THE RULES COMMITTEE
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12 February 2013
Minutes/01/13

Circular No. 10 of 2013

Minutes of meeting held on 11 February 2013

The meeting called by Agenda/01/13 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 11 February 2013 at 9:45 am.

1. Preliminary

In Attendance

Rt Hon Dame Sian Elias, GNZM, Chief Justice of New Zealand
Hon Justice Fogarty (the Chair)
Hon Justice Winkelmann, Chief High Court Judge
Judge Susan Thomas
Mr Frank McLaughlin, Deputy Secretary, Ministry of Justice
Ms Phoebe Dengate-Thrush, Private Secretary to the Attorney-General
Mr Bruce Gray QC, New Zealand Law Society representative
Mr Stephen Mills QC, New Zealand Bar Association representative
Mr Andrew Beck, New Zealand Law Society representative
Mr Kieron McCarron, Judicial Administrator to the Chief Justice
Bill Moore, Acting Chief Parliamentary Counsel, Parliamentary Counsel Office
Ms Paula Tesoriero, General Manager Higher Courts, Ministry of Justice

Ms Rita Lowe, Secretary to the Rules Committee
Mr Thomas Cleary, Clerk to the Rules Committee

Apologies

Hon Christopher Finlayson, Attorney-General
Hon Justice Asher
Judge Doogue, Chief District Court Judge
Judge Doherty
Judge Gibson
Mr Brendan Brown QC
Ms Cheryl Gwyn, Crown Law

Confirmation of minutes

The minutes of 3 December 2012 were confirmed.

Matters arising

Justice Fogarty noted the apologies and welcomed Mr Frank McLaughlin to the meeting.

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

The Chair mentioned that there was some dissatisfaction with the draft rules relating to registry venue. Some had questioned whether the draft rules were addressing the primary concern raised by the Attorney-General relating to efficiently using the court's resources and ensuring that people had access to the justice system. Mr Bruce Gray QC commented that if the draft rules were implemented, this could possibly lead to parties arguing about what was the correct venue to file at. This would not be desirable.

The Chief Justice wondered whether focussing on the correct geographical location to file was outdated as it was likely that with advances in technology how people file documents in the future could radically change. Because of this the Chief Justice thought that tinkering with these rules was unnecessary, especially because the new draft rules did not address any significant problem. The members of the Committee were in general agreement and so it was resolved that the draft rules would not be adopted.

The real issue, the Chair contended, was not where to file but rather where the hearing should be. In determining this, the key question was whether or not the court should have the power to require parties to change to a different venue. Courts in the United Kingdom have this power. The Chief Justice wondered whether providing courts with the power to direct a venue change was necessary unless court resources were being wasted. The Chair agreed, but said that the venue issue was not all about resources but also with ensuring that cases were heard at appropriate venues. To clarify whether there was any problem at the moment, Mr Frank McLaughlin volunteered to have the Ministry of Justice look at whether there was surplus capacity at some courts and whether there was excess demand at others and report back prior to the next meeting.

The Committee also agreed to form a working group comprising the Chair, Mr Stephen Mills QC, and Mr Bill Moore to develop a consultation paper in relation to different jurisdictions' approaches to changing vanues.

3. District Courts Rules 2009 Reform

Judge Thomas reported that a draft set of rules had been produced. The subcommittee of Judges had met and were going to meet with the members of the profession to discuss the draft rules. A draft set of the rules would be circulated around the Committee for comment.

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

The Chair began the discussion by explaining that the new case management regime had introduced principles like proportionality in the High Court Rules. This allows the High Court to tailor case management to the issue in dispute. The United Kingdom and some states in Australia have also introduced these higher level principles into the Rules. Therefore the Chair thought it would be useful to continue the discussion about whether New Zealand should also adopt these broad guiding principles.

The Chief Justice questioned whether there was any need to change the objectives of the rules and introduce these vague concepts. The Chief Justice thought that this could create more scope for parties to argue and would require judges to make assessments of how to apply the rules in accordance with the overriding objectives. Mr Stephen Mills QC thought it was not always helpful to have high-sounding rules that were not capable of practical application.

The Chair clarified that changing the objectives was not intended to allow parties to challenge the application of Rules, but rather provide a lens to interpret the Rules. However, further thought needed to happen about whether there was a need for this change and, if so, what this change should look like. The Chair noted that Mr Brown QC had views on this and the matter should be discussed when he is present at a later meeting.

