The Rules Committee

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18 December 2015
Minutes 06/15

Circular 124 of 2015

Minutes of meeting held on 30 November 2015

The meeting called by Agenda 06/15 was held in the Chief Justice's Boardroom, High Court, Wellington, on Monday 30 November 2015.

1. Preliminary

In Attendance

Hon Justice Asher, the Chair
Hon Justice Venning, Chief High Court Judge
Hon Justice Gilbert
Judge Gibson
Judge Kellar
Mr Rajesh Chhana, Ministry of Justice
Ms Jessica Gorman, representative for the Solicitor General
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
Ms Suzanne Giacometti, Parliamentary Counsel Office
Mr Kieron McCarron, Chief Advisor Legal and Policy, Office of the Chief Justice

Mr Ross Cargill, Secretary to the Rules Committee
Ms Harriet Bush, Clerk to the Rules Committee

Apologies

Rt Hon Dame Sian Elias GNZM, Chief Justice of New Zealand
Hon Christopher Finlayson QC, Attorney-General
Judge Doogue, Chief District Court Judge

Confirmation of minutes

The minutes of 5 October 2015 were confirmed.

Matters Arising

The Chair welcomed Mr Ross Cargill to the Committee who is taking over the role of Secretary to the Committee from Mr Paul McGregor. The Chair thanked Mr McGregor for his contribution to the Committee.

2. Access to Court Documents

Consultation on the proposed Access to Court Documents Rules was completed in June 2015. The proposed amendment rules had been updated to take into account the discussion on the rules at the meeting on 5 October 2015. The Committee agreed to finalise the proposed amendments subject to the approval of the Chief Justice.

Mr Chhana addressed the Committee on the progress of the Judicature Modernisation Bill. He advised the Committee that the Bill is currently being checked and reviewed. It was hoped that this process would be finished at the beginning of next year and that the Bill could be progressed and enacted before the Budget in May. This would mean that it could enter into force at the beginning of 2017.

Mr Chhana stated that there was no inconsistency between the proposed Access to Court Documents Rules and the Judicature Modernisation Bill. The Bill does deal with court records and what information the Ministry can use for its administrative purposes. It also specifies information which can be shared with other departments under approved information sharing agreements. However, this is a separate issue from access requests.

Mr Chhana also described the transitional period for the High Court Rules. He noted that the High Court Rules would be appended to the Bill. Ensuring that the Rules were up to date with any new amendments would slow down the Bill's progress. One option would be for the Rules to come back to the Committee after the Bill is enacted and be inserted into the Act. This would need to be done for any changes made from now on. Mr Chhana stated that the Ministry could provide a paper setting out this process. However, the Committee agreed that it was an issue that could be dealt with later.

The Committee then turned to the Access to Court Document Rules. The Committee discussed the form that the Rules would take. The Chair noted that there would be one set of rules that would apply to criminal and civil proceedings but that there would be different rules for the High Court and District Courts. The rules would be identical in substance. The Court of Appeal and Supreme Court are also interested in adopting Rules based on the High Court Rules. Ms Giacometti noted that it was important to make sure that there was coherence between the different rules. The Chair agreed that consistency was important and that the Committee would encourage the Court of Appeal and Supreme Court to try to adopt that principle when they draft their own rules. The starting point was to get the High Court and District Courts Rules finalised and it would be straightforward for the other courts to decide their own rules from there.

The Committee approved the amended rules in principle for the District and High Courts as drafted subject to a final version being circulated with members having an opportunity to make any written comment and subject to the Chief Justice's approval. If any major issues arise then the rules will be brought back onto the Agenda.

Action point: A final version of the rules to be drafted and circulated to Committee members for comments. The Ministry of Justice to provide a paper setting out the transitional provisions in the Judicature Modernisation Bill and the effect on new High Court Rules.

3. Access to Court Documents by Service Providers

The Ministry of Justice had asked the Committee to consider rules to allow service providers to access certain court documents. Mr Chhana had provided the Committee with a memorandum setting out a proposal for Judges to determine whether specified documents should be released to family violence and restorative justice providers at the time that the Judge makes an order to attend a non-violence programme or when a case is adjourned to assess the appropriateness of restorative justice. The Chair noted that restorative justice was a major area of work in the District Court. The Committee had previously discussed departmental access to court documents as of right. The new paper from Mr Chhana is based on the principle that the ultimate control of the documents remains with the Judge. It addresses how access to court documents in this area where there is an immediate need to access documents where a referral has been made can be most efficiently managed whilst keeping the ultimate control of the access with the Judge.

