The Rules Committee

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5 September 2018
Minutes 03/18

Circular 45 of 2018

Minutes of meeting held on 27 August 2018

The meeting called by Agenda 03/18 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 27 August 2018.

1. Preliminary

In Attendance

Rt Hon Dame Sian Elias GNZM, Chief Justice of New Zealand
Hon Justice Courtney, Chair
Hon Justice Asher
Hon Justice Dobson
Hon David Parker, Attorney-General (attended until 10.30 am)
Mr Andrew Beck, New Zealand Law Society representative
Ms Jessica Gorman, representative for the Solicitor-General
Mr Andrew Barker QC, New Zealand Bar Association representative
Ms Ruth Fairhall, acting Deputy Secretary of Policy, Ministry of Justice
Ms Fiona Leonard, Parliamentary Counsel Office
Mr Jason McHerron, New Zealand Law Society representative
Mr Kieron McCarron, Chief Advisor Legal and Policy, Office of the Chief Justice
Ms Laura O'Gorman
Ms Caitlin McKay, Private Secretary to the Attorney-General (attended until 10.30 am)

Ms Alexandria Mark, Secretary to the Rules Committee
Mr Daniel McGivern, Clerk to the Rules Committee

Apologies

Hon Justice Venning, Chief High Court Judge
Judge Doogue, Chief District Court Judge
Judge Gibson
Judge Kellar
Mr Rajesh Chhana, Deputy Secretary of Policy, Ministry of Justice

Confirmation of minutes

The minutes of the Committee's meeting on 11 June 2018 were confirmed.

General business

The Committee welcomed the Attorney-General to his first Committee meeting.

The Attorney-General questioned whether it was preferable to have near-identical rules across the different courts. From an access to justice perspective it might not be appropriate for the formalities of the High Court Rules to be applied with the same rigour in the District Court. The Committee observed that the similarity between the rules came about following a departure from reforms that were made to the District Court Rules in 2009. Those reforms were intended to simplify processes in the District Court by removing many of the formal pleadings requirements and introducing the concept of an "information capsule". However, these reforms transpired to be widely unpopular, and a District Court Judge-led reform revealed a widening consensus that the District Court Rules should follow the High Court Rules. This philosophy was adopted, subject to some of the prior reforms being maintained in the District Court such as the short trial procedure. The Attorney-General expressed interest in how often the short trial procedure is used in the District Court, and Ms Fairhall agreed to see whether the Ministry of Justice has any data in that area.

The Chief Justice expressed interest in looking into the extent to which the civil jurisdiction — non-family — is used in the District Court. It may be that there is an access to justice issue that the Committee needs to address. The Chair and the Clerk agreed to prepare a background briefing paper in liaison with Judge Gibson for the Committee to assess whether there is a need to revisit the District Court Rules and in particular their similarity to the High Court Rules.

The Attorney-General agreed to look into the issue raised by the Committee at previous meetings concerning the regulatory impact analysis undertaken in respect of amendments to the rules. The Committee's concern is that the process is perhaps too cumbersome for the type of work the Committee does. The Committee agreed to provide a background paper for the Attorney-General, and the Chief Justice noted that Mr McCarron has much of the background to the Committee and can provide a "potted history".

Action point: Ms Fairhall to see whether data is held on the use of the short trial procedure; the Chair to work on a background briefing paper on the use of the civil jurisdiction in the District Court; Mr McCarron to provide the Attorney-General with background information on the Committee's processes.

2. Court of Appeal (Civil) Amendment Rules

At its last meeting the Committee reviewed a draft of the Court of Appeal (Civil) Amendment Rules 2018 (v 5.0), and discussed comments it had received from the New Zealand Law Society, the New Zealand Bar Association and the Ministry of Justice on various aspects of the draft. It was agreed at that meeting that a sub-committee would be set up — comprising Asher J, Tony Randerson QC, Mr McHerron and the Clerk — to investigate the concerns raised and return to the Committee with an updated draft. For this meeting the sub-committee prepared a new draft (v 8.0), which was introduced to the Committee by Asher J. He spoke to the key changes that had been made since v 5.0 was presented to the Committee.

