The Rules Committee

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18 June 2013
Minutes 03/13

Circular 47 of 2013

Minutes of meeting held on 10 June 2013

The meeting called by Agenda 03B/2013 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 10 June 2013.

1. Preliminary

In Attendance

Hon Justice Fogarty (the Chair)
Rt Hon Dame Sian Elias, GNZM, Chief Justice of New Zealand
Hon Justice Winkelmann, Chief High Court Judge
Hon Justice Asher
Judge Susan Thomas
Judge Doherty
Judge Gibson
Mr Stephen Mills QC, New Zealand Bar Association representative
Mr Bruce Gray QC, New Zealand Law Society representative
Mr Andrew Beck, New Zealand Law Society representative
Ms Cheryl Gwyn, Crown Law
Ms Phoebe Dengate-Thrush, Private Secretary to the Attorney-General
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
Judge Doogue, Chief District Court Judge
Mr Frank McLaughlin, Deputy Secretary, Ministry of Justice
Mr Brendan Brown QC

Confirmation of minutes

The minutes of 15 April 2013 were confirmed.

Matters arising

The Chief Justice noted that, following the meeting, the Chair, Justice Fogarty, was stepping down as Chair and as a member of the Rules Committee. Both the Chief Justice and the Chief High Court Judge thanked Justice Fogarty for his service as a member and as the Chair of the Rules Committee. In particular they noted his perceptivity and enthusiasm towards the rules of court, his collaborative approach, as well as his dedication to the Rules Committee, where he had been a member for eight years and the Chair for five years.

The Chief High Court Judge noted that, following the meeting, Justice Asher would become the Chair and Justice Gilbert would become a member of the Rules Committee.

2. Report on the Fourth Judicial Seminar on Commercial Litigation

The Chief High Court Judge and Justice Asher reported back on the Fourth Judicial Seminar on Commercial Litigation that they attended on 15 to 17 May 2013. The seminar covered a wide variety of topics including discovery in the electronic age, the use of social media, and electronic court processes.

In relation to electronic court processes, the Chief High Court Judge and Justice Asher reported that several overseas jurisdictions had moved to an electronic court management system. Singapore had been one of the early adopters of such a system which it implemented 12 years ago. While the initial implementation of that system caused growing pains, the system was effective and efficient and the use of electronic forms allowed for the data to be repopulated for other documents and used for statistical purposes. Hong Kong was also about to begin to use an integrated electronic court management system. While the electronic system had efficiency benefits, Judges from Singapore had said that it had not led to a reduction in staff levels. Instead the efficiency gains were in the processes and staff did more multi-taking and had a more holistic role in the courts.

Both systems in Singapore and Hong Kong cost significant amounts to build and maintain. In contrast, Victoria had recently developed an electronic filing and case book system for approximately $60,000. Victoria was happy to show other countries its system and it was possible that New Zealand, in considering moving to electronic filing, might look at the Victoria model to further explore this to avoid reinventing the wheel and save costs.

The Chief High Court Judge and Justice Asher also reported that there are some new approaches to discovery that some jurisdictions had adopted. The Supreme Court of New South Wales has issued a practice note providing that no discovery is to be given until evidence is exchanged and written briefs are given. Even then, discovery will only be permitted if the court is satisfied that there is an issue. The idea behind this is that the absence of discovery will limit the proliferation of issues and requiring written briefs to be filed prior to discovery will ensure that the written briefs are not tailored to fit discovered information.

In relation to the use of social media, both Judges reported back that no court has a rule expressly allowing service via social media, such as Facebook or Twitter. Many attendees at the Seminar considered that service should not be effected by such trivial means but that the use of emails was permissible and common sense.

