The Rules Committee
Te Komiti mō ngā Tikanga Kooti

29 June 2021
Minutes 02/2021

Circular 25 of 2021

Minutes of Meeting of 28 June 2021

The meeting called by Agenda 01/20 (C 2 of 2021) convened at 10.05 am using the Microsoft Teams virtual meeting room facility due to COVID-19 Alert Level 2 restrictions being in effect in Wellington and it being difficult to accommodate an in-person meeting while observing social distancing requirements.

Present (Remotely)

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 Muir, Special Purposes Appointee and Judge of the High Court
Hon Justice Cooke, Chair and Judge of the High Court
His Honour Judge Kellar, District Court Judge
Mr Rajesh Chhana, Deputy Secretary (Policy) in the Ministry of Justice as Representative of the Secretary of Justice
Ms Jessica Gorman, Senior Crown Counsel as Outgoing Representative of the Solicitor-General
Ms Alison Todd, Senior Crown Counsel as Incoming Representative of the Solicitor-General
Ms Kate Davenport QC, Special Purposes Appointee and New Zealand Bar Association Past President
Ms Laura O'Gorman QC, Special Purposes Appointee and Barrister
Mr Jason McHerron, New Zealand Law Society Representative and Barrister
Mr Daniel Kalderimis, New Zealand Law Society Representative and Barrister

In Attendance (Remotely)

Mr Kieron McCarron, Chief Advisor Legal and Policy in the Office of the Chief Justice and Registrar of the Supreme Court
Mr Christy Menzies, Parliamentary Counsel
Ms Maddie Knight, Secretary to the Rules Committee and Policy Advisor in the Ministry of Justice
Mr Sebastian Hartley, Outgoing Clerk to the Rules Committee
Ms Julia Wiener, Incoming Clerk to the Rules Committee

Apologies

Hon David Parker MP, Attorney-General
Hon Justice Thomas, Chief High Court Judge
His Honour Judge Taumaunu, Chief District Court Judge

1. Formal Items

Apologies

The apologies of the Attorney-General, Chief High Court Judge, and District Court Judge were received and noted.

Minutes of previous meeting

The minutes of the previous meeting as provisionally circulated in C 12 of 2021 were received and adopted. The Clerk is to publish these on the Committee's website.

Matters arising

The Chair noted that Ms Jessica Gorman, who has been the Solicitor-General's representative on the Committee since 2014, is temporarily leaving Crown Law for a secondment at the Department of the Prime Minister and Cabinet, and that Ms Jagose QC has asked Ms Alison Todd to act as her representative moving forward. The Chair, on behalf of the Committee, thanked Ms Gorman for her considerable contributions to the Committee and wished her all the best on her secondment, and welcomed Ms Todd to her first meeting of the Committee.

The Chair noted Ms O'Gorman QC's recent appointment as Queen's Counsel. On behalf of the Committee, he noted the appointment recognises her standing in the profession, including her outstanding contribution to the Committee. The Committee expressed its congratulations by acclamation.

The Chair noted that this is Mr Hartley's last meeting as Clerk to the Committee. On behalf of the Committee, he expressed thanks for Mr Hartley's 2 years and 6 months of contributions to the Committee, noting his organisational and scholastic abilities will be long remembered. The Chief Justice added her own thanks, noting Mr Hartley quickly proved himself the most effective researcher, producer of papers, and organiser the Committee has had in recent memory. She noted his outstanding organisational skill demonstrated in dispatching the Committee's business has helped make possible the ambitious work undertaken by the Committee during his tenure. She said the profession, committee, and judiciary owe Sebastian a debt of gratitude for his contributions. The Committee expressed its thanks by acclamation.

The Chair welcomed Ms Julia Wiener, the incoming Clerk to the Committee, to her first meeting.

