The Rules Committee

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2 December 2016
Minutes 05/16

Circular 105 of 2016

Minutes of meeting held on 28 November 2016

The meeting called by Agenda 06/16 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 28 November 2016.

1. Preliminary

In Attendance

Hon Justice Gilbert, Chair
Hon Justice Venning, Chief High Court Judge
Hon Justice Asher
Judge Gibson
Judge Kellar
Ms Jessica Gorman, representative for the Solicitor General
Mr Rajesh Chhana, Deputy Secretary of Policy, Ministry of Justice
Mr Bruce Gray QC, New Zealand Law Society representative
Mr Andrew Beck, New Zealand Law Society representative
Mr Andrew Barker, New Zealand Bar Association representative
Ms Laura O'Gorman
Ms Suzanne Giacometti, Parliamentary Counsel Office
Mr Kieron McCarron, Chief Advisor Legal and Policy, Office of the Chief Justice

Ms Alice Orsman, Secretary to the Rules Committee
Ms Harriet Bush, outgoing Clerk to the Rules Committee
Mr Daniel McGivern, incoming Clerk to the Rules Committee

Apologies

Rt Hon Dame Sian Elias GNZM, Chief Justice of New Zealand
Hon Christopher Finlayson QC, Attorney-General

Judge Doogue, Chief District Court Judge

Confirmation of minutes

The minutes of 3 October 2016 were confirmed.

2. Striking out before service

At the Committee meeting in October, rules providing for a statement of claim to be struck out before service where the claim is clearly an abuse of the court's process were finalised pending final comments from the Law Society, ADLS and Crown Law.

The Committee discussed the comments received from these bodies.

ADLS had made a number of suggestions for amendments. The first suggestion was to refer to a "proceeding" as opposed to a "claim". "Proceeding" is defined in the High Court Rules as any application to the court, other than an interlocutory application. Although "claim" is used throughout the Rules the Committee noted that "proceeding" was wider than "claim" and the rule was going to cover originating applications. Accordingly, the Committee decided that it would be appropriate to use "proceeding".

The next point made by ADLS was that the Rule did not provide for the Court responding to a person where, for example, a registrar has referred the claim to a Judge and the Judge has considered that the claim was not an abuse of process. ADLS suggested adding a paragraph to specify that a Judge should make a direction to the registrar to sign and release the notice of proceedings in such a case. Ms Giacometti considered that it was probably implicit in the rule that this would happen, but was happy to add this in. Gilbert J agreed that it would be reasonable to add this in.

Asher J stated that he was worried that this could lead to difficulties; if a Judge overlooked making an order someone could try to raise the technical point that the absence of an order meant that the notice of the proceedings had to be released. In addition, he was wary of saying that Judges must do procedural things. Mr Gray also expressed concern. Ms Gorman queried whether there was a timing issue; if this amendment were adopted that would give the Registrar guidance about when to release the documents. She suggested that the Rule could provide that the Registrar must sign and release the document, rather than the Judge. Vennning J considered that that it would be better for the direction to relate to the Registrar signing and releasing the notice of proceedings.

Gilbert J noted that if the Judge did not make an order under the section then proceedings clearly would have to be released for service. He did not consider that the amendment was problematic. The Committee agreed to add the suggested subrule to provide that the Registrar had to sign and release the notice of proceedings.

The third concern raised by the ADLS was whether this rule would apply where a statement of claim was both formally non-compliant and an abuse of process. ADLS was concerned that this would mean a document could be rejected twice. The Committee considered that in practice there was unlikely to be an issue; if the claim was plainly abusive then this route would be used. If there are more fundamental problems than issues with the formatting then it would make sense for this rule to be used. Mr Chhana noted that it was the practice of Registrars, when they rejected claims for formal reasons to give the plaintiff feedback over why the document was non-compliant. The Committee agreed that no change was necessary.

