The Rules Committee

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21 June 2019
Minutes 02/18

Circular 34 of 2019

Minutes of Meeting of 17 June 2019

The meeting called by Agenda 02/19 began at 10:01 am on Monday 17 June 2019 at the Supreme Court Complex, Wellington.

1. Preliminary

In Attendance

The Honourable Justice Venning, Chief High Court Judge
The Honourable Justice Dobson, Chair
The Honourable Justice Cooke
His Honour Judge Gibson
His Honour Judge Kellar
Ms Jessica Gorman, Crown Law (Representative for the Solicitor-General)
Mr Rajesh Chhana; Deputy Secretary Policy, Ministry of Justice (Representative for the Secretary of Justice)
Mr Andrew Beck, New Zealand Law Society (NZLS) Representative
Mr Jason McHerron, NZLS Representative
Ms Laura O'Gorman
Ms Kate Davenport QC, Special Purposes Appointee and President of the New Zealand Bar Association (NZBA)

Mr Kieron McCarron, Chief Advisor Legal and Policy in the Office of the Chief Justice
Ms Fiona Leonard, Chief Parliamentary Counsel in the Parliamentary Counsel Office (PCO)
Ms Alexandria Mark, Secretary to the Rules Committee
Mr Sebastian Hartley, Clerk to the Rules Committee

Apologies

The Right Honourable Dame Helen Winkelmann GNZM, Chief Justice of New Zealand
Judge Doogue, Chief District Court Judge
The Honourable David Parker, Attorney-General

Minutes of Previous Meeting

The minutes of the Committee's meeting of 18 March 2019 (C 21 of 2018) were confirmed, subject to minor corrections being made.

Welcome to New Members

Justice Dobson, as the recently appointed Chair of the Committee, welcomed Justice Cooke and Ms Davenport QC to their first meeting of the Committee.

2. Costs for Litigants-in-Person

Discussion

Justice Dobson noted that the Supreme Court's decision in *McGuire v Secretary for Justice* [2018] NZSC 116 had left the law regarding costs for litigants-in-person in a state of flux. He noted the Committee had agreed in principle, at its meeting of 18 March 2019 (C 21 of 2018), to identify potential options for abrogating the "primary rule" preventing the award of costs to lay litigants upheld in *McGuire*. The mood of the Committee had been that the primary rule is pernicious; particularly given the existence of the exception allowing the award of costs to lawyers appearing in person.

Summarising research set out by the Clerk in a memorandum, his Honour noted that Canada and England have achieved similar reforms; Canada through judicial decisions and England through legislative revision. Canada allows lay-litigants to receive costs for the lost value of the time spent preparing their case together with disbursements, subject to an evaluation of the quality of the work done and reasonableness of expenditure in each case. The English rules allow recovery for steps taken by the lay-litigant in preparing and presenting their case, but at no more than two-thirds the rate that a represented party could have achieved. Australia, it was noted, has not taken any steps to abrogate the primary rule.

His Honour invited discussion regarding what approach if any New Zealand should adopt if, as was identified previously might be desirable, the goal is to ensure equality in the treatment of all litigants. Members noted that this raises the broader question of whether New Zealand has the correct costs model, and that any discussion of costs for lay-litigants could not be properly carried out without that broader question being in the mix.

His Honour noted that the Committee could not promote such a radical change without wide reaching consultation, which the Committee likely lacks the resources to undertake. In referring this topic to either Parliament or the Committee, the Supreme Court had noted in *McGuire* that the changes in the United Kingdom may have produced useful empirical evidence that could assist the Committee. Even in that case, members noted, there are a wide range of policy questions engaged; such as the extent to which it is desirable, even given the

fundamental importance of access to justice, to incentivise lay-litigants when their involvement has been proven to impair the efficient dispatch of the Courts' business.

It was noted that the issue arises, at least in part, because of difficulties in finding adequate legal representation for many lay-litigants under current funding conditions for civil legal aid. If adequate representation could be procured for more litigants the issue would not be as pressing. The Committee broadly supported any approaches that avoided incentivising litigants who could access legal representation to instead litigate in person; noting the features of the English system that seek to avoid that outcome.

The Ministry's representative indicated that while it would be better placed to carry out such work and could potentially refer it to the Law Commission once the Commission has the capacity to take on new projects, the Ministry is unlikely to be able to 'package in' research on this issue to its wider work on access to justice at this time. Nonetheless, the Committee noted that this discussion has become more pressing because of wider public funding decisions in the justice sector, and it is important that the Committee be sensitive to the wider policy environment in proposing any changes with such wide-reaching significance. The Ministry representative noted that, whatever other changes the government makes or work it undertakes, it would be grateful to receive any considered views from expert bodies such as the Committee that aid in its wider work on promoting access to justice. The Ministry offered to update the Committee on its wider work programme in this area at the next meeting.