2. Improving Access to Civil Justice – Update on Progress of Further Consultation

Update on progress to date

The Chair noted that, since the Committee's last meeting, a further consultation paper seeking submissions on the proposals by the judicial subcommittee agreed to by the Committee for the purposes of further consultation at its last meeting has been issued. The window for submissions has not yet closed. The Chair noted that there has been enthusiastic engagement with the process by the profession, noting that he participated in a Bar Association webinar regarding the proposals which over a hundred practitioners attended, and that he believes the Law Society has run two further webinars

on the proposed amendments. Justice Cooke noted that the Chief Justice and he have had meetings with the Attorney-General and other relevant ministers, and that the government continues to support the Committee's continuing with its processes.

The Chair invited the Clerk to summarise the feedback so far received. Mr Hartley noted that the dozen or so submissions already made are from individual judges, practitioners, and court users, with the larger institutional submitters and community organisations still to submit (having signalled their intention to do so). The submissions to date address a range of particular details in relation to the proposals set out in the further consultation paper, and reflect only individual views, such that summarising the overall response to the consultation paper is at this point difficult. However, the Clerk did note that there is general support for the purpose and aims of the proposed reforms as set out in the paper, with submitters instead addressing the extent to which particular proposed reforms may or may not achieve those goals.

Mr Kalderimis agreed with this summary, based on what has been said at the New Zealand Law Society webinars, noting that there is general support for the purpose and thrust of the reforms, but also that concerns have been expressed about how this will be achieved, with particular concerns expressed about there being sufficient judicial time available to make effective use of the proposed issues conferences in particular, given their importance to the proposed framework.

Discussion of substance of proposals

Justice Cooke invited Committee members to comment on what it anticipates the reaction will be, or to raise any comments of their own.

Ms O'Gorman QC sought clarification, also raised at the Bar Association webinar, as to the extent of the proposed discovery reforms, and in particular the extent of any obligation to search for relevant documents likely to remain. Her understanding of what is proposed is that there would be an obligation to disclose only known adverse and relevant documents, with no obligation to search unless that was ordered as a matter of discretion. Justice Cooke agreed that that is one approach that can be taken but made clear his view that the Committee should remain open to a range of possible approaches to the couching of the obligation. Generally, he commented, it might be that reform of discovery obligations will prove comparatively minor, at least so far as large-scale litigation involving major firms is concerned, with the current rules still appropriate there, with more of a focus needed on ensuring obligations related to discovery are proportionate to the value and complexity of the dispute in smaller-scale litigations by making reforms such as those noted.

Justice Muir noted that there is some resistance in the Auckland common room to the proposal to presumptively dispose of interlocutory applications on the papers. This because of a view that in many cases there are real advantages to having counsel attend the Court for an oral hearing, given the opportunity that it affords for judicial engagement, in accordance with the Committee's aims in the reforms. In response, Justice Cooke suggested that interlocutories being disposed of on the papers will be the presumptive position, but that there could be a judicial discretion to order hearings, and that it would be undesirable for the disposal of interlocutory matters on the paper to be mandated in all circumstances.

Ms Davenport QC suggested it may be undesirable, as a general proposition, to have too many exceptions in the Rules such as these, noting that, if the Rules provide that one cannot do X except in exceptional circumstances, a lot of time and energy will end up being devoted in every case where X features as to whether exceptional circumstances apply, contrary to the objectives of the reforms. She says that it is important for the Committee to seek to balance expediency and justice, and noted, for example, the possibility of having oral interlocutory hearings but time limiting these to enforce discipline, so as to strike a balance between these concerns and avoid disputes about whether exceptions apply. For his part, Justice Kós supported an exceptionalism model in relation to this issue, noting that the Court of Appeal now presumptively deals with all interlocutory matters on the papers, having found the miscellaneous motions hearings dedicated to such issues often a waste of time. However, he accepted, that will not always be the case in the High Court, meaning a residual discretion to allow oral hearings to should be retained. It was agreed this issue will require particular consideration as part of the Committee's evaluation of the submission received.

