THE RULES COMMITTEE
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2 October 2012
Minutes/05/12

Circular No. 95 of 2012

Minutes of meeting held on 1 October 2012

The meeting called by Agenda/05/12 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 1 October 2012 at 9:45 am.

1. Preliminary

In Attendance

Hon Justice Fogarty (the Chair)
Hon Justice Asher
Judge Gibson
Judge S Thomas
Mr Rajesh Chhana, General Manager, Ministry of Justice
Ms Phoebe Dengate-Thrush, Private Secretary to the Attorney-General
Dr Don Mathieson QC, Special Parliamentary Counsel, Parliamentary Counsel Office
Mr Kieron McCarron, Judicial Administrator to the Chief Justice
Bill Moore, Acting Chief Parliamentary Counsel, Parliamentary Counsel Office

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

Apologies

Rt Hon Dame Sian Elias, GNZM, Chief Justice of New Zealand
Hon Justice Winkelmann
Hon Christopher Finlayson, Attorney-General
Judge Doogue, Chief District Court Judge
Judge Doherty
Mr Andrew Beck, New Zealand Law Society representative
Mr Brendan Brown QC
Mr Bruce Gray QC, New Zealand Law Society representative
Ms Cheryl Gwyn, Crown Law
Mr Stephen Mills QC, New Zealand Bar Association representative

Confirmation of minutes

The minutes of 6 August 2012 were confirmed.

Matters arising

Justice Fogarty noted the apologies and welcomed Mr Moore from the Parliamentary Counsel Office to the meeting.

The Chair explained to the Committee that prior to the meeting commencing, the Chief Justice had been called to establish what were her views on the case management and written brief rules as well as the proposed change to r 43 (Appeal abandoned if not pursued) of the Court of Appeal (Civil) Rules 2005.

Mr Andrew Beck's memorandum written on the latter topic had been discussed in some detail with the Chief Justice. The Chief Justice expressed that she was sympathetic to Mr Beck's viewpoint and generally did not favour "deemed abandoned" or "unless" rules. However, she did not believe there was a problem in reducing the timeframe to three months as long as the ability to reinstate the appeal was provided for, and the operation of the rule was kept under observation. Her preference was to allow the change to be made but to initiate a principled review of "unless" rules in the District Courts Rules, the High Court Rules and the Court of Appeal (Civil) Rules.

Regarding the case management and written brief rules, the Chair explained to the Chief Justice that he and Justices Asher and Winkelmann desired to see the final draft approved today. The Chief Justice reported that she approved with the draft as it currently stood.

The Chief Justice requested that the topics of the electronic bundle protocol and the objective and application of the High Court Rules remain on the agenda for the next Committee meeting.

2. Case Management, including Written Briefs, Rules

Justice Asher spoke to the Committee about the latest draft of the High Court (Amendment) Rules 2012 v 2.4, which includes the change to the case management and written briefs rules. His Honour explained that this draft incorporates minor changes to the timing and sequence of the rules as a result of the case management pilot schemes running in Auckland and Wellington. Justice Asher noted that these rules had been developed and refined over a long period, and were the result of several consultation rounds with the profession and the pilot schemes. The rules were important in supporting and extending the new discovery rules, particularly in respect of the concepts of proportionality and cooperation that underpin them. He noted that the first case management conference will be of fundamental importance and tailored to each individual case, with the goal of settling discovery and other issues to better facilitate the case towards disposition. Judge Thomas inquired as to the length of the conferences and Justice Asher explained that the goal was to schedule them for one hour. He stated that this change has already had a significant impact on court rostering. The success of the conference invariably depends on counsel having done the required work; unfortunately counsel are often not sufficiently prepared for the conference. He explained that there is a need to educate the profession as to the requirements of the case management conference to ensure that it can function as intended and that timing issues are met.

Justice Fogarty agreed with Justice Asher's remarks and stressed again the importance of the interaction between the discovery and proposed case management rules. He also emphasized the need to have an ongoing programme to educate the profession.

Dr Mathieson QC then noted a memorandum from Mr John Earles that he had received on Friday suggesting minor changes to Form G2, r 5.73A, Form G3, and r 7.6(2). The Committee discussed the suggestions individually and did not believe that they should be adopted. For example, Mr Earle's suggestion to delete r 5.73A as redundant was dismissed on the basis that this rule had been deliberately crafted for several reasons: to ensure that the presiding Judicial Officer at the first case management conference is aware of whether documents have been served and at what dates in order to schedule properly; to support the formal proof rules, and to assist with making arrangements for the conduct of the case management conference. In respect of r 7.6(2), Justice Fogarty explained that the reference to a Judge only was deliberate as a judicial decision was more likely to precipitate events and move the case more speedily to disposition. Dr Mathieson also noted briefly that the concept of setting down has been totally abolished by case management. Although the Committee was happy with the rules as currently drafted it was very grateful for Mr Earle's comments and review.