Mr Chhana stated that the key aim of the proposal is to try and tighten up timeframes in relation to obtaining four types of specified documents: contact details, the summary of facts, the offender's criminal history and any victim impact statement.

Judge Gibson noted that he did not have any objection to the proposal in principle. However one of the concerns that he had was that contact details of the victims might be released and that would have to be managed. Judge Kellar queried whether it was anticipated that these directions would be made at the time that the matter was called in the District Court and remanded for the purpose of a restorative justice conference. Mr Chhana confirmed that this was correct. At the moment the restorative justice provider will receive the caption summary and the contact details of the offender and victim. In addition under the proposal the Judge could order that the provider receive the victim impact statement and criminal history. He noted that this was not currently happening universally.

The effect of the proposal would be to require Judges to turn their minds to and determine whether the documents should be released to the service provider when making a restorative justice order. Judge Kellar noted that in practical terms the provider would make contact with the victim. In a lot of cases this will be the end of the matter. Judge Kellar was not convinced that the victim impact statement and the criminal history should be provided as a matter of routine. Venning J questioned whether this was a decision which was better made by the restorative justice provider after he or she had spoken to the victim and the offender and determined whether they wished to undertake restorative justice. Judge Kellar agreed and stated that at this time it may be useful for the provider to then receive additional information. However, Judge Kellar stated that he did not have any problem for it to be a consideration when the matter was called.

Mr McCarron noted that the proposal was moving the onus from making an application to the Judge to have to consider whether the documents should be released. Mr McCarron noted that when the proposal was last made, the Chief Justice was concerned about the flow of information once it had been released. This proposal was about information going to a provider, which is not really what the Access to Court Documents Rules are about.

Judge Kellar queried what factors would inform the Judge's decision whether to release the document. Judge Gibson noted that there was also a time issue in the District Court list. Mr Chhana stated that the Ministry considered that it was necessary to have a rule to make the process more effective. The Chair asked whether the matter could be addressed informally by the Judges rather than through new rules. Mr Chhana suggested that the best thing to do would be for the Ministry of Justice to talk to the Judges.

The Chair agreed that Mr Chhana should liaise with Judges Gibson and Kellar and possibly talk to the Chief District Court, Family and Youth Court Judges and report back to the Committee at the next meeting.

Venning J asked whether he could be provided with figures on the number of restorative justice referrals that occurred in the High Court as he was not aware that this happened. Mr Chhana agreed to provide these.

Action points: Judges Gibson and Kellar to discuss the proposal with Mr Chhana and report back to the Committee at the next meeting. Mr Chhana to provide Venning J with figures on the number of restorative justice conferences occurring in the High Court.

4. Without notice application rule

Consultation on proposed amendments to r 7.23, applications without notice, had taken place prior to the meeting in August. The Committee discussed the proposal at its meeting in October but deferred finalising the Rule in the absence of Ms Gorman, who had proposed the amendment. Ms Gorman addressed the concerns that the Committee had expressed at the last meeting.

Rule 7.23(2)(a) and (b) currently contain the statement that the application without notice must contain a certificate that is signed by the applicant's lawyer and states "I certify that the application complies with the rules". Ms Gorman noted that the intention was to make the requirement clearer and to make it explicit what the obligation is. The word "certify" is used in the draft rule. Her view was that the new rule sufficiently retained the considerations in the current rule 7.23(a) and (b) and no amendment was necessary to address the submission from ADLSi to retain the current (a) and (b). The second submission was to cross reference 7.23(2)(a) to 7.46(3) as the circumstances set out in the sections were identical. Ms Gorman noted that again her view was that, given the objective of the amendments to make the rule more accessible, it was better to set out the circumstances in which an application can be made without notice in r 7.23 itself.

Ms Gorman then addressed proposed r 7.23(2)(b) which sets out that an application may only be made without notice if the applicant has made all reasonable inquiries and taken all reasonable steps to ensure that the application contains all material that is relevant to the application, including any defence that might be relied on by any other party, or any facts that would support the position of any other party. At the meeting in October, Committee members had questioned whether this requirement was necessary, as it could be covered by the requirement to put all relevant information in the memorandum in draft r 7.23(3)(d). Ms Gorman stated that without the former requirement, it would not be clear that the requirement went further than the applicant putting forward the information they had at the time of deciding to bring the application, that there is an onus on them to make inquiries. Her view was that 7.23(2)(b) was necessary.