Other members noted that, as well as the Committee likely lacking the institutional ability to carry out such a large-scale endeavour, there are potentially some doubts as to the Committee's jurisdiction to change the law in such a fundamental manner. It was accepted that this should be carefully determined before any work is undertaken. However, many members of the Committee were of the view that, while the jurisdiction to award costs is ultimately statutory in its basis (historically the Statute of Gloucester 1278 and, now, s 162 of the Senior Courts Act 2016), the 'real' jurisdiction to award costs is, as was said in *McGuire*, that found in the judge-made common law and rules of court. It was therefore considered likely that the Committee will have jurisdiction to act.

Despite these possible impediments, the Committee agreed it was still important to advance the debate, given the importance of the access to justice concerns engaged. The connection was noted between this topic and the issue of promoting the unbundling of legal services where the issue of giving greater clarity to partly represented litigants (and their lawyers) is a smaller issue with which the Committee might more effectively engage with the profession. Considering that, the Committee agreed to work towards consulting on rules changes on this sub-issue in the first instance. The intention in doing so is to use consultation on this discrete topic to help take the profession's temperature on wider and more fundamental potential changes to rules while also progressing work in this area.

Conclusions Reached and Action Points Agreed

- Committee, as part of its ongoing work considering unbundling of legal services and related costs issues as part of promoting access to justice, to work towards offering greater clarity on the availability of costs for partially represented litigants as a first step in addressing costs for litigants-in-person.
- Justice Dobson and the Clerk to identify a range of possible proposals, for further discussion at the next meeting, that may be able to be circulated more widely for consultation.
- Ministry representative to update the Committee on scope of policy reform proposals, and where research on costs for lay litigants might be accommodated.

3. Service by Post and Prisoners

Discussion

The Committee had received a letter from a prisoner (Mr Smith) complaining that, due to delays in prisoners receiving mail while incarcerated, and because of New Zealand Post's reduced quality of service delivery in recent years, Mr Smith is concerned that documents served by post on prisoners, and responses from them, are not reaching their destination within a reasonable period after being sent. He therefore asked that the timeframes for deemed receipt and service of documents sent by post under the various rules of court be reconsidered.

The Clerk identified that periods for deemed receipt are generally five working days after a document was sent by post; except for the Criminal Procedure Rules, which provide for three working days.

Mr Smith's letter raises two issues. The first is whether Corrections' processes for delivering court documents to prisoners in their custody are adequate. The Ministry advised that Corrections' position is likely to be that they are getting documents to prisoners as quickly as possible once received, subject to the requirements of their policy. It was noted that it might be desirable for the Criminal Procedure Committee, which has established contacts with Corrections, to ask whether a more streamlined procedure could be adopted in respect of court documents. Practically, Crown counsel will often have a role in informing the court as to when documents were sent to prisoners if expected replies have not been received.

As to the wider issue, the Committee was of the view that, as the current timeframes for service by post in place under the various rules of court were adopted to reflect the current New Zealand Post service delivery model; appear, in most cases, to be satisfactory; and any longer period being provided for would be disruptive on the efficient conduct of proceedings. Accordingly, while deciding that the Criminal Procedure Rules should be amended to conform to the other rules of court (that is, should be amended to provide for 5 working days), the Committee decided that no further changes would be desirable.

Conclusions Reached and Action Points Agreed

- Justice Dobson to write to Justice Lang, as chair of the Criminal Procedure Committee, to ask that Committee to engage with Corrections and ensure that court documents are being delivered to prisoners as promptly as possible once received at prisons.
- PCO to incorporate draft amendments reflecting the Committee's decision into future amendment of the Criminal Procedure Rules.
- Justice Dobson to write to Mr Smith informing him of the outcome of the Committee's discussion.

4. Electronic Filing in the High Court

Discussion

Further to its discussion of Justice Osborne's memorandum noting inconsistencies between the High Court and the other Senior Courts in terms of the modes of accepting documents for filing, the Committee considered a memorandum from the Clerk identifying possible amendments to the High Court Rules that would allow for the electronic filing of all non-originating documents. It was agreed that it is important for registry staff to sight all originating documents, and affidavits, to ensure that they have been properly authenticated. This establishes an outer limit to how many documents can be accepted for filing electronically unless some new electronic authentication measure was adopted.