Finally, the Chief High Court Judge and Justice Asher discussed the presentation by Sir Vivian Ramsey, who sits in the Queen's Bench Division of the English High Court, in relation to the effectiveness of the Jackson cost reforms. From what Sir Vivian said, the reforms have not led to the intended cost reductions, and instead the measures have furthered satellite litigation. Mr Mills QC considered that the approach to costs in New Zealand, using a costs schedule, was beneficial as it allowed for costs to be roughly estimated prior to a proceeding without the additional costs of preparing cost memoranda and having those submitted to the Court as occurs in the United Kingdom. Justice Asher agreed that the approach to costs in New Zealand was a midway point and one that worked relatively effectively.

Overall, both the Chief High Court Judge and Justice Asher considered that New Zealand's approach to all the discussed areas involving rules came out well. There was no area that New Zealand was out of sync with the rest of the world. The only area that New Zealand should further explore was the use of electronic systems for court, but this was a funding issue and outside the scope of the Rules Committee.

3. Amending the cross-reference to r 7.9

Justice Asher explained that the current cross-reference to r 7.9 in the High Court Rules was an drafting oversight. However there was no equivalent of the previous r 7.9. To fix this, Justice Asher presented two options that the working group had prepared: resurrecting the old r 7.9 as a new rule, r 1.9A, or alternatively using r 7.43 to provide the power for seeking and giving directions.

While the working group had made the recommendation that the cross-reference could be remedied using r 7.43, upon further reflection Justice Asher said he now favoured using r 1.9A as this rule provided more guidance than r 7.43 did. Mr Beck agreed and said that r 7.43 simply provides the power to make orders without specifying how this power is to be used. The Chief Justice considered there to be benefit in specifying what directions and when the directions could be made. This was set out in the proposed r 1.9A but not in r 7.43.

Mr Gray QC explained that the reason that he had favoured using r 7.43 was to reduce the duplication of processes and achieve consistency. Justice Asher agreed that the Rules Committee should strive to not unnecessarily complicate or duplicate the Rules. On this basis Justice Asher proposed that the Rules Committee consider amending r 7.43 to include some of the specifics set out in r 1.9A.

The Chief Justice pointed out that the old r 7.9 and the proposed r 1.9A provided that any order made under that rule "must" be valid. The Chief Justice considered that, in preparing a draft amendment to r 7.43, this undesirable feature should not be included. Instead, the rule should provide that a direction of a judge is sufficient authority but not go so far as to say the order must be valid.

In order to ensure that an appropriate solution to the cross-reference to r 7.9 was created, it was resolved that Justice Asher, Mr Gray and Mr Moore would discuss the options and come up with a solution responding to the concerns expressed during the meeting and have a draft set of rule amendments to be presented at the next Rules Committee meeting.

4. Case management of applications for judicial reviews

The Chair explained that s 10 of the Judicature Amendment Act 1972 currently provides powers for the Court to case manage judicial reviews. The powers under s 10 are more flexible and timeframes shorter than those for standard case management under the High Court Rules. Because many applications for judicial review involve urgent matters, the Chair suggested that case management under s 10 was more appropriate where the matter could be put on the duty list and directions and orders decided quickly at the first hearing. On this basis, the Chair recommended the rules were amended to take judicial review proceedings outside of automatic case management under the High Court Rules while allowing judges to direct case management according to the High Court Rules.

Mr Beck considered that the case management provisions in the High Court Rules were perfectly adequate. In Mr Beck's mind, the powers in s 10 were developed well in advance of the case management rules and had become outdated in comparison to the case management powers in the HCR. Mr Beck expressed his concern at the case managing judicial reviews outside of the High Court Rules and suggested that all judicial reviews should be case managed under the High Court Rules.

Justice Asher responded that practical considerations, including speed, favoured not requiring all applications for judicial review to be subject to case management under the High Court Rules. Justice Asher said that for general proceedings, it takes between two to three weeks following filing of necessary documents for a case management conference to be held. However, judicial review applications can be case managed within one week of being put on the duty judge list. Further, Justice Asher pointed out that often applications for judicial review needed a burst of intense supervision with a fixture date often assigned at the first conference, while case management under the High Court Rules was aimed at one large conference with the a judge. Ms Gwyn agreed and said

that, from her experience, s 10 seemed to be working well as a discrete regime in ensuring that applications for judicial review were dealt with appropriately.

