THE RULES COMMITTEE
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12 June 2012
Minutes/03/12

Circular No. 47 of 2012

Minutes of meeting held on 11 June 2012

The meeting called by Agenda/03/12 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 11 June 2012 at 9:45 am.

1. Preliminary

In Attendance

Hon Justice Fogarty (the Chair)
Hon Christopher Finlayson, Attorney-General
Hon Justice Winkelmann
Judge Doherty
Judge Gibson
Judge S Thomas
Mr Andrew Beck, New Zealand Law Society representative
Mr Brendan Brown QC
Mr Rajesh Chhana, Ministry of Justice
Ms Phoebe Dengate-Thrush, Private Secretary to the Attorney-General
Mr Bruce Gray QC, New Zealand Law Society representative
Mr Ian Jamieson, Parliamentary Counsel Office
Mr Kieron McCarron, Judicial Administrator to the Chief Justice

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 Asher
Judge Doogue, Chief District Court Judge
Ms Cheryl Gwyn, Acting Solicitor-General
Dr Don Mathieson QC, Special Parliamentary Counsel, Parliamentary Counsel Office
Mr Stephen Mills QC, New Zealand Bar Association representative

Matters arising

Justice Fogarty welcomed Judge Brooke Gibson to the Committee.

Confirmation of minutes

The minutes of 2 April were confirmed.

2. Proposal to Review Rules Relating to Registry Venue: High Court Rules 5.1 and 10.1 (Agenda item 2)

The Attorney-General introduced this topic, noting that his motivation stemmed from a desire to reduce delays in proceedings and that liberalising the rules governing change of venue may provide a means to do this. He observed that while the Auckland High Court is often backlogged there are nonetheless vacant courtrooms and judges available in different centres. He believed that even though any change to the existing rules needs to be carefully thought through, it would make economic and administrative sense to expedite hearings by moving them to another venue. The Attorney-General noted that issues of justice, speed and expense should be primary determinants in judging whether there should be a change of venue.

Mr Gray QC stated that this was an important issue as it related to questions of open justice and the ability of a hearing to take place in the community in which the grounds giving rise to the case occurred. He thought that court efficiency could be a factor which is relevant to a change of venue, but that it would be a more appropriate factor for short to medium length trials rather than longer ones.

The Chief High Court Judge noted that she has previously raised the subject of whether the High Court should regularly sit in 17 different venues. She stated her belief that the circuit model is a less efficient way to work and one that had been developed originally as a response to very different conditions and times. Although Winkelmann J thought that family court and appellate work should remain heard in the community, she considered that the way in which the civil workload is dealt with could be better organised.

Mr Chhana raised the issue of the High Court Rules being drafted in such a way so as to increase party awareness of the possibility of changing venue. He said that Registry and the parties could meet early on to discuss whether there were earlier dates available in different venues before scheduling took place.

Judge Doherty noted that the District Court Rules give a wide discretion to Registrars and Judges as to where hearings can be more conveniently heard, and that there have been several cases in a civil context where disputes have been moved without party consent. The Judge commented that the preference in this jurisdiction was for Registrars to take care of the place of venue. In respect of this, the Attorney-General remarked that he would not want an inevitable rise of satellite litigation. Justice Fogarty highlighted that in the High Court judicial officers were normally responsible for such decisions, and that parties have the ability to appeal as of right to the Court of Appeal over judicial administrative decisions. The Attorney-General too warned of an increase in satellite litigation as a result of the latter point and noted that legislative change may be necessary to avoid applications or appeals in response to change of venue decisions.

Justice Fogarty stated his view that it is preferable to keep as much flexibility in the rules as possible. He favoured a rule which listed the criteria to which the court must have regard before ordering a change of venue. The Judge gave r 30.3(2) of the CPR (UK) as a model for such a rule. The Judge cited a recent example of a case he had presided over where the proceedings were filed in Invercargill and the case managed in Auckland, with, however, all the parties in agreement that it should be heard in Queenstown if it went to trial. He also cited the example of the recent reforms in England with the establishment of the NCBC as an alternatively means of administratively managing venue allocations. Justice Fogarty then noted the Chief Justice's interest in this topic and asked that the Committee not make any decisions today before her views are sought. He suggested that a group be set up to discuss the topic in depth and bring back proposals to the Committee at its next meeting.