Mr Barker stated that he agreed with Ms Gorman that this should be retained. However, he considered that there was a minor drafting issue in that r 7.23(2)(b) referred to ensuring that the *application* contains all relevant material. He considered that it would in fact be the memorandum which would contain this material. This concern could be addressed by amending the wording to say "to ensure that the court is provided with". Ms O'Gorman suggested the wording could be "the application and all supporting documents contain all relevant material". Ms Giacometti questioned whether the application should identify where the relevant material was contained in the supporting document. The Committee considered that it was unnecessary to identify where the material was in the application. The proposed rule already requires the applicant to provide the information and the Judge will read all the relevant material provided.

The Committee also questioned whether 7.23(3)(d) could be better worded. The current wording could lead to duplication. What was required in the memorandum was a summary. However, after discussing the matter the Committee considered that (d) did not need to be amended.

Ms Gorman stated that the Committee had said that it was only uncontested applications that would not require a memorandum. She was happy to remove proposed sub-rule (5) so that uncontested applications would be the only exclusion.

The last point was whether probate should be expressly excluded from the rule. The Committee agreed that it should be. Sub-rule (5) could state that the requirements do not apply to probate applications.

There were several other minor amendments and drafting points. Ms Gorman suggested that she would work with Ms Giacometti and circulate a final version of the rule.

The Committee agreed for the rule to be put forward for concurrence once a final version was circulated.

Action points: Ms Gorman and Ms Giacometti to draft a final version of the Rule to be circulated for concurrence.

5. Striking out before service

Following discussion at the last meeting, a proposed amended rule and a consultation paper on the rule had been drafted. The Committee was happy with the amended rule. Ms Gorman questioned whether the consultation paper should set out how the issue has arisen. The Committee considered that the introduction and other paragraphs gave sufficient information about the problem and why the proposal was suggested. It was difficult to provide more information without identifying particular cases.

The Chair stated that the amendment was important. The Court of Appeal is also considering making similar provision in its rules. The Committee agreed to circulate the consultation paper to professional bodies – NZLS, ADLSi, and the Bar Association – as well as the police, Crown Law and PDS. The Committee noted that it would be very useful to have input from Crown Law, which is often involved in cases of this type.

Action points: the consultation paper and the draft rule to be released for consultation.

6. Applications for probate in solemn form

At the last Committee meeting, Venning J raised the issue of the proper registry for filing applications for probate in solemn form. The issue has arisen following the centralisation of the probate registry in the Wellington High Court. It is currently unclear from rr 27.6 and 27.10 whether the requirement that applications for probate be filed in the Wellington Registry applies to applications for probate in solemn form. This had led to inconsistency in practice. The Ministry of Justice's view was that applications in solemn form should be filed in the closest registry. The Clerk noted that the intention of the 2013 amendments had been that all applications should be filed in the central registry, as the view was that the volume of applications in solemn form did not justify having a separate procedure. Venning J stated that the problem was that the profession had not bought into this view and were filing applications in solemn form in different registries. The best solution would be to treat applications in solemn form separately as they are different, and specify that they should be filed in the registry closest to the residence of the deceased at the time of their death. The Committee agreed. The Chair stated that he considered that it was necessary to spell this out explicitly in r 27.10. Ms Giacometti agreed to draft a rule to circulate to Mr Chhana, the Chair and Venning J. If they were happy with the draft rule it would be put forward for concurrence.

Action point: amendment to be drafted by Ms Giacometti and circulated to Mr Chhana, the Chair and Venning J for approval. Rule then to be put forward for concurrence.

7. Harmful Digital Communications Act 2015

The Committee had received a request from the Ministry of Justice asking it to consider whether it was necessary to set out new rules to provide the procedure for orders under the Harmful Digital Communications Act 2015 to be sought in the District Court.

Mr Chhana noted that the Act was trying to cater for the digital age and deal with online bullying through social media. The Act provides for Approved Agencies which will deal with the issue as a first step to try and get the communication taken down speedily. This is considered to be the best response. The Ministry is now trying to find an agency to take on this role.

The Act also provides the ability for an applicant to apply for an order in the District Court after they have made a complaint to the Approved Agency. The District Court may make a number of orders against a defendant including an order that they take down or disable material.

