The Rules Committee
Te Komiti mō ngā Tikanga Kooti

23 September 2020
Minutes 03/20

Circular 36 of 2020 (Provisional)

Minutes of Meeting of 21 September 2020 (Provisional)

The meeting called by Agenda 03/20 (C 24 of 2020) began at 9:50 am on Monday 21 September 2020 in the Conference Room at the Supreme Court Complex, Wellington.

Present

Rt Hon Dame Helen Winkelmann GNZM, Chief Justice of New Zealand
Hon Justice Kós, Special Purposes Appointee and President of the Court of Appeal
Hon Justice Susan Thomas, Chief High Court Judge
Hon Justice Cooke, Chair and Judge of the High Court
His Honour Judge Taumaunu, Chief District Court Judge (Until 11.00 am)
His Honour Judge Kellar, District Court Judge (From 10.20 am)
Hon Justice Dobson, Special Purposes Appointee and Acting Judge of the High Court
Ms Kate Davenport QC, Special Purposes Appointee and New Zealand Bar Association President
Mr Andrew Beck, New Zealand Law Society Representative
Mr Jason McHerron, New Zealand Law Society Representative
Ms Laura O'Gorman, Special Purposes Appointee
Ms Jessica Gorman, Senior Crown Counsel (Representative for Ms Una Jagose, Solicitor-General)

In Attendance

Mr Kieron McCarron, Chief Advisor Legal and Policy in the Office of the Chief Justice and Registrar of the Supreme Court
Ms Fiona Leonard, Chief Parliamentary Counsel
Mr Sam Kunowski, General Manager (Courts and Justice Services Policy) in the Ministry of Justice
Ms Andrea King, Group Manager (Senior Courts) in the Ministry of Justice
Ms Maddie Knight, Secretary to the Rules Committee and Policy Advisor in the Ministry of Justice
Mr Sebastian Hartley, Clerk to the Rules Committee and Judges' Clerk

Apologies

Hon David Parker, Attorney-General
Hon Justice Venning, Special Purposes Appointee and Judge of the High Court
Mr Rajesh Chhana, Deputy Secretary (Policy) in the Ministry of Justice (Representative for Mr Andrew Kibblewhite, Chief Executive of the Ministry of Justice and the Secretary of Justice)

1b. Confirmation of Minutes of Previous Meeting

The minutes of the Committee's meeting of 29 June 2020 (C 23 of 2020) were confirmed.

1d. Meeting Dates for 2021

The Committee resolved, pursuant to the suitable dates identified in C 21 of 2020, to meet on 22 March, 28 June, 27 September, and 29 November in 2021. All meetings will begin at 10.00 am, and will take place in the usual venue, being the Conference Room at the Supreme Court Complex in Wellington.

2. Improving Access to Civil Justice – Conclusion of Initial Consultation

Justice Cooke began by offering a summary of the dozens of submissions received in response to the Committee's initial consultation on improving access to civil justice in the District and High Courts through rules reform (C 25 of 2020). The Judge noted the encouraging response to the Committee's proposals from a range of practitioners, institutional bodies, community law centres, and other court users which had produced a range of considered and valuable suggestions.

All submitters recognised a significant problem, described by the New Zealand Law Society (NZLS) in its submission as being that the "justice gap" had been "slow burning" for at least a generation. Overall, the Committee observed, there is apparently wide-reaching support and enthusiasm for reform led by the Committee to address these issues. Also, the Chief Justice noted, members of the wider public who submitted expressed considerable belief in the promise of the justice system, and a real concern to see access to civil justice maintained. Similarly, the Committee agreed, the overwhelming majority of submissions by members of the legal profession who demonstrated an admirable commitment to improving access to civil justice, even given the potential implications of this for their practices.

Views varied however as to which aspects of the rules of court, if any, are responsible for that phenomenon, and how best the Committee might respond. Some general threads common to many suggestions could however be identified. Justice Cooke identified two of these being general support for there being greater judicial involvement throughout proceedings, and the need for ensuring procedural requirements are proportional to the value and complexity of the dispute in each case.

To these, Justice Kós added an observation of there being apparently significantly support for applying the model of extensive case management and earlier identification of issues such as that used in the Christchurch Earthquake List. The Chief Justice noted that there also appears to be significant support for a more 'inquisitorial' approach in the sense of an approach reducing the primacy presently afforded to viva voce evidence and with a more limited scope of discovery.

