The Rules Committee

PO Box 60
Auckland

Telephone: (09) 970 9584
Facsimile: (04) 494 9701
Email: rulescommittee@justice.govt.nz
Website: www.courtsofnz.govt.nz

13 February 2017
Minutes 01/17

Circular 8 of 2017

Minutes of meeting held on 13 February 2017

The meeting called by Agenda 01/17 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 13 February 2017.

1. Preliminary

In Attendance

Rt Hon Dame Sian Elias GNZM, Chief Justice of New Zealand
Hon Justice Gilbert, Chair
Hon Justice Venning, Chief High Court Judge
Hon Justice Asher
Hon Justice Courtney
Judge Kellar
Ms Jessica Gorman, representative for the Solicitor General
Mr Rajesh Chhana, Deputy Secretary of Policy, Ministry of Justice
Mr Bruce Gray QC, New Zealand Law Society representative
Mr Andrew Beck, New Zealand Law Society representative
Mr Andrew Barker, New Zealand Bar Association representative
Ms Laura O'Gorman
Ms Suzanne Giacometti, Parliamentary Counsel Office
Mr Kieron McCarron, Chief Advisor Legal and Policy, Office of the Chief Justice

Ms Alice Orsman, Secretary to the Rules Committee
Mr Daniel McGivern, Clerk to the Rules Committee

Apologies

Hon Christopher Finlayson QC, Attorney-General
Judge Doogue, Chief District Court Judge
Judge Gibson

Confirmation of minutes

The minutes of 28 November 2016 were confirmed.

Issue raised regarding Access to Court Documents Rules

Courtney J raised an issue concerning the scope of the draft Senior Courts (Access to Court Documents) Rules 2016 in relation to documents that have been transferred to Archives NZ. Courtney J suggested that r 3(3) of those rules be modified by included the word "back" in between the words "New Zealand" and "to a court". It was Courtney J's view that, although the draft of the Rules do currently encompass documents that have been transferred to Archives NZ and then transferred back to a court, this was not sufficiently clear from the wording. Ms Giacometti noted that there are two types of documents captured by r 3(3): documents originating in Archives NZ which are then transferred to a court, and documents which have been transferred from a court to Archives NZ and then back to a court.

Mr McCarron noted that in most circumstances where a document is transferred from a court to Archives NZ there is a condition that, in the event a request is made to Archives NZ, the document is to be sent back to the court. He took the view that where there is a request to Archives NZ a condition is that the document goes back to the court for consideration. Courtney J did not think that was the issue, however. Ms Giacometti suggested splitting the rule out so that it expressly covers both types of documents referred to above.

The Chair questioned what stage the rules were at. Ms Giacometti confirmed that the rules are coming up for concurrence soon.

Action point: Ms Giacometti to reword r 3(3) of the Access Rules so that they explicitly capture both types of documents.

2. Evidence given by subpoenaed witnesses

The Committee discussed Ms O'Gorman's newly formulated draft rule 9.7A. Under this draft, a party who has been unable to obtain a written brief for a witness must notify the other parties of the name of the witness and the grounds relied on for giving the evidence orally, having regard to three discretionary criteria: (a) whether reasonable efforts have been made to comply with the brief regime; (b) the extent of potential prejudice; and (c) whether admission is required in the interests of justice. Importantly, the evidence can only be given by consent or with leave of the court, subject to any terms or conditions the court thinks appropriate.

Ms O'Gorman indicated that the new wording maintains a discretionary structure, reflecting the case law on the matter. The discretionary criteria are listed in sub-para 3 of the proposed r 9.7A. The other change made is in sub-para 1 which now articulates that justification must be given at the initial step of notifying the other party of an intention to proceed to call the witness. Not only must the name be given, but also the grounds relied on for giving the evidence orally. There has been some discussion on how far this requirement should go. The current draft recognises that the extent of disclosure will vary between cases. Ms O'Gorman suggested that some slight tinkering will improve the wording. Mr Gray QC questioned the necessity of the word "still" in sub-para 1.

