The Rules Committee
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April 2013
Minutes 02/2013

Circular 29 of 2013

Minutes of meeting held on 15 April 2013

The meeting called by Agenda 02/2013 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 15 April 2013.

1. Preliminary

In Attendance

Hon Justice Fogarty (the Chair)
Hon Justice Asher
Judge Susan Thomas
Judge Gibson
Hon Christopher Finlayson QC, Attorney-General
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
Mr Brendan Brown QC
Ms Cheryl Gwyn, Crown Law
Mr Frank McLaughlin, Deputy Secretary, Ministry of Justice
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

Rt Hon Dame Sian Elias, GNZM, Chief Justice of New Zealand
Hon Justice Winkelmann, Chief High Court Judge
Judge Doogue, Chief District Court Judge
Judge Doherty

Confirmation of minutes

The minutes of 11 February 2013 were confirmed.

Matters arising

The Chair noted the apologies and welcomed Ms Jennie Marjoribanks as the new Secretary to the Rules Committee. The Chair also congratulated the Attorney-General on taking silk.

2. The High Court Rules and the New Courts Act

The Chair noted that the Chief Justice and the Chief High Court Judge were unable to be present at the meeting and would prefer for the discussion to be delayed until they were present. The Attorney-General expressed the view that he did not see any need for a change to the status quo.

3. District Court Rules Reform

Mr Bill Moore began the discussion by explaining that around 500 hours had already been spent revising the District Court Rules. Mr Moore estimated that a further 500 hours would be needed to have the draft rules ready to be sent out for consultation. At present the District Court Act is under review and so Mr Moore explained that the further work might become redundant under the new Act.

The Chair acknowledged that the Parliamentary Counsel Office had done considerable work and was under resource constraints. However, the Chair noted that there was consensus that the District Court Rules reforms should continue and not be shelved. Judges Susan Thomas and Gibson agreed and said that the draft rules were eagerly anticipated by the legal profession. The draft rules had come from direct engagement with the legal profession through the road shows. During the course of these road shows the profession was told that the draft rules would come out for consultation in mid-2013.

Judge Thomas pointed out that the District Court Rules Reform Committee had already identified the majority of changes that needed to be made. Rather than pause the reforms, Judge Thomas argued that the good work being done should continue. The Attorney encouraged early resolution of the process. Mr Moore considered it could be done in time for the October meeting, and this would enable the draft rules to reflect changes in the draft District Courts Bill. This would prevent the need to have to engage in further consultation if any changes occurred due to the Bill.

On this basis, it was agreed that further work would be done on the rules and draft rules would be circulated to members of the Rules Committee no later than 1 October 2013, and preferably before then. These draft rules will be considered by the Rules Committee on 7 October 2013. Following this the draft rules would be sent out to the profession for consultation.

4. Consequential amendments to the Court of Appeal and Supreme Court Rules – Criminal Procedure Act 2011

Mr Bruce Gray QC suggested that r 35A(4) should be amended to remove the double-negative. Justice Asher said one possible way of rephrasing this was “only relevant documents should be included”. Mr Brendan Brown QC said that perhaps it could be expressed that the “draft index should not include irrelevant documents”. This minor re-drafting was agreed to.

5. Miscellaneous and Minor Rule Amendments – to eliminate numbering problems and other inconsistencies

Mr Moore outlined the proposed changes in the High Court Amendment Rules (No 2) 2013 and the Court of Appeal (Civil) Amendment Rules 2013. Most of the changes were typographical or correcting cross-references.

Changing the cross-reference from r 7.9 to r 7.2

The main change was correcting the cross-reference of r 7.9 to r 7.2. Mr Brown pointed out that r 7.2 was not entirely satisfactory but was a good pragmatic solution. He wondered whether a better solution would be to have a standalone provision allowing for applications for directions. If r 7.2 was adopted, Mr Brown was concerned that this would dilute case management as a tool. Mr Frank McLaughlin echoed this concern. Mr Brown said there was a risk of using r 7.2 to plaster over the references to r 7.9 without fixing the actual problem of not having a replacement for the old r 7.9.

Asher J agreed that the best solution would be to introduce the equivalent of the old r 7.9. He considered that there would be few downsides to this solution. Mr Stephen Mills QC agreed and said that this would allow parties to obtain directions at anytime and not be tied to case management. However Mr Gray thought that this would not simplify the rules and would create duplicate ways to get directions. Mr Gray argued that a solution should be thought about carefully before creating different rules and reducing the simplicity.

The Chair agreed that the Committee should not rush things through and lose efficiency. Instead a change should be thought about at a higher level. Therefore how to provide for removing the problematic cross-reference to r 7.9 should be thought about in the context of case management as a whole. On this basis it was agreed that the Clerk should assist Mr Brown and Mr Gray with writing a paper on amending the cross-reference to r 7.9.

