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

5 August 2016
Minutes 03/16

Circular 73 of 2016

Minutes of meeting held on 1 August 2016

The meeting called by Agenda 01/16 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 1 August 2016.

1. Preliminary

In Attendance

Rt Hon Dame Sian Elias GNZM, Chief Justice of New Zealand
Hon Justice Gilbert, Acting Chair
Hon Justice Venning, Chief High Court Judge
Judge Gibson
Ms Ruth Fairhall, Acting Deputy Secretary of Policy, Ministry of Justice
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

Ms Alice Orsman, Secretary to the Rules Committee
Ms Harriet Bush, Clerk to the Rules Committee

Apologies

Hon Christopher Finlayson QC, Attorney-General
Judge Doogue, Chief District Court Judge
Judge Kellar
Mr Rajesh Chhana, Deputy Secretary of Policy, Ministry of Justice

Confirmation of minutes

The minutes of 13 June 2016 were confirmed. One amendment was made.

2. Senior Courts (Access to Court Documents) Rules 2016

The proposed Senior Courts (Access to Court Documents) Rules 2016 were left at the last meeting on the basis that Ms Giacometti would finalise the Rules for the Committee to consider a final time so that they could then be put forward for concurrence.

The Chair raised one issue: rule 6 provided different rules for civil proceedings, criminal proceedings and appeals. The rule set out qualifications on general rights for criminal proceedings and appeals but no specific qualifications on general rights for civil proceedings. General qualifications on rights were also set out in rule 9 and rule 16 preserved the Court's inherent power to control its proceedings and for a Judge to direct that any document not be accessed without the permission of the Court.

Ms Giacometti noted that the qualifications came out of the existing rules and did not change that position. The Chair stated the way in which the rules had been brought together gave the appearance that there was something different in respect of criminal proceedings and appeals. Ms Gorman considered the qualification in rule 6(6) which provides "despite subclause (1) a Judge may direct that the court file or any document relating to the appeal not be accessed by the parties or their lawyers without the permission of the Judge" would apply to all proceedings.

Mr Giacometti noted that the way the rules were set up now was intended to make it clear to a media representative or lay person which rules applied to the proceedings that they were dealing with. She agreed to consider these rules to determine whether amendments should be made.

The Committee agreed that the Rules would be circulated to Court of Appeal and Supreme Court Judges for any final comments. The Rules would then be circulated to Committee members for concurrence and Order in Council. Rules for the District Courts would also be circulated for concurrence. Ms Fairhall noted that it would be good to have some publicity about the Rules when they came into force as this would be consistent with the aim of making the Rules more accessible.

Action points: Ms Giacometti to consider whether amendments to r 6 were appropriate. Rules to then be circulated to Court of Appeal and Supreme Court Judges for comment and then for concurrence.

3. Striking out before service

At the last meeting the Committee discussed the responses following consultation on the proposed new strike out rule. Several amendments had been made to the proposal and further comment was sought from the bodies who submitted on the amended rules. The Law Society had responded saying that it was still strongly opposed to the rule. At the last meeting Mr Beck had also expressed concern that the proposal would allow a statement of claim to be struck out without hearing from the plaintiff.

The Chair considered that it was appropriate, in the light of strong opposition to the rule, to pause and consider whether to continue with the proposal. He reiterated that the idea of the rule was to provide a procedural mechanism to deal with claims which clearly on their face are not a genuine attempt to vindicate a legal right but plainly intended to harass or vex the defendant. This was a very narrow class of case. The rule aimed to formalise the procedure in line with the English model. However, despite the attempt to confine the rule to extreme cases many of the submitters who objected had appeared to see the rule as operating in a more general way than the Committee envisaged. The Chair considered the Court had a duty to ensure that its procedures were not abused in this very limited class of case. However, in the light of the opposition, and the separate point about allowing the plaintiff the opportunity to be heard, he asked the Committee how it should progress.

The Chief Justice suggested Gilbert and Venning JJ should discuss the proposal with the Law Society. The Committee agreed that this would be beneficial. If the Law Society were still opposed, even

considering the limited scope of the rule and the safeguards around it, the Chief Justice thought that the Committee should consider whether to go ahead with the rule.

Ms O'Gorman noted the rule articulated a process for something that was already being done. Mr Gray QC noted that the Law Society considered that the problem would be dealt with in wider reforms dealing with vexatious litigants. However, there was a distinction between vexatious litigants and vexatious claims.