Mr Gray QC noted that sub-para 3 acutely captures the tension between procedural fairness of reasonable disclosure and the interests of justice in having relevant evidence before the court. The discretionary criteria could be left to case law development.

Mr Beck was satisfied with the draft as a solution to the problem. He agreed with Ms O'Gorman that it satisfactorily requires the explanation to be given without being too specific. It is sufficient to allow a court to be able to make a decision to allow or not to allow the evidence to be adduced.

Asher J accepted that requiring a summary of the evidence to be disclosed under (1) would be too high a hurdle to cross, but put to the Committee the possibility of adding the subject matter of the evidence as one of the facts to be disclosed. Ms O'Gorman noted that the way the draft deals with this is that it is expressly referred to in 3(b), so the admission of the evidence must be justified in accordance with the discretionary factors, one of which includes whether the nature of the evidence has been disclosed in advance. Ms O'Gorman emphasised that the rules should not be too prescriptive in terms of what must be disclosed as this will vary between cases. She agreed, however, that it needs to be as close as possible to an unsigned brief of what the evidence is likely to be. In some cases, however, the caller of the evidence will not know much at all, such as in cases of hostile witnesses.

Courtney J questioned whether the disclosed facts in sub-para (1) could be extended to include the witness's connection to the case – something more than just the name, at least. Mr Beck said he liked the way that Ms O'Gorman kept it to the grounds in sub-para (3). The rule requires the party to justify why leave should be granted to adduce the evidence. In justifying this, any such explanation may need to include the witness's connection to the case. The key, Mr Beck said, was not to be overly prescriptive in (1). Courtney J observed that this is related to the relevance of the evidence. Mr Gray QC noted that one of the things the Committee has debated is that, in some cases, it is not necessarily what you expect the witness to say that has to be disclosed, but rather what part of the pleading you expect the witness's evidence to address; this can be left for the judge in each particular case, who will be guided by the discretionary criteria in (3).

The Chief Justice expressed reluctance about this rule because it is an erosion of the ability of parties to call evidence that they think is important. The Chief Justice's indicated preference would be to reformulate (2) so that evidence can be given orally either by consent or subject to any terms or conditions the court thinks appropriate. The Chief Justice said that leaving the question of whether evidence should be adduced *at all*, except in exceptional circumstances, is a wrong steer. If the rule were to go in this direction, it would indicate that evidence cannot be called unless the judge makes an order, which is too firm. The Chief Justice would limit the judge's power to merely imposing terms or conditions to admission.

Mr Gray QC questioned whether the point the Chief Justice was making was that the judge should be directed to the possibility of issuing terms or conditions in order to perhaps weigh the judge in favour of granting leave. The Chief Justice indicated that her problem was with 2(b), because there is a prohibition on the evidence being called without the leave of the judge.

Asher J noted that the previous draft, considered at the last meeting, actually adopted the approach preferred by the Chief Justice. The Chief Justice preferred this draft, in particular the presumption that evidence is admissible "unless the court directs otherwise". The Chief Justice noted that this would be a difficult issue to appeal for a party if the evidence was prohibited except with leave, particularly in terms of establishing that there has been a miscarriage of justice.

Mr Barker suggested that the rule should put an incentive on parties to actually disclose what they know about the evidence they seek to call. The Chief Justice suggested however that this should be dealt with by a change to (1). Mr Barker went on to note that there are a range of cases in which this rule may be engaged: perhaps the person just does not want to give the evidence on subpoena, other times the lawyer may not know what the witness is going to say.

The Chair noted that in any case a judge is not going to exclude relevant evidence. This is therefore an issue of emphasis. In any case, relevant evidence will be admissible and it does not make a huge amount of difference which route is taken. Each formulation empowers the judge to ensure that relevant evidence goes in but that people do not 'game' the system. The Chief Justice noted that it reads as a prohibition. The Committee noted that the word "only" could be removed.

