The Rules Committee

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13 October 2017
Minutes 04/17

Circular 47 of 2017

Minutes of meeting held on 2 October 2017

The meeting called by Agenda 04/17 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 2 October 2017.

1. Preliminary

In Attendance

Rt Hon Dame Sian Elias GNZM, Chief Justice of New Zealand
Hon Justice Venning, Chief High Court Judge (acting Chair)
Hon Justice Asher
Hon Justice Dobson
Judge Gibson
Judge Kellar
Mr Andrew Barker QC, New Zealand Bar Association representative
Mr Andrew Beck, New Zealand Law Society representative
Mr Rajesh Chhana, Deputy Secretary of Policy, Ministry of Justice
Ms Suzanne Giacometti, Parliamentary Counsel Office
Mr Bruce Gray QC, New Zealand Law Society representative
Mr Kieron McCarron, Chief Advisor Legal and Policy, Office of the Chief Justice

Ms Regan Nathan, Secretary to the Rules Committee
Mr Daniel McGivern, Clerk to the Rules Committee

Apologies

Hon Justice Courtney, Chair
Hon Christopher Finlayson QC, Attorney-General
Judge Doogue, Chief District Court Judge
Ms Jessica Gorman, representative for the Solicitor-General
Ms Laura O'Gorman

Venning J welcomed Dobson J to the Committee

Confirmation of minutes

The minutes of 12 June 2017 were confirmed.

Other matters arising

The Committee's meeting dates for 2018 were confirmed.

2. Case Management

The Committee's amendments to the case management regime came into effect on 1 September 2017. As a result, rr 7 and 7.3A of the High Court Rules 2016 ("the Rules") now permit a Judge—following the filing of memorandum or memoranda by counsel—to direct that a case management conference or issues conference be held and that there is no requirement for a case management conference. Jason McHerron has written to the Committee with concerns that these changes have not been accompanied with appropriate consequential amendments to Part 8 of the Rules which deals with discovery. Mr McHerron says that there is a presumption in Part 8 of the Rules that a discovery order will be made at the first case management conference, but he says the changes to Part 7 create a presumption that there will not be a first case management conference. In addition, Mr McHerron says there is no express provision in Part 7 for when a discovery order is to be made.

Ms Giacometti provided written analysis of this issue. Parties are required to file memorandum or memoranda under rr 7.3(2) and (3) of the Rules, addressing a number of matters including discovery. If the Judge is satisfied the memorandum or memoranda satisfy the requirements in r 7.3(2) then he or she may do one of the following:

(a) Allocate a trial date under r 7.3(6)(a), in which case the Judge may give directions required to ready the proceeding to trial. The Judge is unlikely to adopt this step if there are outstanding issues of discovery. As well, a proceeding in this category is one where the Judge concludes that there is no requirement for a case management conference or issues conferences, implying that no order for discovery is required.

(b) Direct that a case management conference or issues conference be held. A Judge may then make an order for discovery by consent. Otherwise, if there remains disagreement between the parties, the Judge can deal with that as part of the case management conference or issues conference directed under r 7.3(6)(b).

Part 7 does not define exactly when a discovery order is to be made because an order will be made at the time considered appropriate by the Judge, which may be at a case management conference or an issues conference.

The Committee agreed with Ms Giacometti's analysis; there is no issue with the new rules or with the existing rules relating to discovery.

Action point: The Clerk to draft Suzanne's analysis into a memorandum in reply.

3. Time allocations

The Committee has been reviewing the costs time allocations in Schedule 3 of the Rules. Initially focus was constricted to time allocations for trial preparation. A sub-committee comprising Mr Barker, Mr Beck, Mr Gray and Ms O'Gorman proposed amending the time allocations for trial preparation so that they would be based on the length of a hearing rather than its complexity. The Committee has agreed to that suggestion. Since then, the Committee has considered whether there is scope for a more thorough review of time allocations. The New Zealand Law Society, New Zealand Bar Association

and Auckland District Law Society all provided feedback to the Committee, which broadly indicated that the Committee should look at revising the time allocations for other proceedings, such as judicial review and declaratory judgments.

