The Rules Committee

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23 February 2016
Minutes 01/16

Circular 25 of 2016

Minutes of meeting held on 15 February 2016

The meeting called by Agenda 01/16 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 15 February 2016.

1. Preliminary

In Attendance

Rt Hon Dame Sian Elias GNZM, Chief Justice of New Zealand
Hon Justice Asher, the Chair
Hon Justice Venning, Chief High Court Judge
Judge Gibson
Ms Ruth Fairhall, Acting 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

Mr Ross Cargill, Secretary to the Rules Committee
Ms Harriet Bush, Clerk to the Rules Committee

Apologies

Hon Christopher Finlayson QC, Attorney-General
Justice Gilbert
Judge Doogue, Chief District Court Judge
Judge Kellar
Ms Jessica Gorman, representative for the Solicitor General

Mr Rajesh Chhana, Deputy Secretary of Policy, Ministry of Justice

Confirmation of minutes

The minutes of 30 November 2015 were confirmed.

Matters Arising

The Chair noted the apologies and welcomed Ms Ruth Fairhall, who was attending the meeting on behalf of Mr Rajesh Chhana.

2. Judicature Modernisation Bill

Ms Fairhall had prepared a memorandum for the Committee setting out the Judicature Modernisation Bill's progress and its impact on the High Court Rules. The Bill is currently awaiting the Committee of the whole House stage. It is estimated that the Bill will be passed in May 2016, and come into force in early 2017. Ms Fairhall informed the Committee that the Ministry of Justice was drafting a Supplementary Order Paper (SOP) to be introduced at the Committee of the whole House. The SOP will make the changes to the High Court Rules contained in the Bill made by the High Court Amendment Rules 2014 (No 2) and the High Court Amendment Rules 2015. This is necessary as the Rules currently attached to the Bill are the rules in force when the Bill was drafted two years ago. Ms Fairhall also stated that while the Bill will be brought into force in stages, the SOP provides for the rule-making power contained in the Bill to commence the day after the Bill is enacted, allowing the Committee to make amendments to the High Court Rules under the new Act. This leaves the period until the Bill is passed, where any amendments the Committee makes to the Rules would have to be re-enacted under the new Act. The Committee will be able to make amendments as usual from about July onwards. The Committee agreed that as the Bill was expected to be passed soon, it would be best to defer concurrence of any amendment rules until after it is enacted.

The Chief Justice noted that the High Court Rules have not always been in the Schedule to the Judicature Act. Mr McCarron stated that the issue had been raised when the Bill was first introduced but at that time it was considered too late to consider whether the Rules should be stand-alone. Ms Fairhall confirmed that the Ministry of Justice had discussed and considered this before the Bill was drafted. The Chair noted that at a certain point the Committee had wanted the Rules to be a Schedule to the Judicature Act. If the Committee now wished to change the rules to sit outside of the Schedule it might be considered that the Committee had changed its position on the matter. Ms Giacometti noted that it would be much more accessible for the Rules to be removed from the Act and be made by Order in Council. She stated that this would not be difficult to do from Parliamentary Counsel Office's point of view. Currently, amending Rules are made by Order in Council and require the concurrence of the judiciary. However, the Rules themselves are contained in the Act and so are a legislative act. Ms Giacometti stated that the advantage of having the Rules in the Schedule was that what is now in the Schedule cannot be subjected to ultra vires judicial review arguments. The Chief Justice considered that it would be preferable for the rules to stand alone. She queried whether the Rules should be immune from review as a matter of principle. Ms Fairhall stated that she considered that it would be too late to make this change now. The Chief Justice stated that she would be happy to raise the issue with the Attorney-General.

3. High Court Amendment Rules 2016

Ms Giacometti had prepared High Court Amendment Rules bringing together amendments that the Committee had agreed on last year and several amendments the Committee is still working on. The Committee discussed the amendment to r 7.23 and form G 32, which provide for applications without notice. The Committee agreed to the amendments at the last meeting, however, it had wished to receive the view of a Registrar who dealt with applications for probate on whether the amendments should apply to without notice applications for probate under r 27.4. The Committee had sought the opinion of Mr John Earles, a Registrar at the Wellington High Court. Mr Earles considered that the requirement for certification and to make reasonable inquiries should not apply to applications for probate. That

being the case, he considered that there should be a separate form to be used for without notice applications for probate.