Crown Law had also responded to the amended rule. Ms Gorman noted that some people had suggested that the rules should specify that there was an appeal against the decision to the Court of Appeal, particularly given that the rule was likely to capture unrepresented litigants. The Committee agreed that this was unnecessary – this was not specified in other places in the rules

The final concern raised was over the phrasing that the rule applies where the "registrar believes" that the statement of claim is an abuse of process, and if so, the registrar "may" refer the claim to a judge.

Crown Law had suggested that the wording be amended so that it applied when the registrar thought that the claim may be abusive. The Committee noted that this change would lower the standard of when the rule applied so that the registrar did not have to reach a concluded view. It agreed to stick with the current wording because of the Law Society's concerns over the scope of the rule.

The Committee agreed that the agreed changes should be incorporated and the rules sent for concurrence.

Action point: agreed changes to be incorporated and the rules sent for concurrence.

3. Subpoenaed witness

The Committee has been considering the situation where a witness has been called by subpoena and no witness brief has been given to the other side. At the last meeting the Committee had considered a proposed amendment drafted by Ms O'Gorman. Ms O'Gorman and Mr Gray had agreed to provide a further proposal based on the discussion at that meeting. Ms O'Gorman addressed the Committee in relation to the latest proposal. Sub-rule (1) of the proposed rule provides that, where a party, despite reasonable efforts, has been unable to obtain a brief compliant with r 9.7 in respect of any witness that party must notify the other party of the name of the witness that the party intends to call to give evidence orally. Sub-rule (2) provides that this evidence may be given orally unless the court directs otherwise before or at the trial. In determining what directions are appropriate, the court must have regard to whether reasonable efforts have been made to comply with rule 9.7, the extent to which any other party might be prejudiced and whether the admission of the evidence is required in the interests of justice.

Ms O'Gorman stated that the current proposal came the closest to the current practice. She noted that paragraph (b) lists the discretionary factors that are relevant. The matters are all at the discretion of the Court so that the Court may determine what is in the interests of justice.

Mr Barker noted that if a witness was giving evidence without a brief he would expect a statement of the evidence the party was expected to give to be provided to the other party. He felt uncomfortable that the proposal did not contain a clear statement of the level of disclosure expected. Mr Gray noted that it was difficult to find a bright line in terms of how much information a party is required to give about what the witness will say. He considered it was better to leave it to case law to determine the requirements. Mr Barker noted that the party on the other side would be at a significant disadvantage. Ms O'Gorman stated that as soon as the party became aware of the proposed witness' name it could apply to the Court for directions. In addition, (d) sets out as a relevant factor whether the party wanting to call the witness has disclosed the nature of the proposed evidence in advance. Ms O'Gorman noted that an earlier draft of the rule had provided that the party could only call the witness if the court gave leave, but she thought that the consensus had been that there should be a presumption in favour of the person being able to give evidence.

Asher J noted that the way r 9.7 was currently framed it suggested that the default position was that the party could not call such evidence without the Court's permission. Asher J stated that he did not consider that the Committee had reached a consensus on the default position. He considered that a better way to phrase sub-rule (2) would be to say that "if the Court permits, evidence may be given orally, having regard to" the factors listed in (a), (b), and (c). While he agreed that the rule should not be too proscriptive and matters should be left open he thought that the current proposal might have gone too far in the other direction. He would prefer to keep the bar high.

Ms O'Gorman stated that she did not feel strongly about the wording. Mr Gray noted that there was a tension between case management and the Court excluding relevant material. The rule was just dealing with a failure to comply. Mr Barker agreed with Asher J's approach; the party is doing something unusual so it shouldn't be up to the other party to apply.