Mr Chhana stated that the first applications for orders from the District Courts could come through after 1 July 2016. Mr Chhana noted that the aim of legislation is to provide a very quick process. Even if no specific rules were made to provide for the Act, he stated that it would be good to see how the procedure in the existing rules would play out. Mr Chhana stated that if specific provision were not made, then the originating application procedure would have to be used. The Chair stated that he was aware that digital filing was used in some family court cases. He queried whether this procedure could be used in this case.

Judge Kellar stated that he was not sure that the procedure would slot into the originating application procedure and that it might be necessary to have a specific procedure. The Chair noted that the Harassment Act rules provided a precedent for this.

Mr Gray QC questioned where these applications fitted within the existing procedure. He noted that the Act represented a significant inroad on the freedom to receive and impart information. This is relevant to where the Act sits in the spectrum of remedies. The effect on this right should be born in mind when considering the procedure which is best adopted to implement the Act.

The Chair suggested that he could confer with the Chief District Court Judge to set up a group to look at the matter. The Committee agreed to this suggestion.

Mr Gray QC asked whether it would be possible to see the precedents that led to the Act and what the responses were overseas. Mr Chhana stated that he could prepare a memorandum setting out the background to the legislation to be circulated before the next meeting.

Action points: The Chair and the Chief District Court Judge to set up a group to determine the appropriate response. The Ministry of Justice to provide a memorandum setting out the background to the legislation including whether there are similar regimes in overseas jurisdictions.

8. Changes to intervention rule for barristers sole – meaning of "solicitor"

Following the changes to the intervention rule which allow a barrister sole to receive direct instructions to act in civil proceedings where the client is legally aided, the Committee had agreed that it would be desirable to amend all of the references from "solicitor" to "lawyer" in the High Court Rules whilst retaining references to counsel if appropriate.

The Chair noted that this item is currently a work in progress.

Action point: Item to be listed for next meeting

9. District Courts Rules Schedule 4

Mr Beck stated that this exercise was to deal with the transition provisions in the 2014 District Courts Rules. As all costs matters are dealt with under the 2014 rules it is necessary to have all costs matters set out in the schedule. Mr Beck had determined where it was necessary to provide in the 2014 rules for steps taken under the 2009 Rules and set out in the costs schedule that the relevant items only applied to steps taken under the 2009 Rules. Draft amendments had been prepared reflecting Mr Beck's recommendations.

The Committee agreed that the amendments could go forward for concurrence.

Action point: Amendments to be circulated for concurrence.

10. Costs in pro bono cases

The Chair noted that the Committee had discussed this issue at the last meeting. The Committee had agreed at the last meeting that it would be desirable to specify in the rules that costs are recoverable where work had been done under a contingency fee agreement. Ms Giacometti had drafted a proposed addition to r 14.2 to specify this.

Ms Giacometti had provided two possible wordings of the new sub-rule: the first was to define conditional fee agreement in the rule itself. The second was to reference the definition in Lawyers and Conveyancers Act 2006. The Chair stated that, for consistency, he preferred the latter option.

Venning J stated that he was concerned that the current definition would apply to non-qualified people providing litigation advice and services. It would be important to specify that it was advice given by lawyers which was covered. The Committee agreed. Ms Giacometti stated that if the definition in the Lawyers and Convyancers Act was used, then it would extend only to lawyers as only lawyers can have conditional fee agreements.

Mr Beck also asked about paragraph (3)(b) which states "in relation to services other than advocacy and litigation services, means an agreement under which a party to a proceeding and a person who provides the services agree that some or all of the person's fees and expenses for providing those services are payable only if the party is successful in the proceeding". Ms Giacometti stated that this paragraph is aimed at the costs of expert witnesses. Ms Gorman asked whether expert witnesses' costs were disbursements. Venning J stated that this paragraph would apply where experts provide advice under contingency fee agreements. He stated that there was an issue with an expert being independent. An expert was different from a lawyer who presents one party's view. Ms Giacometti noted that the rules set out obligations on experts. Ms O'Gorman stated that if an expert provides their opinion on a contingency basis then this could compromise their independence. This could provide an incentive for the expert to overstate quantum for example. Gilbert J stated that he agreed that it was inappropriate for an expert to operate under a contingency fee agreement. Under the UK rule, experts are excluded.