The Committee then moved on to discuss the topic of written briefs and the revised Part 9 sequence. The Chair remarked that there had been two rounds of consultation of this topic and that although everyone agrees that there are problems with written briefs, there is no consensus on how to resolve these problems. The proposed changes modify the current regime by imposing a duty on counsel to bring significant facts that are disputed to the attention of the Court and allow the Court to direct that evidence be given *viva voce*. The

requirement that written briefs must be exchanged is left undisturbed to ensure that opposing counsel are not ambushed at trial.

Justice Fogarty explained to the Committee that the issue of written briefs had been raised at the recent New Zealand Bar Association conference in Melbourne, with the President of the NZBA, Miriam Dean QC, asking for a show of hands those who were in favour of abolishing written briefs completely. The overriding consensus at the conference was that written briefs should be abolished. However, the Judge noted that this view did not accord with the Association's submissions on the original consultation round in 2009. The NZBA's submissions were complex and not unanimous. Justice Fogarty believed that there are two questions that need to be distinguished: firstly, whether written briefs should be retained and secondly, whether evidence should be given orally or by reading written briefs. As a result of the NZBA conference, Justices Fogarty, Winkelmann and Asher met to discuss what to do. All three judges were concerned that the case management reform stays on track. While the Chair admitted that there is an option of carving off the written brief rules, these rules already gone through two rounds of consultation and their implementation in current form had only been delayed because of the case management reform. His preference was to have the package of reforms passed now in totality and then initiate a wider dialogue with the profession over the next few years in respect of written briefs whilst concurrently reviewing the rules.

The Chair observed that other jurisdictions had approached this issue in different ways. For example, the Common Law and Commercial Divisions of the Supreme Court of Victoria do not use written briefs or statements routinely: in the Commercial Court parties have to argue for written synopses, while the Common Law Division simply does not use them. The disparity in different jurisdictions' approaches suggests that there is no easy answer to the issue of written briefs and he believed that it would be difficult to change radically the procedure in New Zealand now without difficulties given that written briefs are so embedded in practice.

Justices Fogarty and Asher also both agreed that the proposed changes already went a large way in addressing the NZBA's concerns. The new proposed r 9.10 (Oral evidence directions) states explicitly the court's discretion to direct that evidence is given orally, while r 9.7 (Requirements in relation to briefs) sets out the requirement that written briefs must be in the words of the witnesses with the onus on the courts to enforce this obligation. The Judges thought that the Committee needed to observe how the new rules worked as well as educate the profession and bench and seek feedback from both.

The Chair invited member's comments and questions.

Judge Gibson inquired about expert reports and Justice Fogarty stated that there is no intention to change these rules and that these questions only concern witnesses of fact. Judge Susan Thomas noted that in the context of the District Courts, the District Courts Rules have moved towards the use of will say statements and limiting evidence in chief. She remarked that the question of what procedure to use will revolve around what is the stated objective and how that objective is measured. Justices Asher and Fogarty noted that originally the introduction of written statements was based around the concerns of

Tompkins and John Hanson JJ to speed up procedure and prevent ambush. Whether or not these goals had been met, and to what degree, was debatable. It was Justice Fogarty's belief that further amendments to the Part 9 regime were necessary to reduce delay and complexity with written briefs. The Committee believed that it was sensible to keep the reforms to Part 9 as drafted and have them come into effect with the case management rules. The effect of the changes could then be monitored and a wider dialogue with the profession on the use of written briefs undertaken.

Dr Mathieson drew attention to the consequential amendments to the Rules as a result of the Wills Act 2007 and stated his approval of them. Lastly, Justice Winkelmann's speech at the Judge's Conference was noted in which she reported that thanks to changes made to case management, the New Zealand civil jurisdiction in the High Court as to disposal of cases by trial is now amongst the best in the common law jurisdictions according to international benchmark standards.

The Chair then asked whether the draft rules had everyone's approval, noting that the Chief Justice had earlier that morning endorsed them. The members approved of the rules and believed that they should go to concurrence with a projected start date of 1 February 2013. Justice Fogarty thanked Justices Asher, Winkelmann and Miller, the Judges and Associate-Judges involved in the pilot schemes and everybody else who had spent such a large amount of their time formulating and refining these rules. He expressed his hope that the changes would achieve their goals of facilitating the just, speedy and inexpensive determination of cases.

