The Rules Committee

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14 February 2014
Minutes 01/14

Circular 16 of 2014

Minutes of meeting held on 10 February 2014

The meeting called by Agenda 01B/2014 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 10 February 2014.

1. Preliminary

In Attendance

Hon Justice Asher (the Chair)
Rt Hon Dame Sian Elias, GNZM, Chief Justice of New Zealand
Hon Justice Winkelmann, Chief High Court Judge
Judge Gibson
Mr Frank McLaughlin, Deputy Secretary, Ministry of Justice
Ms Cheryl Gwyn, Crown Law
Ms Laura O'Gorman
Mr Andrew Barker, New Zealand Bar Association representative
Mr Andrew Beck, New Zealand Law Society representative
Mr Bill Moore, Acting Chief Parliamentary Counsel, Parliamentary Counsel Office
Mr Kieron McCarron, Judicial Administrator to the Chief Justice

Ms Jennie Marjoribanks, Secretary to the Rules Committee
Mr Thomas Cleary, Clerk to the Rules Committee

Apologies

Hon Christopher Finlayson QC, Attorney-General
Hon Justice Gilbert
Judge Doogue, Chief District Court Judge
Mr Bruce Gray QC, New Zealand Law Society representative

Confirmation of minutes

The minutes of 2 December 2013 were confirmed.

Matters arising

The Chair congratulated Thomas J on her appointment as a Judge in the High Court. As a result of her appointment, Thomas J was no longer a member of the Committee. The Chair thanked Thomas J for her invaluable contribution as a member and her outstanding leadership in relation to the reform of the District Court Rules.

2. Reform of the District Court Rules

The draft District Court Rules were presented to the Committee. Judge Gibson explained that these draft Rules had been amended to incorporate some of the suggestions made in the submissions from the consultation on the proposed reform of the District Court Rules. During the consultation period, the Committee had received five submissions. All five submissions supported the general aim of aligning the draft Rules with the High Court Rules, with some submissions suggesting further alignment was both possible and desirable.

The Committee considered the specific comments raised in each of the submissions and also in the consultation meetings held in November. The Committee discussed the recommendation that summary judgment could be applied for without leave after the statement of defence had been filed. As drafted the rule allowed a party to apply for summary judgment without leave until 20 working days after the order for discovery. The Committee considered that this period was too long, provided too much scope for delay tactics, and failed to address the reason of seeing whether an arguable defence was raised in the statement of defence (or even if there was a statement of defence) before applying for summary judgment. As Ms Laura O'Gorman pointed out, one of the purposes of seeking summary judgment was to avoid the cost of discovery and so it was odd to base the time period off the discovery order, after which time some cost might already have been incurred.

Rather than base the time period around the order for discovery, the Committee decided that it would be preferable to base the time period around the filing of the statement of defence. The Committee considered that a 10 working day period after the filing of a statement of defence would provide an adequate period for a party to file for summary judgment without the need to seek leave, while not expanding the period too broadly.

The Committee discussed several of the differences between the draft Rules and the High Court Rules raised in the submissions. The Committee considered that these differences were justified for either practical reasons or based on the statutory provisions relating to the District Court.

After considering the draft Rules, the Committee agreed to the draft Rules subject to amendments relating to the period for applying for summary judgment without leave. The Chair thanked Judge Gibson, Mr Bill Moore and the other members of the District Court Rules Sub-Committee for their dedication and diligence in developing the draft Rules, as well as to those who provided submissions and comments on the draft Rules.

Action point: The Committee agreed to the draft District Court Rules, subject to changing the time limit for applying without leave for summary judgment, as well as a final proof-read of the Rules. These Rules will be circulated for concurrence.

3. Interlocutory Appellate Pathway

The Chair explained that the issue of how to deal with interlocutory appeals had been raised several times by various members of the Committee, most recently in August. However, this matter was now being addressed by cl 57(3) of the Judicature Modernisation Bill 2013 (178–1). Clause 57(3) provided that all appeals of interlocutory decisions in the High Court required the High Court's leave.

As discussed at the last meeting in December 2013, the Committee had reservations about the scope of this leave requirement. While the Ministry of Justice had relied on the Court of Appeal's decision of *Waterhouse v Contractors Bonding Ltd* [2013] NZCA 151, [2013] 3 NZLR 36 for interpreting cl 57(3) to mean that appeals from substantive interlocutory decisions were not restricted, the Ministry had accepted that the definition of "interlocutory order" was unsettled and the leave requirement might apply to all interlocutory decisions.

The Rules Committee considered that, from a public policy perspective, interlocutory decisions that substantively determine a matter should be appealable as of right and not require leave. However, the question was how to achieve this outcome, especially in light of cl 57(3).

The Committee considered Mr Moore's draft rules which defined "interlocutory order" exclude decisions relating to striking out a claim, summary judgment, and security for costs. While this option had been proposed at the last meeting, and the draft rules fleshed this proposal out, it was contended that these rules did not address the problem in cl 57(3). The Chief Justice explained that the blanket limitation of rights to appeal without leave any interlocutory decision was aimed at preventing minor interlocutory matters from being appealed and delaying the final hearing or trial. However, this blanket restriction on appeal rights restricted both minor and substantial interlocutory decisions from being appealed. As such, the leave requirement in cl 57(3) was not tailored to fit the identified problem.

The Chief Justice considered that the real issue that needed to be addressed was the timing of appeals, rather than whether a leave requirement was justified. Ideally appeals could be staged so that appeals against minor interlocutory decisions would not delay the trial or hearing for the substantive proceeding, while interlocutory decisions that had a substantive effect could be appealed and heard prior to the hearing or trial. The question was how to do this.