The Chair set out Mr Earles' propositions and stated that Mr Earles' points were good. He agreed that there should be a separate form to be used for probate applications. The Committee agreed that this would be sensible. The Clerk reported that Ms Gorman, who had proposed the amendments, also agreed with the points made by Mr Earles, aside from his suggestion that form G32 state "signature (solicitor for the applicant(s))." The amendment deliberately used the phrase "signature: (of applicant or solicitor/counsel for the applicant)" to allow unrepresented applicants to sign the certification themselves. The Committee agreed that this should not be changed.

The Committee agreed that Ms Giacometti would come up with a specialised without notice probate application form in conjunction with Mr Earles and report back at the next meeting.

Action point: Ms Giacometti to draft a proposed form to apply to without notice applications for probate for the next meeting.

4. High Court (Access to Court Documents) Rules 2016

The Chair noted that the Committee has been reviewing the Access to Court Documents Rules for the last two years. It has now refined the Rules based on consultation undertaken last year. Very small drafting changes have been made to the current draft since the last meeting. At the last meeting the Committee approved the Rules subject to the Chief Justice's agreement.

The Chief Justice raised a number of queries. First, she asked why the definition of document excluded any document relating to the administration of the Court. Mr McCarron stated that there could be material on the court file that did not necessarily relate to the proceeding itself otherwise than in an administrative sense. The Chair noted that this definition had always been there as a "catch-all" for administrative communications which would not be appropriate to release.

Secondly, the Chief Justice asked why requests could be made orally. The Chair confirmed that an oral request could only be made for a document to which the public had a right of access in r 5. The Chief Justice was happy with this.

Thirdly, the Chief Justice asked about use of the phrase "the person's reasons for accessing the document". The Chair confirmed the phrase is in the current rules and has not given any trouble. "Reasons" is a plain word as opposed to a word such as "purpose". "Reasons" require the requester to justify why he or she wants to access the document. Mr McCarron noted that historically the person requesting access had to show a genuine and proper purpose. Mr Gray QC stated that when the Rules were updated in 2008, the Committee had debated the terms "reasons" and "grounds". "Reasons" was preferred as it was a less technical word.

The Chief Justice then stated that the requirement for a party to object to release of a document by the third working day imposed a very short timeframe. Mr Gray QC noted that the Commerce Commission had made this point in its submission. The timeframe relates to currency of press interest. The Chief Justice asked whether "unless extended" could be added to r 8(4)(a). While there is already a general power to extend timeframes, a specific reference in the rule could act as a reminder. The Committee agreed that words to this effect could be added. The Chair noted that these types of applications were made quite informally; usually the timeframe did not cause any trouble. Venning J stated that the time limit could apply in two different circumstances: first during the course of the currency of the proceedings when the timeframe was unlikely to create any difficulty as both parties are focused on the case and able to respond. However, when there is interest in a historical proceeding there may no longer be representation held. Three working days could create issues in these circumstances. Ms Giacometti agreed to draft an amendment.

The Chief Justice considered that a reference to the institution of the courts was missing in the matters to be considered by the Judge in r 10. Court control does not just protect individuals' privacy: it also protects the institution of the court. Enabling people to go to court to resolve disputes without

prematurely bringing down the public gaze on them is important for the court's institutional validity. While 10(c) refers to the right to bring proceedings without the disclosure of any more information about the private lives of individuals or matters that are commercially sensitive the Chief Justice considered that it did not quite cover the provision of dispute resolution through the courts. People's access to the court should not be affected by the risk of premature disclosure. Venning J stated that he agreed but that he had thought this aspect was covered by 10(b) the orderly and fair administration of justice. The Chief Justice considered that this referred to the administration of justice in the proceedings, whereas her concern was with the intuitional position. Mr Gray QC's view was that 10(b) was not limited to the specific proceedings. After some discussion the Committee agreed that the phrase could be tweaked to clarify that 10(b) is not limited to the particular proceedings but encompasses the institutional role of courts in general. The Chief Justice suggested amending the provision to "open access to the courts and the orderly and fair administration of justice". The concern that this is aimed at is the need of litigants not to be inhibited in their access to courts. The Chief Justice also queried whether 10(b) would be better as the first matter to be considered as 10(a), the right to a fair trial, only applies to criminal proceedings. The Committee agreed that the Chair and Ms Giacometti would draft an amendment to r 10(b) and circulate it for approval.