Mr Gray QC noted that one of the differences between the previous draft (discussed at the last meeting) and this draft was that the current draft states that it is the party *calling* the evidence that applies. Ms O'Gorman suggested that this can be raised informally in a conference, rather than requiring a formal application. Mr Beck noted that it has to go the court for a decision. Ms O'Gorman

agreed unless it is just noted as housekeeping because it is not contentious. Mr Beck said that even in a disputed case it could be resolved in a case management conference.

Mr Gray QC put it to the Committee that if it thinks the party calling the evidence should apply, then it should focus on the new draft and modify the wording to remove the implication that it is a presumptive prohibition. He questioned whether the Chief Justice's suggestion to remove the prohibitive element would completely eliminate any power to exclude the evidence. The Chief Justice agreed and saw no problem with that if the evidence is relevant – such evidence is admissible under the Evidence Act 2006. Asher J noted that the Committee was worried about someone patently 'gaming' the system. The Chief Justice suggested that an adjournment could be granted to counter it, and wondered why relevant evidence should be excluded for want of notice as this can be dealt with by imposing terms and conditions.

Ms O'Gorman explained that the proposed rule addresses the argument that there might be no jurisdiction to admit the evidence as a result of a gap in the rules. This rule is an attempt to assist the admissibility of the evidence by clarifying that there is a discretion to admit it in these circumstances. Asher J noted that it started with the decision of Dobson J in *NZX Ltd v Ralec Commodities Pty Ltd.*

The Chief Justice indicated that she was not convinced by the rule due to its inconsistency with primary legislation, but would defer to the Committee.

The Chair asked whether the old draft would address the problem. The Chief Justice reframed the discussion by explaining that if the issue is lack of notice then this can be addressed by adjournments and costs orders. Mr Gray QC noted that this may pose problems for lawyers who do not have the time or flexibility to comply with ongoing adjournment orders in these types of cases. Venning J agreed, explaining that resolving these issues with adjournments and costs orders will derail the process. Venning J explained that trials proceed on the basis of advanced notice of evidence from both sides. Cases are often set down for three or four weeks at a time and having to adjourn these cases halfway through would be problematic. The Chief Justice recognised these concerns but suggested that the Court may have to firmly adopt this stance. Fundamentally, relevant evidence should be admissible; a refusal to give a brief should not operate as a bar to admissibility. The Chief Justice wondered whether evidence should be excluded even where someone has *not* made reasonable efforts to comply with the rule – in this case the judge could address it with orders rather than simply keeping the evidence out.

Asher J noted that if a judge thinks that adducing the evidence would have an unfairly prejudicial effect then there is jurisdiction under s 8 of the Evidence Act to exclude it. Courtney J identified the issue to be how the rules could deal with potential prejudice without presumptively excluding the evidence.

Ms O'Gorman wondered whether even the timing requirement in the rule is too prescriptive (for example if a witness is found shortly before trial and the other party raises this as an issue in relation to the evidence sought to be adduced).

Asher J noted that the initial purpose of this discussion was not to have a prescriptive rule, but merely to have something here to deal with the problem. Asher J said he was happy with the current rule and did not have problem with going back to the first draft and amending that to reflect the Committee's discussion. The Chief Justice suggested tweaking the new draft so that it reads "with the leave of the court as to the terms or conditions the court thinks appropriate." Under this wording, leave will still be required by the court. The Chief Justice questioned how a judge is going to decide this matter if not on relevance – there are authorities to the effect that the judge should not take a punitive approach to the matter (in other words, opting for exclusion on punitive grounds). The Chief Justice accepted that there could be scope for a judge to decline to give leave if there is clearly an abuse of process, but this would need to be set at a high level.

The Committee discussed the application of s 8 to these issues. Ms Giacometti noted that any rule that cuts across s 8 is problematic. The Chief Justice agreed and considered whether the rule could be framed so as to require the judge to consider the application of s 8. The Committee did note however that a judge is required to consider it anyway.