Asher J explained that r 5A(1)(b), which dealt with rejection of documents by a registrar and which was the subject of extensive discussion by the Committee at its last meeting, had been reduced to a narrower ambit in accordance with the Committee's consensus. That rule now provided:

> **5A Registrar's powers**
>
> (1) The Registrar may, unless otherwise directed by a Judge,—

…

(b) decline to accept a document for filing—

(i) that contains plainly abusive material unless that material is removed:

(ii) that is plainly filed in the wrong court:

(iii) until a relevant prescribed fee is paid or a completed fee waiver form is filed:

…

The Chief Justice queried the appropriateness of proposed r 5A(1)(b)(iii). In particular, it is not clear whether payment of fees is something that should be dealt with by rules of procedure, given fees themselves are the subject of regulation — in this case, the Court of Appeal Fees Regulations 2001. Those regulations, as Mr McCarron explained, require all specified fees to be prepaid, and also provide for the proceedings to be stopped pending the determination of an application for the fee to be waived. This means an intending appellant must apply for the proceeding to continue if the fee has not been paid. In this way, proposed r 5A(1)(b)(iii) complements the regulations. The Committee agreed with the Chief Justice's suggestion that it would be preferable simply to provide in the rules a cross-reference to the ability of a registrar to reject a document for filing. The Committee agreed to reword r 5A(1)(b)(iii) so as to read: "if authorised by an enactment to reject it if a prescribed fee is not paid or waived". Mr McHerron observed that it is only implicit in the regulations that a registrar can exercise this power, but the Chief Justice observed that it is not for the Committee to determine this — the regulations can be made more explicit by the drafters if that is thought necessary.

Ms Fairhall identified an issue regarding r 5A(1)(b)(ii) and in particular its reference to "the wrong court". The rule implies that there must be a "right court" when in fact if there is no jurisdiction then there will not be a right court. The Court of Appeal registry was more comfortable with the previous wording of the rule, which provided that a registrar may, unless otherwise directed by a Judge, decline to accept a document for filing on the grounds that "the Court lacks jurisdiction in the matter to which the document relates". However, as Asher J explained, the Committee had agreed to depart from this wording because questions of jurisdiction involve judicial analysis and are inappropriate for decision by registrars. The Committee agreed with the Chair's suggestion of rewording the rule so that the grounds for rejection will be that the document "plainly should have been filed in another court". Mr McHerron added that the word "instead" should come at the end, to account for the instance where an intending appellant must file in both the High Court and the Court of Appeal, for example. The Committee agreed for this matter to be left to the sub-committee.

As Asher J explained, it was agreed prior to the meeting that the proposed five-page limit for written submissions on contested applications for leave be restored to the current 10-page limit in response to concerns raised by Mr Beck that five pages would be too limiting in combination with the removal of an express right to an oral hearing.

One issue in respect of which the sub-committee was unable to agree was whether proposed r 44A(4) should be retained. Rule 44A provides for the Court's power to strike out or stay an appeal. Sub-clause (4) provides that the powers under this rule must be exercised by three Judges. Mr McHerron said this was inconsistent with s 49(2) of the Senior Courts Act 2016, which provides that any two or more Judges of the Court of Appeal may act as the court to determine any contested application for leave to appeal, any contested application for an extension of time to appeal, and any other contested application or matter (other than an appeal) that effectively determines or disposes of the substantive proceeding. Mr McHerron appreciated the policy justification for having three Judges determining a matter that disposes of an appeal, but observed that to the extent the rule prevents such matters being determined by two or five Judges, it is inconsistent with the Act, which is superior to rules of procedure. Mr McHerron suggested that the rule be removed, and acknowledged that the Court is entitled to adopt a policy of having three Judges for such matters rather than including it in a rule. The

Chief Justice observed that it was misconceived to include such a statement in the rules. The Committee agreed that the Court of Appeal can assign three Judges to such matters regardless of whether or not a rule is the means by which that is determined. The Committee considered replacing the word "must" with the word "will", but the Chair considered that this is inconsistent with the language of a *rule*. Asher J acknowledged that the matter should not be debated further and would discuss with the sub-committee the prospect of removing the rule, or at the very least making the rule consistent with the Act. Mr McHerron added that the same will need to be considered for proposed rr 27(6) and 27B, which record matters that may be determined by two Judges, simply reflecting the position already established in the Act.

