The Rules Committee

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2 December 2019
Minutes 04/19

Circular 67 of 2019

Minutes of Meeting of 25 November 2019

The meeting called by Agenda 04/19 (C 56 of 2019) began at 10:02 am on Monday 25 November 2019 in the Conference Room at the Supreme Court Complex in Wellington.

Present

The Right Honourable Dame Helen Winkelmann GNZM, Chief Justice of New Zealand
The Honourable Justice Kós, Special Purposes Appointee and President of the Court of Appeal
The Honourable Justice Venning, Chief High Court Judge
His Honour Judge Taumaunu, Chief District Court Judge
The Honourable Justice Dobson, Chair and Judge of the High Court
His Honour Judge Kellar, Special Purposes Appointee and Judge of the District Court
His Honour Judge Gibson, Judge of the District 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)
Ms Jessica Gorman, Crown Law (Representative for Ms Una Jagose, Solicitor-General)
Mr Andrew Beck, New Zealand Law Society (NZLS) Representative
Mr Jason McHerron, NZLS Representative
Ms Laura O'Gorman, Special Purposes Appointee

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 in the Parliamentary Counsel Office (PCO)
Ms Alexandria Mark, Secretary to the Rules Committee
Mr Sebastian Hartley, Clerk to the Rules Committee
Dr Bridgette Toy-Cronin, Director of the Legal Issues Centre at the University of Otago (10:59 am to 11:34 am)
Ms Jo Dinsdale, Principal Advisor (Courts and Tribunals Policy) in the Ministry of Justice (10:30 am to 10:58 am)

Apologies

The Honourable David Parker, Attorney-General
The Honourable Justice Cooke, Special Purposes Appointee and Judge of the High Court
Ms Kate Davenport QC, Special Purposes Appointee and New Zealand Bar Association (NZBA) President

1. Preliminary

Welcome to New Members

Justice Dobson welcomed Justice Kós, the President of the Court of Appeal, to his first meeting as a member of the Committee. The Judge was appointed to the Committee for special purposes by the Chief Justice for a term not exceeding three years from 21 October 2019.

Justice Dobson also welcomed Judge Taumaunu, the Chief District Court Judge, to his first meeting of the Committee. The Chief Judge became a member of the Committee ex officio with his appointment to that role from 27 September 2019.

Minutes of Previous Meeting

The minutes of the Committee's meeting of 23 September 2019 (C 58 of 2019) were confirmed.

2. Access to Justice

Discussion

The Committee considered a draft consultation paper, intended for circulation to the legal profession, prepared by the Clerk and substantively refined by Mr McHerron and other members of the Access to Justice Working Group (C 58 of 2019).

The Committee considered two substantive questions as to the overarching design of the paper.

The first was whether to revisit the Committee's decision to include four proposals for reforms promoting access to justice in the civil jurisdiction by ensuring that the costs of going to court are proportional to the value and complexity of each case. The Committee was content to include all four options for reform. While acknowledging that the feedback received would be more detailed if fewer options were presented, the Committee decided, at this preliminary stage, not to preclude a fuller range of feedback.

The second question was whether to reformulate the paper to divide the proposals for reform most applicable to the District Court from those applicable to the High Court. Although the proposals would impact on each court very differently, the Committee decided not to amend the paper in this way, given that all the proposals being advanced would impact on claims of all values.

Accepting that the design of the paper was fundamentally 'sound', the Committee considered concerns relating to each proposal for reform.

Requirement for all proceedings to begin with summary judgment application

The Committee thought it prudent to expressly identify that an "escape valve" would exist for proceedings inherently unsuitable for the summary judgment procedure by reason of their complexity and subject matter. One such category of claims would be default judgment applications in respect of liquidated debt claims in the District Court. Otherwise a large number of submitters would focus on the need for such a mechanism, which is already recognised, at the expense of feedback on other aspects

of the proposal. Justice Venning noted that High Court claims are triaged as being either 'ordinary' or 'complex' at an early stage, and that would provide a suitable point at which to determine if the summary judgment procedure should apply.