Mr Barker explained that the sub-committee has reviewed other time allocations and agreed on a general approach going forward. However, there is not yet consensus on the precise numerical allocations that would be applied. There is difficulty in dealing with cases where evidence is not given orally, because trial length in those cases is not a sufficient indicator of complexity or preparation of evidence. As a result, trial length would be an impractical measure in those types of proceedings. The sub-committee's view is that there are three ways in which the matter can be approached:

(a) Leave the Rules as they are and rely on Judges in individual cases to amend the costs award on application by the parties. The sub-committee considered that this approach would be inconsistent with the overall thrust of the Rules, which is to promote certainty.

(b) Have carve-outs for judicial review proceedings and declaratory judgment proceedings. The sub-committee considers this approach too random, as there are many other proceedings where evidence is given by way of affidavit and it would be difficult not to have carve-outs for those other proceedings as well.

(c) The sub-committee's preferred option was to have a division between proceedings where evidence is given orally and proceedings where evidence is not given orally. Problems arose, however, when it came to drafting allocations based on trial length but at a higher rate than applied to other proceedings; the numerical results appeared to be over-generous in some cases and under-generous in others.

Although the time allocations remain a work-in-progress, the sub-committee's position is that the allocations will reflect a combination of a straight-allowance for the preparation of evidence in those sorts of proceedings and the length of the hearing.

The Chief Justice suggested that the Committee should at some stage have a look at the question of costs more broadly. The Chief Justice expressed concern at the expansion of the costs regime, which has gradually become very prescriptive in the pursuit of precision. Venning J raised the concern that while the aim of the current regime was to enable Judges to assign a band and category to a case as to enable counsel to work out precisely what the costs were and the Registrar to resolve disputes, Judges are now being called upon to deliver large costs judgments in a substantial number of cases.

Asher J observed that the "two-thirds" rule is a fiction, as the rule more properly delivers about one-third. The costs regime has not kept up with actual costs. Even when it was initially set-up it did not achieve two-thirds. New Zealand also has a particularly unique costs regime: in the United States there are no costs awarded, while in the United Kingdom there are close to full costs awarded. New Zealand's costs system has largely been accepted by the public. New Zealand has largely grown to this point without ever having a proper discussion as to whether this is the course that costs should go down.

Mr Gray questioned whether the concern was (a) whether "reasonable contribution" is the best way to do costs; (b) that we are not currently achieving reasonable contribution; or (c) both. The Chief Justice explained that reasonable contribution could not be departed from by the Committee at this stage, but time continues to pass without there being an assessment of whether our costs regime is a reasonable contribution to costs. The Chief Justice expressed concern at the extent to which costs may be inhibiting access to justice: using a crude measure such as how much time has been spent does not appear to reflect the most effective use of court resources.

Judge Kellar and Venning J agreed that it is important for people to have a certain measure of costs, and that litigants can ask their lawyers how much their services will cost and how much the court might reasonably be expected to award. The Chief Justice noted that while the public has certainty as to the

applicable costs formulae, there is no certainty over how much costs those formulae will deliver at the outset. Venning J and Judge Kellar took the view that in most cases lawyers will be capable of predicting the total likely award of costs by applying the schedule. Mr Barker explained that it is common to give litigants preliminary advice on what costs are likely to be recovered.

The Chief Justice explained that her concerns were bigger than that issue: costs at present do not appear to fully reflect the public interest in many cases where large sums of costs are routinely being awarded. The Chief Justice explained that at some stage a more impressionistic measure may be preferable rather than something more precise. Mr Barker explained that the sub-committee at present is trying to keep the new time allocations as general as possible, without splitting the matter into several different types of proceeding.

Venning J explained that many parties are now making applications for costs on the basis that they perceive their particular case to be different and warranting a departure from the band and scale that was assigned. Judge Gibson added that this is reflected in the applications for indemnity costs which tend to be very large and out-of-scale.

Action point: Sub-committee to continue work on time allocation schedules for proceedings where evidence is given by affidavit.