The Chief Justice noted that the Attorney-General had asked her to reiterate his view that there can be real advantages to an iterative approach to hearings, and had asked that the Committee give consideration to allowing District Court Judges, as is envisaged at paragraph [63] of the consultation paper, to convene hearings, decide what more they need to hear in terms of witnesses and submissions, and then adjourn the matter part-heard in a more inquisitorial manner. Justice Kós expressed his support for this proposal, noting that it has parallels with the experience of the Christchurch Earthquake List, in which close judicial control was exercised over the proceeding from an early stage.

The Chief Justice also raised a new idea, which was accepted to be within the spirit of the proposed reforms even though it is not canvassed in the paper, that the rules ought to be amended, or a statutory amendment proposed, to ensure that judges feel comfortable in dealing with interlocutories in fairly summary judgments. Justice Muir noted that this would help balance the concerns he had identified about maintaining interlocutory hearings as an opportunity for robust judicial involvement while advancing the objectives of the reforms. Justice Kós expressed his view that this should be being done wherever possible as a matter of course, and judgments should be as long as they need to be. The Chief Justice and Chair suggested it might be advisable for appellate guidance to that effect to be given, with Justice Cooke noting the key problem is really the need for cultural change; more changing the assumptions under which bench and bar operate through guidance in the Rules than changing the Rules themselves. He offered the view that, if interlocutory judgments can be given briefly, then they should.

Next steps

The Committee, having considered its work programme, determined that the whole of the September meeting should be dedicated to considering the submissions received in relation to the further consultation paper on improving access to civil justice and deciding what to say in its report to government and informing its future decision-making on the issue. Apart for that, only smaller matters requiring progression at that meeting such as, in particular, the progression of the end-of-year omnibus amendment rules, will be considered. All other matters that were slated for consideration at that meeting are to instead be considered on the papers where that is acceptable to the Committee or deferred to the November 2021 meeting. This was generally considered preferable to having a special half-day remote meeting between this meeting and the meeting scheduled on 27 September 2021.

Committee to consider submissions received in relation to the further consultation paper on improving access to civil justice and to determine, in principle, the contents of its report to government and informing its future decision-making on this issue at its next meeting on 27 September 2021. This will be, except for minor and technical matters that time pressures require be considered at that meeting, the only matter addressed at that meeting.

3. Costs for Lay Litigants – Consideration of Draft Further Consultation Paper

The Chair referred the Committee to a late paper (C 20 of 2021), a draft further consultation paper on the Committee's proposed reforms to the costs regime distilling the content of the extensive paper prepared by the Clerk on this issue considered by the Committee at its last meeting and the Committee's discussions at that meeting.

The Chief Justice said that, overall, the paper is fairly good as written at present, but considered that it is necessary to simplify the paper before it is published, thinking it somewhat too densely written. Also, she took the view that it is undesirable for the Committee to publicise its failure to reach agreement on the issues traversed in the paper, and that the paper should be reframed to emphasise the issues on which there has been disagreement and seek comment on those, rather than the disagreement.

Justice Kós concurred in both these points, and also expressed his view that the proposals set out in the draft paper will enjoy greater support if the point made at paragraph [19] of the paper – that we are rewarding only successful self-represented litigants, not querulants – is made more clearly and repeatedly throughout the paper. This needs to be conveyed more clearly, he suggests, so as to overcome much of the likely resistance to the proposal to award litigants-in-person costs.

Justice Cooke expressed the view that the section on in-house solicitors ought to focus more on the potential justification for having a new rate for parties represented by in-house counsel is that they are less expensive to retain than external counsel, and concerns of fairness as between successful and unsuccessful parties, than on the issue under that heading about their relative (compared to external counsel) independence and professional status. He thought this preferable to inviting a conversation on the latter, more contentious, issue. The Chief Justice disagreed with this proposal, saying that this is an issue and needs to be considered.

