative proceedings to be brought and the extent to which such legislation provides for matters of procedure or relies wholly on rules of court.

Rule 4.71 deals with the information required to be included in the affidavit in support of an application for a representation order. Subclause (e) includes within that information whether the whole or any part of the plaintiff's claim is funded by a person who is not a party to the proceeding; that person is defined by the rule to be a "litigation funder". The Committee agreed to change the phrase "the whole or any part" to "wholly or partly". The Chair observed that the former phrase might suggest the proceeding should be viewed in numerous parts whereas the latter contemplates instances where, for example, a funding agreement provides for funding up until a certain point.

The Committee also agreed to change r 4.71(e) generally so that the affidavit must include "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. The Committee considered that this recasting of the disclosure requirement will limit it to instances of commercial funding. The Committee agreed that "litigation funder" did not need to be defined by the rules.

The draft rules considered by the Committee at its last meeting expressly referred to the Limitation Act 2010. Now, r 4.70 says, "a representative proceeding is commenced by the person who is named in the statement of claim as the plaintiff suing in a representative capacity, and by all unnamed persons comprising the group represented, at the time the statement of claim is filed". The Committee preferred an approach which expressly recognises that the composition of the class might be settled at a later date. Accordingly, the Committee agreed to change r 4.70 to read, "a representative proceeding is commenced *for the purpose of these Rules* at the time the statement of claim is filed by the person named in the statement of claim as plaintiff suing in the representative capacity, and by all unnamed persons *determined to comprise the group represented*".

Mr McHerron put to the Committee a potential repugnancy between the rules and the Limitation Act 2010 and in particular with s 50. Section 50 allows a party to apply to the court, in circumstances where the primary claim is not barred by the Act but an ancillary claim is, for an order that the ancillary claim be not barred. The effect of the rules may however be to lead represented claimants to think they do not need to apply under s 50 of the Limitation Act for any claims ancillary to that in the representation order. This might, in the case of a claim for damages for example, result in reliance on a limitation defence despite the granting of a representation order. The Chair considered whether a specific provision in r 4.73(c) providing that nothing in the rules affects the Limitation Act would resolve the issue. The Chief Justice, however, noted that that does not need to be expressed in the rules because they cannot override statute in any event. The Chief Justice instead suggested making a comment in an explanatory note to the rules. The Committee did not express a consensus on this point.

Mr McHerron also considered that the new rules, which would comprise rr 4.65-4.73, would not be appropriately placed in relation to r 4.24. While there is a cross-reference from the new rules back to r

4.24, there might need to be one back the other way. Ms Giacometti did not think this needed to be addressed at this early stage.

The Committee agreed to send out this draft for consultation once changes are made to it to reflect this discussion.

Action point: Clerk to check other legislation for representative procedures; Ms Giacometti to make changes to draft rules.

3. Time allocations

Discussion of this issue was deferred pending the preparation of time allocation schedules.

Action point: Matter to be raised at the Committee's next meeting.

4. Electronic Courts and Tribunals

The Ministry of Justice prepared a memorandum updating the Committee on the operation of the Courts Case Portal (CCP) pilot in the Court of Appeal. The pilot involves a simple, electronic self-service system that enables law firms to file documents online for civil and criminal cases, pay court fees online, and access case information and documents online. The pilot has been established within the framework of the Court of Appeal's rules. Ms O'Gorman noted that further work needs to be done to understand what developments are on the horizon.

Venning J explained that the original purpose of addressing this issue was to assess whether the Electronic Courts and Tribunals Act 2016 is sufficiently prescriptive to apply without amendments to the rules of procedure. Ms O'Gorman explained that some documents would not require additional rules and that much of what the Court of Appeal does would not require it. Ms O'Gorman added that the legislation does not contemplate the filing of evidential documents, which the High Court deals with frequently. Mr Chhana and Ms O'Gorman agreed that, looking forward, the question is whether rules will be needed to support what the technology can ultimately provide. The pilot is expected to be ongoing and will be gradually expanded as a way to test what might work. Mr Chhana agreed to update the Committee on the progress of the pilot.