Concurrence to the High Court Amendment Rules (No 2) 2013 and the Court of Appeal (Civil) Amendment Rules 2013

The Rules Committee gave concurrence to the Court of Appeal (Civil)Amendment Rules 2013 and most of the High Court Amendment Rules (No 2) 2013 apart from the rules dealing with changing the cross-reference from r 7.9 to r 7.2 (cls 4, 7, 8, 9, 10, 13, 14, 16, 17 and 18) as well as the rule extending the service for bankruptcy from 1 to 6 months (cl 15).

Case management for appeals and judicial review

Currently judicial reviews and appeals are not automatically subject to case management. The Chair noted that some judicial reviews and appeals would benefit from case management but not always. It was noted that r 7.14 provides for some appeals to be case managed. However, because of the phrase “that is to be the subject to case management” in r 7.14(1) it is unclear when appeals under part 20 or 26 are to be case managed.

From discussions, it appeared that there was a variety of practices in different registries to when case management applied to appeals. Some required memorandum to be filed whereas other locations used the list process for directions. Mr Andrew Beck said that filing memorandum was cheaper than having to appear in person. Asher J agreed but said that Schedule 6 setting out what was required for a memorandum could be confusing for lay litigants.

Asher J pointed out that the Rules Committee had simply assumed case management conference applied and had not given attention to when it should apply to other types of proceedings which had been explicitly excluded from the case management process. However, maybe it was time to directly consider whether case management was appropriate for judicial reviews or appeals.

The Chair expressed the opinion that case management might not be always appropriate for judicial reviews as judicial reviews required immediate attention. Often judicial reviews were placed on the list where, after a short hearing, the list judge would issue directions to the parties. Justice Asher commented that this process seemed to work well. Mr Gray agreed that it worked well but suggested that there was a broader philosophical question about whether every proceeding should be case managed or whether there was an appropriate distinction between types of proceedings that should be case managed and others which should be dealt with differently. Other members agreed that this question needed to be investigated and considered properly. It was resolved that the Clerk with the assistance of the Chair would prepare a paper looking at this broader philosophical question of whether case management should apply to all proceedings or if there was a case made out for differentiating between types of proceedings. This paper will be circulated a month before the next meeting.

6. Extending period for Service of Bankruptcy Notice

The Chair began by outlining Associate Judge Bell's suggestion that the period for service of bankruptcy notices be extended from one month to six months. Currently, a person has one month to serve a bankruptcy notice after it has been issued. Prior to the one month period expiring the person has to apply to have the bankruptcy notice renewed. The Chair explained that Associate Judge Bell is concerned that this process creates unnecessary work for parties, lawyers, Registry staff and even Judges. The Chair then explained that the Official Assignee was approached and had no reservations about extending the notice period and also that overseas jurisdictions had adopted a longer period (Victoria, 6 months) or had changed to a statutory demand (United Kingdom).

Mr Beck was attracted to the idea of having a statutory demand. Currently, Mr Beck explained, the bankruptcy process is costly. Further, there is nothing in the High Court Rules discussing how a bankruptcy notice should be served and this should be addressed. Mr Beck suggested that the whole area of bankruptcy under the Rules should be looked at. Asher J agreed that changing to a statutory demand is a significant change and should be considered within a broader review of the bankruptcy procedure. This would require a consultation paper.

Mr Gray raised concerns about extending the period of time. Mr Gray pointed out that prompt service was necessitated because of how bankruptcy impacted on the rights of third parties and how dispositions could be set aside. Instead of proceeding now, Mr Gray suggested that the effects of this change should be carefully considered before proceeding.

It was agreed that Asher J, Mr Gray and the Clerk would prepare a short paper looking at the effects of extending the period for serving a bankruptcy notice. In addition, Mr Beck would prepare a paper looking at whether there should be a common proceeding for initiating company and insolvency proceedings.

7. Electronic Bundle Protocol

Asher J expressed gratitude to the many people involved including Laura O'Gorman and David Goddard QC for their invaluable assistance in getting the Electronic Bundle Protocol to its final form. The The working group had consulted with the Supreme Court and Court of Appeal on the Protocol. Asher J acknowledged the valuable input of Gordon Thatcher from the Supreme Court. Asher J hoped that this guideline would be published in McGechan and in Sims. Mr Kieron McCarron noted that the minutes from the previous meeting on 11 February 2013 indicated that both the Chief Justice and the Chief High Court Judge were happy with the Protocol.

Mr Mills queried whether the Protocol made it clear about whether it was binding or not. He said that the introduction indicated that the Protocol was voluntary but that the rest of the Protocol was expressed in directory language. Mr Mills wondered whether it would be helpful to clarify whether the Protocol should bind parties to avoid any confusion. Originally, Mr Mills pointed out, the idea of the Protocol was to be "soft law" intended to encourage but not force people to follow it. Mr Gray responded that this had been discussed in the working group and that while the Protocol was voluntary in nature, unless it was ordered by the Court, the aim was to encourage parties to discuss whether to use the Protocol. Asher J reiterated that the Protocol did not give judges any further powers to regulate the proceedings. While normally this Protocol would require both parties to agree to it, Asher J said that a Judge could order the Protocol to be followed even if both parties did not agree, just as a judge could do at present. However, Asher J was of the opinion that ordering an unwilling party to follow the Protocol would be extremely rare as a judged would have to be persuaded that the Protocol was necessary in a trial.