Mr Gray thought that, if judicial reviews were not subject to case management under the High Court Rules but instead under s 10 of the Judicature Amendment Act 1972, an issue the Committee should consider was the lack of signposting of how proceedings not automatically subject to case management under the High Court Rules are case managed. The Chief High Court Judge agreed and wondered whether r 7.1 could be amended to more clearly direct parties to provisions for how those other proceedings are case managed. Justice Asher said one possible way is to clarify using r 7.8 that the proceedings are not to be subject to case management *under Part 7* of the High Court Rules.

Mr Mills raised a point about how judicial reviews that are not brought under the Judicature Amendment Act 1972 are case managed. He suggested that the Rules Committee consider whether to direct these judicial reviews to be managed in the same way as those judicial reviews under the Judicature Amendment Act 1972. Mr Beck did not consider that this was appropriate for the same reasons he stated previously, including the anachronistic nature of s 10. The Committee decided that this matter should be looked into further in relation to reconsidering the form of r 7.1.

With this reservation about the form of r 7.1 as it now stands and about judicial reviews not brought under the Judicature Amendment Act 1972, the Committee decided to automatically exclude applications for judicial review brought under the Judicature Amendment Act 1972 from being case managed under the High Court Rules as the Chair's paper proposed.

5. Case management of appeals

Justice Asher explained that, at present, appeals were not automatically subject to case management under the High Court Rules. Despite this, Justice Asher explained that both Auckland and Wellington Registries were de facto case managing all appeals. Justice Asher considered that this was unsatisfactory. The Chief High Court Judge agreed and said that there should be consistency between all High Court Registries in how the same type of proceedings are dealt with.

Justice Asher recommended that all appeals be case managed because he thought most, if not all, appeals benefit from case management. Such case management would not require a formal standalone conference, but could continue to be by hearing during the appeals list. The Committee agreed with Justice Asher's recommendation. On this basis, rr 7.1 and 7.14 would be amended to clarify that all appeals were to be case managed.

Despite agreeing to the rule change, the members of the Committee came back to the issue raised in relation to agenda item 4 about signposting how the other proceedings are case managed. Mr Moore suggested that there could be signposts following r 7.8 or as part of r 7.8 stating that Part 7 of the High Court Rules would not apply, but that for the specified thing are managed under the specified rules. The Committee agreed that this would be helpful and so a working group of Justice Asher, Mr Gray, Mr Moore, Ms Gwyn and the Clerk will work on what a roadmap would look like. The working group will prepare draft rules and a paper outlining the proposal for consideration at the next meeting.

6. Extending the period for service of bankruptcy notices

Mr Gray explained that the hesitation at the last meeting to extend the period of service of bankruptcy notices was caused by the concern about the consequences including its effect on the doctrine of relation back. However, a working group had looked at this and the doctrine of relation back had been abolished by the Insolvency Act 2006. The working group had concluded that extending the period of service would not have any adverse consequences. Instead, Mr Gray contended, it would reduce the workload of parties involved in a bankruptcy proceeding. On this basis, Mr Gray explained that the working group had decided that the proposed amendments should occur. Mr Beck agreed with the proposal, saying that the proposal was sensible and would reduce wasted time and costs.

Judge Doherty wondered whether there was any reason behind the specific periods for service or whether they were arbitrary. Justice Asher explained that the stated periods were pragmatic choices

and so necessarily arbitrary. The Committee agreed to the extension of the periods of service. On this basis rules would be prepared for concurrence.