The Chair observed that some rules will be needed once the technology is implemented in the High Court. The Chief Justice added that there is some time pressure to this exercise given the Act has been passed. The Committee agreed to bring this item back onto the agenda at the meeting following the next.

Action point: Ms O'Gorman to track progress in this area and to aim to have item back on the agenda at its August meeting; Mr Chhana to monitor progress of pilot.

5. District Court Forms

Julian Long wrote to the Committee on three matters relating to the District Court Rules.

First, Forms 1 (Notice of Proceeding) and 35A (Summary Judgment Notice of Proceeding) are inconsistent in several respects:

- (a) Form 1 now contains extensive information informing the reader about who can appear for them, with reference to the relevant sections of the District Court Act 2016. By contrast, Form 35A has retained the previous wording which is not as extensive.
- (b) Form 1 omits information on protest to jurisdiction which has survived in Form 35A.
- (c) Form 35A provides definitions for working days whereas Form 1 does not.
- (d) Form 35A labels the information given to people as "Memorandum" whereas Form 1 labels it "Information" – the latter is appropriate.

The Committee agreed to have these inconsistencies rectified.

Second, Mr Long suggested the Committee think about long-term changes to court forms generally. In particular, the forms could be made more useful for non-lawyers who receive them and might not know what is required of them. Looking forward, the Committee might also want to think about how electronic court forms might be used in the future and how the rules might provide for those.

Ms Giacometti agreed to have someone at Parliamentary Counsel Office consider the general usability of court forms at the District Court and how it could be enhanced.

Third, Mr Long suggested the Committee look into changing the High Court Rules to replicate a change to the District Court Rules which allows a summary judgment application to be made without leave within 10 days of a statement of defence being filed. At present, the High Court Rules require the Court's leave. Mr Long says such a change would allow a party expecting no defence papers to proceed to an expedient judgment when a default judgment is no longer available because a statement of defence may have been filed.

The Committee agreed no change is warranted. While that ability might be useful in the District Court which deals with a large number of debt collection proceedings which are not defended, it would not be appropriate in the High Court which deals with cases of a very different nature. Parties should still ordinarily be required to apply for summary judgment at the outset, and in any case leave can still be given by the Court.

Action point: Parliamentary Counsel Office to look into usability of District Court Forms; Ms Giacometti to manage changes for consistency; clerk to draft a letter to Mr Long.

6. Personal Property Securities Amendment Act

The Ministry of Justice put to the Committee amendments to the Rules to enable the Personal Property Securities Amendment Act 2011 to be brought fully into effect. The Act was introduced in 2011 to clarify the interrelationship between the seizure and sale of secured property by the courts and security interests registered against such property. Section 167A(1)(b)(iv) – relating to personal property sold in the High Court's civil jurisdiction to pay judgment debts – needs amendments to the Rules for it to be brought into effect. Draft rules were prepared in 2012, but at the time the Committee did not consider it had the authority to enact the rules. This constitutional issue has been resolved by s 149(b) of the Senior Courts Act 2016, which clarifies that the Committee does have jurisdiction to pass rules of that nature.

The Committee agreed to consider amendments to the Rules that will enable s 167A(1)(b)(iv) of the Act to be brought into effect by Order in Council. The Committee also agreed to note that additional amendments will need to be drafted by Parliamentary Counsel Office to update the 2012 draft amendment rules and provide purchasers with unencumbered title.

Action point: Ministry to look at changes to the draft rules put forward.

7. Māori intituling

The Ministry of Justice has prepared a memorandum updating the Committee on the certified Māori translations for court locations for the purposes of the intituling of court documents. The Committee agreed to endorse those translations for future changes to the Criminal Procedure Rules 2012, the District Court Rules 2014, and the High Court Rules 2016 insofar as they are inconsistent. The translations will be incorporated into the courts' JDI system for inclusion on the intituling templates.