Mr Brown QC agreed with this idea and applauded the Attorney-General's objectives and believed that his ideas were logical and worthwhile. Mr Brown thought that there were a number of issues that need to be considered in depth including the need to incentivise the profession, what costs parties will be entitled to recover, the rules governing residency of company defendants, the fee structure of proceedings, and when decisions regarding venue should be made.

It was agreed that a group consisting of the Attorney-General, Messrs Gray and Brown, Justices Winklemann, Asher, and Fogarty, the Chief Justice (or Mr McCarron as her representative) and Mr Chhana are to meet in Auckland late June to discuss the issue further. In the meantime, members from the group and other interested Committee members are to send to each other think piece papers in preparation for the meeting.

3. District Court Rules Review (Agenda item 3)

Judge Susan Thomas reported back to the Committee on progress made on the review of the DCR. Judge Thomas has been working on the review with a sub-committee consisting of

herself and Judges Paul Kellar and Brooke Gibson. She noted that they have taken various steps, including seeking input from District Court Judges at their recent conference as well as holding meetings throughout New Zealand to discuss the Rules with the profession. Regarding the first step, Judge Thomas observed that most judges were satisfied with the different types of trial available but expressed some concern with the Forms and the lack of judicial involvement. With the meetings, Judge Thomas stated that five had been held at the main centres (Dunedin, Christchurch, Wellington, Hamilton and Auckland) and that they had been very constructive and interesting. The Wellington meeting in particular was very well-attended, with many worthwhile points and suggestions being raised. The main problems that emerged from the meetings were that the DCR forms did not assist in clarifying the issues in complex proceedings and that practitioners would welcome the option to return to pleadings where both parties are represented. Another point made was that the profession would also welcome early judicial assistance, particularly in respect of case management (the Rules are designed to keep cases away from judges by encouraging early settlement). However, the recent amendments to the Rules were very welcomed by the profession and most practitioners also felt that JSCs are a success.

Judge Thomas then raised the importance of ensuring that qualitative research is undertaken on how the DCR function in practice, especially in respect of litigants in person. For example, although there are current statistics that show that 64% of notices of claim are filed by self-represented litigants, this number may include debt collection agencies. Without further and better information as to who uses the Rules, how they do so and how the Rules function, a proper assessment of the lacunae, problems and benefits of the current Rules cannot be made. The sub-committee had begun the process by writing a preliminary draft survey, which admittedly needed some correction and refinement. The Judge stated that as the Ministry of Justice could not commit to assisting with the research, the Otago University's Legal Issues Centre had been approached.

The Committee, lead by comments from the Chief High Court Judge, expressed some reservation about the research being undertaken by the Legal Issues Centre and believed it would be better done by the Ministry. The Attorney-General restated the importance of gathering data to gain knowledge of how civil proceedings work in the District Court, especially given the move to increase the jurisdiction of the District Court. Mr Chhana is to look into whether the Ministry can do the required research. Justice Fogarty also suggested that Judge Thomas be in contact the Law Commission. The Chief High Court Judge also suggested that the DCR sub-committee may like to consider the international research on comparable jurisdictions. It was agreed that the District Court Civil Committee is to meet with the Ministry and bring back preliminary proposals to the Committee at their August meeting.

Lastly, Judge Thomas raised a concern expressed by the profession about how difficult it now is for young practitioners to gain courtroom experience. She noted that part of this problem was caused by the abolishment of civil lists in the District Court. The Committee agreed that this was a significant issue, albeit one that was probably outside its remit. Justice Winkelmann remarked that the lack of opportunities for young lawyers starting out is a structural issue and one that the legal profession needs to face.

The Chair thanked Judges Doherty, Gibson and Thomas for their time on this issue.

4. Criminal Procedure Rules (Agenda item 4)

The Chair welcomed Justice Ronald Young, Chair of the CPRAM sub-committee, to the meeting to speak on the consultation round of the draft Criminal Procedure Rules (CPR).

Justice Young introduced this topic by stating that he would concentrate on the broad issues identified in the Clerk's summary of submissions.