Mr Barker said the only problem is that a party is entitled to call whatever evidence they want, but here they are not giving advanced notice. The old practice was that if a party got evidence on subpoena they had to provide a brief of what they expected the evidence to be, and if they could not do so then they had to provide reasons. Mr Barker indicated that the rule should avoid prescriptively putting in place too many criteria for a judge to consider.

Ms O'Gorman questioned whether the rule should be redrafted so that it refers to the rules on written briefs and states that nothing in those rules prevents a court from admitting evidence given orally. The Chief Justice said there was nothing wrong with the way the current draft rule is structured except that it does not permit evidence to be called except with leave. The Chief Justice suggested inserting a power to impose any terms and conditions the judge thinks appropriate and then inserting a (c) directing the judge to consider the application of s 8. The Chief Justice would take out (3) altogether because a judge will consider those criteria anyway when dealing with terms and conditions.

The Chair noted that the criteria in (3) could be put into (1). The Committee could put 3(a)-(b) into delete (2) and (3). In essence, it could be made clear to parties under (1) that they should give notice and refrain from 'gaming' the system. It could also clarify exactly what the parties must do by incorporating the ideas currently contained in 3(a)-(b). The Chief Justice added that with the benefit of how the rule works, specific rules can be devised if it transpires that the system is being gamed. Courtney J indicated that the rule could be reformulated to make it clear that non-compliance will not be linked to admissibility, but that it may be linked to issues of costs later down the track. The Chair noted that costs consequences are always present in cases of non-compliance, so there would be no need to put that into the rule.

The Chief Justice suggested that a new rule be circulated between meetings as the Committee is generally in agreement as to substance. It is merely the form of expression which requires finalising.

Mr Gray QC restated the outcome of this discussion: the party gives notice and the evidence will be admitted unless s 8 of the Evidence Act is invoked. The Chair noted that you do not even need to include the s 8 point in the rule as it is a mandatory consideration in any given case. The rule will effectively provide for parties to provide notice if they cannot supply a written brief. Asher J therefore suggested only having a r 9.7A(1), deleting (2) and (3) but adding a 1(c) to reflect what is now in 3(b) (the nature of the proposed evidence). The Chair added that the ideas in (a) and (b) are useful to incorporate into (1). The Chief Justice explained that it should address whatever reasonable efforts have been made to comply with r 9.7.

The Chief Justice noted that (2) will need to remain, because it must be reiterated that the judge can give directions as to any terms or conditions, otherwise it will not go the judge. The Chair questioned whether it would even need to go to the judge. If the parties have done all they can do then they have complied. If there is a problem then the opposing party can raise it. The Chief Justice agreed – a party can object under s 8 at any point.

Asher J was cautious about the ability of a party to have evidence admitted simply by pointing out that they have complied with r 9.7A. The Committee noted however that the Evidence Act will trump the Rules in these circumstances.

Action Point: Ms O'Gorman to provide a reworded draft rule to reflect the Committee's discussion

3. Case Management Conferences

Ms Giacometti confirmed that the new rules on case management conferences, discussed at the last meeting, are at the drafting stage. The Committee agreed to defer discussion of this agenda item while drafting takes place.

Action Point: Ms Giacometti to draft the rules to reflect the Committee's discussion at the last meeting of 28 November 2016.

4. Practice Notes

Venning J led the discussion of this issue at the Committee's last meeting. Ms Giacometti indicated that most of the civil practice notes have already been caught up with by case management regime. There are very few that will need to be kept.

Ms Gorman agreed to go through the practice notes and prepare a memorandum for the Committee to consider. Venning J suggested that a few of the notes will need to be picked up by the Rules, such as the procedure for amending and correcting notes of evidence.

Action point: Ms Gorman to prepare a memorandum to be discussed with Venning J before the next meeting.