5. Cultural Property (Protection in Armed Conflict) Act – Associated Rules

The Committee agreed that the consequential amendments be made to the High Court Rules and District Court Rules.

However, some members wondered why the Rules Committee had to always deal with these minor consequential amendments to the High Court Rules. The Chief Justice suggested that one solution could be a default position to allow these minor consequential amendments. The Chief High Court Judge said that r 19.5 gave the court discretion to allow applications to be made by originating application. However, this would require an application to be made to the court.

The Chair said that having the Committee approve all rules changes was the best way of proceeding. The deeper issue was whether the Committee should maintain the distinction

between originating application and other forms of applications. This is a broader issue that might require further consideration but was not pressing.

6. Developing a Protocol for Electronic Files

The Chair updated the Committee on the progress of the draft Electronic Bundle Protocol. This protocol would not require a rules change as it was simply a guideline. The Chair stated that it was important to ensure that the both the Supreme Court and the Court of Appeal were in step with this protocol as it would be optimal for the same electronic bundle to be used in the other courts. Mr Gray commented that having a consistent protocol would be best, but that processes would need to be developed to remove documents which had not become part of the record from the electronic bundle. This would need to be discussed further. Therefore Asher J, Mr Gray and Mr McLaughlin would meet with members of the Supreme Court and Court of Appeal to discuss this further.

Mr Andrew Beck raised a concern about why cl 2.5 had a presumption that an electronic bundle would be used based on the numbers of pages involved. As this was a voluntary code, Mr Beck argued that a presumption is wrong. The Chief High Court Judge clarified that the point of containing a presumption in a voluntary code is to encourage parties to think about and to use the electronic bundle in certain cases. Mr Gray commented that the working group had considered a presumption and also the point where the presumption arose and had decided that this was appropriate.

The Chief High Court Judge concluded the discussion by expressing the view that the judiciary are looking forward to the introduction of the Electronic Bundle Protocol as this will provide for easier way of accessing and viewing of the evidence. The working group will release the final version of the Electronic Bundle Protocol and this will be circulated around the Committee. The Chief Justice suggested that this be issued as a practice note.

7. Review of Unless Rules and Orders

The Chair began the discussion by mentioning that since the last meeting little progress had occurred on reviewing the principles behind the existence of unless rules and deemed abandonment rules. Further work needed to be done and that a paper would be written on this.

Mr Gray was of the opinion that this review needed to be done in a broader context of how to make litigation quicker and more cost efficient. Mr Gray suggested that at present many pleadings were prolix and do not capture the issues. Because discovery is controlled by pleadings, this often meant that discovery was too broad. Further, briefs of evidence often became narratives rather than directed at the central issues. The two central questions Mr Gray raised were whether judges will use tools like unless orders and deemed abandonment rules to achieve compliance and whether these are tools are effective?

The Chief Justice said that judge-led case management has focussed on judges having powerful tools, but that perhaps something is flawed in the current system and so they need to be rethought. Mr Beck raised the concern that unless rules and deemed

abandonment rules, as opposed to unless orders, were wrong in principle as they did not permit the courts to shape a response but mandated one. The Chief Justice agreed that these concerns were legitimate and suggested that the Committee indicate its concern with unless rules or deemed abandonment rules.

Because the main deemed abandonment provision was in the Court of Appeal (Civil) Rules, the Committee decided that the topic should be discussed next meeting with representatives of the Court of Appeal present. Prior to this meeting Mr Gray, assisted by the Clerk, will write a paper on deemed abandonment rules and look at the international approaches to these rules.

8. Costs Rules

Mr Mills summarised the concern Mr Harrison had raised with the Committee. This was that on summary judgment, the notice of opposition is essentially the equivalent of the statement of defence, but it is treated as an interlocutory matter and so lower costs are able to be awarded. Mr Beck suggested that one way of dealing with this is to treat summary judgment as a separate matter from interlocutory matters for costs purposes.

The Chief Justice commented that this was appropriate as applications for summary judgments should be discouraged. This is based on the District Court's findings that very few applications for summary judgement are successful.

Mr Beck queried whether summary judgements as a class are different to interlocutory applications. The Chair commented that strike out applications can be similar to applications for summary judgement, although, as Mr Mills and Mr Gray pointed out, costs are higher for summary judgement.

The Committee resolved to begin to look at treating costs for summary judgments separately. Mr Beck, Mr Brown and a member from the Bar Association Council will write a paper on whether applications for summary judgment should be treated differently from interlocutory applications in relation to costs. This paper will be circulated to the Committee prior to the next meeting.

