The Rules Committee

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6 of December 2013
Minutes 06/2013

Circular 115 of 2013

Minutes of meeting held on 2 December 2013

The meeting called by Agenda 06B/2013 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 2 December 2013.

1. Preliminary

In Attendance

Hon Justice Asher (the Chair)
Hon Justice Winkelmann, Chief High Court Judge
Hon Justice Gilbert
Judge S Thomas
Judge Gibson
Ms Cheryl Gwyn, Deputy Solicitor-General (Constitutional), Crown Law
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
Mr Frank McLaughlin, Deputy Secretary, Ministry of Justice
Ms Phoebe Dengate-Thrush, Private Secretary to the Attorney-General
Ms Kelly Harris, Senior Policy Advisor, Ministry of Justice
Mr Bill Moore, Special Parliamentary Counsel
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 Christopher Finlayson QC, Attorney-General
Judge Doogue, Chief District Court Judge

Confirmation of minutes

Mr Bill Moore noted that the minutes of 7 October 2013 did not record the discussion around the consequences of having the High Court Rules included as a Schedule to the Judicature Modernisation Bill. With this change, the minutes of 7 October 2013 were confirmed.

Matters arising

The Chair noted the apologies.

The Chair then welcomed Ms Laura O'Gorman and Mr Andrew Barker to the Committee. Ms O'Gorman was appointed by the Chief Justice. Ms O'Gorman is a partner at Buddle Findlay and had been very involved in the the new discovery rules, the case management reforms, and the recently implemented electronic bundle protocol. The Chair explained that Mr Andrew Barker was to be Mr Stephen Mills QC's alternate. Mr Barker is a barrister at Shortland Chambers and has a particular interest in rules of civil procedure and has written various articles on rules.

The Chair also noted that this meeting was Ms Phoebe Dengate-Thrush's last meeting. Ms Dengate-Thrush had been with the Committee for two years as the Attorney-General's Private Secretary but was leaving to take up a position in Rarotonga in the Attorney-General's office there. The Chair and the Committee thanked Ms Dengate-Thrush for her contribution and wished her all the best for the new job.

Report on the District Court Rules consultation

During November, consultation meetings on the new District Court Rules have been held throughout New Zealand. The Chair asked Judge Susan Thomas to report back on any feedback from the meetings.

Judge Susan Thomas explained that the Sub-Committee held a series of meetings in the main centres to consult on the draft District Court Rules. Few practitioners attended the meetings, which was ascribed to most practitioners being happy with the proposed reforms.

At the meetings, one issue raised related to the time period before judgment by default could be obtained. In line with the High Court Rules, the draft District Court Rules provide a period of 25 working days compared to the 2009 Rules which have a shorter period of 20 working days. Two or three practitioners suggested the period should remain 20 working days. However, the majority of practitioners consulted with preferred consistency with the High Court Rules.

Some practitioners had suggested bringing back default summons for obtaining a simple undisputed debt quickly. This suggestion was raised at various meetings but the majority of practitioners were not in favour of this. The sub-committee had also written directly to banks, debt collection agencies, finance companies and had received no feedback in relation to default summons. This indicated that these institutions were content with the summary judgment mechanism.

A further matter that arose at the meetings was whether a party should be able to seek summary judgment after a statement of defence is served. The draft Rules are currently identical to the High Court Rules and would require leave once a statement of defence is filed. Many practitioners suggested that the requirement to seek leave should be deleted. This proposal was raised by the Sub-Committee at other centres and was met with

enthusiasm by the practitioners. On this basis, Judge Thomas suggested the Committee should consider the merits of not requiring leave to seek summary judgment.

Mr Barker expressed concern with this proposal. If summary judgment was defended, Mr Barker contended that this could lead to unnecessary delays. If discovery was already completed, Mr Barker contended that it would normally be better to simply proceed to trial. Justice Winkelmann agreed that this could lead to unnecessary delay but saw merit in the proposal to not require leave earlier on.

Justice Winkelmann suggested that the rules could be amended to allow a party to seek summary judgment without leave for a certain period after the filing of the statement of defence but before discovery occurred. Following this period (which would need to be determined) parties would require leave to seek summary judgment. If discovery provided a party with a document removing either a cause of action or a defence, leave to seek summary judgment would ordinarily be granted.