It was identified that, despite this change being desirable in principle, it would not presently be feasible for the High Court to reconcile the large number of electronic payments of filing fees that would have to be received under such a proposal with individual documents being filed. It would be necessary to move to a comprehensive electronic filing system incorporating automatic reconciliations and more effective document management, for which funding is not likely to soon be made available. Justice Venning observed that any movement in the rules on this topic would be very much of a piecemeal nature; allowing for more extensive electronic filing of documents as an adjunct to the ongoing need to maintain a hard copy master court file. The Ministry noted that, as banks become increasingly reluctant to accept and issue cheques, it will be necessary to eventually move away from the current reliance on cheques as the primary means of paying filing fees. (Contemporaneous physical receipt is relied on to match the file to the document(s) in respect of which it is paid.)

Two potential solutions to this problem were identified. One is the ability to make credit card transactions over the phone with registry staff, and the other is the use of credit card payment forms like those used by certain Tribunals. These, together with some mechanism for accepting documents as provisionally filed until payments are processed, could provide a solution. Willingness to explore these possibilities at some point in the future was expressed, subject to a recognition that even a comparatively minor change would have resourcing implications. However, given the clear practical reasons for the distinction between the High Court and the other Senior Courts (mostly because of volume of filings and that Court's

responsibilities to monitor compliance of originating documents with the rules), it was agreed to not action any wider change in the position until facilities, resources, and Ministry policies allow.

Considering what changes could nonetheless be made without relying on these wider changes, it was identified that, by the time that non-originating documents not requiring the payment of a filing fee were able to be accepted for filing electronically, we would arrive at much the same position as we are at now. One exception, which the Committee agreed to consider further, was to remove the distinction between first case management memoranda and subsequent memoranda that is currently found in the rules, and to allow all submissions and memoranda not attracting a filing fee to be accepted for filing electronically.

Conclusions Reached and Action Points Agreed

Clerk to advise Committee on rules changes necessary to allow memoranda and submissions not attracting a filing fee to be accepted for filing electronically.

5. Second Applications for Summary Judgment

Ms O'Gorman drew to the Committee's attention the effect of the interaction between rr 7.52 and 12.4 of the High Court Rules 2016, as identified in *Air New Zealand Ltd v Wellington International Airport Ltd* [2009] NZAR 138 (HC). That is, that the High Court did not have jurisdiction to grant leave for a party to make a second application for summary judgment. This was despite Justice Wild, in that decision, noting that such an outcome is "Draconian and certainly less than satisfactory".

More recently, Associate Judge Sargisson in *Yingling v Gifford* [2018] NZHC 53, echoed Justice Wild's dissatisfaction with this if it is in fact the case, while also expressing some doubt as to his Honour's conclusion on jurisdiction.

Members of the Committee expressed agreement with Associate Judge Sargisson's view that Justice Wild's conclusion places too much weight on the use of the singular in the phrase "an application" in r 12.4, bearing in mind the Interpretation Act's clear statement that the singular can be read as representing the plural where necessary. The Committee was minded to amend the rule to allow contrary outcomes in future cases, while noting the need to ensure that no adverse inferences arose from the choice of language adopted. A second application could only be justified if there had been a material change in circumstances relevant to the claimed absence of defence or cause of action.

PCO was asked to advise the Committee on how rr 7.52 and 12.4 of the High Court Rules might be amended to ensure that the High Court has jurisdiction to grant leave for a party to make a second application for summary judgment while avoiding any unintended consequences or ambiguity.

6. Unbundling of Legal Services

Discussion

Further to the Committee's discussions at the meeting of 18 March 2019, the Clerk had identified that the Saskatchewan Queen's Bench Rules provide a model for providing clearer recognition of the possibility of a lawyer assisting an unrepresented party in the drafting of proceedings or at certain stages of the proceeding while not becoming a solicitor on the record. The NZLS representatives took the view that the Saskatchewan Queen's Bench Rules place an undue emphasis on recording the involvement of a lawyer 'in the background' to avoid surprise to the other side. In practice, they suggested, such a requirement would potentially make lawyers less willing to assist an unrepresented party under a limited retainer by associating them, potentially, with a product over which they had no control and for which they were not ultimately responsible.

The NZLS representatives, and other members of the profession present, stated that it was a primary concern of practitioners, when appearing for defined purposes only, not to be asked by the Court to more widely assist. There is a prospect that, as officers of the Court, lawyers would feel unable to reject such a request, even if it went beyond the scope of their retainer.