The Committee designated the Chair, Justice Kós, Ms O'Gorman QC, and Ms Todd, with the assistance of Ms Wiener, to redraft the paper to take account of the above suggestions, which is then to be circulated around the Committee to establish whether a consensus that the paper as redrafted is suitable for the purpose of further consultation is presence. If that is agreeable, the paper can then be published – at such a time in future as to avoid consultation fatigue within the profession – without it needing to be further considered by the Committee at a meeting. If disagreement remains, the Committee will further consider the issue at its November 2021 meeting.

4. Representative Proceedings

Justice Cooke introduced the item by stating that members may recall that the Committee had between 2017 and 2019 endeavoured to attempt to codify the common law development of the High Court's jurisdiction to allow proceedings to proceed on a representative basis under r 4.24 of the High Court Rules 2016 and its predecessors. The draft amendments representing the culmination of this process

were agreed to by the Committee in 2019, but work on this area was then suspended when the common law position was modified significantly by the Court of Appeal with its decision in *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 341, (2019) 25 PRNZ 33, which has since been approved by the Supreme Court in *Southern Response Earthquake Services Ltd* [2020] NZSC 126 (C 19 of 2021). That decision confirmed the availability of opt-out representative proceedings in New Zealand and made a number of broader comments about the jurisdiction under r 4.24, underlying which, the Judge noted, are a range of wider policy issues. The effect of this, in the Chair's view, is to make considerably more difficult the task of codifying the common law originally decided on by the Committee than it was in 2017-2019.

As he put it, the Committee could respond to this development in one of three ways:

1. Do nothing. That is, leave r 4.24 as it is at present because, as the Supreme Court said in *Southern Response*, the Courts will continue to adapt the law to the evolving circumstances over time as they have done in an apparently satisfactory manner to date, and the decision in that case makes clear the High Court has the jurisdiction it requires to continue to do so in response to what is currently seen as best practice even without the Rules being amended. There is therefore no need to devote time and resources to amending the Rules, at least not in advance of any legislative reform resulting from the Law Commission's current workstream.

2. Revise the draft amendment rules agreed to in early 2019 to attempt to capture the development in the law in *Southern Response*, so as to clarify the operation of r 4.24 and make more accessible the common law that has grown up under it and its predecessors, improving accessibility of justice until further revision becomes necessary following the conclusion of the Law Commission's work in this area.

3. Making more circumspect revisions to the current draft amendments to ensure it clearly contemplates the making of representation orders on an opt-out basis and adding a rule allowing the High Court to make any ancillary orders considered necessary for the appropriate determination of a representative proceeding in the interests of justice, ensuring the Court has a broader and unfettered jurisdiction to continue to improve the regime without prescribing exactly what those orders would be or how they are to be made.

Mr Kalderimis noted that, if the Committee were to pursue option three, the New Zealand Bar Association's 2018 submission to the consultation on the current draft amendment rules proposing a fairly insubstantial amendment to the proposed r 4.71 that would make clear the ability to permit both opt-in and opt-out proceedings could serve as the necessary vehicle for changes.

The overall view of the Committee was that the first option is the preferable course of action. This on the basis that while the Rules may not clearly reflect the way in which they are now being applied which engages, at least in principle, access to justice concerns, these concerns are not so prescient as to justify the Committee investing the time or resources necessary to pursue either of options two or three. In this respect, the Committee noted that it is unlikely that any person would ever seek to embark on a representative proceeding without legal advice, which advisors will likely be fully conversant with the common law as has developed in this area. Moreover, the Committee agreed with the Chair's assessment that the decision in *Southern Response* makes clear that there is no jurisdictional lacuna

requiring remedy in r 4.24; at least not in relation to any matter in respect of which this Committee, as opposed to Parliament, is competent to promote reform.

That there was perceived to be no cogent need for immediate reform in these respects was seen to point strongly in favour of adopting the first possible course of action, particularly given that any reforms made now would need to be revisited once the Law Commission's work resulted in legislative changes. In this respect, however, the Committee accepted that even in the best case those reforms would not be in place before 2024, reducing somewhat the saliency on this consideration.