Implementation of inquisitorial process for resolution

This would be modelled on the Christchurch Earthquake resolution processes. However, the Committee noted that there were pressures on the parties to those disputes to achieve resolution, potentially contributing to the success of that procedure, which may not be present in relation to other claims.

The Committee agreed to refer to the streamlining of standard "pre-trial and trial" processes, as opposed to only "trial" processes, to clarify the breadth of the proposed reforms.

Reform of discovery obligations

The Chief Justice, Justice Kós, and other members of the Committee identified the need for proposed terms to be made more "directive". That is, it should more clearly emphasise the potentially radical nature of the reforms the Committee may promote in this area, such as moving to a 'presumptive no discovery' or 'disclosure only', model. The Committee agreed it is important for the paper to more clearly signal the breadth of the Committee's thinking, including reference to the potential of affording greater primacy to the role of documentary evidence in appropriate claims. The paper should also advert to the disproportionate and needless cost attaching to the present discovery regime.

Distribution of consultation paper

Finally, the Committee considered how best to distribute the paper to ensure the greatest number of possible submitters are reached. It was agreed that the model for distribution of the Committee's paper on representative proceedings should be used, but with a more concerted effort to ensure all parts of the legal profession are reached. The Ministry of Justice, Crown Law, NZLS, and NZBA representatives present agreed to ensure the paper would be circulated to their members and through the Government Legal Network. The Ministry of Justice and Chief Justice indicated they have access to a mailing list of Community Law Centres, as the practitioners most likely to be advising those with low-value claims. It was also agreed that the Chair should do a written interview with the legal professional publications to ensure awareness of the initiatives.

The Committee proposed that the closing date for submissions should be the end of March 2020. Consultation is to begin as soon as the paper can be made ready by the Clerk, who was tasked with updating the paper to reflect the Committee's discussions.

Conclusions and Action Points

- Clerk to revise the paper to reflect the Committee's discussions as a matter of priority, with the paper to be circulated to the Access to Justice Working Group for final comments and review. Following that, the paper is to be circulated to all members of the Committee for comment, with all comments to be provided by December 9.
- Clerk to prepare to distribute the paper for consultation in early December, in accordance with the Committee's discussions.

- Justice Dobson to help promote awareness of the paper by doing an interview with the legal professional publications.
- Justice Dobson to ensure paper is circulated to the High Court judges for awareness and comment at their one-day meeting in February 2020.
- All Committee members and attendees to aid in ensuring the widest possible dissemination of the paper once published through their professional networks and affiliations.

3. Costs for self-represented litigants

Discussion

The Committee considered a draft consultation paper prepared by the Clerk and intended for circulation to the legal profession on whether to maintain the exception that enables self-represented lawyers to recover costs (C 59 of 2019).

The Committee agreed with Justice Kós's suggestion that the paper might usefully be reformulated by beginning with the underlying question of "what are costs?". The current definition is found in the scale, which describes a series of essential steps that must be taken as part of litigation by a successful party. On that view, the Committee can advance three options for reform. First, to recognise that these are steps performed by legal practitioners, and that the performance of this work should be rewarded whenever a legal practitioner performs those steps for a successful party. This reflects the status quo. However, that is illogical because they are steps that must be taken by a successful party, whether they can afford a lawyer or not. area second option is to allow recovery in respect of those steps but only for 'out of pocket' expenses incurred in taking those steps; thereby abrogating the exceptions. The third option is to allow all costs incurred in achieving those steps, including opportunity costs as well as 'out of pocket' costs, to be claimed. That would be a fundamental change. Nonetheless, it is no more than defining what "costs" means, which the courts have been doing since the Statute of Gloucester 1278 (Eng).

It was accepted that it would nominally be possible to modify the costs regime through continued judicial reasoning as to the meaning of "costs". However, the Committee considered it prudent, having previously established it had jurisdiction to do so, to instead amend the rules to provide for the meaning of "costs" in relation to the power to award costs.

Given this perspective, the Committee agreed that any consultation paper should clearly signal that the nature of costs may be significantly changed as part of any reforms, and that the paper should be recast to clarify the potential scope of changes. To better express this, the paper should also set out the background and policy of costs in clear terms, following the above discussion.