The first and most prevalent issue raised by the submissions was that of timeframes, and although the dates stipulated in the draft CPR were the result of much discussion by the sub-committee, the Judge remarked that the Criminal Procedure Act itself provides for a lot of the required process. The timeframe that provoked the most concern was the time of five working days after first appearance until a defendant's second appearance. This timeframe was controversial for two reasons: firstly, practitioners were concerned as to whether disclosure would have taken place, and secondly, whether applications for Legal Aid would have been granted. Justice Young agreed that this timeframe was too narrow and he recommended allowing category 1 and 2 proceedings as having a 10 working day period until second appearance and category 3 and 4 as having 15 working days.

On this issue Judge Doherty agreed that 10 working days should be the minimum allowed, while Judge Thomas thought that it was appropriate to split the timeframes according to whether they were summary or trial matters. Rule 1.7 was discussed but Young J believed that this rule should be invoked as an exception rather than the norm, and that it was preferable to have realistic timeframes set down.

Another timeframe that submissions focussed on were the limitations placed on written and oral applications on appeal (e.g. r 8.9). Justice Young stated that these simply mirrored the limitations in the Court of Appeal rules and he believed it was useful to prescribe some type of time limit.

Justice Fogarty queried whether the rules should require full written submissions for appeals (r 8.15), and that this requirement seemed to duplicate workload and was unduly burdensome for counsel. Young J concurred that "full" could be deleted and the rule rephrased to require that all grounds of appeal are included.

Justice Young moved on to discuss criticism of the level of prescription in the draft CPR. He noted that the CPA is very uneven in this respect and that it was CPRAM's aim in the Rules to identify situations where prescription was useful but also allow for situations where there should be more judicial flexibility. The Judge lamented that the CPA had precluded the ability to draft a set of comprehensive criminal procedure rules, but stated that the sub-committee had endeavoured to create the most flexible rules possible within its limited framework.

His Honour then discussed concerns that the CPR will impose additional administrative burden and costs on parties, especially in regards to summary crime. Again, the sub-committee had to work within the parameters and requirements set out by the Act. He stated that the CPA and the Rules essentially substitute status hearings with more formal case management ones and that he personally did not think the Rules were overly bureaucratic. Judge Doherty observed that the Rules appear to simply formalise what already happens at a status hearing. Winklemann J believed that it would be instructive to provide a simplified CMM form.

The Committee raised a concern over whether all applications would need to comply with the requirements set out in subpart 2 of Part 4. Judge Doherty suggested that it may be preferably to have a presumptive list of situations where applications could be made orally, unless otherwise directed. Justice Young and Judge Thomas agreed that this was a preferable approach, with Young J asking Judge Doherty for help in compiling such a list. Justice Fogarty believed that r 1.5(2) could be flagged in such a way that the overriding ability of judges to make directions was highlighted.

Mr Gray raised the issue that the Rules are contingent on disclosure and yet there is an absence of almost any sanction for non-compliance. Mr Gray also queried whether disclosure can sensibly be made by the defence given that their resources are so limited. Young J replied that while sanctions were catered for in the CPA (e.g. through an increase in sentences, bail conditions, or costs/penalties), in respect to r 4.1 the process was contingent on the Police meeting disclosure requirements. He believed it was best to leave discretion with the Judges as how to best deal with non-compliance. Mr Jamieson noted that the issue of some sanctions may be ultra vires to the Rules anyway. The Chief High Court Judge, the Chair and Justice Young all expressed concern that the changes to Legal Aid will detrimentally effect defence lawyers but believed that Judges are aware of these changes and the burden placed on defence counsel.

Justice Young also noted that there were several inconsistencies with the draft Rules that need to be tidied up and that once a new draft has been settled, the current Practice Directions will be reviewed. He stated that the sub-committee is due to meet on Tuesday 19 June and will go through the draft Rules thoroughly then, with a view to having a final draft ready by the full Committee's meeting in August. The issue of whether there will be workshops on the Rules was raised, and Young J noted that the services of the sub-committee had already been offered to the Law Society.

Justice Fogarty thanked Justice Young for coming and for his and the other sub-committee member's work on the Rules.