In accordance with a suggestion made by Ms Davenport QC, and developed by the Chief Justice, the Chair, will write a letter to the professional bodies, to be published in their respective publications, outlining the Committee's proposed course of action and the background to this decision and inviting comment (if not consultation as such) on this course of action. This will allow anybody in the profession with views on this area an opportunity to be heard before the Committee commits to a course of inaction in relation to this matter in the near future, both the Chief Justice and Ms Davenport QC having suggested this is likely to attract attention in the profession.

The Committee determined to not undertake any further work in relation to this issue at present, coming to a firm decision on this matter once further informal dialogue with the Law Commission can be undertaken at the Committee's November 2021 or March 2022 meeting. The Chair is to liaise with the President of the Law Commission and invite her to attend another Committee meeting to that end.

Chair to write and send to the professional bodies a letter for publication in their legal professional publications outlining Committee's interim decision, the background to that decision, and inviting correspondence on the same.

5. Preparedness for Future Emergencies

The Chair referred the Committee to C 14 of 2021, the current draft High Court Amendment Rules (No 2) 2021, and invited Ms Menzies, the Parliamentary Counsel Office representative, to speak to the draft amendment r 4, which seeks to insert a new definition of "emergency" into the interpretation provision (r 1.3) of the High Court Rules 2016. As Ms Menzies explained, the first limb of the proposed definition is taken from the Civil Defence and Emergency Management Act 2002, with the second limb adapting the test applicable under the current rules of court, the overall goal being to broaden the range of circumstances in which an emergency is considered to exist. The current definition of emergency given in r 3.4(3) of the Rules would be repealed, but the other emergency provisions left in place.

This, Justice Cooke noted, is the current product of the Committee's efforts to introduce provisions into the various rules of court allowing each head of bench to suspend and vary the operation of the rules of their court during emergencies. The Committee considers the introduction of such provisions desirable, given the experience during COVID-19, but accepted that promoting such amendments raised an issue about the Committee's rules-making power, such that legislative reform was considered preferable. The Ministry of Justice undertook to inform the Chair of when such legislation is likely to be passed, noting that it will likely be considered as part of the whole-of-government initiative to improve the legislative framework for pandemics and other emergencies generally, being led out of DPMC, in which the Ministry of Justice is firmly involved.

This amendment, as the Chief Justice put it, as a stop gap measure intended to allow the current emergency provisions in the Rules (those engaged only where an emergency as defined exists) to apply in a wider range of circumstances.

Mr Kalderimis suggested, and the Committee agreed unanimously, that cross-references to those provisions of the Rules triggered or modified by the existence of an emergency as defined could usefully be included in the definition of emergency, so as to assist court users and staff in navigating the Rules. The Clerk identified these as rr 3.4, 3.4A, 5.1A, 5.1B, 6.1A, and 9.73 of the High Court Rules 2016.

Mr McHerron suggested that the Committee consider whether the abolition of the proviso to the current r 3.4(3), which is without parallel in the proposed r 1.3 definition of emergency, is desirable. That proviso deems an emergency to exist, without regard needing to be had to whether a state of danger to the health and wellbeing of persons exists in a place (including the whole of New Zealand) as a result of the existence of a natural disaster, pandemic, armed conflict, or the like, when a epidemic notice has been given or a state of national or local emergency exists. His understanding, with which the Clerk agreed, is that the effect of this proviso is to deem an emergency to exist at present, given that an epidemic notice has been given in relation to COVID-19 of the Epidemic Preparedness Act 2006, when an emergency might not otherwise exit under the Rules in circumstances where COVID-19 Levels 1 and 2 are in effect across New Zealand. In his view, with which the Committee agreed, is that it is desirable for emergency powers to remain available so long as an epidemic notice is in force, and that it is not clear this is possible under the proposed r 1.3 definition of emergency. It was agreed that the Parliamentary Counsel Office should consider further this suggestion and look to incorporate it into the proposed re-definition of emergency.