Mr McHerron raised one further issue regarding cl 2 of proposed Schedule 1AA, which deals with transitional provisions. It appears the transitional provisions apply only to (a) an application for leave to appeal made before the amendment rules commence and pending or in progress at the time of the commencement; and (b) an appeal for which leave is granted before the amendment rules commence and that is in progress at the time of the commencement. It does not appear to cover appeals in respect of which leave is available as of right and which were commenced prior to the commencement of the amendment rules. Asher J acknowledged that this issue — one of careful drafting — could not be determined at a tabled Committee meeting and is better left for determination by the sub-committee.

Mr Barker QC raised three matters. The first is with proposed r 5A(1)(c), which allows the Registrar to, unless otherwise directed by a Judge, "extend the time for complying with any rule, direction, or order of the Court" either by consent, or by up to five working days despite the absence of consent. Mr Barker considered this rule could cause confusion regarding whether it was intended to apply to the date on which the appeal must be filed, which is a matter for statute. The Committee did not agree any change was necessary.

Mr Barker's second issue concerned proposed r 42(3), which requires the insertion of official reports of cases (where available) for the bundle of authorities. Such prescription might not be necessary given there is now a wide range of secondary reporting series. The Committee agreed there is no need to depart from the current practice of requiring official reports where available.

Mr Barker's third issue was with the time allocations in the proposed rules, which are unchanged from the rules now in force. Mr Barker considered the allocations to be low in some respects, including for example the one-day allocation for preparing the case on appeal. The Committee agreed to expand the Time Allocations agenda item to include the Court of Appeal's time allocations, and that there does not need to be further amendment made to the current amendment rules in respect of time allocations.

Mr Beck raised two issues. The first was with the appropriateness of rules requiring the labelling of volumes of materials on the spine of the volume. Such practice can prove difficult, for example if one is using wire binding. However, Asher J emphasised that it can be difficult for Judges in the absence of clear labelling to keep up with oral argument. And the Chair observed that the practice is not solely for the benefit of Judges but also for the benefit of litigants in that it expedites the hearing of the proceedings and makes the case easier to follow. The Committee agreed no change was necessary.

Mr Beck's second issue was with Form 2 to the Rules and its phrasing. Currently the form includes the phrases: "What are the specific grounds of the appeal?" and "What judgment does the appellant seek from the Court of Appeal?" Mr Beck observed that other forms have departed from this style of phrasing and that Form 2 in these rules appears to be anomalous. The Committee agreed this was a useful point and that wording along the lines of "The specific grounds of appeal are:" and "The appellant seeks the following judgment from the Court of Appeal:" might be more appropriate.

The Committee agreed to have the sub-committee revisit the rules with a view to preparing an updated draft for concurrence.

Action point: Sub-committee to further review rules to ready them for concurrence.

3. Costs for in-house counsel

The Committee agreed to defer discussion of this agenda item until the next meeting, given nothing has been heard of the appeal of Associate Judge Matthews' decision in *Commissioner of Inland Revenue v New Orleans Hotel (2011) Ltd.*

Action point: Item to be kept on the agenda.

4. Filing / Electronic Courts and Tribunals

The Committee agreed to discuss Agenda Items 4 and 10 together given they both concern electronic filing.

Ms O'Gorman had prepared a memorandum for the Committee on the Electronic Courts and Tribunals agenda item. This agenda item concerns whether rule changes are required to support the provisions under the Electronic Courts and Tribunals Act 2016, which allows for the use of certain types of documents in electronic form. From the Court of Appeal's perspective, as outlined in Ms O'Gorman's memorandum, changes to the rules are not required because all references to paper in the rules are deemed to be digital equivalents. However, it will be sensible to update the rules when the Courts Case Portal (CCP) is established as usual practice in the Court of Appeal so that readers understand the position and need not have recourse to the Act as well. Ms O'Gorman explained that the Ministry of Justice is working to implement enhancements to the CCP, with the intention that the CCP become a public website for the Court of Appeal in September.