Having agreed on the content of the paper, the Committee considered to whom and when it should be distributed. The Chief Justice suggested, and the Committee agreed, that it is imperative to go beyond the usual consultation with the profession and engage with those who work most often with unrepresented litigants, including the Citizens Advice Bureaux and the Human Rights Commission. Additionally, the in-house lawyers' association, and Crown Law (the government being one of the largest users of in-house counsel), should be consulted regarding the significant implications for users of in-house counsel. The Committee agreed it was desirable to stagger this consultation with the paper

on access to justice, and that a revised paper could be reconsidered at the Committee's next meeting before circulation.

Conclusions and Action Points

- Clerk, with assistance from Justices Kós and Venning, to recast the paper in terms of the Committee's discussion before the Committee's first meeting of 2020. The paper is to be circulated to Ms Gorman for pre-publication consultation from Crown Law before that time.

4. Contempt of Court Act 2019 Implementation

Discussion

Justice Dobson welcomed Ms Jo Dinsdale, Principal Adviser in the Ministry of Justice with responsibility for the Contempt of Court Act 2019, to her second meeting of the Committee. Ms Dinsdale noted the Parliamentary Counsel Office's draft High Court (Contempt of Court) Amendment Rules 2020 (PCO 22429/2.0) and District Court (Contempt of Court) Amendment Rules 2020 (PCO 22430/2.0) (CC 62 and 62A of 2019), which had been provided by Ms Leonard following discussions with the Ministry of Justice.

Having reviewed the draft amendment rules, the Committee agreed that it was useful and appropriate to provide forms for the High Court's use in dealing with contemptors, modelled on the forms already in use in the District Court. In the Ministry of Justice's covering memorandum (C 62B of 2019), this was "option two" ("option one" having been to omit the forms).

One question was whether inserting the new provision relating to disruptive behaviour in court proceedings as a new r 8.33A of the High Court Rules 2016 was the best place for that rule. Having evaluated several options, the Committee decided to insert the provision as a new subpart of pt 10 of the rules, as the part most logically connected to contempt in the face of the court.

Conclusions and Action Points

The Committee concurred in the making of requisite amendments to the High Court Rules 2016 and the District Court Rules 2016 to implement the Contempt of Court Act 2019, as recommended by the Ministry of Justice, in terms of C 62 of 2019 and C 62A of 2019. PCO is to make any necessary typographical corrections and implement the Committee's decision as to the placement of the new provision in Part 10 of the High Court Rules 2016 . The amendment rules, once amended, are to be circulated for formal concurrence.

5. Evidence-Based Approaches to Rules-Making

Justice Dobson welcomed Dr Bridgette Toy-Cronin, the director of the Legal Issues Centre at the University of Otago, and invited her to speak to the briefing paper she had prepared for the Committee regarding the implementation of an evidence-based approach to rules-making in New Zealand courts (C 66 of 2019).

Based on her extensive study of previous rules reforms (in particular the 2009 amendments to the District Court Rules), Dr Toy-Cronin observed that rule-making for the New Zealand courts, as in comparable jurisdictions, is largely informed by the anecdotal experience of those on the Committee.

It proceeds by the Committee implementing the reforms that, in its members' experiences, will best confront those anecdotally-reported challenges.

In her paper, Dr Toy-Cronin invites the Committee to adopt an evidence-based approach to rule-making using social science techniques. This involves:

- the identification of what (with a reasonable degree of precision) the rules reform is meant to achieve;
- the identification of measures (whether direct or indirect) of success;
- determining the amount of time to wait before measuring those metrics;
- ensuring that a baseline measurement is available at the time the reform is implemented (to provide a comparison); and
- establishing success criteria.

The Committee identified, and Dr Toy-Cronin agreed, that this will require a potentially substantial lead time in some cases, such as where a process is one that is rarely used, or where there is a large amount of data to process and compile. It would also be important for the Committee to clearly identify its intention with different reforms, and how success will be defined, as this will assist with identifying the correct metrics for success and the correct data to be interrogating.