In terms of relevant matters outside of this Committee's jurisdiction, Justice Cooke noted that there was also wide-reaching support for increasing the jurisdiction of the Disputes Tribunal, and an identified need for a change in litigation culture to ensure bench and bar apply the existing rules in the manner most likely to ensure justice is done in an affordable manner.

As to the specific proposals contained in the Committee's consultation papers, Justice Cooke noted that the proposals regarding a shorter form trial process put forward by the New Zealand Bar Association (NZBA) and the other suggestions contained in the paper for shortening trial processes had elicited a

range of views. Again, an overall thread common to these submissions was the need to ensure the procedural requirements attached to each case are proportionate to the value and complexity of the dispute. There was, to this end, general support for the creation of different pathways for different disputes, but no general agreement as to the details of any such processes. Justice Cooke observed that one point not widely explored in submissions, except that made by Judge Kellar on behalf of the District Court Judges, was whether such proposals involved different considerations in the District and High Courts.

The position was similar in respect of the proposal to create more inquisitorial processes. Several potential processes were canvassed in submissions. These included those set out in the Committee's consultation paper, the models provided by the existing operation of tribunals such as the Disputes Tribunal and Employment Relations Authority in New Zealand, the English Intellectual Property and Enterprise Court, and the Hon Raynor Asher QC's proposal to create an inquisitorial division of the District Court. One theme common to several of these submissions is the proposition that the Disputes Tribunal's jurisdiction should be extended to $50,000 or $100,000; which was a matter beyond the Committee's jurisdiction. Again, there was no consensus among submitters on the details of any such processes, with some of the submitters' concerns about inquisitorial processes, such as in the NZLS' submission, depending on matters of detail.

The proposal that all proceedings begin by way of a summary judgment application or analogous process by way of 'triage' attracted the least support. While submitters were attracted by the prospect of achieving earlier identification of issues and saw this as an important goal for any reform, this was not considered an attractive mechanism for achieving those outcomes in many submissions.

As a next step in this area, Justice Cooke suggested the Committee agree to the creation of a subcommittee, comprised of judicial members of the Committee, to consider the submissions received and formulate potential areas to be furthered by way of reform. The sub-committees views could then be brought back to this Committee. The Committee agreed to this proposal, with Ms Davenport QC identifying that the subcommittee being comprised of judges would help address concerns recorded in the submissions of some members of the wider community that the legal profession are engaged in, as they termed it, "patch protection" and might thwart more ambitious reforms.

The Committee determined that the subcommittee should be comprised of the Chief Justice, Justice Kós, Justice Thomas, Judge Taumaunu, Justice Cooke, and Judge Kellar. The Committee thought it appropriate that the subcommittee set out a comprehensive report for publication setting out the submissions received and the Committee's response to the same. The Committee agreed with the Chief Justice that there is a legitimate expectation on the part of the public and profession in seeing that the Committee has taken note of what has been said, and in receiving a full statement of the Committee's response.

The subcommittee is also to identify those matters canvassed in submissions requiring a legislative response or other measures falling outside of the Committee's jurisdiction that it thinks it prudent for the Committee to commend to the appropriate bodies

The subcommittee was authorised to consult with members of the Ministry of Justice, legal profession, and wider community as necessary to further the production of that report, and the formulation of its views.

In the interim, the Clerk is to prepare the submissions received for publication on the Committee's website, and publish the same, together with a covering letter of thanks from the Chair on behalf of the Committee. The Chair is also to write to each submitter expressing the Committee's thanks.

Subcommittee constituted and instructed to formulate the Committee's response to the submissions received on the initial consultation on improving access to civil justice in accordance with the terms of reference set out above.

Clerk to publish submissions received, with appropriate redactions to protect the privacy of submitters, on the Committee's website; together with a covering letter of thanks from the Chair.

Chair to write to each submitter expressing the Committee's thanks for their submission.

3. Costs for Lay Litigants – Update on Status of Initial Consultation

The Committee agreed to extend the deadline for responses to the Committee's initial consultation paper on reforming the law regarding the availability of costs for litigants in person through to 5 pm on 30 October 2020. This extension was precipitated by a request from the NZLS and other intending submitters, who had experienced difficulties in meeting the original 2 September 2020 deadline because of disruptions associated with the impact of COVID-19.