Mr Beck questioned to use of the word "presumption" in 2.5. Mr Beck argued that 2.5 should be deleted and instead the reference in 2.4 to "significant number" or "significant length" should act as a guide. This was related to the concern that one party might try to force the use of the Protocol on the other and that the other party would then have to displace the presumption. Mr Mills agreed that this could create confusion and so parties might think they had to comply. Asher J said that it was unlikely that this would occur and even if it did a Judge would not normally force the Protocol on another party unless it was seen as desirable. However, the parties should consider and consult with each other over the use of the Protocol if more than 500 pages. Mr Gray suggested that this concern could be ameliorated by deleting "presumption" and replacing with "will usually be appropriate".

Mr Brown pointed out that 500 pages was not a large amount of documents and would amount to two Eastlight folders, or even less if the pages were double-sided. Mr Brown wondered how this amount was justified, especially when tied to a presumption. After some discussion it was accepted that any number was arbitrary and with the change to "will usually be appropriate" there was no concern about the number of pages.

Finally, Mr Brown considered that the use of "pleadings bundle" was not clear. Asher J said that pleadings bundle was used to differentiate the bundle from the common bundle. The pleadings bundle was intended to include the statement of claim, the statement of defence, and key documents. Mr Brown thought that "bundle" could be deleted from "pleadings bundle" as the "bundle" was redundant and possibly confusing. Judge Thomas agreed with this suggestion as did Asher J.

The Committee agreed to the Electronic Bundle Protocol subject only to discussion at the next meeting about whether the Protocol should be a Practice Note or a protocol.

8. Proposed Amendment of HCR 1.2 and 1.4 – Objectives and Application of the Rules

Mr Brown said that the objectives were part of a larger issue of what the High Court Rules were to do. There was no point in importing these principles without ensuring that the rules did what these objectives claimed they did. This was more of a challenge to continue the good work of improving the High Court Rules. Mr Brown was happy with most of the proposed objectives, but thought that "equal footing" was a poor phrase and that "treated equally" would be better.

The Chair agreed with Mr Brown and said that these objectives were essentially catching up to the case management and discover rule changes which had already introduced proportionality into the rules. The Chair gave an example where parties might be arguing about a limited amount and about which defendant should pay what but wanted to use extensive court resources. In such situations the

concept of proportionality would help courts to not waste resources, assist parties with focussing on the significant issues and keep overall costs down. Judge Thomas thought this was a good example where proportionality helped balance the competing desire of the parties and the interests of the state in allocating resources appropriately. Judge Thomas noted that in the District Court the concept of proportionality was useful.

Mr Gray expressed reservations the expressive expansion of the objectives and thought that the introduction of "proportionality" in relation to the case management and discovery rules was sufficient. Asher J was concerned about elevating proportionality to become a primary principle. Instead, Asher J considered that "proportionality" flowed from the current objectives of "just, speedy and inexpensive" as these three main objectives needed to be balanced. He considered that this was the appropriate for proportionality.

The Chair suggested that in the light of these comments, the topic is best removed to the whiteboard discussion, where it can be taken up again, if any member wants to, in a wider frame of reference.

9. Changing HCR 15.11(2)(a) Judgement by Default in Overseas Service

The Chair explained that the area of overseas jurisdictions had been carefully surveyed for the Rules Committee in the past by both Professor Campbell McLachlan QC and Mr David Goddard QC. Mr Beck pointed out that if a party is overseas and does not protest then they may be subject to the jurisdiction.

The Chair was of the opinion that it was best to leave this issue until the next meeting where a paper will be prepared by the Clerk and the Chair looking at this issue and the case cited of *Export Trade Corp v Irie Blue New Zealand Ltd* [2012] NZHC 2870. At the same time it needed to be remembered that the Harmonisation Committee of Australasia had reviewed this issue of overseas service. Following this, most Rules Committees in Australia had adopted the New Zealand approach and so the Chair was reluctant for any changes to occur until the proposed change had been considered in light of the broader position which the paper will address.

10. Review of Rules Relating to Registry Venue – HCR 56.1 and 10.1

The Chair began by mentioning that the Ministry of Justice's data showed that there was consistent, ongoing extra court room and judicial capacity in Wellington. The Chair noted that the mood of the last meeting was that there was no need for a rule change to address the Attorney-General's concerns. Messrs Beck, Mills, Gray and Brown all agreed that no rule change was needed to address this concern and instead the Judge or Registrar should simply raise the possibility that the trial could be moved elsewhere and held earlier.

Ms Phoebe Dengate-Thrush enquired as to what was required for this to begin to happen. The Chair replied that as no rule change was required then it was up to the Chief High Court Judge and the Ministry of Justice to begin to work out the practicalities and implement this. Mr Mills helpfully offered to publicise this on the New Zealand Bar Association's website once the practicalities had been worked out. .

The meeting ended at 1:00 pm.