3. Proposed Amendment of HCR 1.2 and 1.4 – Objective and Application of the Rules

Justice Fogarty spoke to the Committee about his paper on this topic and noted that it was motivated by r 7.2 of the latest case management rules and the recent expansions of the objectives in the Federal Court Rules 2011 (Australia) and the Civil Procedure Rules (UK). While his recommendation was to adopt the CPR formulation of the Rules' objectives, his paper was intended to generate discussion and clearly any changes would need to go out for consultation. The suggested changes incorporated a duty so far as is practicable to deal with cases proportionately, save expense, ensure that parties are on an equal footing, ensure that cases are dealt with expeditiously and fairly, and allot to cases an appropriate share of court resources.

Judge Thomas noted that the proposal was interesting as it aligns exactly with DCR 1.3 and it would mean that the HCR and DCR had the same objectives. Members thought that the DCR and HCR should have the same objectives and the Clerk was asked to look into the provenance of both jurisdiction's objectives. The issue of adopting an equality of arms provision was controversial and Dr Mathieson questioned its practical effect. Judge Thomas thought that such a provision was part of the wider tension of self-represented litigants in court and Mr Moore wondered how the proposed Ministry fee increases would impact on such a goal. Justice Asher agreed that incorporating an equality of arms provision could be problematic, although he felt that proportionality was a sensible guiding principle.

The Chair concluded this discussion by stating that he would write an expanded research paper on this issue and circulate it for comment to Judges Thomas and Gibson, Winkelmann and Asher JJ before the next meeting.

4. District Courts Rules 2009 Reform

Judge Thomas provided an interim update on this topic and anticipated that she would be able to give a much fuller report to the Committee at its December meeting. She noted that practitioners from Auckland, Wellington and Christchurch had been appointed to the DCR sub-committee and that a full day meeting on the Rules is scheduled for 9 November. The Ministry has been continuing to analyse statistics to obtain more meaningful data about the users of the DCR. Ms Jeanine Ford from the Ministry has established that the true number of self-represented litigants who file notices of claim was 7.15% for the financial year 1 July 2010 to 30 June 2011. The number of those litigants who remained self-represented throughout the claim process is much smaller (0.25% of the total notices of claims filed in 2010/11). She believed that this number vindicated the decision made at the last meeting to not pursue any independent research into self-represented litigants in the District Courts. Judge Thomas also told the Committee that the Dunedin Community Law Centre (which was approached by 2,104 clients in relation to civil matters between 1 July 2011 and 30 June 2012) advised its clients whose claim falls within the District Court's jurisdiction to seek legal representation.

The Chair noted that for most people's contact with the legal system is in relation to civil disputes and that most people are involved in some way with a civil dispute during their lifetime. Accordingly, we must not overlook the value of civil justice. He believed that given that most claims pursued by lay litigants are debt collections, reverting back to a one page form would be a sensible idea. Judge Gibson agreed that the forms needed simplifying and that the forms from the District Courts Rule 1948 were interestingly very easy to follow.

Mr Chhana requested to attend the sub-committee's meeting on 9 November.

5. Review of Rules Relating to Registry Venue – HCR 5.1 and 10.1

Dr Mathieson spoke to his paper and noted the Attorney-General's suggestion to alter the current rules so that the interests of justice and administrative reasons could be taken into account when considering the transfer of a case to another registry. The rationale for such a change is to reduce court delays and better use court facilities. Dr Mathieson noted Mr Brown QC's memorandum, in which Mr Brown outlined his proposed solutions at paragraph [27]. One solution was to redraft HCR 5.1 so as to limit the selection of filing venue to the location of the essence or "gist" of what constitutes the dispute, rather than some "material part" of the factual matrix. Dr Mathieson explained that his paper addressed how to draft this concept of Mr Brown in such a way as to limit as much as possible any collateral or satellite litigation over this issue. He did not think that we should follow the equivalent CPR

(UK) rule as it has a wide range of mandatory factors to consider that he believed could give rise to appeal rights issues. Dr Mathieson also stressed that the Committee needed to consider the policy aspect of changing r 5.1 as to whether administrative efficiency or the convenience of the parties was to be a guiding principle. Mr Brown's memorandum appears premised on the belief that party convenience is still the guiding factor, but that party choice should nonetheless be reduced by regulating the place of filing more objectively. Dr Mathieson's suggested solution to Mr Brown's proposed redraft is "In this rule *source of the proceeding* means the place where the principal act or event constituting the cause of action, or giving rise to the proceeding, occurred", with examples appended to the rule. While this redrafting would not eliminate all possible argument he felt that it would indicate much more clearly where filing should take place. He agreed that the separate rule for corporate defendants and the Crown should be removed. Dr Mathieson also considered that the HCR and DCR should have the same rule, something that Judge Thomas agreed with.