5. Allowance and scale for trial preparation

The Chair introduced this agenda item by explaining that it has been nearly nine years since Willie Palmer wrote to the Committee questioning whether preparation before trial was allowable if the trial did not go ahead. The Committee back then thought that there was an anomaly in the Rules. The Chair noted, however, that the Committee came 'full circle' because it untethered the allocation from the duration of the hearing which appears to have been a sensible guide. The current proposal for consideration by the Committee is to restore the philosophy that had prevailed prior to Palmer's email, that allocation should be tethered to the length of the trial.

Mr Beck said the problem before centred on instances in which the trial does not proceed. The Committee has now modelled an approach where there is an allowable preparation time irrespective of whether the trial proceeds. The Chair said this proposal seemed sensible.

Ms O'Gorman was cautious about the proposal in relation to complex matters where there may be lots of preparation time for what transpires to be only a one-day hearing. The Chair replied, stating that costs are ultimately in the discretion of the court in any case.

Mr Barker suggested that while the Committee is generally satisfied with the proposed rule, no rule can capture every situation. For example in cases of judicial review, where a lot of time is spent preparing affidavits, there may be a disconnect between the short length of the hearing and the length of preparation time. Venning J said there was already a provision for preparation of affidavits for originating applications. Mr Beck replied, stating that judicial review is a 'hybrid' which is not provided for.

Ms O'Gorman noted that under the current rules, eight days are allocated on a 2B basis for judicial review. Under the proposed rule this would drop to as low as two days. Mr Beck suggested that a separate category may be needed for judicial review. The Chief Justice, Mr Gray QC and Venning J agreed. Venning J, in particular, noted that if the rules separate out originating applications then they should also separate out judicial review.

Mr Gray QC noted that the Committee will have to consult on this issue. The Chair queried whether, as part of consultations, the Committee could garner some opinion on whether other time allocations need to be addressed. Mr Barker noted that interlocutory applications are currently allocated 0.6 in terms of preparation, which struck him as being quite low.

Mr Gray QC suggested that the Committee seek permission to develop a consultation paper on adding in some provision to deal with judicial review as a special category. The Chief Justice added that a circular should be sent out indicating that the Committee plans to issue a consultation paper and that it is seeking opinions on whether there is any appetite in the legal community for a more thorough attempt to be undertaken.

Venning J noted that ADLS did write to the Committee raising some other issues but that these were not pursued by the Committee.

Action Point: Mr Gray QC to prepare a circular that the Committee is considering a consultation paper on this issue.

6. DC notice of proceedings

The Committee discussed a potential anomaly in the District Court Notice of Proceedings. Ms O'Gorman explained that the current wording contained in the Notice of Proceedings is not correct. In the Notice it is explained that whether a company can be self-represented is determined by case law when in fact it is actually covered by legislation. Ms O'Gorman suggested that this be more closely modelled on the new District Court Act.

Judge Kellar indicated that there is no sense of urgency by the District Court for this change. Venning J said that there cannot be an inconsistency between the legislation and the Notice of Proceedings. Ms O'Gorman noted that the Committee should be careful to recognise the clear distinction drawn in s 107 of the new District Court Act between an attorney of a corporation and a (lesser) agent authorised in writing. Ms O'Gorman's provided a rewording which addresses the inconsistency.

The Chief Justice questioned what the meaning of "attorney" was for the purposes of the Act. Mr Beck noted that it is generally taken to be mean an agent. The Chief Justice considered it odd that it could be merely an agent and not an officer. Mr Beck noted that the Act provides for officers *and* attorneys. The Chief Justice identified that s 107(2)(b) of the Act suggests that an attorney is not a lawyer.

Ms O'Gorman envisaged a power of attorney being constituted by proper documentation which is different from merely a letter requesting someone to appear as an agent. The Chief Justice noted that an attorney must be constituted an attorney which is inevitably a legal status as opposed to a mere agent.

Action Point: Ms Giacometti to draft the necessary change to the Notice of Proceedings to reflect the Committee's discussion.