Different options were considered. One issue with delaying filing or hearing an appeal against an interlocutory decision was the time limits set out in the High Court Rules and the Court of Appeal (Civil) Rules. Some members considered that delaying hearing an appeal was no different from the existing practice of the Court of Appeal. At present, the Court of Appeal determines whether to hear an interlocutory appeal in advance of the substantive hearing in the High Court and can exercise its discretion to decline to hear the appeal if the Court considers the issues may be overtaken by the substantive hearing or the appellant is unlikely to be prejudiced by postponing the appeal. Ms O'Gorman and Mr Andrew Beck considered that the existing regime worked well but that the leave requirement in cl 57(3) would interfere with this approach. Rather than implement a blanket leave requirement, one option would be to amend the Court of Appeal (Civil) Rules to provide that the Court will not allocate a hearing date of an interlocutory appeal until after the substantive hearing, unless the Court of Appeal grants leave.

The Committee also had concerns about delaying hearing interlocutory appeals as a default position. First, it can be difficult to show that the interlocutory decision was wrong once the final decision has been made and, even the party convinces the Court that it was wrong, it is also difficult to prove that the final decision should be overturned due to the error. Mr Andrew Barker gave an example of an appeal against a failure to order security for costs, when if this appeal was delayed, the plaintiffs would have to continue to prepare the bundle of documents and incur expenses rendering the appeal after the substantive hearing nugatory.

The Committee considered that the best course of action would be to address the issue through tailored rules rather than by a blanket leave requirement. Further thought was needed to come up with a tailored solution but the blanket leave requirement in cl 57(3) was problematic. The Committee decided that the Committee will make a submission to the Justice and Electoral Select Committee considering the Judicature Modernisation Bill 2013 (178–1). Mr Frank McLaughlin and Ms Jennie Marjoribanks, as Ministry employees involved in the Bill, asked to be excused from being involved in the submission.

Action point: Ms O'Gorman and Mr Barker will prepare a submission on cl 57(3) to then be circulated around the Rules Committee (with the exception of Mr Frank McLaughlin and Ms Jennie Marjoribanks). The Committee will then submit to the Select Committee.

4. Case Management of Judicial Reviews

Mr Beck reported back that he was still following up the proposed rules with certain members of the judiciary. Mr Beck will provide a report and any draft rules to the Committee at the next meeting.

5. Patent Act 2013 Amendments

The Committee was presented with the High Court Amendment Rules 2014 which included various amendments resulting from the Patents Act 2013 (along with rules already agreed to). As rule changes were all consequential and none were substantive. The Committee agreed to the rules.

Action point: The High Court Amendment Rules 2014 are agreed to and will be circulated for concurrence following a final check.

6. Trans-Tasman Proceedings Act Amendments to the District Court Rules

The Trans-Tasman Proceedings Regulations and Rules Amendment Rules 2014 were presented to the Committee. These make a minor amendment to form 1 in the Schedule of the Trans-Tasman Proceedings Regulations and Rules 2013. The Committee agreed to this change.

Action point: The Trans-Tasman Proceedings Act Regulations and Rules Amendment Rules 2014 are agreed to and will be circulated for concurrence.

7. Access to Court Documents

Winkelmann J explained that the working group is still progressing in developing a clearer set of rules that would be more accessible to non-lawyers. To assist with this, the Clerk will prepare a short explanation of rules relating to accessing court documents.

The Chair commented that the rules should specify that the informal letter of application should set out the proposed use and reason for the request to access court documents.

Action point: The Clerk will prepare a note explaining the general operation of the rules and the working group will then develop the rules to be presented at the next meeting.

8. Purpose of Rules of Civil Procedure

The Committee considered three circulars relating to the purpose of civil procedure and principles of rules: Ms O'Gorman's and Mr Barker's papers on the purpose of civil procedure and principles for rules reform, and Mr Moore's paper on principles of drafting rules.

Ms O'Gorman stated that the difficulty with trying to come up with overriding principles or purposes is that the principles pull in different directions. Reconciling this tension between the principles can only be done in relation to specific circumstances. While having general principles might not provide answers in themselves, having general principles provides a useful framework to operate in when approaching reform of the rules.

Mr Barker agreed and stated that it was important to have this framework. The Committee needed to make explicit the purposes it was trying to balance when reforming the rules. Mr Barker asked the Committee whether they agreed with the purposes identified in the papers. The Committee agreed with the purposes listed in both Mr Barker's and Ms O'Gorman's papers, albeit with members placing different emphasis on the importance of some of the purposes.

The Committee agreed that the purpose of civil procedure was a worthwhile discussion to continue. The Committee considered that having a general framework document setting out the purpose and principles of civil procedure would assist the Committee in the future. Ms O'Gorman will synthesise the purposes and principles in a framework document.

Action point: Ms O'Gorman to synthesise the purposes and create a framework document. The item to stay on the agenda for the next meeting.

9. Other matters

Two further matters arose:

(a) Applications to declare will valid

The Chair explained that he had spoken with MacKenzie J and with various other people including Mr Tony Mortimer about applications to declare a will valid. It was by no means clear that the Committee needed to create a new procedure, and placing applications to declare a will valid in Part 19 seemed like a good solution. However, further discussions were needed and the Chair would speak with MacKenzie J again. This matter will be discussed again at the next meeting.

(b) The role of the Rules Committee under the Judicature Modernisation Bill

The Committee also considered the role of the Rules Committee under the Judicature Modernisation Bill. The Clerk will look at the role of the Rules Committee under the Judicature Modernisation Bill and provide a paper for the next meeting.

The meeting closed at 1:15 pm