Asher J indicated that the Court of Appeal registry have identified numerous difficulties with the practical details of what is proposed, and advised the Committee not to anticipate anything immediate regarding the implementation of the CCP at the Court of Appeal as there is still much to be done.

Although there may need to be tidy-up changes to the rules once the practical aspects of the CCP are finalised, the Committee agreed it is too early at this stage for it to commence work in this area. This is also true in respect of the High Court, which will need to wait and see how the CCP operates in the Court of Appeal.

Associate Judge Osborne had written a memorandum for the Committee on a related matter. Associate Judge Osborne suggests the Committee look into how the concept of "filing" is provided for in the High Court Rules. In particular, there are differences in the approach taken in the High Court Rules to the approach taken in the Court of Appeal (Civil) Rules and the Supreme Court Rules. The Committee agreed to consider this item alongside the Electronic Courts and Tribunals agenda item.

The Committee agreed to defer discussion of these matters until its first meeting in 2019.

Action points: Item to be brought back onto the agenda for its first meeting in 2019; the Chair to write to Associate Judge Osborne.

5. Restoring companies to the register

Mr Beck raised for discussion whether applications made under s 329 of the Companies Act 1993 — restoring companies to the Companies Register — should be included in r 19.2 of the High Court Rules as applications that can be made by originating application. The Clerk had found that in December 2004 the Committee agreed that it should be. However, such change was never implemented and no reason could be found as to why that was.

Associate Judge Bell looked into this issue in *Re Salamanca Investments Ltd* [2015] NZHC 572, [2015] 3 NZLR 411 and, according to Mr Beck, could not find any good reason why such application could not be brought as an originating application. Mr Beck observed that it appears, looking through law reports, that these applications are brought by originating application as a matter of practice, but leave is

required under r 19.5 of the High Court Rules. Mr Beck said there is no real reason why the default position cannot be that such applications are brought by originating application — the courts retain the power to require further information in a particular case.

Mr McHerron queried whether an application under Part 18 of the High Court Rules might be more appropriate. He explained that in *Groves v TSSN Ltd (in liq)* [2012] NZHC 2402, [2013] 1 NZLR 111, MacKenzie J observed that the originating application procedure was not intended for routine use in cases where there was another likely party with contrary interests, and the stance taken by the liquidator in that case placed that case into that category. Mr Beck responded that in the majority of cases these issues can be resolved in the originating application context.

The Committee agreed to have a fresh look at this issue before committing to any change to the High Court Rules. Mr Beck agreed to prepare a memorandum for the Committee to review at its next meeting. Ms Fairhall agreed to consult with MBIE on this issue as it administers the Companies Office.

Action points: Mr Beck to prepare memorandum; Ms Fairhall to consult with MBIE.

6. Accessing neighbouring land

The Clerk spoke to this issue on behalf of Judge Kellar who was unable to attend the meeting. Jo Appleyard of Chapman Tripp had written to the Committee, observing that applications made under ss 319 and 320 of the Property Law Act 2007 — for an owner or occupier of land to enter onto or over neighbouring land — cannot be made by originating application. Ms Appleyard considers that the omissions of these sections from r 20.13(u) of the District Court Rules — listing applications that can be brought by originating application — appears to be a drafting oversight as it was the practice and procedure under the previous Property Law Act for such applications to commenced by originating application. Judge Kellar had passed on his agreement with this view to the Clerk prior to the meeting.

Mr McHerron had looked through Law Commission reports and did not find anything on this topic. Mr Barker observed that applications under these sections are by definition confrontational — one can enter into or onto neighbouring land either by consent or, if there is no consent (i.e. a dispute), an application to the Court can be made.

Ms Fairhall agreed to look into whether the Ministry of Justice has any information on this topic from when the Act was passed. The Committee agreed to have the Clerk look into the background on this issue.