Clerk to liaise with Office of Chief Justice communications staff to ensure extension of deadline for submissions is appropriately publicised.

4. High Court Rules 2016, r 20.9

Mr Beck referred the Committee to C 32 of 2020, which sets out the results of his, Justice Kós, and Justice Cooke's consideration, following discussion at the Committee's last meeting, of how best to amend the High Court Rules in relation to the participation of decision-makers in appeals against their decisions.

The product of that sub-committee's consideration is a new r 20.9A, as set out in C 32 of 2020, replacing the existing 20.9(2)-(3) and 20.17 of the High Court Rules 2016. The Committee agreed the draft rule appropriately ensured that only those decision-makers who do not exercise a purely adjudicative function will be named, except where the Court directs otherwise or that is required by law. This, the Committee considered, will maintain the policy within the current rr 20.9(2)-(3) of avoiding decision makers who exercise a purely adjudicative function from being named as a respondent to an appeal. At the same time the Committee agreed the draft rule will ensure that the Court has the benefit of full argument from a decision-maker, and that the decision-maker has a right of appeal where the decision-maker is the natural contradictor on the appeal. As discussed at the Committee's last meeting, it was not the intention behind rr 20.9(2)-(3) and 20.17 for the decision maker not to be named in such cases, even though the manner of the drafting of the provisions was, as identified at the last meeting, producing that outcome.

The Chair queried whether it was necessary to consult with the Commerce Commission, as it is specifically named in the current provision, before promoting this amendment. The Committee was of the view that was unnecessary, provided it was clearly recorded that the amendment was not intended to affect the position of the Commerce Commission.

The Committee agreed to the proposed new r 20.9A and deletion of rr 20.9(2)-(3) and 20.17 advancing to concurrence, subject to:

- the amendment of the proposed r 20.9A(2) to read "Subject to (3) the appellant must name *the* decision maker as a respondent";
- the substitution of the word "law" for the phrase "virtue of a legislative provision" in the proposed r 20.9A(1); and
- the substitution of the word "law" for the phrase "a legislative provision" in the proposed r 20.9A(3).

Proposed amendments set out at paragraph 6 of C 32 of 2020 to proceed to concurrence as part of the next omnibus rules amendment, subject to those minor amendments set out above and stylistic refinements to be made by the Parliamentary Counsel Office (PCO).

5. Electronic Filing in the High Court

Justice Cooke advised the Committee that, since this topic was discussed at its 29 June 2020, a significant amount of work has been done by representatives of the Ministry of Justice and judiciary towards the greater use of electronic file management in the High Court. Ms King, one of the Ministry people involved, identified that a comprehensive electronic file management system will still take some time to implement. However, as early as October 2020 a web-browser based system allowing for the uploading of documents to the Court and the electronic payment of filing fees should be implemented. In the immediate future however, it is likely that the court file itself will remain a paper file maintained by registry staff.

Justice Cooke observed that it will be necessary for the rules of court to reflect the operational reality arising from the implementation of the new electronic filing system in the short term, allowing for the movement to a comprehensive electronic file management system in the future.

The Clerk summarised the material set out in a related memorandum (C 27 of 2020), identifying that the rules of practice and procedure in each jurisdiction follow the operational reality, in terms of the features and technical limitations of, the electronic file management and filing systems in use in that jurisdiction. Avoiding any gap between operational reality and rules requirements in this sense promotes, the Clerk noted, the expedient resolution of proceedings and the efficient administration of justice. More generally, the Clerk noted based on previous discussions of the Committee, the greater use of electronic filing and file management by the High Court is in itself likely to promote the efficient administration of justice.

The Committee agreed with the representatives of the profession that the availability of electronic filing in the High Court during the recent COVID-19 emergency has made filing documents far more convenient and efficient and that it was highly desirable that it be maintained.

The Clerk suggested the most desirable course of action is for the Committee, by amending the general filing provisions of rr 5.1A and 5.1B of the High Court Rules 2016, to create an authorising framework within the Rules within which the Ministry and judiciary can pursue operational innovations increasing the use of electronic filing in the High Court as new technologies, systems, and processes are implemented. This would take the form of a rule authorising electronic filing, framed in a technologically neutral manner, and requiring that any person seeking to file documents electronically comply either with instructions to be promulgated by a Registrar or a practice note issued by the Chief High Court Judge. Those instructions or that practice note could then be amended to reflect the evolving technologies and processes implemented from time to time.