Judge Gibson was concerned by the comments made by the Law Society about the Central Processing Unit (CPU). He had thought that the problems with the CPU were resolved. The CPU was likely to be involved in the District Courts as it would consider whether to refer a statement of claim to a Judge. Mr Beck considered the proposed rule would mean the CPU would scrutinise a claim with even greater care to determine whether to refer it to a Judge. This would cause more delay. Consequently, he had grave concerns about the rule applying in the District Courts.

The Chief Justice noted that the inherent jurisdiction was reserved for exceptional circumstances. The proposal would bring the jurisdiction into the rules and could encourage its use. Venning J stated that the rule was just setting out a process. The way these types of claims are currently dealt with is not entirely transparent. For example, a Registrar might bring a document to a Judge and the Judge could issue a minute directing the Registrar not to accept the document or to send it back. This raised a question as to the status of the minute given there was no proceeding, no court file and no court record. In addition the Chair noted that the rule would regularise how Judges deal with these types of claim. The rule also preserved the party's appeal rights and gives certainty to the process. Ms Giacometti considered that there was already the jurisdiction for the Registrar to refer a matter to a Judge, and already the jurisdiction for a Judge to strike out; the rule brought these two processes together. In addition, the rule would link in to the vexatious litigant procedure in the Judicature Modernisation Bill.

The Committee agreed that there should be further consultation with the Law Society to see whether these concerns remained. The Committee agreed to defer discussion of the rule as amended until the next meeting.

Ms Fairhall stated that the Ministry could prepare a paper on the matter raised by the Inland Revenue Department – whether the rule would apply to the Taxation Review Authority. The Committee agreed that would be useful. Ms Giacometti stated that the rule could be amended to prevent it applying. Mr Beck considered that the IRD had identified a legitimate risk that the rule was used to strike out a complaint against the commissioner. It was the issue of where the line was drawn and the possibility of crossing that line. Mr Barker did not think that the position in this case was any different than in other cases if the person has not identified any claim.

Action point: Gilbert J and Venning J to talk to the Law Society. The Ministry to provide a paper about the Taxation Review Authority

4. Harmful Digital Communications Act 2015

A set of rules governing the procedure under the Harmful Communications Act 2015 had been prepared by Ms Giacometti in conjunction with Judge Harvey, Judge Gibson and the Ministry of Justice.

Judge Gibson addressed the Committee about several aspects of the rules. He noted that under the Act there was the ability for the District Court Judge to refer the matter back to the approved agency or seek documents. Rule 16 might need to be amended to reflect this. Judge Gibson also raised two issues in relation to the earlier draft of the Rules. The first was that the rules allowed the Judge to make a final order on a without notice application. However, Parliamentary Counsel had advised that this was the position under the Act. Judge Gibson agreed. The second issue was that he considered the grounds on which a party could apply for an order without notice should be more clearly defined. Other than this he stated that a lot of the matters that had been raised had been addressed. Judge Harvey had raised an issue about whether service at the address to service included electronic service.

Ms Giacometti questioned what further grounds should be specified for a without notice application. Although there were no restrictions on without notice applications in the Act, the Committee considered the normal requirements for without notice applications in the rules should apply.

Mr Beck queried why a stand-alone set of rules had been adopted rather than having the rules in the District Courts Rules. Judge Gibson stated that the sub-committee had considered this was preferable. Mr Beck stated the Harassment Act rules were working well within the District Courts Rules. In addition the proposed rules were quite detailed but lots of the detail concerned matters already addressed in the District Courts Rules. Ms Fairhall stated that one of the reasons for having the stand-alone set was to provide easier access for people who were not familiar with the District Courts Rules. Many people making these types of applications could be self-represented. Ms Giacometti advised the rules were the same as the District Courts Rules but had been drafted in plain English.

Mr Gray QC suggested that, as the rules had been drafted in a short timeframe, there should be a period after which the Committee would review the rules to consider whether stand-alone rules were working well or whether the rules should be brought into the District Courts Rules. Judge Gibson thought it was better to have the Rules outside of the District Courts Rules for the reason identified by Ms Fairhall. The Chief Justice also considered that stand alone rules were justified as applicants were unlikely to even know about the District Court Rules. The Chair said it would always be possible to review the rules after a period in any event.