Action points: Ms Fairhall to look into whether the Ministry of Justice has any information; the Clerk to research the background of this issue more generally.

7. Registry

The Auckland District Law Society had written the Committee expressing concern at issues being encountered by practitioners when filing documents and communicating and Registry staff while commencing proceedings in the District Court in Auckland. In particular, four issues were raised:

(1) Registry does not allocate a file number to proceeding at the point of filing, and pending the documents being received and approved by the CPU in Wellington. There is no way of checking what has happened to the documents while they are in the process of going to and coming back from the CPU. It is possible for a limitation period to expire during this period if the CPU decides to reject documents on grounds of deficiencies in their form.

(2) There is a general anxiety caused through uncertainty while proceedings are travelling to and from the CPU. A tracking system could perhaps be introduced, or a temporary file number allocated to documents which can be confirmed if the documents are accepted.

(3) Even where proceedings and documents are filed on interlocutory or procedural matters it is possible for them to disappear for a period, causing practitioners and their clients a great deal of additional time and cost in ascertaining what has happened. There are no case managers to contact conveniently as in the past.

(4) The impression of practitioners is that the new system requiring diversion of many files to the CPU lies at the heart of a number of procedural problems.

Ms Fairhall said the Ministry of Justice will write to ADLS to understand more about the issues raised. The Clerk advised the Committee that he had been informed by Judge Kellar that he will take up this matter as he sits on the Chief District Court Judge's Advisory Board as its Civil Judge. The Clerk agreed to look into the review of the CPU that took place a few years ago.

Action points: Ms Fairhall to arrange contact with ADLS; the Clerk to research background to this issue and to brief Judge Kellar.

8. Time allocations

Ms O'Gorman presented an updated schedule with amendments to the time allocations for trial preparation. The new schedule is split between affidavit hearings and witness hearings, and is based not solely by band but also on the length of the trial.

Mr Barker acknowledged that there was a typographical error under Band C for preparation of briefs/affidavits, lists of issues/authorities, and agreeing the common bundle (all of these are one item on the schedule). Under Band C the allocation is "4 per day for 1st to 5th hearing days:" when it should just be "4 for 1st hearing day".

The Committee agreed on three further changes. First, the words "capped from then on", for allocations after the fifth day of trial, be replaced with "no further allowance after 5th day". Second, that the phrase "Differential for plaintiff or defendant, whichever prepared the common bundle" be replaced with "Additional allowance for whichever party prepared the common bundle". Third, that the phrase "Plaintiff's or defendant's" be removed from the schedule, as in some cases it will be incorrect to refer to a party as either a plaintiff or a defendant.

It was agreed those changes would be made and further consultation sought by those who initially made comment in respect of the previous schedule.

Action points: Ms O'Gorman to work with PCO to have changes implemented; new version to be put out by the Clerk for consultation on a limited basis.

9. Civil practice notes

Ms Leonard had prepared an updated version of the High Court Rules 2016 Amendment Rules 2018. These rules include the removal of the words "of letters" from r 7.23; the inclusion in r 19.2 of applications made under s 76 of the Public Trust Act 2001 and under s 8 of the Trustee Companies Act 1967 (to replace Practice Note 11); a new r 11.8A to replace Practice Note 3; the removal of judicial settlement conference directions which had been added into the previous amendment rules; and updated daily recovery rates. Ms Leonard had also prepared updated daily recovery rates for the District Court (set at approximately 80 per cent of the High Court daily recovery rates).

Rule 11.8A is a substantial copy of Practice Note 3. However, the Committee considered some of its language inappropriate for the High Court Rules. For example, it is not appropriate for the rules to refer to counsel seeking an "appointment" with a Judge in chambers through the Registrar. The Chair noted that something along the lines of counsel being able to "file a memorandum requesting leave to file further submissions" might be more appropriate.

The Committee agreed to leave the matter to the Chair and the Clerk for redrafting.

The Committee also agreed with the increased daily recovery rates for the District Court Rules (the High Court rates having been approved at a previous meeting).

Action point: The Chair and the Clerk to redraft r 11.8A

The meeting finished at 12.15 pm.