The Committee also agreed to a suggestion by Mr McHerron, Justice Kós, and Justice Cooke that a further limb be added to the proposed r 1.3 definition of emergency deeming an emergency to exist where so declared by the Chief High Court Judge, or similar. At present, it was noted, there is no clear mechanism empowering or designating any particular individual to declare an emergency exists, which was agreed to be an undesirable state of affairs.

Parliamentary Counsel Office to further develop draft amendment of definition of emergency to take into account the above considerations, with the Committee to review this as part of its final approval of the present draft omnibus rules (currently entitled the High Court Amendment Rules (No 2) 2021 (PCO 23675/2.0), which it was agreed will take place at its 27 September 2021 meeting.

6. Review of Current Omnibus High Court Amendment Rules

The Committee next considered the balance of C 14 of 2021.

It approved in principle the draft rr 5-6, which together confer on Judges and Associate Judges the jurisdiction to strike out abusive interlocutory applications of their own initiative before service (paralleling the current provisions of rr 5.35A-5.35C that relate to entire proceedings), and the draft r 7, which amends the procedure governing parties' obligations in preparing for first case management conferences.

The Parliamentary Counsel Office supplied two possible wordings of the draft r 9, which concerns the amendment of pt 20 of the Rules by the insertion of a new r 20.9A. This relates to the Committee's

previous discussions as to how to prevent bodies exercising a purely adjudicative function (such as the District Court and Environment Court) being named as respondents to appeals except where required to do so by the Court or law. The Committee's draft r 20.9A, somewhat more broadly, attempted to codify who ought to be named as a respondent to an appeal, directing that every person who is directly affected by the decision appealed against and every person who is required by law to be a respondent, subject to a provision that decision-makers exercising a purely adjudicative function (such as the District Court and Environment Court) should not be named except where required by Court order or law.

The Parliamentary Counsel Office raised concerns that the phrase "directly affected" is problematically ambiguous, so proposed an alternative wording of r 20.9A simply prohibiting the naming of such decision-makers, subject to the same exceptions. Under this option the Rules will be silent, as they are at present, as to whom should be named as a respondent to an appeal, except for addressing the position of purely adjudicative decision-makers.

In both versions, the Court is granted the power to direct the extent to which a decision-maker is to participate in the appeal. This, it was noted, will allow for an overriding flexible approach where justice requires.

The Committee preferred the second version. The first version went beyond addressing the problem that the Committee sought to address, and that requiring those who have not participated below but who are directly affected by the decision will cause unnecessary problems. This is despite the fact that the present practice requires directly affected parties who were not parties to the first instance proceeding to bear the cost of being joined, and needing to act quickly to be joined before the matter's first mention. These parties, it was noted, are and will be required to be given notice of the appeal as parties "affected" by the appeal under the present r 20.3(7). This consideration was acknowledged, but was considered, on balance, the better course of action, given the problems associated with joining too many parties and the ease (if expense) of having to seek directions.

The Chief Justice noted that the phrase "purely adjudicative function" is potentially ambiguous but considered that attempting to reformulate it would likely only lead to more problems. In this regard, Ms O'Gorman QC suggested the wording captures the current common law test as to when it is appropriate and inappropriate to name a decision-maker as a respondent to an appeal against its decision, noting the phrase helps distinguish those bodies that act exclusively as adjudicators of adversarial disputes from those that have some policy or investigatory approach

The Committee agreed to the making of the proposed amendment rr 5-8, and option 2 for the proposed amendment r 9, in the current present draft omnibus rules (currently entitled the High Court Amendment Rules (No 2) 2021 (PCO 23675/2.0). Subject to a further review of the language of the proposed amendment rules at its meeting of 27 September 2021, the Committee will give final approval to the making of these amendment rules as part of the next omnibus amendment rules at that meeting.