The Chair then raised a query about how the anonymity provisions would work. Rules 14 and 15 provide for the applicant's details to be kept confidential and identity not to be revealed. However, under r 17 the documents that need to be served are the notice of proceeding, are the application and the supporting affidavit. The Chair asked whether these documents would have to be redacted before service. Judge Gibson noted that the matter would have been through the approved agency as well. The anonymity also affected r 28 which related to authenticating the document. Ms Giacometti suggested this document would be redacted as well. The authenticated document would be on the Court file. The Chair considered there were likely to be many cases where the applicant would wish to remain anonymous. Ms Gorman noted that redaction would make it difficult for the defendant to challenge the authentication. Judge Gibson confirmed that the Family Courts had some expertise with this type of issue already. He considered the redacted document would specify everything that the respondent needed to know in respect of the communication.

The Chair also queried the definition of "on notice" in r 5 – interpretation. Paragraph (b) states that on notice means notice "given by certain documents relating to the application (for example, a copy of some of the documents required to be filed to make the application) being served on (that is, in general terms, delivered to) those persons." Ms Giacometti confirmed it was a generic definition taken from the Family Courts Rules 2002.

The Ministry was keen for the rules to progress before the next meeting. Ms Giacometti agreed to work on the amendments and circulate these to Judge Gibson and the Chair for comments before the rules were circulated for concurrence.

Action point: Ms Giacometti to finalise the rules in consultation with Judge Gibson and the Chair. Rules to be circulated for concurrence

5. High Court Amendment Rules 2016

A number of proposed amendments had been collected in the High Court Amendment Rules 2016. The first were amendments to r 5 and form G 1 to provide that intituling of documents filed in the Court could be in Māori. Venning J noted that the words "in the High Court of New Zealand" could also be in Māori. Ms Giacometti agreed to make this change to the amendment. She asked whether the change was intended to be made in the District Courts. Judge Gibson said that he was not aware of such a proposal. He would raise the matter with the Chief District Court Judge.

The next set of amendments dealt with the recovery of costs and disbursements where conditional fee agreements had been used by the lawyer or expert witness. The Committee had agreed to the

amendments at the last meeting subject to the amendments being finalised. Ms Giacometti had now prepared a further draft of the amendments. Mr Barker stated the original version of the amendment to r 14.2 had contained a potential inconsistency between what the conditionality was; whether it related to success or recovery. Originally the proposal linked recovery to success, however Mr Barker considered that it should be recovery. The Chair asked whether it would be better to define the contingency even more broadly as "dependent on the outcome of the proceedings". This would cover whatever the defined outcome was that triggered the obligation to pay. The Chair considered that broad wording in the rule would be best. The change would also have to be made to the amendment to r 14.12. Mr Barker agreed with these changes.

Mr Barker then asked whether in proposed r 14.2(2) the words "in respect of the service provider's normal fees and expenses" should be deleted as an award of costs, except indemnity costs, did not relate to the lawyer's normal fees and expenses. This would mean that r 14.2(2) read "… costs may be awarded under this Part even though the party claiming those costs is liable to pay the fees and expenses only if the party is successful in the proceeding." Ms Gorman asked whether the rule could provide "under this Part" without saying "even though the party claiming those costs…" as the rule already defines conditional fee agreement to be that agreement. The Committee thought that this phrase was helpful, to avoid doubt, even if it was not strictly necessary. The final amendment related to the Code of Conduct for expert witnesses. The proposed amendment stated that the expert witness must disclose the fact that they were engaged under a conditional fee agreement and "the basis on which he or she will be paid." Mr Barker asked whether the Committee considered that this generic wording went far enough. The Committee agreed that it would be better to keep it general. If there were an issue of mark-up the expert would be cross-examined on this.

The Committee agreed that Ms Giacometti would draft the amendments and then circulate them for concurrence.

The final set of amendments related to without notice applications. These had been finalised by Ms Giacometti following the last meeting. The Chief Justice asked about the applications for probate. All without notice applications for probate are currently filed in Wellington. There appeared to be no issues with this. The Chief Justice asked whether there would be any issue with having a split rule. Venning J did not think that this would cause problems: straight-forward applications which are not contested are filed in Wellington. The Committee had not reconsidered whether without notice applications for probate should be filed in the central probate unit.

The Committee agreed that the amendments could be circulated for concurrence.