Mr Beck then raised the point about clarifying the service of bankruptcy notices. Mr Beck stated that when the Insolvency Act 2006 came into force it removed the Insolvency Rules that specified how bankruptcy notices were to be served. The current High Court Rules did not specify this. Therefore, Mr Beck suggested r 24.9 should be amended to specify that a bankruptcy notice should be served in accordance with the High Court Rules. The Chair enquired whether the failure to specify the methods of service of bankruptcy notices in the High Court Rules was intentional or whether this was merely an oversight.

Mr Mills pointed out that s 17 of the Insolvency Act 2006 stated that the bankruptcy notice had to be served on the person. This pointed to personal service. Mr Mills wondered whether the substituted service provisions in the High Court Rules would be ultra vires in relation to service of bankruptcy notices. The Chief High Court judge agreed that this could be one reading and so caution was required before any rule change was made. It was agreed that the Clerk would write a paper addressing whether substituted service was allowed under the Insolvency Act 2006 or whether it was ultra vires.

7. Initiating bankruptcy and liquidation proceedings by statutory demand

This item was delayed until the next meeting when Mr Beck will present a paper looking at the feasibility and desirability of having a common proceeding for initiating bankruptcy and liquidation proceedings.

8. Application of HCR to statutory orders

The Chair explained that the Ministry of Justice had raised the issue of how statutory orders should be dealt with under the High Court Rules in advance of proposed legislation. The Ministry wanted the Committee's views on the best means to ensure the High Court Rules applied appropriately in relation to specific legislation allowing for orders to be made, such as child harm protection orders. The Chief Justice queried the practicality of such a request without further details about the proposed legislation and the Ministry identifying what rules would be affected.

Justice Asher expressed some discomfort at the idea that the proposed legislation would be considered to be civil rather than criminal. Justice Asher pointed to the Criminal Proceeds (Recovery) Act 2009 as a current example of such legislation. Justice Asher thought that civil rules were not necessarily suited to issuing protection orders or forfeiture orders. Judge Thomas considered that forfeiture orders could be under either a criminal or civil regime, but agreed with Justice Asher that child harm protection orders and public protection orders would significantly restrict people's freedom and should be within a criminal regime rather than a civil regime.

Because most of the statutes providing for the statutory orders were simply on the legislative horizon, the Chief Justice concluded that more details were needed before further time was spent discussing any possible changes to the High Court Rules. The Chair agreed that more details were necessary, but thanked the Ministry for alerting the Committee to this issue. This matter will stay on the agenda and further details will be sought.

9. Separating out summary judgment in the costs schedule

Mr Beck explained that a practitioner had written to the Committee detailing that in the practitioner's opinion summary judgments were not adequately provided for in the costs schedule. After considering this matter as part of a working group, Mr Beck said the costs for summary judgment proceedings were satisfactorily provided for under the current costs schedule. Mr Beck contended that the costs provided for were sufficient and there was flexibility to seek costs under a 2C category if the issue was complex. This should fairly compensate a party if successful.

Judge Doherty enquired whether there was a groundswell for such a change within the profession. Mr Beck responded that there was no such groundswell and this issue was raised by one practitioner. In

general the costs schedule was working well in providing fair compensation. This did not mean that all costs were recovered though and nor should it. The Chief High Court Judge agreed and stated that the costs rules are rough justice but there is sufficient flexibility to provide greater or lesser remuneration where appropriate. After further discussion, the Committee decided that the costs schedule was appropriate and should not be changed.

10. Electronic Bundle Protocol

Justice Asher explained that the Electronic Bundle Protocol had been agreed to at the last meeting. The issue that the Committee had to decide was what form the Electronic Bundle Protocol should take: a protocol or a practice note? The Chief Justice commented that a protocol was normally something agreed between two parties. If what was being sought was an informal guide then it should be a guideline. However, if the Committee wanted the Electronic Bundle Protocol to be more formal then it should be a practice note. The Chief Justice noted that the Supreme Court's Electronic Bundle Protocol was likely to be issued as a practice direction. This was because the Supreme Court wanted parties to use an electronic bundle.