9. Proposed amendments to rules relating to applications for grant of probate

The Chair began the discussion by saying that, internationally, there was clearly a mixed practice of filing applications for grant of probate. Some countries or states require applications to be made in person while others permit applications to be made by post.

The Chief Justice wondered whether the proposed rules focus on the correct registry was unnecessary. The Chief Justice commented that she did not see the problem with applicants going to the nearest registry and having the will scanned and sent to the centre that would deal with granting probate.

Ms Paula Tesoriero said that this suggestion about keeping electronic copies of wills would be discussed by the registrars when they met to discuss the upcoming changes. Indeed

keeping an electronic copy could be a good way of mitigating the effects of any natural disaster. Ms Tesoriero also clarified that under the changes people will still be able to go in person to a registry and hand in the application. The Chief Justice was delighted to hear that lay applicants would not be turned away.

Mr McLaughlin suggested that the proposed rules could allow for filing at any registry or sending it to Wellington. Ms Tesoriero responded that this could lead to inconsistent handling of probate applications. The aim of centralising applications for grant of probate is to lift the quality of service and ensure consistent handling.

The Chief High Court Judge commented that another solution would be to continue to allow filing at the nearest High Court registry. After receiving the application, registry staff could then scan the will and this could be sent to Wellington. This option would provide for professional receipt. The Chief Justice voiced the opinion that filing by paper could soon be outdated and the Ministry and the Committee should begin to think about permitting scanned documents to be used. Ms Tesoriero had no issue with permitting scanning the copy and sending this on. However, the systems were not in place.

The Chief High Court Judge also raised questions about why the centralisation was going to happen in Wellington and not Auckland where the majority of applications would come from. The Chief High Court Judge said that Auckland was known to have good processes in place for dealing with probate. Ms Tesoriero replied that registry staff would talk to each other to adopt the best possible processes for handling probate requests and that Wellington already received 40% of probate applications. Therefore it made sense to centralise in Wellington.

Following the discussion, the Committee agreed to the rule change.

10. Continuation of Whiteboard Discussion

Mr Gray suggested that two areas the Committee look at where: first, what centralised filing should look like, and, secondly, how to make civil litigation quicker and more cost effective?

In relation to the second question, The Chair pointed out that, as Mr Brendan Brown QC has said, part of the problem is not enforcing the High Court Rules on statements of defence. This has lead to statements of defence being unhelpful as being full of bland denials. Mr Gray said that statements of defence were often determined by statements of claim and so the starting point should be on how to ensure statements of claim achieved their objective.

Mr Mills pointed out that the High Court Rules are clear and the problem is not in the rules but rather that people do not follow the rules. Formality is necessary but formality needs to be backed up for it to be observed.

Mr Mills thought that the new issues conference was a forward step in that it allowed the proceedings to be narrowed down. Mr Gray agreed, but said that if issues are not defined in pleadings then it is unclear what the courts will do. Further, parties should focus in on the contentious issues and the facts that are at issue. This will reduce the time and costs of the

proceedings. One way to do this, the Chief Justice suggested, would be to allow judges to step in earlier to help narrow or refine the issues, or, alternatively, striking out documents that do not comply with the Rules. The Chief High Court Judge noted that the new case management regime is intended to give judges these powers. Judges can step in and focus the proceedings earlier. They can also strike out parts or the whole of written briefs of evidence if they do not comply with the Rules. Mr Gray suggested that this approach was better than automatically applying sanctions for failure to comply with the Rules.

The Chief High Court Judge said that these were not necessarily a problem with the rules but rather with how the profession engages with the rules. The Chair agreed and said that rules are just printed words, and how judges apply and enforce the rules is critical. Therefore the discussion needs to be broadened from just focussing on rules to attitudes around the rules.

The Committee decided that this topic should be kept on the agenda for the next meeting where it can be continued.

11. Other matters

The Chair mentioned that the Ministry of Justice was supposed to have provided the consequential amendments to the Supreme Court Rules 2004 and Court of Appeal (Criminal) Rules 2001 arising from the Criminal Procedures Act 2011. However, the Ministry had not been able to do so. Because it was important to get the amendments reviewed and potentially passed by July 2013 then the draft will be circulated among the members and changes made prior to the next Rules Committee meeting on 15 April 2013.

Meeting closed at 12:55 pm.