The Committee observed the viability of this approach is contingent on the quality of the data available to the Committee. Dr Toy-Cronin reported her experience of using CMS, the courts' case management system , to undertake previous social science research. She treated that system as clearly designed to be used by registry staff in administering files. Data relating to files is not always correctly entered by staff, and some information that would be useful for research purposes is not captured. The judicial members of the Committee observed that CMS data is useful for providing some insight into trends, such as the number of litigants-in-person, but not their types of claims, the value of those claims or whether a lawyer is involved at some point in the process. The Ministry of Justice agreed that better data of that type is available in the family and criminal jurisdictions than in the civil jurisdiction.

These processes have obvious resourcing implications. The Ministry of Justice advised that the Ministry will be able to help the Committee identify and analyse relevant data already collected through CMS and other channels, especially if provided with a forward work plan for the Committee for each year, to allow for existing data-collection resources to be employed. More generally, the Ministry representative agreed that it is desirable, in principle, for any future system replacing CMS to have the necessary functionality to capture data of the sort being discussed.

The Committee also identified the desirability of moving beyond consultation papers of the sort previously used as a tool in informing rules reform, both in terms of requesting relevant quantitative information (such as anonymised data from billing systems) and in changing the questions in order to gather a wider range of perspectives. The Committee identified the potential, including in relation to the two consultation papers earlier discussed, of asking questions relating to individual users' experiences of processes, rather than asking for detailed reform suggestions from practitioners. This may assist the Committee in obtaining the views of a wider range of stakeholders, and better tailoring reforms to address their concerns and expectations. Dr Toy-Cronin suggested that the difficulties

encountered following the 2009 District Court Rules reforms were because of engagement beyond inviting submissions from the legal profession not being a priority of the Committee.

Justice Dobson thanked Dr Toy-Cronin for her contributions to the Committee and indicated a wish to remain in touch about research on major rules reforms.

6. High Court Rules 2016, r 19.2(l)

Mr Beck drew to the Committee's attention the apparently incorrect cross-reference to the Land Transfer Act 1952 in r 19.2(l) of the High Court Rules 2016. The Committee agreed the rule should now refer to the corresponding provision of the Land Transfer Act 2017.

Ms Leonard noted that, if this did result from a failure to update the cross-reference when the 1952 Act was repealed and replaced, she had a discretion under the Legislation Act 2012 to correct the error. The Committee agreed that was expedient and appropriate and instructed PCO accordingly.

7. District Court Rules 2014, sch 4 item 23

Mr Beck drew to the Committee's attention that the description of item 23 (case management of appeals) in the time allocations schedule to the District Court Rules 2014 (sch 4) states that the allowances are to be "as for ordinary proceedings", but then includes figures corresponding to each category of proceedings. The corresponding provision in the High Court Rules 2016 states that the allowances for case management of appeals are to be "as for ordinary proceedings" for each category of proceedings. The columns against that item are blank, and the words "as for ordinary proceedings" expand across the columns. Mr Beck suggests the District Court Rules 2014 should be amended to resemble the High Court Rules 2016, with the words "as for ordinary proceedings' expanding across the columns for categories A, B, and C.

The District Court Judges on the Committee could not think of an occasion on which this had caused an issue and thought it may not arise in practice because appeals to the District Court from tribunals tend not to require extensive case management.

Ms Leonard advised that the current description has appeared since the District Court Rules 2014 were promulgated, and there is no apparent reason why the position in the District Court does not parallel that in the High Court.

Judges Kellar and Gibson were asked to liaise with their District Court colleagues to identify a rationale for the description remaining as it is presently drawn, as opposed to Mr Beck's suggested amendment.

8. High Court Amendment Rules (No 2) 2019

Ms Leonard placed the draft High Court Amendment Rules (No 2) 2019 (PCO 22079/2.0) (C 63 of 2019) before the Committee for consideration. She suggested, and the Committee agreed, that as a matter of general practice moving forward, minor and technical rules amendments will be compiled into two sets of omnibus rules for concurrence following the Committee's June and November meetings each year.