The Committee then discussed the references in r 11(b) and (c) to open justice having greater weight "in relation to documents admitted into evidence than other documents" during and after the substantive hearing. The Chief Justice asked why open justice has any weight in relation to documents that have not been admitted into evidence or taken into account. Mr Gray QC stated that the Committee had used tentative wording. Ms O'Gorman stated that there could be open justice interests in the media accessing information ruled inadmissible so that it could understand the issues involved, even if access were subject to reporting restrictions. The Chair noted that the Committee had proceeded on the basis that open justice had passed its shadow over all aspects of the proceedings. Mr Barker considered that the language was relatively direct: if the documents had not been admitted into evidence it will be difficult to get the documents. The Chief Justice accepted that if there were an argument about admissibility there may be open justice in having access for the sake of reporting on the ruling. The Committee agreed that it would be more accurate to change the phrase to "documents relied on in a determination" in r 11(c) and "documents relied on in the hearing" in r 11(b). The Chair noted that the determination might not refer to documents which were extensively referred to in open court. The Chief Justice stated that the rule was aimed at specifying what has greater weight: open justice will be greater in relation to the documents which are relied on in the determination once the case has been decided as the interest here is in accessing the documents in order to illuminate the determination. The Committee agreed that the Chair and Ms Giacometti would draft and distribute this change.

Finally the Chief Justice raised the question of whether a separate more formal procedure should be set up for access requests. Venning J noted that the procedure was the same as that used in the current rules and that it has not caused any problems. The Chief Justice was content to leave this for the time being.

The Chair noted that a set of Rules to apply to the High Court, Court of Appeal and Supreme Court had been drafted. His view was that there would be a benefit in having rules applying to all of the Courts so that a consistent body of case law could develop. It would also help general understanding by media and academics about the applicable principles. The Chief Justice stated that she would distribute the most up to date copy of the Access Rules to Supreme Court members to consider. Mr Beck noted that applications for leave in the Supreme Court were very different to interlocutory applications in the High Court as this is often where important argument will take place. There is a much greater public interest in these applications. They cannot be treated in exactly the same manner. The Chief Justice agreed. She considered that it might be beneficial for the Supreme Court to publish all applications for leave.

Action points: Ms Giacometti and the Chair to draft the three amendments to the Rules suggested and circulate the changes for approval.

5. Access to Court Documents by Service Providers

Last year, the Ministry of Justice asked the Committee to consider amendment to the Criminal Procedure Rules to allow service providers to access certain court documents. The Chair noted that this issue has been floating around for some time. Initially, the Ministry had proposed automatic disclosure. The current proposal would require the Judge to consider whether certain documents should be given to the service provider at the time a case is referred to restorative justice. Following the last meeting, Judge Gibson met with Ministry of Justice staff. He raised concerns with the release of victim impact statements due to provisions in the legislation. First, s 27 of the Victims' Rights Act 2002 allows a Judge to give directions relating to the disclosure and distribution of a victim impact statement. Judge Gibson considered the rules should not duplicate a power that is already specifically provided for in the Act. Secondly, s 23 provides that only the offender's lawyer may give the offender a copy of the victim impact statement. Judge Gibson noted that he was concerned that the victim impact statement should not be shown to the offender by the restorative justice service provider. However, conditions as to release of the victim impact statement and a requirement to return the statement to the court file could address this concern. He noted that he was not so concerned with the criminal history being released although he did not see why the person making the referral could not look at the history and provide any relevant information to the service provider. Another concern raised was that the victim impact statement should not be released without the victim's knowledge. The Chief Justice was concerned with the release of victim impact statements being dealt with by essentially administrative rules. What happens to a victim impact statement is important enough that it should be dealt with by legislation. Judge Gibson said that it would fit within the existing legislation for the victim impact statement to be asked for in court. The Chair asked whether an administrative addition to direct a Judge to consider the issue might be helpful. Judge Gibson said it probably would be useful as the release of documents might be a matter that was overlooked and left to the victim services provider.