4. Representative actions

At its last meeting in June the Committee agreed that it should turn its attention to developing some rules to manage representative proceedings in New Zealand. At present, such proceedings rely on r 4.24, which as a rule is largely inadequate to deal with the types of cases that are now being brought in reliance on it. The Committee's position at the conclusion of its meeting in June was that while the Committee should promulgate rules to more effectively manage this area, it must proceed with caution given the underlying policy issues it touches, which should ideally be managed with legislation.

Venning J explained that part of the reason for the Committee's action on this issue was that there was no indication that there would be any statutory reform in the area despite there having been a draft Bill and rules prepared in 2008. However, the Minister of Justice has now referred the matter to the Law Commission for review. Venning J asked the Committee for its views on whether the Committee should continue dealing with the matter or whether the Law Commission should simply take over.

The Chief Justice rephrased the question to be whether the Committee is content for the time lag between now and when the Law Commission completes its process, or whether it could be left for more case law development. The reason statutory intervention was proposed the last time was because the matter was thought to be beyond the remit of the Committee. Venning J explained that this time round there is concern that courts are having to manipulate r 4.24 to manage the cases coming before them.

Dobson J explained that the *Feltex* litigation presented tricky issues: an English litigation funder was brought on board with a specialist adverse cost insurer in the Bahamas, which led to issues that the security for costs was a trace through to people in the Bahamas against whom the defendants doubted they would be able to enforce judgment. In that case the Rules operated effectively. More recently in *Strathboss*, the litigation funders came very well-organised with a settled agreement between them and the plaintiffs' committee and an agreement between the funders and those who joined as plaintiffs. Dobson J considered that there has been enough experience for people to start finding their way, but that does not mean that rules would not be helpful. New rules could be effective provided they are not too prescriptive given the differing circumstances as between funders and plaintiffs in individual cases.

The Chief Justice asked whether it would be beneficial waiting for more case law to resolve the matter: while there are rules in overseas jurisdictions, those rules are often against very different legislative backgrounds. Mr Gray explained that there is community concern that the courts are perceived not to

be responding to. And there is a high degree of uncertainty as to whether what is being achieved is actually in the interests of justice. The debate that the community would want would be more extensive than possible for a rules committee to undertake. It may be that the Law Commission is better placed to receive submissions and facilitate the kind of debate that people in the community are looking for. There are concerns about (a) who is actually controlling the litigation and (b) whose financial interests are being protected.

The Chief Justice explained that the question of whether third parties should be able to interfere in litigation for profit is a matter of policy which must be left to the Law Commission. Mr Beck added, however, that it would be helpful to case law developments put into the rules rather than left scattered through various cases.

Mr Barker explained that it is not clear what the Committee could actually look at. The Committee could not create a class action scheme of its own. As well, there is the issue of why litigation funders should be singled out in the representative proceeding context as opposed to, for example, family trusts that fund litigation. The Committee is not in a position to offer a complete solution and it might be dangerous even to try.

Mr Gray considered the case of using crowd-funding to pursue a claim. Whether that is something the law should permit is a policy matter, not a Committee matter. The Chief Justice explained that if that is the view then there may still be an issue as to some of the purely procedural matters which could be tweaked. Venning J added that many of the cases coming before the courts involve issues such as the similarity of interests as between plaintiffs, which is why the existing rules are inadequate. The Chief Justice noted that that issue could be tweaked because that is simply about the identity of interest as opposed to things arising out of a common cause. Another issue, for example, is that r 4.24 does not encompass an opt-in or opt-out procedure because of the use of the words "all persons". Mr Gray suggested that it would be helpful to summarise where courts have found there to be a sufficiently similar interest as to invoke r 4.24.

Mr Beck explained that if Ms Giacometti has a draft already then that could be used as a starting point. Mr Chhana added that the Law Commission's timeframe suggests that it will be at least two to three years of work, if not more.

The Committee agreed to circulate Ms Giacometti's draft rules. As well, Ms Giacometti explained that, before committing time to this issue, Parliamentary Counsel Office would want an indication from the Committee of what its plans are as to this issue. The Chief Justice suggested that the Committee could take the initial step of reviewing the maters that it can address without trading on policy issues.

Action point: Ms Giacometti to circulate drafts to members; Dobson J, Mr Gray and the Clerk to prepare notes on issues to be addressed by the Committee; and the Clerk to prepare research on cases where common interest has been found.