Action Point: Ms Giacometti to finalise the amendments. Rules to be circulated for concurrence

6. Subpoenaed witness

At the last meeting the Committee had considered the position where a witness is called by subpoena and no brief of evidence is provided. There is currently no rule which governs this situation. Ms O'Gorman had proposed a draft rule based on the UK rule which would require a party proposing to call a subpoenaed witness without a brief to seek the leave of the court not to obtain a brief and instead serve a witness summary. The summary would set out "if known, the evidence that would otherwise be included in a brief or an outline of the evidence that the witness has (however informally) indicated he or she will give; or if such expected evidence is not known, the matters about which the party serving the witness summary proposes to question the witness."

Ms O'Gorman stated the old rules had allowed a trial judge to make orders so there had always been an issue if the matter arose before a trial judge had been allocated. The rules which were applied also seemed to be aimed at situations where the witness had already provided a witness brief giving some or all of their evidence orally. She noted that there is currently a relatively widespread practice of the party calling a witness by subpoena providing a will stay statement. How to translate this practice into a rule, and what the rule should provide, however, was more difficult.

Ms O'Gorman had considered the UK rule was a helpful starter but was narrower than what was necessary. The will say statement practice meant that the party had to disclose as a matter of honesty the evidence that it thought the witness would give.

The Chair asked what would happen if the witness said that they would speak off the record on the basis of confidentiality and then the party could subpoena them. Mr Gray QC stated that the Evidence Act provisions on confidentiality would apply.

The Chief Justice was not convinced the rule needed to go as far as it had been drafted. She considered that the English approach was better: the party has an obligation to disclose if it does know what the witness is going to say. The Chief Justice noted that if there is a rule of practice, it is derived from first instance decisions without appellate scrutiny. She considered any prompt in the rules should be as minimalist as possible.

Ms O'Gorman stated the disadvantage with the proposed draft of the rule was that it removed the balancing exercise traditionally undertaken by the trial Judge where disclosure was one of the relevant considerations to be weighed to determine the interests of justice.

Ms O'Gorman noted that the witness summary could be captured in the discretion of whether to grant leave. The rule could say "if satisfied that sufficient disclosure has been made about the subject matter of the witness' evidence". This would be much broader.

Ms O'Gorman stated that although a subpoenaed witness had been called without a brief in a number of cases she was involved in, she did not ever recall the parties asking for leave, it was a matter that the parties sorted out between themselves.

Venning J asked whether instances of "gaming" the witness brief provisions through use of subpoenas was currently widespread. Mr Gray QC confirmed that he did not think that it was.

The Chief Justice asked how the draft differed from the UK rule. Ms O'Gorman stated that she had expanded on the UK provisions so that the party would have to disclose the fact when they had an informal indication of what the witness' evidence would be. The UK rule requires the party to state the "evidence if known", which is more definite. The Chair noted that one of the problems was where it was necessary to subpoena a person and the party genuinely did not know what the witness would say. The witness should be in a position to confirm certain things. However, once the witness was in the witness box they turned out not to be hostile but to be very helpful. The party might have indicated that they would examine the witness on one thing but because the witness was being forthcoming, the party decided to take the risk to ask further questions. The Committee members agreed that this could not prevent the party going further than it had indicated.

The Chief Justice considered that the party should not need leave of the court if the subpoenaed witness was giving relevant evidence. It would be wrong to gag the witness for procedural reasons. The Judge might have to make consequential directions so that the other party has an opportunity to consider the evidence and prepare, but to say that they party could not call the witness at all seemed contrary to the Evidence Act and to set a premium on procedure.

Venning J stated that where a party called a subpoenaed witness without a brief the other party would object and there would be a discussion about how the situation came about and consequential orders would be made. He did not see it as a major issue.

The Chair stated that the rule was there to stop parties gaming the disclosure rules by not providing disclosure when they should be. The proposed way of dealing with the issue was to provide that unless there has been disclosure or a brief, the evidence could not be led without leave. Mr Barker agreed: the rules provide a briefs of evidence regime. He did not see what was controversial about providing that when the party could not get a brief of evidence, that party was required to state the evidence that it expected to get from the witness. If the witness said something different from what they had indicated the party was not held to what it had indicated.

Ms O'Gorman raised the issue of whether the application should be able to be made without notice. This was the UK approach. Presumably this was due to time constrains so that it did not hold up the trial.

The Chief Justice suggested the issue could be dealt with by requiring the party to give notice to the other party of their intention to call the subpoenaed witness. If the other party had an issue with the witness being called it could then apply to the court for directions. The Chief Justice considered a rule like that would probably serve; if notice was given at the time that witness briefs were exchanged, the party would give as much information as possible to stop an application for directions being made. Mr Gray QC agreed: as there is a prior disclosure regime the rules should require a person who genuinely cannot get a witness brief to do what they reasonably can to inform the other side of what the evidence is going to be about, but give them the freedom to call that witness. The rules could require the party to give notice, and then the other party could seek directions if they want to complain about it or put some more constraints or rules around it. The Committee agreed.