Justice Venning expressed the view that, all things being equal, judges would still be most grateful for even the limited involvement of counsel in the drafting of pleadings and the arguing of interlocutory applications and other matters on behalf of otherwise unrepresented parties. His Honour noted that, under the rules of court, separately from the professional obligations arising under other rules, so long as lawyers did not purport to file documents on behalf of a party and no memoranda to that effect are filed, they will not become the solicitor on the record. There would be, for the purposes of the rules, no broader obligation to assist the Court. Practically, this will mean that the party will have to file their own documents; which, it was noted, is appropriate to their position as a litigant-in-person. Justice Venning volunteered to communicate to the profession the Committee and judiciary's view that there is no impediment seen to acting under a limited retainer, from the perspective of the rules of court; that lawyers are encouraged to assist unrepresented parties under a limited retainer; and that no improper pressure will be brought to bear on lawyers to assist more widely where involved in this manner.

Mr McHerron noted, as a discrete issue, the possibility of amending r 5.40(1) of the High Court Rules to provide that a notice of change of representation will not be required if a litigant in person is represented by a lawyer in a hearing but continued acting in person for other aspects of the proceeding. He suggested this would make it clearer that compliance with the usual formalities relating to solicitors on the record and change of representation is unnecessary where a lawyer is acting on a limited retainer. He expressed his willingness to draft an amendment to this effect, which parallels that in place in the Civil Procedure Rules for England and Wales.

Conclusions Reached and Action Points Agreed

- Mr McHerron to prepare and provide to Clerk for circulation memorandum outlining possible amendments to r 5.40(1) High Court Rules 2016 to modify change of representation rules to clarify the position of practitioners acting under a limited retainer.
- Justice Venning to communicate with representatives of profession to indicate Committee's support for the provision of legal services under a limited retainer, and view that no impediment or undue risk exists for practitioners in appearing and acting under such arrangements.

7. Access to Civil Justice Working Group

Discussion

Judge Kellar reported the working group's preliminary thoughts on improving access to civil justice in the District Court. The Judge noted that it would be relatively simple to simplify rules related to witness briefs, discovery, and so forth in suitably simple cases. The goal is to ensure that the judge presiding over each proceeding has the means to tailor the procedural requirements applying to each proceeding to the value and complexity of the claim in front of them. However, the Judge noted that there is an element of "deceptive simplicity" to such reforms as there would inevitably be disputes between parties as to whether their proceeding should be governed by those simplified rules or the full procedure. That is, the desire for simplification could in fact invite new procedural disputes: increasing costs and delays. Additionally, it is necessary to consider any such steps as part of a wider package of reforms, such as the wider work already underway in this area. Nonetheless, the Judge said, it is important that the Committee does something.

Regarding the specific issue identified by the Judge, members of the Committee noted that the issue of what track is to be used to progress a case can be made a matter for consideration at a first case management conference; like the short trial vetting process presently. It was noted that it would be desirable, in that case, to postpone the parties' discovery and other procedural obligations falling due, to the greatest extent compatible with the administering judge having a sufficient overview of the matter at the time of that conference, until after the correct track has been identified. Simple changes that could be made as part of these reforms would be to expand the current position in the District Court of requiring only lists of relevant documents, not the documents themselves, to be provided together with statements of claim.

In terms of wider considerations, Justice Dobson said that the Committee has a range of options. At one extreme is doing nothing. At the other is adopting a Scandinavian model such as that President Kós has discussed, in which a more inquisitorial system of justice is adopted. Intermediate options involve widescale changes to specific areas of procedure, such as following Western Australia's recent abandonment of written briefs for witnesses in favour of will say statements.

Justice Cooke noted that Sir Graham Panckhurst, hearing several insurance claims in Christchurch, has been pioneering a hybrid model of mediation and adjudication with apparently quite expeditious results, which might provide a half-step towards a full inquisitorial model. It was noted that, in such cases, there will be a need to consider how appeal rights might be affected by a departure from the adversarial system, with the Committee noting that appeals may need to be limited to questions of law or entirely precluded. The operation of the doctrine of precedent would also, in such a model, be impacted.

Another idea again, noted by Justice Venning, would be to begin all civil proceedings by summary judgment to produce a rapid clarification of the issues at stake; thereby potentially improving the efficiency of proceedings.

Conclusions Reached and Action Points Agreed

- Having identified some possible options, and some relevant considerations and potential pitfalls, the Committee instructed the Clerk to provide the working group with information as to overseas experiences of removing a requirement for written witness briefs, structures such as President Kós' Scandinavian model, and simplified discovery obligations. Clerk also to obtain further information on Sir Graham Panckhurst's model of dealing with claims in Christchurch.
- Working group to discuss this material, and matters arising therefrom, before the Committee's next meeting.