The Chair asked Dr Mathieson to work on a redraft of r 5.1 for the December meeting. The Committee felt that while this proposal dealt with the issue of place of filing, it did not address the Attorney-General's concerns that cases could be transferred at election of the parties if there was a nearer available fixture at a different registry. Ms Dengate-Thrush raised whether or not registries had the ability to ascertain fixture availability throughout the country and if so, could be instructed to offer parties an earlier alternative date. Mr Chhana noted that the Ministry would need to update its system and install a procedure whereby registry staff would as of practice offer a date in another registry. Mr Chhana is to investigate how to implement this on a practical level by liaising with Graeme Pitt and Kieron McCarron.

6. Criminal Procedure Rules (Agenda Item 7)

The Chair tabled the revised draft of the Criminal Procedure Rules (v 13.0) for final approval, noting the proposed commencement date of 1 July 2013. The Committee in general approved the Rules although Judge Gibson raised the issue that there was no translation requirement in r 1.9(1)(a) and (b) and that the language of the notice of intention to speak Maori is not specified in the rule. Dr Mathieson QC believed that the answer may be in the Maori Language Act 1987, while the Clerk recalled that several of the submissions raised this point. The Committee decided to send an email to Justice Ronald Young to confirm that the sub-committee had considered the point before sending the Rules round for concurrence.

7. Court of Appeal (Civil) Rules 2005 (Agenda Item 9)

The Chair noted that the proposed change to r 43(3) and Mr Beck's memorandum on the issue had been discussed in some detail with the Chief Justice earlier that morning. Mr Beck's primary point, which the Chief Justice and the Chair were sympathetic to, was that there should not be rules providing that appeals are deemed abandoned because of procedural non-compliance. Mr Beck was concerned that appellants applying for legal aid

may not have their funding applications processed within three months, which would leave them in an invidious position as the rule is currently drafted. He believes that there needs to be an orderly process with which an appellant can seek and be granted an extension of time without jeopardising its right to continue with the appeal.

Justice Fogarty stated that the Chief Justice was comfortable with letting the amendment proceed provided Mr Beck had the opportunity to raise with the Committee the wider issue of deemed abandonment/ "unless" rules as of principle. He turned the issue over to the Committee for discussion.

Justice Asher noted that the r 43(3) reform had the full support of the Court of Appeal Judges and that significant consultation had taken place on the issue of reducing the time for filing. The profession were largely behind the change with the reservation of the timing issue around the Christmas holidays, which has been corrected. While Asher J was sympathetic to Mr Beck's concerns, he did not believe that the amendment should be halted as a result of an inquiry into "unless" rules. His personal view was that the amendment should proceed, but that a wider inquiry take place into deemed abandonment rules. The Judge also noted that the number of legally aided civil appeals filed in the Court of Appeal was very small and consisted of five out of a total of 250 civil filings. Judge Gibson further observed the obligation on Legal Aid to notify courts of any application it receives.

On balance the Committee approved of the Court of Appeal amendment. The issue of commencing a wide review of deemed abandonment rules is to be added to the December agenda.

8. Developing a Protocol for Electronic Bundles

Justice Asher introduced this topic by noting the preference of the Chief Justice to leave this topic for general discussion at the next meeting. The Chair questioned whether the draft protocol should be taken out to consultation. Justice Asher believed that while a formal consultation was unnecessary, the Committee should invite comments from the profession and upload the draft onto its website. He would also talk to Darise Bennington about publicising the draft more widely and raising the issue with the profession.

The Chair thanked Justice Asher and the members of the working group for their tremendous work in drafting the protocol. He believed that the protocol would provide an important model for the other courts and expressed the hope that it would also prove useful for the Ministry of Justice in progressing the court's operating system.

9. Regulatory Impact Analysis (agenda item 12)

Mr Chhana spoke about the Ministry's role in supporting the Committee and how this could be best provided. It was his view that the policy group should provide the Ministry's representational arm to the Committee, as its capabilities were more suited to the job. The

policy group were used to providing legislative input, technical research and drafting help and liaising with the Parliamentary Counsel Office. The Chair agreed with Mr Chhana in that his preference was for the policy rather than operations group to manage the Ministry's relationship with the Committee.