As to the present rules, which reflect items brought forward from discussions at the Committee's June and September 2019 meetings, the Committee concurred in the amendment of the High Court Rules 2016 in terms of C 63 of 2019, subject to PCO making the following amendments:

- the inclusion of language, such as the words "special circumstances", in the amendment effected by clause 11, to indicate that it will rarely be appropriate to bring a second application for summary judgment (the proposed wording relating to the "interests of justice" not being sufficiently clear as to the high standard); and
- the correction of the reference to r 12.4(2AA) in clause 9.

The amendment rules, once amended, are to be circulated for formal concurrence.

9. Time Allocations

The Chair referred the Committee to a letter received from Mr Grimmer, an Auckland barrister, (C 60 of 2019) suggesting that the Committee revisit the time allocations made for the compilation of electronic bundles. Mr Gimmer says the production of electronic bundles, now required in many cases, takes much longer than was envisaged at the time the provisions for the compilation of bundles were last reviewed.

However, Ms O'Gorman has recently publicised a method for the creation of electronic bundles that greatly expedites the process. The Committee agreed that this addresses the issue raised by Mr Gimmer. The Clerk is to draft a response to Mr Gimmer, to be approved by Justice Dobson, directing him to the explanation of the process appearing on Ms O'Gorman's website. Ms O'Gorman has agreed to make a copy of this method available to the NZLS for dissemination; allowing other practitioners (and their clients) to avoid the costs associated with less efficient methods of creating electronic bundles.

10. High Court Rules 2016 and District Court Rules 2014, rr 4.56

The Chair referred the Committee to a letter received from the Civil Litigation Committee of the Auckland District Law Society (ADLS) (C 57 of 2019) suggesting there is some ambiguity as to whether a party can be added to a proceeding through the filing of an amended pleading without obtaining an order from the Court.

The Committee considered it clear, following the High Court's decision in *Smith v Noble Investments Ltd* [2017] NZHC 477, that an order of the Court is required before a party can be added to a proceeding in relation to an existing cause of action. This is clearly implicit from the wording of the rule. While that is not expressly stated in the rule, the Committee was satisfied that it was nonetheless sufficiently clear. No amendment to the rule was required.

The Clerk is to draft a response to the ADLS committee, to be approved by Justice Dobson, advising them of the Committee's view and its reasons for not taking further action.

11. *Beddoe* Applications

Mr McHerron produced a memorandum for the Committee on behalf of the Society of Trust and Estate Practitioners (C 64 of 2019) outlining a matter of current concern to practitioners involved in litigation concerning trusts. The issue concerns a lack of clarity as to the procedural aspects of *Beddoe*

applications, which has caused confusion and dispute, whereas *Beddoe* applications are meant to be quick and flexible. Mr McHerron suggests that the issue can largely be resolved by amending r 19.4 of the High Court Rules 2016 by the insertion of a r 19.4(f) authorising trustees to seek *Beddoe*-type directions by means of originating application.

The Committee agreed that it is desirable to clarify that the appropriate means of making a *Beddoe* application is by originating application under pt 19 of the High Court Rules, as opposed to by way of an application for directions under s 66 of the Trustee Act 1956 (and thus by way of pt 18). The Committee also agreed with Mr McHerron's further suggestion of implementing a brief rule adopting aspects of the comprehensive practice direction regarding this topic in England and Wales (albeit with far less depth). Mr McHerron is to prepare a draft amendment rule reflecting the Committee's agreement with his suggestions, with Justice Kós to assist, before the Committee's next meeting.

12. Representative Proceedings

The Committee received, for noting only, a memorandum from the Clerk summarising the Court of Appeal's decision in *Ross v Southern Response* [2019] NZCA 431. An application for leave to appeal that decision has been filed with the Supreme Court, and the Committee agreed it was not appropriate to further discuss this matter until the final disposition of that appeal. Work on this matter is to remain suspended until that time.

The meeting closed at 12:06 pm.

The next meeting of the Committee will begin at 10:00 am in the Conference Room at the Supreme Court Complex in Wellington on Monday 23 March 2020.