5. Routine amendments

Mr Chhana had prepared memoranda for the Committee:

(a) First, seeking the Committee's agreement to amend Form 18 of the District Court Rules 2014 to reflect recent changes to r 7.16, which were made by the District Court Amendment Rules 2017. Rule 7.16 now requires the claimant to specify the grounds on which they are applying for application without notice and certify that all reasonable inquiries and steps have been taken to ensure that the application contains all relevant information, including any information or facts that would support the position of the opposition, defence or any other party.

(b) And second, seeking the Committee's agreement to revoke Forms CL1, CL2, and CL3 of the Rules. These forms were associated with the High Court Commercial List which has now been dissolved and replaced with the Commercial Panel.

The Committee agreed with the proposed changes.

Action point: Ms Giacometti to implement changes.

6. Civil practice notes

The Committee has been undertaking a review of the civil practice notes that remain in effect. The object of this exercise is to determine (a) what practice notes are no longer needed and (b) whether those that are needed should be left as practice notes or incorporated into a rule. At its last meeting the Committee agreed to further consider the ongoing significance of Practice Note 11 and the Court of Appeal Fast-Track procedure.

Asher J confirmed that the Court of Appeal's Fast-Track procedure is being taken into account in that Court's review of its own rules. The Committee therefore decided to park that issue and proceed to consider Practice Note 11.

Practice Note 11

Practice Note 11 deals with situations where the Public Trust is appointed as administrator of an estate because the appointed or nominated executor in the will does not wish to carry out his or her obligations.

Since the Committee's last meeting, John Earles has written to the Committee, explaining that these types of applications do not arise often as the Public Trust has a right to apply for administration when no one else does and it uses that vehicle quite frequently. However, Mr Earles added that it would be very useful to have the Practice Note incorporated into the Rules so that the procedure is laid out for when any trust company wishes to adopt that course.

The Chief Justice questioned whether a new rule is needed to replace Practice Note 11, as its effect may already be covered by existing rules. The Committee was in agreement that Practice Note 11 should be revoked, which meant the question became whether a rule is needed to preserve its effect or whether existing procedures are sufficient. Asher J considered that the theme of the Rules is to avoid a proliferation of different initiations of proceedings. The original goal was to have a single mode for every application, but ultimately it was split into statements of claim and originating applications. By having a special rule for this the Committee would be departing from that philosophy. The Chief Justice suggested that the Clerk research whether an application under s 76(1) of Public Trust Act 2001 or s 8(1) of the Trustee Companies Act 1967 can be made under an existing rule, and if it can then no action is needed following the revoking of the rule.

Judicial Settlement Conferences

Since the Committee's last meeting, Ms Giacometti had prepared a set of draft rules to replace some of the Practice Notes previously considered by the Committee. Included in those draft rules is a schedule for standard settlement conference directions. Mr Barker noted that it may be helpful to include in the schedule that parties must exchange expert witness reports if they have them. Mr Barker also observed that the questions in the schedule which must be answered are written for laypersons, when in fact it tends to be counsel who prepare the documents. All that should need to be included is an explanation of (a) what settlement discussions have taken place and (b) where those discussions got to. At present, however, the schedule appears to be a direction to actual parties rather than to the counsel who will be dealing with it.

Mr Beck explained that there is a similar schedule in the District Court Rules. Venning J added that in principle the schedules should be the same as between the two sets of rules. The Committee agreed that the questions in the current proposed schedule are too particular and overly prescriptive. Mr Gray added that the schedule should enable the presiding Judge properly prepare for the conference. But

one of the key benefits of settlement conferences is the cathartic value of asking a party to explain in their own words why they are there. And in mediation this is facilitated by only two requirements: (1) that the people present have authority to settle and (2) that the parties come with a genuine willingness to settle. Everything else is left to be dealt with in the facilitated discussion so as to preserve the cathartic benefit for parties of explaining who they are, what they want and why they have not been able to achieve it thus far.

Dobson J agreed with Mr Barker's suggestion that there should be an obligation exchange reports. The dynamics of conferences differ as between parties. In many cases parties realise that their case is not as strong as they thought it would be and it forces them to shift their position.