7. Consequential amendments

Mr Chhana proposed three tidy-up amendments to the Rules. The amendments are merely consequential changes arising from the enactment of the Judicature Modernisation Bill. The Committee was satisfied with the three consequential changes. The first was to amend Form 27 (Witness summons) by changing the fine amount from $300 to $2,000, the second was to amend Form 64 (Warrant for recovery of land) by changing the tools of trade maximum amount from $500 to $5,000 and the furniture clothing maximum amount from $2,000 to $10,000, and the third was to amend Form 109 (Summons for extortion of misconduct) by changing the fine amount from $300 to $2,000 and "section 19 of the District Courts Act 1949" to "section 70 of the District Court Act 2016".

Mr Chhana indicated that he would come back to the next Committee meeting with a more substantial and consolidated run through of all the changes being proposed by the Ministry of Justice. In the mean time, the Committee agreed that the three changes mentioned were acceptable.

8. Ministerial changes

Mr Chhana took the opportunity to discuss some ministerial changes. The Hon Amy Adams remains the Minister of Justice. She has also picked up other responsibilities, including in relation to social housing. The Hon Mark Mitchell has now taken up the role of Associate Minister of Justice. He also has responsibilities in relation to Land Information New Zealand and Statistics New Zealand.

Mr Chhana said he will circulate a document around to Committee members outlining the delegation of responsibilities to the Associate Minister. The delegation here follows tradition by delegating responsibilities such as the appointment of Justices of the Peace and statute amendment bills.

Action Point: Mr Chhana to circulate a document outlining the responsibilities of the Associate Minister of Justice.

9. Final Matters

The Chair questioned whether it is necessary to hold a meeting in April. The Chief Justice suggested that the Committee may need to consider its programme moving forward as it has not given too much thought to anything highly ambitious in a while. Venning J suggested that there will need to be some consideration of the Rules regarding commercial panels – this should be done reasonably promptly.

The Chief Justice suggested that representative orders may need to be looked at. Mr Beck noted that that is a statutory matter. Venning J questioned whether there was legislation in draft form. Asher J explained that the draft went to the Parliamentary Secretary in 2009 but was not taken up. Asher J queried whether the Committee should be looking at implementing some rules dealing with representative actions in the context of litigation funding. The Chief Justice agreed, adding that this cannot be deferred any longer.

Venning J noted that at the moment the issue is being dealt with in a very ad hoc way, using rules that were not properly designed to deal with these sorts of situations. Mr Beck suggested that the Committee could deal with this issue by capturing the case law, which would be useful.

Mr Gray QC expressed an interest in examining what other jurisdictions have done that has been useful.

Asher J explained that a few years ago he tried to undertake a review of this matter. Asher J asked the Clerk to look through the papers on this review to see whether some draft rules could be implemented which capture the case law. This could provide some certainty to parties trying to decide whether a class action is warranted and what they must do. Mr Gray QC was particularly interested in finding a jurisdiction where members of a particular class of people have been benefitting, and how this has been enabled.

Venning J noted that he attended a conference in Perth at which a Victorian judge mentioned the success of the class action regime in facilitating the bringing of class actions following the devastating bush fires in Victoria. The regime was very interesting and effective.

Asher J referred the Clerk to a letter from Robert Gapes asking the Committee to review the issue from the perspective of litigation funding claims.

The Chair queried whether Asher J saw the topic of litigation funding being addressed in the context of representative actions. Asher J replied stating that class actions is a much broader category but there is a large overlap between them.

Asher J explained that there are claims that could be brought in New Zealand that could benefit a lot of people but under the current regime they cannot be brought. The reason for this is that litigation funders cannot find clarity in the New Zealand regime and do not want to get involved. The end result is that a lot of people are prevented from bringing actions.

Asher J suggested that if the legislature is not going to address the issue then the Committee can by amending the Rules to make them clearer. Mr Beck suggested the clerk look at what the current position is, what work has been done, and what can be done in terms of capturing current practice in the Rules.

Action Point: Clerk to prepare research on the possibility of implementing changes to the Rules to clarify the regime for bringing class actions.

The meeting finished at 11:10 am.