Venning J asked whether in some cases the proceeding would be referred to restorative justice, the victim would say that they were not interested in participating in restorative justice and that would be the end of the matter. Judge Gibson confirmed this was the case. Venning J's view was still that it would be better for the relevant documents to be provided once the restorative justice provider had ascertained whether the victim wanted to engage in restorative justice. At this time the Judge would be better placed to consider what information would be helpful for the purposes of the conference. Ms Fairhall stated that the victim impact statement would provide the restorative justice provider with a sense of whether restorative justice would be appropriate. However, Judge Gibson noted that victim impact statements are often prepared right at the beginning of the process and a lot of things may have changed by the time that the restorative justice programme is being considered. The Chief Justice noted that the victim would be going along to the restorative justice programme and provide their views – what purpose would also having the statement serve? A dated document may in any event be inappropriate to give the service provider a sense of what was happening. Further, the victim impact statement is prepared by the police. Judge Gibson noted that it is appropriate for the provider to know who they are dealing with.

The Committee did not finally resolve whether an amendment should be made but agreed that the proposal should be considered by the Chief District, Family and Youth Court Judges.

Action point: proposal to be discussed with Chief District Court, Family Court and Youth Court Judges.

6. Striking out before service

Following the meeting on 30 November, the consultation paper and draft rules on striking out a statement of claim prior to service had been released for consultation. The consultation period had been extended until 15 February 2106. The Committee agreed to defer the discussion until all the submissions were received.

Action point: clerk to summarise the submissions received.

7. Harmful Digital Communications Act 2015

The Committee had received a request from the Ministry of Justice asking it to consider whether it was necessary to set out new rules to provide the procedure for orders under the Harmful Digital Communications Act 2015 to be sought in the District Courts. At the last meeting the Committee agreed to set up a group to look at the matter. Applications to the District Courts may be made from June/July this year, but existing rules may be used if specific rules are not made in time. The Chief District Court Judge had nominated Judge Harvey to be involved. Judge Harvey has prepared a paper looking at possible rules. The Chair noted that the Committee had not yet determined whether rules were required, although the Ministry of Justice's view was that new rules were necessary. Judge Harvey's view was that this could be an appropriate occasion to use electronic processes. He had proposed a process where everything could occur electronically but within the existing rules framework. Ms Fairhall noted that the Ministry of Justice thought that the rules prepared by Judge Harvey were a very good start and agreed that this Act provided the opportunity to look at the use of electronic processes. Mr Gray QC raised the issue that he had raised at the last meeting: what is the Act doing when it restrains speech. His view was that this would inform the proper procedure for applications under the Act. Ms Giacometti noted the communication principles in the Act: it is aimed at situations where parliament considers it necessary to act quickly on a really harmful communication. The Chief Justice noted that the Committee is not concerned with the larger question, the Committee was just concerned with the procedure to adopt to give effect to the legislation. The first question is whether any specific procedure or a specific set of rules is necessary. The need for separate rules would need to be made out. Ms Fairhall noted that issues of timeliness and anonymity requirements pointed to the need for separate rules. She stated that her preference would be to draft some rules with Judge Harvey before the next Committee meeting for the Committee to consider. The Committee agreed that Judge Gibson, Mr Chhana, Ms Fairhall and Judge Harvey would work on a set of Rules for the Committee to consider at the next meeting. Whether a separate procedure was appropriate would be decided at that stage.

Action point: Judge Gibson, Mr Chhana, Ms Fairhall and Judge Harvey to work on a set of Rules for the Committee to consider.