The Chief Justice suggested that the schedule could simply be reworded so as not to be a checklist. Venning J added that many of the issues that the questions cover may be explored during the course of the conference if appropriate. That sort of information in advance, however, is not particularly helpful.

Regulatory Impact Statement

The Chief Justice questioned why a Regulatory Impact Statement (RIS) is needed for Rules. Although it is standard practice, it might not be appropriate to have an assumption that there is an executive responsibility to help inform decisions taken by the Government in respect of Rules. The Chief Justice asked Mr Chhana whether an RIS could be provided to see what information it covers. Mr Chhana agreed to provide an earlier statement.

Action points: Clerk to research whether applications under s 76(1) of the Public Trust Act or s 8(1) of the Trustee Companies Act can be made under an existing rule or rules; Ms Giacometti to review and prepare a new schedule for judicial settlement conferences; and Mr Chhana to provide a Regulatory Impact Statement.

7. Probate

Mr Earles wrote to the Committee to point out an error in new r 7.23(5) of the Rules. Mr Earles says r 7.23(5) should not have the words "of letters" in between the words "grant" and "of administration", and that the consequence of its inclusion is that r 7.23 will apply to applications for probate.

Ms Giacometti has addressed this issue. It is accepted that r 7.23 will have to be corrected, but it can wait until the next set of amendments goes through. There is no urgency in making the change because although new r 7.23(5) does not expressly exclude new rule 7.23 in relation to applications for probate without notice, that does not mean that new rule 7.23 therefore applies to applications for probate:

(a) New rule 7.23 is inconsistent with the requirement of r 27.4, which is the particular rule providing for applications for grants of administration without notice. As a matter of interpretation, that particular rule overrides the general r 7.23 concerning interlocutory applications without notice in civil proceedings.

(b) Rules 27.3, 27.4(1), 27.4(3), 27.4(5)-(7) and Form PR 1AA effectively comprise a code in relation to applications for probate without notice.

(c) There is nothing in r 7.23 "over and above" the above provisions that could apply to an application for probate without notice. Rule 24 of the High Court Rules 2016 Amendment Rules (No 2) 2017 revokes existing r 27.4(4) because, under the amendment rules, existing rule 7.23 is replaced and the substitute provision does not contain a provision equivalent to existing r 7.23(4). Rule 24 also revokes existing r 27.4(8), which provides that the procedure for dealing with an application for a grant of administration without notice is the same as for an application without notice under rr 7.19 and 7.23, subject to the provisions of Part 27.

(d) It is unlikely that a user wanting to look up the rules applying to an application for probate would conclude that because new rule 7.23(5) expressly excludes r 7.23 in relation to an application for a grant of letters of administration without notice, new rule 7.23 applies to an application for probate without notice. The user would more likely go straight to the Part 27 and bypass any considerations of the provisions concerning general applications without notice in new r 7.23 and the general form for interlocutory applications without notice in new Form G 32.

The Committee agreed with Ms Giacometti's analysis.

Action points: Clerk to draft a letter to Mr Earles; and Ms Giacometti to include change in next set of amendments.

8. Substituted service

In the lead up to the Committee's meeting, Judge Kellar had been asked by the Principal Family Court Judge whether the Committee has considered the issue of direction as to service by Facebook or other electronic means. Service by electronic media is a big issue. People seem to move around so much that personal service by post is problematic, which means it may make sense to consider specific provisions relating to directions as to service via social media platforms.

Since that enquiry was made, the Family Court Rules 2002 have been amended to expressly provide for substituted service via social media, in r 126. Mr Beck observed that r 6.8 of the Rules is sufficiently wide to encompass substituted service via social media.

Mr Gray noted that he was happy with the idea of service by electronic means, but worried about privacy issues surrounding the use of social media accounts as addresses. Control over who reads the social media account rests with the account holder and he or she may have chosen to allow a wide group of people to read the content posted on his or her page. Judge Gibson explained that it is not the entire document that is posted on the Facebook page. Mr Chhana agreed, adding that in most cases it is merely to draw the attention of the account holder, which is similar to a public notice.