Ms O'Gorman and Mr Gray QC agreed to prepare a further draft of the Rule for the next meeting.

Action point: Ms O'Gorman and Mr Gray QC to prepare a further draft of the rule

7. Time allocations

ADLS had written to the Committee raising two issues in relation to the time allocations set out in sch 3 of the High Court Rules. The first was that it considered that time allocations for attendances in relation to alternative dispute resolution and attendances at expert conferences should be added to the schedule. The second issue was that ADLS considered the time allocated for trial preparation was insufficient. At the June meeting the Committee agreed that it did not wish to include attendance at alternative dispute resolution and expert conferences in the schedule. The Committee agreed that the professional representatives on the Committee would look at the issue and prepare a report for the Committee.

Mr Barker spoke to the issue. He noted that the Committee had agreed that the allocations for trial preparation were inadequate. Mr Barker, Ms O'Gorman, Mr Gray QC and Mr Beck had disused the issue and favoured going back to some form of allocation that was based on the length of the trial. The Chair asked why an allocation based on the trial length had been abandoned. This rule seemed to be logical as preparation was usually linked to the length of the trial. Having a fixed number of days for preparing briefs appeared to be a bit odd. The most onerous part of trial preparation was likely to be the briefs.

The Chair also queried whether it would be better to put the different elements involved in trial preparation back together. He didn't think that they could sensibly be unbundled. He considered the briefing of evidence could be linked to the length of the trial. This would be going back to the old rule which had had the problem that it was often too generous. However, this is saved by r 14.2(f) which provides an award of costs should not exceed the costs incurred. Ms O'Gorman also noted that the time allocation could be scaled down from twice the length of the trial to one and a half times. Mr Barker considered trial preparation consisted of preparation of cross-examination, and preparation of submissions. Splitting up the different parts of the time allocations represented the different timing of preparation: the briefs are prepared and then the second phase is cross-examination and submissions. Mr Beck considered that it was desirable to keep preparation of briefs separate from actual trial preparation as otherwise it would be much harder to come up with an estimate of what the scale costs should be. Mr Barker suggested one way of doing it would be to split the old rule so that the party could recover, for example, one day for the briefs of evidence and one day for trial preparation.

Mr Barker considered that the sub-committee should consider the matter further. The Chair agreed. He asked whether it would be useful to look at why the rules had been changed. Mr Beck recalled that there had been separate rules for when the trial didn't eventuate and when it did, which had caused a lot of confusion. He thought that the rule may have emerged out of that.

The Chief Justice asked whether it would be useful to send out an open ended questionnaire to the profession about how it considered the rules were operating and whether they had got out of kilter. There might be a wider issue. The Committee considered that it would be better to have a more formal proposal before going to the profession. At that stage the Committee could ask whether members of the profession considered that the recovery times were sufficient. The time allocation was meant to be as accurate as possible with the two thirds recovery principle coming from the daily recovery rates.

The Committee agreed that the Clerk would find out why the Committee changed the rules for recovering trial preparation.

Action point: clerk to investigate why the rules were changed. Sub-committee to consider the matter further

8. Case management conference allocation

Mr Barker had raised the issue of case management conferences not being allocated within the appropriate timeframe – 25 to 50 working days of the statement of defence. Venning J had provided some figures on case management conferences in the Auckland High Court. He noted that the figures only concerned Auckland and conferences allocated by Associate Judges, that is, conferences for ordinary proceedings. The figures revealed that in the year, there were 442 case management conference slots allocated to Associate Judges to carry out conferences, but only 242 cases actually proceeded as conferences. This reflected Mr Barker's comment that a lot of cases were dealt with by joint memorandum from Counsel and the Judge just signs off on the memorandum. Conferences are therefore not being held as the rules contemplated.

Further, only 18 per cent of the case management conferences that proceeded in the year were first case management conferences. The rules envisage only one meaningful case management conference being held. Venning J considered that Mr Barker's memorandum had highlighted the issue of whether the rules are meeting that objective. 28 out of 442 conferences were allocated outside of the 50 working day period. While this was not a large number of cases it was still concerning as 50 working days in the life of a case were lost. The delay in some cases this might be due to the case subsequently going down the summary judgment route, if there was an interim injunction application or if the case was transferred from the District Court.