The Committee agreed to this proposal. However, further thought was required relating to the period. The Sub-Committee will consider what the period should be. The Sub-Committee, with the assistance of Mr Moore, will prepare an amended rule and report back to the Committee before the next meeting.

Extending the commencement date for the Court of Appeal and Supreme Court Rules relating to the use of the electronic bundle protocol

The Secretary to the Committee, Ms Jennie Marjoribanks, raised an issue relating to the commencement date for the rules regarding the use of the electronic bundle protocol in the Court of Appeal and Supreme Court. Ms Marjoribanks noted that the commencement dates provided for in the rules agreed to at the last meeting could not be met due to the legislative process.

Ms Marjoribanks asked whether the Committee would agree to change the commencement dates from 1 April 2013 to 1 June 2014. The Committee agreed to this.

2. Appellate pathways for interlocutory decisions

The Judicature Modernisation Bill 2013 (178-1) has been introduced to the House of Representatives. The Chair explained that cl 57 of the Bill will require leave to appeal any interlocutory decisions made in the High Court. The Chair stated that there were two issues the Committee should consider: first, whether a decision that finally determines a proceedings should require leave or whether such a decision should be appealable as of right, and, secondly, whether appeals from interlocutory decisions made in the District Court to the High Court should also have a similar leave requirement.

Should some interlocutory decisions be appealable as of right?

In relation to the first issue, regarding whether final determinations should require leave, the Chair explained that the Committee had always accepted that there should be a right to appeal any final determination. Following the Court of Appeal's decision in *Waterhouse v Contractors Bonding Ltd* [2013] NZCA 151, it was possible to argue that a final determination arising from an interlocutory application is not an "interlocutory decision" and so would not require leave under cl 57 of the Bill. This was because the Court of Appeal had defined an interlocutory decision as a decision that does not substantially determine rights of the parties. However, the Chair explained that the Clerk's memorandum to the Committee illustrated that the law is not settled on what is an "interlocutory decision" and it was possible that the Supreme Court could decide that an "interlocutory decision" includes a final

determination. Therefore the Chair suggested that the Committee should not place complete reliance on the Court of Appeal's interpretation of "interlocutory decision" in *Waterhouse*. The Committee agreed that all final determinations should be appealable as of right and that the Committee should not rely on *Waterhouse* in interpreting what is an "interlocutory decision".

Mr Frank McLaughlin stated that the Ministry of Justice also agreed that there should be a right to appeal interlocutory decisions that finally determine a matter. Clause 57 was not intended to remove this. However, if the interpretation in *Waterhouse* could not be regarded as certain, it would be necessary to ensure that the Bill provided a right to appeal final determinations. The question was how? Mr McLaughlin explained that Ms Kelly Harris, a Senior Policy Advisor at the Ministry of Justice, had come up with three options and would present these to the Committee.

Ms Harris outlined three proposals: first, change the definition of interlocutory order in the High Court Rules to reflect the Court of Appeal's definition in *Waterhouse*; second, change the leave requirement in the Bill to not include final determinations; and third, provide more specific listing of decisions that are not "interlocutory orders" either in the Bill or in the High Court Rules. Ms Harris explained that each option had difficulties. In relation to the first and second option, parties could dispute the effect of a decision and this could lead to satellite litigation over what the effect was and whether or not leave to appeal was required. In relation to the third option, Ms Harris considered the difficulty was selecting the appropriate types of decisions that could be listed.

Mr Andrew Beck considered that attempting to define what was a final determination would create uncertainty and would simply lead to disputes about whether the interlocutory decision was a final disposition or not. The Committee agreed and so defining an interlocutory decision by its substantive effect was rejected.

The Chair favoured the third option and suggested that the proceedings that would not require leave could be spelt out. For example strike out decisions and orders granting summary judgments are in substance final determinations and leave should not be required to appeal the decision. Ms O'Gorman agreed but observed that there are a number of other permutations which should be considered for the purposes of finalising such a list. For example, on Friday 29 November the High Court had issued a decision (*ANZ v Calvert*) about an application to set aside summary judgment granted by default. After considering conflicting authorities on the issue, the High Court concluded that although the outcome of a summary judgment decision was appealable to the Court of Appeal, a decision not to set aside a default summary judgment was not (instead it was only reviewable under the current rules).