5. Protocol for Electronic Case Files (Agenda item 5)

The Chair explained the background behind this topic and that this was a judicial initiative to be developed between Bench and Bar. He asked whether the Committee had anything to add in absence of Asher J.

Justice Winkelmann believed that the group dealing with this topic should work together with the CPRAM sub-committee. Mr Gray agreed with this and noted that there are some very document intensive criminal matters and that courts should have a consistent approach in the civil and criminal jurisdictions. He believed that there were other issues to consider including software ones (e.g. building appropriate firewalls to allow private notation of documents in court) and evidential concerns (e.g. distinguishing original documents from copies).

The Committee agreed that it was a good idea to appoint a criminal barrister to the group. Asher J will report back to the Committee on progress at the next meeting.

6. Discovery (Agenda item 6)

Andrew Beck spoke to the Committee about his concern that r 8.4 did not allow an exception to initial disclosure in cases where there has already been statutory disclosure, such as under the Tax Administration Act or Official Information Act. At present r 8.4 is drafted so as to only exempt parties from initial disclosure if it is impossible or impracticable and certification requirements are met (r 8.4(2)).

There was some discussion on this issue, with several members noting the difference between "initial disclosure" of principal documents and statutory disclosure that may have occurred earlier. As the former requires parties to provide principal documents that will be relied upon in trial, it is a useful method to get parties to confront the issues early on even if disclosure (through the passing on of a large collection of documents) has already taken place.

Justice Fogarty considered that if the rule is to be amended it should be confined narrowly to cases where statutory disclosure has taken place. Judge Doherty noted that r 8.4 appears inconsistently drafted in that subclause (3) implies that parties can contract out of initial disclosure whereas subclause (2) does not allow this. A suggested solution to this concern was an amendment whereby parties would not have to provide initial disclosure in instances where a statutory exchange had occurred but rather serve a letter listing principal the documents among those that had already been exchanged.

It was decided that Messrs Gray, Brown and Beck are to work together to come up with a draft clause for the Committee's consideration.

The impact of the new High Court Rules on discovery on the District Court was also discussed. Judge Thomas noted that the process in the District Court was sufficiently monitored and measured and that judicial discretion meant that electronic disclosure obligations were usually dispensed with.

7. Case Management (Agenda item 7)

The identification by the Ministry of Justice of several consequential amendments to the case management rules was discussed. It was agreed that Dr Mathieson QC should consider the amendments suggested so far after his return to work and that another comprehensive check for inconsistencies in the HCR needs to be made urgently by Dr Mathieson and Mr Jamieson. Any necessary changes identified can then be integrated and concurrence redone. The Secretary is to report back to the Chair on finalising the Rules.

There was then discussion about a concern of Associate Judge Faire regarding fees and the timing of the close of pleadings and setting down date. Mr Brown noted that this was a substantive issue and the Chair agreed that the Committee needed to consider the implications of timing in relation to fees. Mr Chhana agreed to circulate a copy of the fees regulations to the Committee for their consideration.

The question of how to ensure a more thorough and timely review of draft rules for any inconsistencies was raised. Mr Chhana noted that the Rules Committee is not set up for this type of technical due diligence as it is a time consuming exercise. He explained that for other legislation the usual practice is for there to be a dedicated person in the Ministry tasked with working with Parliamentary Counsel Office on legislative drafts. He suggested appointing such a person who could liaise with Dr Mathieson and produce a draft paper recommending any necessary consequential amendments earlier on. The Chair agreed that it would be useful to have such a technical advisor and that it would provide a more timely means of checking draft rules.

Mr Chhana also proposed writing a memorandum on the steps required as part of the Regulatory Impact Analysis procedure, which he could table at the next Committee meeting. He believed that it may be useful to structure Committee discussions according to Regulatory Impact Statement requirements.

The Chair thanked Mr Chhana for both his suggestions, which he believed were useful and valuable.

The possibility of holding workshops on the new case management rules was also raised by the Chair. It was agreed that feedback on the discovery regime could also be sought at the same time. Messrs Gray, Brown and Beck confirmed their availability during August to help with such workshops. Winkelmann J hoped that such workshops would be organised by the Law Society.

Meeting finished at 12.40