8. Parliamentary Counsel Office

Ms Leonard drew four matters to the Committee's attention.

The first two concerned inconsistencies in the capitalisation of Te and O in Te Reo Māori intituling of documents, such as Form G 1 of the High Court Rules 2016, when the English equivalents are not capitalised and inconsistent translations of the Court of Appeal's Te Reo Māori name. Regarding all such issues, both now and in the future, the Committee decided that PCO should adopt the Maori Language Commission certified translations provided by the Ministry of Justice in preference to any less formally sourced translations adopted by the Committee in previous rule-making efforts.

The third concerned the fact that r 8.17 of the High Court Rules is expressed as being subject to r 7.18. However, r 7.18 was revoked on 4 February 2013. PCO suggested that the reference to r 7.18 in r 8.17 is now redundant, and the reference ought now to be to the equivalent r 7.7. The Committee agreed to this change.

The fourth concerned a large number (in the order of a hundred) of possible consequential changes required to the District Court Rules 2014 following the repeal and replacement of the District Courts Act 1947. PCO noted that the table, which identified possible updated cross-references, should not be considered definitive, and that policy work is necessary to ensure

the equivalence of the suggested amended cross-references to the former provisions, and to ensure that all amendments have been captured.

Ministry of Justice to undertake such policy work. Judge Gibson and Mr Beck to assist in clarifying any matters on which the Ministry seeks assistance as required.

Ms Leonard circulated draft versions of the Criminal Procedure Amendment Rules 2019, Draft High Court Amendment Rules (No 2) 2019, and the Draft High Court Rules (Representative Proceedings) Amendment Rules 2019 for noting. Ms Leonard noted two typographical errors identified by Committee members in these drafts and undertook to recirculate the Representative Proceedings Amendment Rules as the version circulated does not incorporate matters agreed at the Committee's meeting of 22 November 2018. Clerk to recirculate updated version once received from Ms Leonard.

9. Miscellaneous Suggested Rules Amendments

Ms Gorman drew to the Committee's attention three matters brought to her attention by colleagues that she thought the Committee may wish to consider.

The first concerned the current impossibility of applying for security for costs on applications for leave to appeal to the Supreme Court. She noted a recent decision in which the applicant incorporated society failed to obtain leave, was the subject of an adverse costs award of $4,500, then ceased to exist for practical purposes before costs could be extracted by the successful respondent. Mr McCarron noted that the inability to obtain security for costs before leave to appeal is granted has seldom posed a major issue over the course of the Supreme Court's lifetime to date and, while the situation described by Ms Gorman can occur, in most cases costs will not exceed $2,500 and there is consequentially little appetite, on the part of the Supreme Court judges, for this issue to be addressed.

The second concerned the default timetabling provisions under the High Court Rules for opposed interlocutory applications. Ms Gorman noted that where service of the application is effected 11 working days before the hearing of the application under rr 7.24(1) and 7.39(2) a notice of opposition would be due the day before the hearing, the applicant's synopsis would fall due before the notice of opposition was due, and the respondent's synopsis would be due on the same day as the notice of opposition.

It was noted that, at first glance, an amendment providing that, in all cases, the notice of opposition is due no later than 3 working days before the hearing date may avoid the issue, if accompanied by other appropriate changes. However, it was also noted that any amendment would need to cater for all possible eventualities, such as might arise where timetabling orders cause a departure from the default position, and it was identified that a simple 3-day rule might not achieve that goal. Ms Gorman and Ms O'Gorman agreed to consider the issue more fully before the Committee's next meeting.

The third related to r 5.36(1)(b) of the High Court Rules, which refers to a person holding a practising certificate as either a solicitor or as a barrister or solicitor when, under s 39(1) of the Lawyers and Conveyancers Act 2006, it is possible to hold a certificate only as a barrister sole or as a barrister and solicitor. The Committee instructed PCO to include an amendment correcting this apparent typographical error in future amendment rules, such that the reference in r 5.36(1)(b) of the High Court Rules is only to those holding a current practicing certificate as a barrister and solicitor.

10. Other Business

Mr Chhana noted that contempt of court legislation is continuing its passage through the House and that several consequential issues requiring the Committee's attention will arise as and when that legislation passes into law. He indicated that the Minister would write to the Committee inviting them to consider these issues in due course.

The meeting closed at 12:41 pm.

The next meeting of the Committee will be held on Monday 23 September 2016, to begin at 10:00 am at the Supreme Court Complex, Wellington.