Justice Winkelmann agreed that the Committee could not capture all permutations. However, Justice Winkelmann considered that the focus should be on striking the correct balance between capturing enough interlocutory proceedings but not capturing too many. The list of proceedings would reflect this and the Committee should recognise that some proceedings that do finally determine a matter will be left out, but that in such cases leave to appeal would invariably be granted.

The Committee then turned to consider whether the list should be inclusive or exclusive. Ms Harris suggested that an inclusive list risks creating the precise litigation that a list was intended to avoid. The Committee agreed that it should be an exclusive list. The Committee then discussed whether the exclusive list should be included in the Bill or in the High Court Rules. The Committee favoured placing the list in the High Court Rules as this would allow the list of proceedings to be reviewed and modified if need be. This could be done by

including a definition of “interlocutory decisions” in the Bill as having the meaning of “interlocutory order” as defined in the High Court Rules.

The Committee agreed that it needed to be made clear that decisions in relation to interlocutory applications that had the effect of finally determining rights of parties should be appealable as of right. To clarify this, the Committee agreed to adopt a list of determinations that would be appealable as of right. Mr Moore, Ms Harris and Mr McLaughlin will prepare options and draft amendments and will give this to the Chair to discuss with the Chief High Court Judge.

Should interlocutory appeals from the District Court to the High Court also require leave?

The Chair then raised the second issue of whether the same leave requirement should apply to appeals from the District Court. Ms Harris suggested that achieving this might be difficult because there was a mosaic of legislation dealing with appeals from the District Court to the High Court. Therefore to achieve consistency several statutes would need to be amended.

Mr Bruce Gray QC queried whether amending statutes to require leave would limit the jurisdiction of the High Court. Mr Gray pointed out that the Court of Appeal and Supreme Court are created by statute, while the High Court has complete originating power. On this basis he questioned whether the restricting some appeals from the District Court to the High Court by requiring leave would be appropriate. However, Mr Gray also pointed out that even with a leave requirement, the High Court could still review the District Court’s decision to not grant leave. This would, however, increase the delay and complexity of appeals and might defeat the point of requiring leave in the first place.

Judge Gibson agreed and suggested that the Committee should not be too quick to adopt a leave requirement without first considering the purpose of such a change, the effect and whether the purpose could be achieved, and the various statutes that would need to be amended. Only then should the Committee proceed. The Committee agreed that a change should not be rushed and further thought needed to be given to this proposal.

The Committee agreed to revisit this matter at the next Committee meeting in February and to consider this proposal in light of what is done with appeals of interlocutory decisions form the High Court.

3. Costs for appeals and interlocutory matters in the District Court

Mr Beck explained that the proposed changes to the allocations in the District Court Rules costs schedule for appeals and interlocutory matters were to bring the allocations into line with the High Court Rules. Mr Beck noted that the New Zealand Law Society and the New Zealand Bar Associate had questioned the justification for there being any difference in time allocations between the costs schedules in the District Court Rules and High Court Rules. While the differences should be reviewed, this would be a major project. In the meantime, Mr Beck was of the view that the Committee should focus on costs for appeals and interlocutory matters.

In relation to the proposed changes, Mr Beck explained the Law Society and Bar Association had provided invaluable feedback. The Law Society recommended that cl 10 of the District Court Rules costs schedule dealing with summary judgment should be aligned with the High Court Rules costs schedule. The Bar Association had recommended that the costs schedule for appeals should allow for second counsel as is provided for in the High Court Rules costs schedule. The Committee expressed their gratitude to the Law Society and the Bar Association and agreed to both these proposals. On this basis, Mr Moore will amend the

costs schedule in the draft District Court Rules to reflect Mr Beck's proposal and the changes agreed to in relation to aligning summary judgment

Mr McLaughlin suggested that the Committee should consider having transitional provisions. The Chair agreed that transitional provisions would be necessary to provide certainty in relation to costs. The Committee then discussed whether the costs schedule should apply to steps commenced or completed from the commencement date of the rules. The Committee decided to be guided by previous transitional provisions.

The Committee agreed to amend the costs schedule in the draft District Court Rules in relation to interlocutory matters and appeals as discussed. The Committee will also provide transitional provisions. These changes will be included in the draft District Court Rules will be uploaded to the Rules Committee's website along with a note explaining the changes.