Asher J noted that, in some US states, Facebook service is treated as actual service, not substituted service. Judge Kellar explained that in reality this is a very effective form of service, but he was not proposing that the Committee undertake any immediate action on the issue.

Mr Gray suggested that the Committee consult with Dr David Harvey on the issue, to see whether some work could be put together so that the Committee will know where it is going in about two years' time. Asher J added that the Rules currently deal with electronic service via email as actual service, but only where the recipient volunteers it. The issue is service via social media where the person cannot otherwise be found, which is a different issue to actual service via email.

While Venning J agreed that the Committee may have to review the issue of service via social media at some point, now may not be the time.

Action point: Item to be taken off the agenda until later raised.

9. Supreme Court Rules and Court of Appeal (Civil) Rules

Ms Giacometti briefed the Committee on the respective statuses of the Supreme Court Rules 2004 amendments and the Court of Appeal (Civil) Rules 2005 amendments. The Supreme Court Rules have been reviewed for consistency and style. The Court of Appeal (Civil) Rules, however, are subject to a further stage of review by that Court. The Committee agreed with Ms Giacometti that the Supreme Court Rules should be enacted as soon as practically possible, and any amendments to those rules can be treated as an exercise at a later date.

Action point: Court of Appeal (Civil) Rules amendments to go back to the Court of Appeal; and Supreme Court Rules amendments to be progressed to enactment.

10. Strike-out before service

The High Court Rules 2016 Amendment Rules (No 2) 2017 came into effect on 1 September 2017, including new rr 5.35A-C, which deals with the striking out of a claim prior to service where the claim is plainly abusive.

ADLS has written to the Committee, noting that the rules were intended to apply to originating applications, but with originating applications there is no notice of proceeding or memorandum from which signature can be withheld. So the references in rr 5.35A and 5.35B to a Registrar refusing to sign and release a notice of proceeding for service have no effect in those situations. Rule 7.22 provides that an applicant must serve the application promptly after filing and specifically provides for the date of hearing to be advised separately. This may lead to a situation where an originating application is filed in court and referred by the Registrar to a Judge under the new rules but is also served on the respondent who could take steps without knowing of the Registrar's referral.

Venning J noted that there is no real issue. Most of these difficult applications are by way of statement of claim. As well, an originating application has a hearing date allocated by registry anyway, so if the papers are defective then a hearing date will not be set. Mr Beck added that the issue was considered by the Committee, and that you cannot stop people sending documents that they propose to serve in any event.

The Chief Justice raised a separate matter. In a few Supreme Court cases, litigants have brought a point of law for determination which has been treated as a strike-out application. It proceeds on the basis of assumed facts whereas it would be preferable to have a procedure for finding those facts. It is not clear in those cases what the Supreme Court is to do: does it strike out the claim or simply revert to answering the legal question? Venning J considered that the Court could answer the question which might resolve the proceeding, but subject to matters of issue estoppels the parties could come with different facts.

Action point: Clerk to draft a letter in response to ADLS.

11. PCO Formulae

Ms Giacometti sought the Committee's approval to changes to the layout of formulae on the New Zealand Legislation website. The new layout will assist those with visual and/or reading difficulties. The effect of the change will be to have formulae shown on a single line rather than on multiple lines. The Committee agreed to the proposed changes.

Action point: Ms Giacometti to implement agreed change.

12. Electronic Courts and Tribunals

The Electronic Courts and Tribunals Act 2016 is now in effect. The question posed for the Committee was whether the Act is sufficiently prescriptive to apply or whether it will be necessary to have some rules to complement it. Venning J explained that, on a liberal interpretation of the Act, one could say that rules are not necessary. It does, however, require an Order in Council to implement it in each court.

Asher J explained that Miller J has prepared some draft rules relating to this matter, which will eventually work their way to the Committee. Venning J indicated that it is something that will need to be looked at for the future. The Act is sitting there and needs to be implemented for the courts. The

Committee agreed to keep the item on the agenda. Given Ms O'Gorman's speciality in the area, Asher J agreed to orchestrate a phone conference between Ms O'Gorman and Miller J.

Action point: Asher J to orchestrate phone conference between Ms O'Gorman and Miller J

The meeting finished at 11.20 am.