The Committee agreed with this sentiment, and that the proposed framework model represented the best means of avoiding the language of the rules inhibiting the scope of operational innovation in the registries, and also avoiding the Committee having to continually modify the Rules to reflect any such innovations. It was considered desirable that, of the two possibilities put forward, a nationwide practice note model be adopted to avoid any undesirable variations in practice between each registry arising.

The Committee agreed to await the receipt of a report from the Ministry of Justice and relevant members of the judiciary, to be provided to the Committee at its 30 November 2020 meeting, before determining the exact framing of such an authorising provision.

Addressing other points canvassed in C 27 of 2020, the Clerk identified that it might be appropriate for the Committee to consider which types of documents, if any, should not be accepted for electronic filing, and how documents filed electronically should be required to be authenticated. The Committee supported these questions being considered by the Ministry of Justice and judiciary as part of that ongoing process and addressed as part of the report to be received at the Committee's next meeting.

Justice Kós identified the need to address whether the rules would contemplate that particular documents, such as original affidavits, would need to be subsequently filed, or whether it was sufficient that they be retained. It was agreed that this should be addressed as part of further consideration of this issue once the report noted above is received.

This was subject to a clear view that wills should be expressly excluded from the ambit of electronic filing. The Committee noted the English model excludes wills in "contentious" probate manners from the ambit of electronic filing and agreed with Justice Dobson that criterion may prove pernicious in practice and place an undesirable an unworkable burden on the registry in having to identify what is "contentious". More generally it was thought appropriate, having regard to the solemn nature of a will, for the original document to have to be filed with the Court.

The Committee also agreed that it was important to ensure that permitting greater use of electronic filing did not result in the wholesale shifting of printing costs from parties to the registry. Also, the Committee was concerned to avoid unduly burdening registry staff.

The Committee agreed that it will also be appropriate for the reforms implementing the above proposals to delete rr 5.1A(5) and (7) of the High Court Rules 2016. These provisions were introduced to ensure that 5.1A had the desired effect of allowing electronic filing of all documents during the period in which access to the Court's registries was restricted during the COVID-19 emergency, any

contrary rules or practice notes withstanding. The Committee agreed these provisions should not remain part of the Rules moving forward. While it was identified these might produce undesirable effects, it was considered no problems are in fact arising in practice, and

Finally, the Committee agreed with the Clerk's observation, set out in C 27 of 2020, that at some point in the future – likely, based on the overseas experience, once a comprehensive electronic file management system is introduced – that it will be appropriate to mandate use of that form of filing because of the case management efficiencies it can produce. Equally, the Committee agreed, it will likely be necessary to exempt lay litigants from that requirement, as has been done in the overseas jurisdictions surveyed, in order to uphold access to justice. However, the Committee agreed, none of these considerations call for action at the present time.

Committee to consider report from Ministry of Justice and relevant members of the judiciary at its 30 November 2020.

7. Rules Remediation and Enhancement

The Clerk outlined the matters addressed in CC 20 and 29 of 2020. A number of these, it was noted, were reflected in the draft amendments set out in C 34 of 2020, which was to be considered as part of a subsequent agenda item.

It was determined to address the other matters contained in these memoranda at the Committee's 30 November 2020. These relate to remediating provisions of the High Court Rules 2016 related to the authentication of certain types of documents that had been amended by the High Court (COVID-19 Preparedness) Amendment Rules 2020 in a manner that might produce undesirable results. As set out in C 29 of 2020, the remediation of those provisions will need to proceed in a manner co-ordinate with the electronic filing reforms in any event. Accordingly, it was thought undesirable to address this issue in advance of substantive decision being taken in relation to the electronic filing issue.

Committee to consider any matters arising out of C 29 of 2020 it is considered necessary to address as part of the further consideration of how to best implement the greater use of electronic filing in the High Court.

6. Preparedness for Future Emergencies

The Chair referred the Committee to C 28 of 2020, a memorandum from the Clerk setting out potential amendments to the rules of court for each of the Supreme Court, Court of Appeal, High Court, and District Court (and including both the civil and criminal jurisdictions of each court).