4. Access to court documents

Justice Winkelmann explained that the rules relating to access to court documents are labyrinthine and unnecessarily complex. To remedy this, Justice Winkelmann had asked the Clerk to prepare a draft set of rules that provided a simpler scheme. Justice Winkelmann asked the Committee whether the Committee considered the current scheme setting out rules relating to three different periods for accessing court documents. Justice Winkelmann was of the view that no substantive change to the rules was required, and all that should be changed was the organisation of the rules. The Committee agreed that the rules could be improved.

On this basis, a working group would be formed comprising Justice Winkelmann, Mr Moore, Mr Gray and the Clerk to revise the draft rules and report back to the Committee at the next meeting.

A working group will work on the draft access to court documents rules and report back to the Committee at the next meeting.

5. Consequential amendments following the High Court Amendment Rules (No 3) 2013

Associate Judge Faire had written a letter to the Committee setting out three comments in relation to the High Court Amendment Rules (No 3) 2013. The first related to the omission of "working" in the phrase "25 days" in r 12.5. The second related to the definition of ordinary and complex defended proceedings in rr 7.1AA and 7.1(4). The third related to the lack of a compliance provision for r 7.43A.

In relation to the first comment about the phrase "25 days" rather than the correct "25 working days" in r 12.5, the Chair stated that this was being addressed. Mr Moore had prepared amendment rules inserting "working" after "25" in r 12.5. The Committee agreed to this amendment.

Turning to the second comment, relating to the definition of ordinary and complex defended proceedings, the Chair suggested there was no need to change. The classification of a proceeding as an ordinary or complex defended proceeding is primarily to assist with the administration. If a proceeding originally classified as an ordinary defended proceeding requires more than one case management conference this would automatically transform it into a complex defended proceeding but nothing turns on this. A matter is not bound by the classification given at the beginning. In r 7.1AA this flexibility is made clear and r 7.1AA simply acts as a guide. The Committee agreed that there was no problem with the definition.

Finally, in relation to the third comment, the Chair explained that the concern was that there was no consequence set out if an order made under r 7.43A was not complied with. It was considered, after discussion, that there was no need for such a consequence to be specifically set out because many other rules did not set out a consequence for non-compliance and non-compliance was dealt with in r 1.5.

The Committee agreed to insert "working" after "25" in r 12.5.

6. Applications to declare a will valid

The Chair began by outlining Justice MacKenzie's proposal relating to creating a procedure for declaring a will valid under ss 14 and 31 of the Wills Act 2007. In his letter, Justice MacKenzie pointed out that there was no procedure for making applications under ss 14 or 31 to have a will declared valid. At present the Court has dealt with it by allowing the application to be made as a without notice interlocutory application in the probate proceeding itself. However, Justice MacKenzie considered that this was a somewhat ad hoc solution and suggested that the Committee should create a formal process.

At present, the Chair explained, there were only two ways to start a proceeding: by filing a statement of claim or an originating application. The Chair was hesitant to add to these procedures, especially by creating a unique procedure for a limited problem.

The Committee queried whether a unique procedure was necessary. Mr Beck considered that r 19.10 allowed an originating application to be brought without notice. Ms O'Gorman considered that even though the proceeding for validating a will was governed by Part 27, an application under Part 19 could still be made. All that would need to change is for some cross-referencing to be inserted to make this clear and for ss 14 and 31 of the Wills Act 2007 to be inserted in r 19.2.

The Committee decided that further proceedings should not be created unless necessary. The Chair would discuss this matter further with Justice MacKenzie and see whether a different solution might be adopted. The Chair will report back at the next Committee meeting.

7. Case managing judicial review proceedings

The draft case management rules were discussed at the previous meeting. The Committee had concluded that the draft rules should be examined. Ms Olivia de Pont provided a memorandum reviewing the proposed case management rules. In her memorandum, Ms de Pont made the following suggestions: the first case management conference should not depend on the filing of a statement of defence, the rules should retain the flexibility set out in s 10 of the Judicature Amendment Act 1972, and r 7.1 needed to be amended. Mr Beck agreed with all of Ms de Pont's suggestions.