The Committee then discussed whether information about the evidence the party expected to be given should be required. Gilbert J suggested that the default position should be that leave is not required, but in terms of getting to that default position the party needs to do more than what proposed sub-rule

(1) provides – the party also need to give notice, to the extent that it can, of the evidence that the witness will give. If the party has done this, the default position should be that the evidence can be called. Asher J stated that he was cautious about requirement for the party to provide the evidence the witness will give as the party may be unsure what the witness will say. The party may end up showing more of its hand than intended and this may not be fair. Gilbert J stated that the party would not be required to state what the witness would say if they did not know. The party would be able to say they expect that the witness will give evidence about a certain thing but not exactly what they would say.

Venning J questioned whether there was a big issue about parties gaming the system. Mr Gray concerned that the issue of gaming was not often a problem but that when it did come up it was important.

Ms O'Gorman noted that the issue was getting the drafting correct and clarifying what the party was required to provide; whose responsibility it was; the name of the witness; and any further information. Mr Gray stated that the party must know what they are going to ask the witness about, but they may not know what the witness will say.

Venning J noted that in most cases where evidence is ruled inadmissible the objection is admissibility based. Here, what is being discussed is a sanction for failing to comply. It would only be in a very extreme case that the party would be prevented from calling the evidence.

Asher J confirmed that he liked the way that Ms O'Gorman had drafted the rule. His only suggestion was that it should provide the court may direct that the evidence is given orally, rather than "such evidence may be given orally". This changes the default position. Mr Beck agreed with this solution.

The Committee agreed that a further draft should be prepared which is built on the current draft but requires leave.

Venning J noted that r 9.52(3) which states that the party does not need to give the name of the witness they are calling by subpoena when requesting orders of subpoena would need to be changed.

Action point: Ms O'Gorman and Mr Gray to provide a further draft to the next meeting.

4. Case management conference allocation

The Committee turned to the proposed amendments to the case management conference regime which would link the filing of the case management conference memorandum to a number of days after the statement of defence had been filed. Venning J had produced a draft rule for discussion which required parties to file a joint memorandum or separate memoranda addressing the sch 5 matters, making of discovery orders, and the hearing and fixing of dates not more than 15 working days after the filing of the statement of defence. The Judge could then decide whether a first case management conference was necessary.

Mr Barker noted that it would be difficult to estimate the likely time that the trial would take when discovery was not complete. Venning J stated that this was a problem even under the current rule. Mr Barker considered that most counsel would also say that it would be too early at this stage to allocate a trial date. Venning J pointed out that the rule allowed for the Judge not to allocate a trial date and to allocate a case management conference or issues conference.

Asher J stated that the aim of the case management conference reforms had been to put the control of the file in the hands of the court. This was to stop parties dragging things out. Asher J stated that his only concern was one of the ideas behind the reforms had been that the first case management conference was to try to streamline the case and address issues early on. Moving away from the rigidity of the current rules may slip away from this approach. Venning J considered that, as the rules currently stood, this idea did not work in a number of cases. Often the Judge would sign off on the joint memorandum and no conference would be held. He stated that the proposal was not an attempt to do away with the idea of one meaningful case management conference being the default position.

Ms O'Gorman questioned whether requiring the case management conference memorandum to be filed 15 working days after the statement of defence would give the parties enough time. Venning J stated that the timeframe could be changed – the Committee would be guided by the profession as to what was appropriate.

Venning J noted that there was a tension between cases that justified a bespoke approach to case management and where efficiency meant that it was not appropriate. Currently, the rules lean too far in favour of a bespoke approach. Asher J considered that there were three types of cases: cases which required their own approach; cases which don't require it and the parties are working with one another; and the third which should not require the court to get involved but counsel are not working amongst themselves. The last type of case is the most problematic. The current rules are aimed at progressing this type of case efficiently. Venning J noted that the proposal sought to do this too. Whether or not the case management conference was allocated the memorandum would allow the appropriate orders to be made to ensure that the case could be progressed.