These would, in line with the Committee's discussion at its meeting of 29 June 2020, authorise the Head of Bench for each Court to promulgate a practice note in the event of an emergency modifying the practice and procedure of that court in order to respond to the emergency. This, as identified at the Committee's last meeting, would avoid the difficulties associated with attempting to anticipate what responding to an emergency will require in advance, as would be required if a suit of rules active only in an emergency was to be implemented. It would also avoid the delays in enacting a bespoke suit of emergency amendment rules to the rules of court by allowing the heads of bench freedom of action.

Implementing such an amendment was also considered more desirable than relying on s 24 of the Epidemic Preparedness Act 2006 because of that dispensing power under that provision operating only on a case by case basis. The Committee communicated to the Ministry of Justice representatives present the strong desirability of s 24 of the Epidemic Preparedness Act 2006 being rendered fit for purpose by this limitation being addressed as part of the government's recently commenced review of the epidemic preparedness legislation. In any case however, the Epidemic Preparedness Act 2006 only applies to epidemics, not other kinds of emergencies.

Mr McHerron, on behalf of the Law Society, expressed concern that the proposed amendments purported to use the relevant rules-making powers found in the Senior Courts Act 2016 and the District Courts Act 2016 to delegate those powers, which under those statutes are vested in the Governor-General-in-Council, to the various heads of bench. The making of the proposed amendments would for this reason be, he suggested, ultra vires the statutory grant of rules making power.

The Committee identified this as a concern that needed to be addressed before the proposed amendments could be made, though some members did not share in Mr McHerron's analysis.

The Chief Justice suggested that if on further investigation it was identified that the making of such amendments would indeed be ultra vires, then the next best option, in lieu of amendments to the Senior Courts Act 2016 and the District Courts Act 2016 addressing the vires issue, was the introduction of a suit of rules operative only during emergencies to modify the rules regarding certain subject matter areas that previous experience have indicated need to be addressed during emergencies. The Committee identified, repeating its comments at the previous meeting, that certain difficulties are associated with this approach, including the difficulty of identifying in advance of a given emergency what response is best.

Mr McHerron suggested it might be prudent, as part of any legislative review of emergency preparedness legislation, for an alternative more streamlined rules amendment procedure to be created for use in emergencies, resolving the vires issues while largely obviating the need for emergency rules of the type under discussion. This possibility was commended to the Ministry representatives for consideration.

Subject to reviewing the issue concerning the vires of the proposals the Committee was generally agreed the proposed amendments were appropriate, subject to the need for further consideration and the deletion of the proposed power allowing an individual judge to close an individual registry of a court of their own motion. The Committee agreed that it was better, as is now the position under r 3.4 of the High Court Rules 2016, for that decision to be taken by the head of bench.

Mr McHerron to further advise Committee before its 30 November 2020 meeting as to the apparent vires issues with the proposed amendments, with Clerk to undertake further research as directed by Chair. The Committee will, at its 30 November 2020 meeting, and based on that advice, consider whether to move forward with the proposed amendments if thought to be intra vires, or, if these are thought to be ultra vires, identify an appropriate alternative manner of proceeding.

9. Omnibus Amendment Rules and High Court (Personal Properties) Amendment Rules 2020

Mr Kunowski introduced **C 34 of 2020**, a memorandum from the Ministry of Justice covering draft proposed District Court Amendment Rules 2020, High Court Amendment Rules (No 2) 2020, High Court (Personal Property Securities) Amendment Rules 2020, Criminal Procedure Amendment Rules 2020, Court of Appeal (Civil) Amendment Rules 2020, Court of Appeal (Criminal) Amendment Rules 2020, and Supreme Court Amendment Rules 2020. These:

- correct oversights in the District Court (Contempt of Court) Amendment Rules 2020 and High Court (Contempt of Court) Amendment Rules 2020 to allow for the enforcement of undertakings as well as judgments and court orders in both the High Court and District Court (which power was inadvertently omitted from the earlier enacted rules);
- clarify the relationship between sale orders enforcing a court judgment and the Personal Property Securities Act 1999, Insolvency Act 2006, and Companies Act 1993;
- include the names of the District Court registries in both English and Te Reo Māori on Form 1 and Form 2 in sch 2 to the District Court Rules, and require that documents filed in proceedings in the civil jurisdiction of the District Court include the registry name in both languages;
- require the heading of each document filed in criminal jurisdiction of the Court of Appeal to include the name of that court in both English and Te Reo Māori; and
- require that all documents filed in the District Court or High Court pursuant to the Criminal Procedure Rules 2012 include the registry name in both English and Te Reo Māori, and inserts a new sch 2 into those rules setting out the names of the relevant registries in both English and Te Reo Māori;
- allow summary judgment to be granted on part of a claim in the District Court;
- align District Court time allocations for costs purposes in relation to case management in the High Court with the time allocations in the District Court;
- apply Part 18 of the High Court Rules 2016 to proceedings in which the sole relief sought is a declaration of inconsistency under the Bill of Rights Act 1990;
- allow the Court of Appeal and Supreme Court to accept all documents for filing electronically;
- clarify and codifying the proper manner of bringing a *Beddoe* application in the High Court;
- amend r 6.1 of the Criminal Procedure Rules 2012 to increase the number of working days that must pass before a document sent by mail is to be treated as having been served from 3 to 5;
- remove an incorporation by reference of the Senior Courts Civil Electronic Document Protocol in the Court of Appeal (Civil) Rules 2005, addressing an issue of non-conformity with the requirements of the Legislation Act 2012; and
- make a number of other, minor, technical amendments the Committee has identified as being required at various meetings since late 2018.

Ms Leonard noted that no proposed commencement date has yet been inserted into the draft rules. She noted that there is no urgency in making the only time-sensitive amendments contained in the draft rules, those allowing the Court of Appeal and Supreme Court to continue accepting all documents for filing electronically after the COVID-19 epidemic notice lapses as that notice has recently been extended through 23 December 2020 and, it appears, may be extended into 2021.

Ms King noted the Ministry of Justice would like to add further amendments to the draft amendments contained in C 34 of 2020, such as amending the provisions of r 10(1)(b)(iii) of the Court of Appeal (Civil) Rules 2005 to remove the reference to electronic filing being by email and replace it with a technologically neutral definition of electronic filing modelled on that found in r 5.1A of the High Court Rules 2016. This will allow, she notes, for the future introduction of new filing technologies in that Court without having to wait for rules reform. The Committee agreed this would be a desirable further change to include and would be preferable to introducing an idiosyncratic definition of "email" capable of accommodating any new such technologies into those Rules. Equally, the Committee agreed it would be most preferable of all to avoid delaying the progression of the amendment rules package. In this respect, the Ministry of Justice and Parliamentary Counsel Office advised that this further amendment could be made quickly, and

Mr McHerron noted two minor errors, which corrections the Committee endorsed being made, namely:

- the amendment of the proposed r 19.4A(1)(b)(i) contained in the draft High Court Amendment Rules (No 2) 2020 to read "the value and nature of the *trust* assets"; and
- the deletion of the numbers 085 from the English name of the Papakura registry of the District Court in the proposed Criminal Procedure Amendment Rules 2020.

Proposed draft District Court Amendment Rules 2020, High Court Amendment Rules (No 2) 2020, High Court (Personal Property Securities) Amendment Rules 2020, Criminal Procedure Amendment Rules 2020, Court of Appeal (Civil) Amendment Rules 2020, Court of Appeal (Criminal) Amendment Rules 2020, and Supreme Court Amendment Rules 2020 contained in C 34 of 2020 to proceed to concurrence, subject to amendments noted above being made.

10. Drafting Practice in Respect of Amendments to the Costs Regime

The Chair referred the committee to C 30 of 2020, a memorandum from the clerk summarising and offering context for Justice Palmer's recent decision in *EA v Rennie Cox Lawyers* [2020] NZHC 1372, in which the Judge suggested it was undesirable for the Committee, in promulgating amendments to the costs regime as part of the High Court Amendment Rules 2019, to have not included transitional provisions expressly stating that the revised daily recovery rates and time allocations would apply only for steps taken on or after 1 August 2019 (the commencement date of the Amendment Rules).

Mr McHerron, Ms O'Gorman, and Justice Dobson noted that the Committee had not included such a transitional provision as this was consistent with a conscious change in drafting practice made by the Committee made in connection with the 2011-2012 review of the discovery rules.