Action point: Changes to be implemented by the Ministry; Ms Giacometti to look into amendments to Rules.

8. Criminal Procedure Rules

The Committee agreed to amend r 6.1 of the Criminal Procedure Rules 2012 to refer to the District Court Rules 2014 and to the District Court (Access to Court Documents) Rules 2017.

Action point: Ms Giacometti to assist with implementing change.

9. District Court Rules

Associate Professor Barry Allan has written to the Committee identifying updating issues with the District Court Rules. In particular, r 21.2 refers to the provisions of the now-repealed District Courts Act 1947 when it should now refer to the District Court Act 2016. The Committee agreed to make this change.

It was also suggested that the Committee give some thought to the fact that s 65 of the District Court Act allows for the admissibility of documents which the rules require the Registrar to keep, but that there are no rules which require the Registrar to keep any records. Section 64 of the Act and the Chief Executive of the Ministry are the only sources of record-keeping requirements. The Committee agreed to take no action: s 65 merely imposes an obligation which follows from any requirement that might be in the rules, and no changes to the rules are necessary.

Action points: Ms Giacometti to assist with implementing change to r 21.2; Clerk to write to Associate Professor Allan.

10. Supreme Court Rules

Ms Giacometti explained to the Committee that the Supreme Court Rules are ready to be enacted pending the Cabinet processes.

11. Daily recovery rates

The Clerk, at the request of the Committee at its last meeting with a view to reviewing the daily recovery rates, put together recent statistics on the Producer Price Index (PPI). These statistics suggest that since 2015, when the daily recovery rates were last altered, the PPI for legal services has increased by around seven per cent.

The Committee agreed to consult with the profession on whether it would be appropriate to increase the daily recovery rates by around seven per cent.

Action point: Clerk to draft letters regarding daily recovery rates.

12. Regulatory Impact Statements

Since the Committee's last meeting the Chair has written to the Secretary for Justice expressing the Committee's concern with the application of Cabinet's Impact Analysis to the Committee's work. In particular, the Impact Analysis is not appropriate in the context of what the Committee does. The Committee sought to have its work included under a new discretionary exemption promulgated by Treasury, on grounds that no further governmental input is necessary beyond that already provided by the Committee's inbuilt consultative processes.

The Secretary for Justice has in turn observed that the Ministry usually seeks an exemption from the Impact Analysis on the basis that rules proposals have little or no impact on individuals and businesses. From time-to-time rules changes might have more significant impacts and in such circumstances Treasury has suggested it will be open to the Ministry applying for a discretionary exemption, which will be done on a case-by-case basis rather than as a blanket exemption. The Secretary for Justice agreed to keep the Committee informed of the progress of applications for exemptions.

The Chief Justice agreed to write back to the Secretary for Justice on this matter. The Chair favoured establishing a protocol with the Ministry under which the Ministry would inform the Committee of when it applies for an exemption. Following confirmation that Crown Law had provided commentary on the proposed changes to the Supreme Court Rules to the Ministry of Justice, the Chair confirmed that such comments are properly directed to the Committee itself.

Ms Giacometti observed that the difficulty is when rules are prepared and finalised but are then circulated around various agencies. Mr Chhana agreed that it would be better to have departmental comment at an earlier stage for the Committee's consideration than when the rules have been finalised by the Committee.

Action point: Mr Chhana to establish protocol; Chief Justice to write in response to the letter from the Secretary for Justice.

13. Court of Appeal Practice Note

The Court of Appeal judges have put together a practice note regarding synopses of arguments for civil appeals in the Court of Appeal. Asher J emphasised that this is to keep the Committee informed of the Court's work in this area.

14. General business

The Committee thanked Ms Giacometti for the incredible value she has brought to it during her time as its Parliamentary Counsel. Ms Giacometti will finish up her time with the Committee before the next meeting. The Committee wished her well for her next endeavour.

The meeting finished at 11.50 am.