The figures suggest that the current theory might have to be looked at. Venning thought that that a default rule for a joint memorandum being filed after the statement of defence as suggested by Mr Barker was a good idea. The meaningful case management conference could then be held at a later date. Reasons why a conference does not proceed include where counsel want to have discovery before the case management conference, further parties are joined or senior counsel is engaged and wishes to redraft pleadings.

Mr Gray reported that in his experience the reforms to case management were encouraging people to work even harder to address and settle issues before case management conferences. He thought that the rules were partly having the intended effect by regulating behaviour. He did not consider that the statistics lead to the conclusion that the system was not working; in the cases he was involved in the interlocutory phase was progressing well and the counsel were working to progress things themselves without the court having to be involved. However these cases were complex cases, which probably moved away from the default rule.

Mr Beck considered that even in simple cases counsel were agreeing and progressing things themselves. However, Venning J stated that if counsel were agreeing then it was unnecessary to wait for 50 working days until the case management conference.

Mr Barker agreed that having the memorandum linked to the statement of defence was a good solution. However, he asked what would happen where the parties couldn't agree. In addition he questioned whether the rule would mean that the conference was allocated initially on filing the statement of defence or allocation was left until a memorandum is filed telling the Court that the parties cannot agree. Venning J considered that a joint memorandum being filed would either show that

the parties agreed and did not need a conference or did not agree and needed a conference. He thought that would not raise any issues with allocating the case management conferences.

Mr Barker asked whether he should provide a more detailed proposal. The big question was about allocating the case management conference. The parties could say in their memorandum that they wanted the conference after they had completed discovery, or they couldn't agree and wanted a conference immediately. Venning J considered that if this procedure were adopted, in a situation where the parties said they wanted a conference immediately, it should be possible to allocate a conference within 10 working days. At the moment conference time is allocated and then a week before the conference it is vacated; only 45 per cent of conferences allocated go ahead.

Venning J stated that the problem was that the idea that one meaningful case management conference would take place was not happening in practice. This was not a bad thing. From the court's point of view the conferences are usually towards 50 working days. It would be much better if this could be cut down to 20 working days.

Ms Giacometti considered that it would just need an amendment to 7.3(2). She agreed to draft an amendment reflecting what the Committee had discussed for consideration.

Action point: Ms Giacometti to draft the proposed amendment

9. Close of pleadings

This issue was raised at the last meeting. The proposal was to provide for a default close of pleadings date for cases where a close of pleadings date has been over looked. The Committee agreed that it would be desirable for the Committee to insert the 60 working day default date back in.

Action point: Ms Giacometti to draft the proposed amendment

10. Summary judgment for defendants

Mr Beck led the discussion on this issue which had been deferred at the last meeting. The Committee had previously informed the Law Society that it considered there were good reasons for the difference in summary judgment rules for plaintiffs and defendants. The Law Society had raised the issue again, citing an example of a case where the facts for each cause of action were different and it considered that summary judgment for the defendant on one cause of action would substantially save time. The question was whether there was a good reason to change the rule. He considered that there had to be a real strong argument for the defendant before summary judgment was granted. The level was higher than strike-out as it acted as res judicature. The Supreme Court has said there is a principle difference between summary judgment and strike out.

The Chair queried, in the example provided by the Law Society, there was one set of facts giving rise to seven causes of action in tort and another set of facts giving rise to an equitable claim, and the first seven causes of action could be easily disposed of as there was a "king hit" limitation defence, what would be wrong with using the existing rules to determine the tort cause of action first, determination of a preliminary question. It would be possible to use a strike out as well if there were incontrovertible facts. Either way, the answer could be produced without encouraging summary judgment for defendants.

The Committee considered that in principle there was a difference between the plaintiff and the defendant: the plaintiff only has to succeed on one cause of action. So the position is not symmetrical.

The Committee agreed to respond to the Law Society that in its view the case for a change had not been made out. The positions are not the same and there is a risk of unnecessary hearings. Mr Beck considered that it would be a rare case where summary judgment for a defendant on a single cause of action would be of significant help in progressing the case and saving time. It would only be where there are two very different causes of action.

Action point: Chair to write to the Law Society advising it of the Committee's view

11. General Matters

The Committee recorded its congratulations to Asher J who had been appointed to the Court of Appeal and its thanks for the work he done as a Committee member and Chair.

The meeting closed at 12:10 pm