7. Additions to Rule 19.2 of the High Court Rules 2016

Justice Cooke advised that, following discussions between he and Mr Chhana, the Ministry of Justice is withdrawing from consideration C 18 of 2021, a memorandum proposing additions to r 19.2 of the High Court Rules 2016. In its current form, the paper does not provide the necessary analysis as to whether

each of the proposed additions to r 19.2 of the High Court Rules 2016 relate only to situations where leave to proceed by way of originating application under r 19.5 is routinely given so that there is no need for judicial supervision in each case as to whether Part 19 will apply, which is likely to be the case only where leave is already regularly granted under that provision. These are the types of application the Committee intended to add to r 19.2 in this exercise. A number of the recommended additions to r 19.2 set out in the paper are newer provisions and those under which applications are rarely made, suggesting that analysis is unlikely to have been offered by the Court before. It is also necessary to ensure the addition of particular applications to r 19.2 is internally incoherent across the Rules.

The Committee noted that this paper has been withdrawn from consideration pending further work by the Ministry of Justice, with Justice Muir to assist. The Chair will provide Justice Muir and Mr Chhana a memorandum with his thoughts as to how they can most usefully proceed.

8. Form C 2 to the High Court Rules 2016

The Chair referred the Committee to C 15 of 2021. This is a memorandum by the Clerk recording that Associate Judge Andrew, on his own behalf and that of the other Associate Judges at Auckland, have expressed concerns that Form C 2 to the High Court Rules 2016, form of statement of claim required under r 18.14A to be used in proceedings by prejudiced shareholders under s 174 of the Companies Act 1993, is "inadequate in not requiring particulars and/or the relief sought", and as being "expressed in bald and unhelpful terms." This, in their view, is impacting on the just and expeditious resolution of such proceedings, contrary to the objectives of the Rules.

In the memorandum, the Clerk noted that the Committee had, not long after Form C 2 was promulgated in 2008, been notified of similar concerns, and had agreed to amend the form to address those concerns. Ultimately however, that issue was eclipsed by an ensuing issue as to whether such applications should be dealt with under pt 18 or pt 31 of the Rules. This resulted, ultimately, in the promulgation of r 18.14A as such applications came to be dealt with under pt 18 of the Rules, rather than pt 31, but with no action being taken as to the perceived deficiencies of Form C 2.

The Committee agreed that Form C 2 is deficient. It also agreed in principle with the suggestion made in the Clerk's memorandum that Form C 2 be repealed and the requirement to use it in r 18.14A revoked, such that, so far as the Committee understands the position, the default requirements for forms of pleading under the Rules will apply, which will address the Associate Judges' concerns. The Committee also agreed in principle with Mr McHerron's suggestion that Forms C 3 and C 4, the special form of notice of proceeding and form of affidavits currently required to be used in such proceedings, be revoked, and the provisions of the Rules requiring use of those forms repealed. This is subject to the Associate Judges' views on this proposed course of action being elicited, and

Parliamentary Counsel Office to draft amendments effecting revocation of Forms C 2, C3, and C 4 to the High Court Rules 2016, and repeal of the provisions of the Rules requiring their use, with the intention being that ordinary forms of pleading, notice of claim, and affidavit be required in proceedings under s 174 of the Companies Act 1993, with this to be progressed in the current omnibus amendment rules. The Chair is to consult with Associate Judges on this proposed course of action and report back any feedback to the Committee when the Committee next considers the current omnibus amendment rules. The Ministry of Justice is to consult the Ministry of Business, Innovation, and Employment (as the

Ministry responsible for administering the Companies Act 1993), and to promptly report any feedback to the Clerk for forwarding on to the Chair.

9. Rule 13.9 of the High Court Rules 2016

The Chair referred the Committee to C 16 of 2021, a memorandum from Associate Judge Bell expressing concern that the requirement under r 13.9 of the High Court Rules 2016 for a party to obtain leave to obtain a possession order to enforce a judgment creates inconvenience where, as he suggests is done at times, and as he did in a recent case, a Judge gives the defendant time to vacate the premises, the defendant does not vacate, and the plaintiff, more than three months after the judgment was given but less than three months after the date on which the defendant was required to vacate, then seeks a possession order. He proposed that r 13.9 be amended to state that the requirement to obtain leave ensues only three months from the date given in the judgment for the defendant to give up possession, not three months from the date of judgment.