The Committee discussed the differences that necessitated a separate procedure. The Committee considered that often a case management conference needs to be held as soon as possible and should not depend on the filing of a statement of defence. Ms O'Gorman pointed out that often the Court needed to make directions relating to who was the defendant and this was a matter addressed at the first case management conference. Ms Cheryl Gwyn raised an issue about proceedings involving other causes of action, and suggested that getting such a proceeding before a Judge ensured that a Judge could decide whether it should be dealt with under the judicial review framework or whether the

proceeding should be dealt with using standard case management processes. For these reasons the Committee agreed to make the timing of the case management conference not depend on the filing of the statement of defence.

The Committee decided that the rules needed to be further refined and would be discussed again at the next meeting. Mr Beck would talk with Justices Cooper and Winkelmann to refine the rules.

8. & 9. Proliferation of procedures and the purpose of rules

The Chair introduced both items by mentioning that the Committee was clearly against proliferation of procedures. Only when clear differences existed and necessitated a different procedure from the existing ones should the Committee create additional procedures. The Chair commented that the Committee had considered the proliferation of rules and the purpose of rules at previous meetings.

Mr Gray stated that the question the Committee needed to answer was what should the Committee do with the rules as they stand? Mr Gray suggested that there were two matters the Committee should consider: first, whether the Committee should adopt a set of guiding principles and guidelines to consider when reforming the rules, and, second, whether the Committee should seek to review parts or all of the High Court Rules. Mr Gray thought the principles were necessary to guide the Committee in reforming the rules. In relation tot he second question, Mr Gray considered that the case for wholesale reform of the rules was very weak and the possible gains were not worth the effort and disruption that a wholesale reform could create. Mr Gray proposed that the Committee might with to choose a part at a time and improve the drafting of these.

Ms O'Gorman was of the view that the current rules struck the appropriate balance in providing clarity while avoiding being overly prescriptive. Ms O'Gorman mentioned that the Committee had recently completed a substantial rewrite of the High Court Rules which required practitioners to deal with the substantial changes to numbering and wording of the High Court Rules. In dealing with these changes, Ms O'Gorman commented that practitioners were comforted by the substance of the rules remaining the same. When substantive changes were required, Ms O'Gorman was of the opinion that such changes should occur incrementally in small, contained parts as they did with the discovery reforms and the new case management regime.

Mr Beck agreed with Ms O'Gorman that the prospect of wholesale revision was terrifying and that it would be a huge project with very little benefit. Justice Gilbert considered that the Committee should let the current rules operate for a period. Ms Dengate-Thrush agreed and suggested that the Committee should first identify whether there was an actual problem and avoid tinkering with the High Court Rules. The Committee agreed that a wholesale revision of the High Court Rules was unnecessary.

Justice Winkelmann agreed with Mr Gray that the Committee needed guidelines and to enunciate a philosophy of what civil procedure rules were meant to achieve. This would provide a framework to ground the Committee when considering reform. Justice Winkelmann also considered that some drafting guidelines would help to ensure consistency and to avoid mistakes like those involving cross-referencing.

Ms Gwyn agreed that having a framework of the purposes and principles of rules would assist the Committee in reviewing the existing rules and in considering proposed reforms. Ms Gwyn considered that this framework would be extremely useful to provide consistency, especially with the changing membership of the Committee.

Mr Barker suggested that the Committee formulate a higher level document looking at the purpose of civil litigation itself and then from there work out what place rules of civil procedure have and what the purpose of such rules are. This would involve making judgment calls and creating a balance between competing purposes. From there, the Committee could derive some more concrete principles to guide rules reform. Mr Barker stated that it was important to make explicit the purposes and think through some of the assumptions the Committee was making whenever it reformed any of the High Court Rules, as inevitably the Committee was taking positions on the purpose and principles whenever the Committee engaged in reform.

The Committee agreed that the Committee should attempt to formulate views on the purpose of rules and civil litigation and create a framework. Mr Barker agreed to prepare a paper setting out his thoughts and perspectives. The Chair encouraged other members to do the same. In particular the Chair suggested members should answer four questions: First, what are the principles that drive our civil litigation system? Second, what is the purpose of having rules dictating civil procedure? Third, what circumstances justify changing rules? Finally, what principles should guide drafting rules?

The Committee agreed to work towards creating a higher level document setting out the purposes and principles of rules. The Committee will also create guidelines for drafting rules.

The meeting closed at 12:55 pm