The Committee considered that while there are arguments either way, and the accessibility of legislation points made by Palmer J have some force, there was no need to revisit the Committee's drafting practice. The clear presumption against retrospectivity set out at common law, as codified in the Interpretation Act 1999 (which applies to the construction of the rules) means that the Committee's intention – that revisions to the costs regime operate only prospectively – would be carried into practice by the courts, as was in fact the result in *EA v Rennie Cox Lawyers.*

The Committee agreed with Ms Leonard's observation that this was the practice followed by Parliamentary Counsel, and is very much the purpose of having an Interpretation Act, and it would be

undesirable to clutter the Rules by inserting practically unnecessary transitional provisions into every reform, given that these become "skeletal" once spent.

The Committee agreed with the Chief Justice's suggestion that, generally speaking, it may be appropriate for the Rules Committee to speak publicly on issues of practice and procedure so as to educate bench and bar on issues such as these.

The Committee agreed that it is undesirable that, in coming to his decision, Justice Palmer had not been able to identify the relevant conscious change in the Committee's drafting practice as a result of that having been minuted in respect of the decisions taken in respect of the 2011-2012 discovery reforms and not previous iterations of costs regime reforms. Accordingly, the Committee agreed that the minutes of the Committee's decisions on drafting matters should in future clearly identify other drafting decisions relevant to that decision.

Committee's minutes in respect of future drafting decisions to more clearly identify all relevant aspects of drafting practice to help ensure Committee's legislative intent is as ascertainable as possible.

12. Ambit of rr 5.35A and 15.1 of the High Court Rules 2016

The Chair referred the Committee to **C 35 of 2020**, which is a recirculation of the earlier considered **C 51 of 2018**; a memorandum from Justice Wylie proposing the Committee expand the ambit of r 5.35A of the High Court Rules 2016 to allow for the striking out of abusive steps in proceedings such as interlocutory applications before service. At that point in time, the Committee did not think it appropriate to expand the application of r 5.35A, noting that rule had never been intended to apply to interlocutory applications.

The Chair explained the issue, and the related issue of the lack of an express basis in the Rules for a Judge striking out a plainly abusive proceeding of their own notion if that was not referred to a Judge for directions under r 5.35A when presented for filing. The Chief High Court Judge explained that the limits within r 5.35A were an issue that had recently been raised at a High Court Management Committee meeting.

The Committee identified the power of the Court to strike out abusive proceedings of its own motion without notice to the parties, and the application of a r 5.35A type procedure to abusive steps, such as interlocutory applications in otherwise appropriate proceedings were separate issues, albeit related.

It was noted that the former issue is properly addressed, if at all, through an extension or clarification of the scope of r 15.1. In this respect, it was noted that the Court already has such a power under its inherent jurisdiction, and also potentially under r 15.1 as no application is required to be made before that rule can be applied to strike out vexatious or abusive proceedings. The Chief High Court Judge noted that judges of that Court are, in her view properly, reluctant to rely on their inherent jurisdiction or an implication of 15.1 to take such a step when dealing with querulous self-represented litigants as they most often would be where that rule is being invoked. The Committee agreed that r 15.1 could be clearer.

As to the latter issue, the Committee recalled that the formulation of r 5.35A adopted when that provision was introduced from 1 September 2017 was the result of considerable debate within the

Committee, including because of concerns advanced by the NZLS as to the effect of r 5.35A in limiting access to justice. That is why, the Committee recalled, the present formulation of r 5.35A is quite narrow. Any extension of the ambit of r 5.35A should not be undertaken, the representatives of the profession suggested, without review of the Committee's records as to the introduction of r 5.35A and potentially also consultation with the profession and public.

The Committee agreed that this was an appropriate way to proceed, while identifying the force in the argument that a r 5.35A type power should be exercisable in respect of abusive individual steps in otherwise legitimate proceedings. Any expansion of the ambit of r 15.1 should also have regard, several members of the Committee considered, to these considerations.

Clerk to place relevant materials from Committee's record before Committee at its 30 November 2020 meeting to allow for further discussion of this issue.