The Committee did not oppose the making of the proposed amendment, but the Chief Justice suggested it is not clear that the issue referred to in the Associate Judge's memorandum arises sufficiently often to warrant the Rules being reformed, in accordance with the Committee's principles of rules-making, which she suggested be recirculated. More generally still, the Committee agreed with the Chief Justice, that it is generally preferable that Associate Judges seeking to make such suggestions circulate these to their colleagues for input before referring the suggestion to the Committee, and that the views of registry staff are also solicited. In this case, for instance, the Judge's memorandum prompted the Ministry of Justice to obtain, usefully, the view of registry staff that rr 17.8-17.9 should be amended to include a cross-reference to the time limit in r 13.9 because, in their experience, parties routinely make applications in contravention of that time limit, not thinking to review r 13.9 in seeking an order for enforcement under pt 17 of the Rules.

Parliamentary Counsel Office to draft amendments amending r 13.9 in accordance with Associate Judge Bell's suggestion and including the cross-references to r 13.9 in rr 17.8-17.9 suggested by registry staff, with these to be included (provisionally) in the current omnibus amendment rules. The Chair will write to Associate Judge Bell asking him to canvas the views of the other Associate Judges, with the Committee to consider his reply before concurring in the making of such amendments.

The Clerk (Ms Wiener) will circulate the principles of rules-making to the Committee once more, with the Chair and Clerk to discuss further whether and how the Committee's rules-making process should be clarified, given the Committee's discussions of that process in relation to this item.

Justice Kós left the meeting at 11.47 am.

10. Clarifying the High Court's Power to Dispense with an Oral Hearing

The Chair invited the Clerk to speak to C 17 of 2021, a memorandum presented by the Clerk of his own initiative. In the memorandum, Mr Hartley noted that judges in the High Court regularly dispense with the hearing of interlocutory and originating applications, and occasionally also more substantive hearings, on the basis that requiring an oral hearing would be disproportionately burdensome as the

issue can still be disposed of justly (substantively and in terms of natural justice) on the papers. However, he identified, except in a small category of cases there is no clear basis in the High Court Rules 2016 for judges dispensing with an oral hearing in this manner, absent the expressed consent of the parties.

The Clerk recommended that the Committee should clarify when a hearing is presumptively required, more comprehensively provide for when a hearing is presumptively not required than is provided for at present, and provide clearly when a hearing can (or cannot) be dispensed with absent the parties' expressed consent. Particularly in the last case, Mr Hartley argued, this may also promote the efficient administration of justice and the dispatch of the Courts' business by giving expression in the Rules to existing practice. The position in the District Court could also usefully, he suggested, be evaluated as part of this exercise.

The Committee thanked the Clerk for his memorandum, which was noted to usefully summarise the present position. Mr Kalderimis noted his surprise at the Clerk's conclusion, which he appeared to agree with, that r 7.43A does not appear in its terms to authorise a Judge to dispense with an oral hearing of their own initiative in giving directions for the conduct of a proceeding in the manner that, he appeared to agree, is currently often done at present. He, and the rest of the Committee, agreed that it is important that the issues raised in the Clerk's memorandum be further considered in the course of considering the access to civil justice reforms.

The Committee agreed with the Clerk's proposal that this further consideration be undertaken as part of the Committee's response to the submissions on its consultation on improving access to civil justice, given the subject matter of the Clerk's proposal intersects with the Committee's proposal as part of that consultation for interlocutory proceedings to presumptively be disposed of on the papers. His memorandum is to be used as a resource by the Committee in undertaking that further consideration.

The meeting closed at 11.52 pm.

The next meeting of the Committee is scheduled to begin at 10.00 am on 27 September 2021.

Justice Francis Cooke
Chair