Mr Chhana noted that the appointment of the new Deputy-Secretary, Mr Frank McLaughlin, will commence in November and that he would brief Mr McLaughlin on the Committee and its unique relationship to the Ministry. He believed that the office of the Deputy Secretary will be in a better position at the end of the year to have a more in-depth discussion about how it can help or provide expertise to the Committee. Mr Chhana also expressed his viewpoint that the Ministry needed to provide more timely input and assistance to the Committee and that this could be achieved by instigating a more formalised process of response as well as fostering greater discussion internally within the Ministry.

Mr Chhana then tabled two documents ("Government Statement on Regulation" and "Requirements for regulatory impact statements") to discuss the issues arising out of regulatory impact analysis (RIA). He noted that the basis behind introducing the changes to regulatory impact analysis in 2009 were intended to slow down and test the need for new regulation. The RIA provides a best practice of rule making and only allows for regulation to be introduced if it satisfies Cabinet that it is required, reasonable and robust. The regulatory impact statement (RIS) provides a means of demonstrating that the specified process has been followed. Mr Chhana wondered whether the Committee could integrate more clearly this process more clearly into our rule making, as currently the practice has been to prepare the RIS after the changes are approved. He suggested that the minutes could be used as a means of capturing the RIS requirements, which tended to be addressed at a sub-committee level. This may mean structuring the discussion around such issues as cost benefits/ risks, implementation, and arrangements for monitoring, evaluation and review. While none of this would affect how the Committee operates (particularly given that the Committee operates through concurrence and that the rules it develops are not drafted by the Executive), it would enable to Committee to perhaps more formally address issues at the outset. Mr Chhana suggested that the projected whiteboard discussion could provide a useful means of discussing this issue further.

The Chair thanked Mr Chhana for talking to the Committee and for his input. He believed that this discussion could constructively be continued at the December meeting.

10. Civil Costs Review (agenda item 6)

The consultation on the proposed increases to the cost fees for civil jurisdictions was noted. The Committee assumed that the discussion would continue at a different level, but that given the consultation paper had been emailed to all judges individually it would be helpful to know whether there will be response by the Chief Justice's Office or the various Heads of Bench on behalf of all judges.

11. Proposed Probate Amendments

The Chair noted the Ministry's proposal to centralise as much as possible the initial administration for processing applications for probate and/or administration and include these changes into the High Court Amendment (No 2) Rules 2012. While the Committee could see that the proposal had some long term benefits, the changes were radical and consultation with the profession and other interested parties was needed. Questions were raised as to whether the changes could be made simply by practice rather than a rule change, and whether it would be sensible to instigate a pilot in the three main registries before rolling out this plan nationwide. As the Ministry needed to assure the Committee that there would not be any substantive effects or drop in quality as a result of these changes, the Chair asked that the Ministry provide a more developed memorandum with a realistic timeframe that also identified the full range of practical options and the benefits and risks of those options.

12. Proposed Amendments to HCR and DCR (Civil Debt Enforcement)

The Chair asked Judge Gibson to speak to his minute on this issue. Judge Gibson explained that the District Courts Amendment Act 2011 inserted a section into the principal Act that allows the Chief Executive of the Ministry to approve and issue forms not being forms required to be prescribed by regulations or rules made under this Act. One of the Ministry's proposed changes to the DCR in its paper of 3 May 2012 is to revoke and replace several prescribed forms with approved forms. The Judge believed that while a number of the proposed forms appear unobjectionable, the Committee may be reluctant to allow, for example, orders for community work or warrants to arrest to be changed to approved forms. He recommended that this issue is added to the sub-committee's review of the DCR and that whatever changes the Committee accepts will be added to a new set of DCR promulgated in its entirety.

The Chair agreed with Judge Gibson and raised the Committee's general concern with approved forms, in that they are administrative and may not be publically accessible or easily pre-examined. Dr Mathieson noted that the PCO's preference is towards having prescribed forms as otherwise *vires* issues can easily arise. Mr Moore further observed that many of the agencies themselves prefer prescribed forms.

The Committee endorsed Judge Gibson's recommendations.

13. Other matters

The change in the meeting days from Mondays to Fridays in 2013 was raised. Ms Dengate-Thrush raised that it would be difficult for the Attorney-General to attend on Fridays. The Chair asked Mr McCarron to check the change with the Chief Justice before next year's meeting dates were confirmed.

Due to a lack of time the issues of the costs rules as raised by Mr Harrison (agenda item 10) are to be carried over to the next meeting.

Meeting closed at 1:25 pm.