13. Scope of Representative Proceedings and Litigation Funding Rules Reform

The Chair referred the Committee to C 26 of 2020, a memorandum inviting the Committee to reconsider the scope of its reform of the rules regarding representative proceedings and litigation funding insofar. This would take the form of the Committee working alongside the Law Commission in its present review of the law in this area; a possibility that Justice Cooke as Chair has discussed with Associate Professor Amokura Kawharu, the President of the Law Commission and Commissioner responsible for the Commission's work in that area. The Committee had previously pursued only modest reforms in this area, given the Law Commission's interest in the area and the likelihood of new legislation being introduced pursuant to the Commission's recommendations.

The Committee was generally supportive of the proposal, given the likelihood of amendments to the High Court Rules 2016 eventually being required to implement the Commission's proposals.

Chair to inform Law Commission of Committee's in principle support for working alongside the Commission in respect of the Commission's review of this area, and to report back to the Committee more specific proposals as to the form of that co-operation once these can be devised.

13. Recommendations by Crown Law

The Committee considered the proposed amendments set out Ms Gorman in C 31 of 2020. The Committee agreed the amendment suggested to r 8.11 of the High Court Rules 2016 suggested at paragraph [6] of that memorandum should be made. The Committee agreed this will address the possibility for incongruence between the time frames set out in rr 7.3 and 8.11 of those Rules for the filing of memoranda for the first case management conference and the parties' discussing and attempting to agree on the discovery order.

The Committee agreed that the apparent error in cross-referencing in r 43 of the Court of Appeal (Civil) Rules 2005 should be corrected in the manner identified at paragraph [11] of C 31 of 2020, whether by an amendment rule or by the Chief Parliamentary Counsel exercising her correction powers under the Legislation Act 2012. The Committee also agreed with Ms Gorman's further suggestion to clarify the distinction between the effect of subclauses (1B) and (2) of r 43 by amending r 43(1A) in the way suggested at [12] of C 31 of 2020.

Amendments proposed at paragraphs [6], [11], and [12] of C 31 of 2020 to be included in future omnibus amendment rules or, where possible, made pursuant to the Chief Parliamentary Counsel's correction power as part of a future reprint of the rules.

8. High Court Rules 2016, r 31.35

The Chair referred the Committee to C 33 of 2020, in which he detailed the results of his consultation with the Associate Judges pursuant to the Committee's discussion of this matter at its previous meeting.

He explained that, to the extent the Associate Judges responded, they thought it was appropriate to amend r 31.35 to remove the requirement for all applications in relation to a company placed into liquidation to be brought by interlocutory application in the original liquidation proceedings. Associate Judge Bell in particular thought it unhelpful for this requirement to apply in relation to matters that later developed in relation to a company in liquidation when what was effectively new matters with different parties were involved. At the same time, Justice Cooke reported, to the extent this issue was seen as arising by the Associate Judges, they agreed it did not cause significant problems in practice.

Equally, the Associate Judges considered a new r 31.35(4)(c) providing "An application which the Court decides would be better addressed under another part of these Rules", so as to allow applications such as those described above to instead be brought under pt 19 where leave is obtained, would allow such matters to be dealt with pragmatically and more efficiently where they arose.

The Committee considered some small potential gains in efficiency might well be realised. Given this, and the fact there do not appear to be any disadvantages associated with the proposal, it was considered appropriate to proceed with the reform, despite the lack of many problems in practice.

Amendment proposed at paragraph [2] of C 33 of 2020 to be included in next omnibus amendment rule.

14. Vote of Thanks to Mr Andrew Beck

The Chief Justice and Mr McHerron proposed that the Committee record a vote of thanks for Mr Andrew Beck's many years of faithful service to the Committee ahead of his departure from the Committee before its next meeting. It was noted that Mr Beck had been involved in the work of the Committee for so long that it was difficult to ascertain the exact date of his appointment and has made an immeasurable contribution to the Committee's work during the period of his involvement.

In particular, the Chief Justice asked that the minutes record her thanks for Mr Beck's many years of service; his willingness to contribute his likely unrivalled knowledge of New Zealand's civil procedure to discussions; and the vital, necessary, and often robust character of his contributions to discussions. The Committee agreed with her assessment that Mr Beck's departure will be a great loss and hope that he will continue to make available his expertise.

A vote of thanks for Mr Beck's inestimably valuable contributions to the Committee's work during the period of his appointment was carried by acclamation.

The meeting closed at 12.03 pm.

The next meeting of the Committee is scheduled to begin at 10:00 am on 30 November 2020.

Justice Francis Cooke
Chair