8. Costs in pro bono cases

The Chair noted that the Committee had discussed this issue at the last meeting. The Committee had agreed to an amendment to r 14.2 to make it explicit that costs may be recovered where a lawyer has provided their services under a conditional fee agreement. Currently, the wording indicates that the costs must actually have been incurred. Members of the profession had expressed concern over this following a comment made by members of the Supreme Court in the King Salmon case questioning whether the rules did provide for recovery under a conditional fee agreement. In drafting the amendment, the issue had arisen as to whether expert witnesses should also be able to recover costs on the same basis.

Mr Barker had agreed to look at this issue. He noted that a conditional fee is where the fee charged is the normal fee but it is agreed that this will only be charged where the expert is successful. A contingency fee is where the fee allows for some percentage of the amount recovered. He noted that he thought that everyone was agreed that costs on a contingency basis were not appropriate. However, he did not have a problem with conditional fees as the reality is that the costs of modern litigation is that in many cases it will not be helpful for the lawyers to be able to be paid where the case is brought on a conditional fee basis but that the party is not able to recover the cost of the expert witness. He considered that there was no problem in principle for the expert to recover costs under a conditional fee agreement but that the agreement needed to be disclosed to the court. However, he stated that if the Committee considered that provision should be made for the recovery of expert costs then this raised the issue of where this change should be made in the rules. The current amendment is contained in r 14.2 which deals with solicitors' fees whereas expert witness costs are considered to be a disbursement. Mr Barker noted that he considered this issue fed into a bigger issue as to how the Rules should deal with experts' fees. Solicitors' fees are dealt with by scale, whereas expert witnesses can recover all of their fees provided the court is satisfied of some factors. He considered that this situation was undesirable.

The Chief Justice asked how the Court knew whether there was a conditional fee agreement. Mr Barker noted that the expert witness report would often set out how the fee was calculated. He saw no problem with the expert saying that the fee would not be charged unless they were successful. They could then be cross-examined on this matter.

The Committee also discussed the use of the word "success" in the draft amendment. The Chair noted that it came from r 14.2(a) which states that the party who fails with respect to a proceeding should pay costs to the party who succeeds.

The Committee agreed that the real problem was with experts recovering under a contingency fee agreement as this could provide an incentive for them to overstate matters such as quantum. Ms O'Gorman noted that even a conditional fee agreement could distort incentives as they are not going to be paid if they don't succeed. She considered that if the change were made there would need to be express provision in the disbursement provisions and under schedule 4 (the Code of Conduct for Expert Witnesses) requiring the experts to disclose the fee agreement. The fee structure used could invalidate the experts' evidence in terms of their independence. The Chair noted that he was reluctant for experts not to be able to be paid where lawyers can be if they provided their fee under a conditional fee agreement as it might deny access to justice. The experts could be crucial for the party to be able to win their case. Venning J agreed provided that the fee was the expert's usual fee and not contingent upon the outcome. Mr Gray QC noted that experts are giving evidence that would otherwise be admissible because it is opinion evidence, and they can only give it in an area of expertise that the court does not possess. The Court receives their opinion as if they are facts. The necessity for independence is greater. He was still concerned that the proposal would start to undermine the very basis upon which experts can give evidence. Mr Barker noted that the fee structure related to whether the experts should be giving evidence in the first case. If the court had heard the evidence and considered that it was useful then costs should be recoverable.

The Chair noted that he imagined that there were quite a lot of circumstances where the expert would provide services and say that they would not charge their fee unless the party was successful. He did not want to stop this process but thought that it should be regulated so it was disclosed to the Court. Venning J noted that this would allow the other party to take the matter further.

Mr Barker and Ms Giacometti agreed to provide a more refined proposal relating to expert witness' costs for the next meeting.

Action Point: Mr Barker and Ms Giacometti to provide a more refined proposal relating to expert witness' costs for the next meeting.