The Chief High Court Judge considered that the there might be a difference between the Supreme Court and the High Court in the desired effect of the Electronic Bundle Protocol. In the Supreme Court and Court of Appeal the use of an electronic bundle was preferred for all proceedings, while in the High Court the aim was to provide a standard protocol for how electronic bundles should be compiled if parties wanted to use them.

To achieve this guidance function, the Chief Justice wondered whether the Electronic Bundle should be a schedule, much like the electronic discovery guidelines in the High Court Rules. The Committee provisionally agreed to this but considered that it was important to ensure that this Protocol and those in the Court of Appeal and Supreme Court were compatible while also making clear that the Protocol, as included as a schedule, was not mandatory. Justice Asher volunteered to liaise with the Court of Appeal and Supreme Court and prepare possible amendments to the Rules to make the Protocol a schedule.

11. Methods of service

The Chair began by discussing Mr Chapman's email about methods of service. Mr Chapman considered that unrepresented parties should be able to be served by methods other than personal service. Presently the High Court Rules did not allow for this unless the consent was in writing. Mr Chapman recommended that r 6.1(d) should be amended to remove the restriction of having to be represented before the private mail boxes, emails and faxes were able to be used as methods of service. The Committee agreed that this was appropriate and so a set of rules would be prepared by Mr Moore amending rr 6.1(d) and 5.44 to allow for unrepresented litigants to be served using alternative methods if the unrepresented party specified a particular method.

12. Judgment by default in overseas service

The Chair stated that Mr Fulton had suggested adding an additional test that a party accepts jurisdiction before default judgment is given in proceedings involving overseas service. The Chair explained that the current rules relating to overseas service had been crafted by an expert subcommittee and had been adopted in Australia. Therefore the Chair was hesitant to interfere with them unless there was an issue. Mr Mills considered that the concern about enforcement of a default judgment was a secondary issue to jurisdiction and so the proposed change was conflating the two issues and no change was warranted. The Committee agreed and so decided that the rules relating to default judgment in overseas service proceedings would not be altered.

13. Whiteboard discussion

Mr Gray asked whether there were any additional ideas, other than those canvassed already, about how to make civil litigation quicker and more efficient. Mr Gray noted that the New Zealand Bar Associate conference would discuss this as well. In particular, Mr Gray wondered whether the Committee had captured all efficiency gains through real time transcription in that written briefs no longer saved time.

The Chair considered that a possible way of improving efficiency was by adopting the New South Wales approach of requiring written briefs prior to discovery. Further, the Chair stated that statements of defence were often opaque and specifics were only provided after discovery. While the rules required specifics, these requirements were often not enforced. Therefore, Justice Fogarty contended that the judiciary needed to enforce the rules more stringently in order to capture some of the efficiency gains that the rules provided for. The Chief High Court Judge agreed but noted that opaque statements of defence often followed from opaque statements of claim, therefore the judiciary should focus on both. Mr Gray concurred saying that many statements of claim now have multiple facts in one paragraph contrary to the High Court Rules and this makes it difficult to respond to each claim.

Judge Thomas said a similar problem existed in relation to the District Court Rules where pleadings are often not defined and so a hearing becomes more a counselling session rather than determination of the issues. However, Judge Thomas thought that the proposed reforms of the District Court Rules should help alleviate this problem.

Justice Asher said that there seemed to be a fundamental error in how some practitioners wrote their pleadings. Some practitioners set out all the background facts in the statement of claims and then later referred to the specific facts relied on. This was unnecessary and unsatisfactory. However, this was not a problem with the High Court Rules but rather with the practice of practitioners. Mr Gray agreed and said that reform of the rules was not necessary. Rather educating the profession and tightening up the enforcement of rules was important to make civil litigation quicker and less expensive.

The meeting was closed at 1 pm.