Mr Barker stated that he thought that the drafting of (2) was not quite right. The current description of a conditional feel agreement as one where costs are recoverable "only to the extent that the party recovers sums in respect of the agreement" only included particular types of agreements. Conditional agreements would usually turn on whether the party is successful, which is broader than whether that party "recovers sums".

The Chair stated that there were two different ways of looking at the issue. First is the view that experts have to be independent and they compromise their independence if they have an interest in the result. The second way of looking at the matter is that it is important to ensure that people who cannot afford experts get all the help that they can through the rules including the ability to engage an expert on a conditional fee basis.

Mr Barker agreed to work with the Clerk to consider the issue in more detail and report back to the Committee at the next meeting.

Action point: Mr Barker and the Clerk to consider whether expert witnesses providing their services on a contingency basis should be covered by the Rule.

11. Reviews brought under the Coroners Act

The Committee agreed at the last meeting that a review under s 75 of the Coroners Act should be brought by originating application. Ms Giacometti had drafted an amendment to provide for this. The Chair had sought the view of the Chief Coroner, Judge Deborah Marshall, who had said that she supported the proposed amendment. The Committee agreed that the amendment could be circulated for concurrence.

Action point: amendment to be circulated for concurrence.

12. Representative Actions

Prior to its meeting in August, the Committee had received a letter from Mr Robert Gapes suggesting that the Committee consider making provision for representative actions in the High Court Rules following recent developments in case law in the area. In 2008 the Committee prepared a Draft Class Actions Bill and Rules and presented them to the Minster of Justice. However, the Bill has not been

considered. Following the August meeting the Clerk drafted a paper setting out the case law for bringing proceedings on a representative basis under r 4.24.

Discussion of the item was adjourned until the Chief Justice was present.

Action points: item deferred until the next Committee meeting.

13. Central Processing Unit

Mr Chhana had provided a memorandum to the Rules Committee setting out the tasks that the CPU undertakes and who performs the task in an Appendix. The Committee had deferred discussion of this item at the last meeting until Judges Gibson and Kellar were present. The Chair noted that the Committee had been interested in the judicial oversight of the Committee.

Judge Gibson noted that he had drafted some guidelines. The first talks about default judgment in the case of liquidated demands. This had been circulated to members of the District Courts Civil Committee. Judge Kellar noted that there was an outstanding issue concerning cases where default judgment is sought where the CPU considers that it contains elements of oppression due to the interest rate in the contract or due to delay. The CPU now refers these cases to a Judge for consideration. There has been a difference of approach in the District Court. Some Judges will permit interest to be awarded for a year and finance companies in Auckland have taken this into account. In other places Judges consider that they have no jurisdiction to refuse to enter default judgment. The issue is the Court's jurisdiction to, of its own motion, decline to enter judgment. Mr McCarron noted that it was clear that the rules had changed: now r 15.7 states that a Judge or Registrar "may" authorise the sealing of a judgment. This may have something to do with the matter.

The Committee considered that as there is jurisdiction for the Registrars to refer the issue to the Judge by virtue of the general referral power in s 51F of the Judicature Act 1908 the Committee agreed that the issue was not something for the Committee to be concerned with.

The Chair noted that the Committee had been concerned that matters were not being referred to Judges. It was clear that this was now happening. Judges Gibson and Kellar would be involved with the Central Processing Unit on an ongoing basis. Accordingly, the Committee agreed that this would be noted and that it would not need to look at the Central Processing Unit again unless a specific issue arose. The Chair thanked Mr Chhana for his paper and Judges Gibson and Kellar for their work.

Action Point: no further action required

14. Criminal Procedure Amendment Rules

The final item on the Agenda was the Criminal Procedure Amendment Rules. The Committee had agreed that the Rules would be circulated for concurrence at the previous meeting. However, Ms Giacometti had made some drafting changes to the Rules since the last meeting. Simon France J had agreed to the changes. Ms Giacometti informed the Committee of the changes. The most important change was the reference in r 5A.5 to a sentence of reparation. Ms Giacometti stated that the reference had been changed to the "appropriateness of imposing reparation" to reflect the wording of ss 12 and 32 of the Sentencing Act 2002. The other changes made were minor drafting changes.

The Committee agreed that the rules could be put forward for concurrence.

Action point: Criminal Procedure Amendment Rules to be circulated for concurrence

The meeting closed at 12:20 pm