9. Representative Actions

Prior to its meeting in August, the Committee had received a letter from Mr Robert Gapes suggesting that the Committee consider making provision for representative actions in the High Court Rules following recent developments in case law in the area. In 2008 the Committee prepared a Draft Class Actions Bill and Rules and presented them to the Minster of Justice. However, the Bill has not been considered by parliament. Following the August meeting the Clerk drafted a paper setting out the case law for bringing proceedings on a representative basis under r 4.24. The ADLS had also written to the Committee endorsing Mr Gapes' suggestion. The Chair asked the Committee whether it wished to draft some rules to provide for representative actions and elaborate on r 4.24 to reflect the case law developments over the last seven to eight years. The Chief Justice noted that there were a small number of useful cases which tailored the requirements for bringing a representative action to the particular case. She queried whether it would be best to leave the requirements to develop in individual cases rather than making rules based on the cases so far. Mr Gray QC agreed: the cases decided so far were useful, but the courts have been tentative and there are a range of other particular fact situations involving litigation funders which are making their way to court. It would be better to wait until there was a big enough sample to draw general principles from. Mr Barker also agreed but wondered whether a minor amendment to provide that the party has to file a memorandum addressing the issues which tend to arise in each one of the cases would be useful. Venning J noted that generally the action was

filed and then the defendant would lodge a challenge to the form of the proceedings and the issues would then be addressed. The Chief Justice said that the matter might well evolve to the stage where some sort of checklist would be useful but that it was not yet there. Mr Barker noted that litigation funders would want reform through legislation, such as allowing for opt out procedures. This is not something that rules would address.

The Chair noted that the consensus was that a letter would be sent to ADLS and Mr Gapes saying that the case law is building up and it may be useful to capture some of it at some stage but that the Committee did not consider that it had been reached.

Action point: letters to be drafted to ADLS and Mr Gapes setting out the Committee's view and thanking them for the proposal.

10. Lists of Documents

ADLS had raised a tension between in r 8.4 and r 5.28(4) the District Courts Rules. Rule 8.4 requires a list of documents to be served on the other party after the pleading is filed. Rule 5.28(4) states that the statement of claim must be accompanied by a list of documents Mr Beck stated that there was no need for the lists of documents to be filed in the Court with the statement of claim – r 5.28(4) was a mistake. However, the difference in procedure between the High Court and District Courts was deliberate. In the High Court the party must provide copies of the document relied on. In the District Court the party only has to list the documents. This is because it was not considered necessary to require the documents in the District Courts.

Mr Coulter had also raised the point that there were no costs allocated for the lists of documents and initial disclosure in the District Courts and High Court. The Chair noted that the Committee had previously debated this matter and had considered that no award of cost was warranted. The cost preparing the list of documents was part of drafting the statement of claim. A party has to have the documents relied on in order to commence the proceedings.

The Committee agreed that letters would be drafted to ADLS and Mr Coulter thanking them for their proposals

Action Point: letters to be sent to ADLS and Mr Coulter.

11. Criminal Procedure Amendment Rules

The final item on the Agenda was the Criminal Procedure Amendment Rules. The Committee had agreed that the Rules would be circulated for concurrence at the previous meeting. However, Ms Giacometti had made some technical drafting changes to the Rules. The Committee confirmed that the Rules could be circulated for concurrence. Concurrence for these rules is not affected by the Judicature Modernisation Bill.

Action point: Criminal Procedure Amendment Rules to be circulated for concurrence

12. General Matters

Finally the Chair raised a matter about the level of detail the Committee should go into when responding to suggestions for changes. The Chair noted that the Committee wished to encourage practitioners to engage with the Committee and show that the suggestion had been carefully considered. The Chief Justice said that the Committee should respond fully to the suggestion by lifting the reasons from the discussion that the Committee had had at the meeting. Mr McCarron noted that there could sometimes be a resources issue in responding in detail to submissions.

Venning J informed the Committee that the Higher Courts had agreed to the use of Te Reo Māori in intituling which would require a rule change. He agreed to work with the clerk on this matter.

Finally, Judge Gibson noted that the District Court had noticed a substantial fall-off in proceedings coming through the Central Processing Unit from about August onwards. The Judges were investigating this issue and would report back to the Committee at the next meeting.

The meeting closed at 1:00 pm