The Committee then discussed whether the proposed 15 working day timeframe would be sufficient. Venning J stated that he would be happy to increase the timeframe to 20 working days. He had come up with 15 working days because the current rules provide that the case management conference should be allocated 25 working days after the statement of defence is filed, and the memorandum is due 10 working days before the conference. After discussing the issue the Committee agreed that 15 working days should be maintained. Ms O'Gorman raised concerns with the ability of the parties to start working towards discovery before filing the memorandum.

Venning J noted that r 8.11 currently provides that the parties must discuss and endeavour to agree on the appropriate discovery order not less than 10 working days before the first case management conference. This rule might require change.

Action point: Ms Giacometti to finalise the changes for the next meeting.

5. Swearing of affidavits

Ms Gorman had raised an issue about registrars in the Wellington Registry refusing to swear affidavits which are not bound. This is because of the requirements in rr 5.7 and 9.77 for affidavits to be bound at the time they are sworn. This raises issues with photocopying affidavits which have a large number of exhibits. At the last meeting the Committee had noted that the requirement for affidavits to be bound was aimed at the accuracy of the affidavit by ensuring that pages are not inserted later. It was important for the original affidavit to be a fairly secure document. Ms O'Gorman had agreed to discuss the issue with Ms Gorman and come up with a proposal.

Ms Gorman and Ms O'Gorman had proposed several minor amendments to rr 5.7 and 9.77 to deal with the issue which would mean that affidavits only had to be bound at the time they are filed and served. Ms Gorman stated that while they understood the concern about tampering with affidavits they considered that there were always obligations on counsel not to add documents to the affidavit or change it after it was sworn. Currently it would still be possible for someone to unbind an affidavit after it was sworn and tamper with it. However, ethics clearly constrains how the documents are dealt with. They considered that this was a sufficient safeguard.

After discussing the change the Committee agreed to the proposed amendment.

Action point: Amendment to be circulated for concurrence.

6. Review of Practice Notes

Venning J had suggested that the Committee undertake a review of the civil practice notes to see whether the practice notes in force were still necessary and whether the matters dealt with them were appropriately dealt with in a practice note or should be moved into the rules. Venning J had provided a list of practice notes that Westlaw listed as still in force. At the October meeting the Committee had

expressed surprise at the number that were still in force. Mr McCarron had agreed to check whether any of the practice notes listed had in fact been repealed.

Mr McCarron addressed the Committee. He stated that in 2002 a large number of practice notes had been repealed. However, only one civil practice note, dealing with suppression, had been repealed at this time. The list provided was accurate. Mr McCarron also noted that in 2003, the Committee had stated that the Notes of Evidence practice note should be revoked. The Committee also noted that the practice notes concerning synopses of argument and the fast track rules in the High Court should be dropped as there had been no update on the using the fast track procedure.

Ms Giacometti agreed to look at the matter and which matters were sufficiently covered in the Rules for the next meeting.

Action point: Ms Giacometti to look at which practice notes were now covered by the Rules

7. Criminal Procedure Sub-Committee

The Criminal-Rules sub-Committee had been established to help the Committee with the introduction of the Criminal Procedure Act and Rules. The Committee is chaired by Simon France J. Simon France J had written to the Committee to ask it to consider disbanding the Sub-Committee. He considered that the Sub-Committee was no longer necessary; the Criminal Procedure Rules were working well and if any specific issues arose in the future a group could be consulted by the Rules Committee if necessary.

The Committee agreed to disband the Sub-Committee and to write to it to thank the members for their work.

Action point: Committee to write to the sub-Committee to thank them for their work

8. Unbundled legal services

The Committee had received a letter from Dr Toy-Cronin suggesting an amendment to the rules to allow a lawyer to work for a client under a limited retainer and to appear in court without being the solicitor on the record. She noted that in the United Kingdom the rules allow for a solicitor to appear on a limited retainer: r 42.2 requires a party to give notice of a change of solicitor where, after the party has conducted the claim in person, the party appoints a solicitor to act on his or her behalf, "except where the solicitor is appointed only to act as an advocate for a hearing".

The Committee noted that in New Zealand a solicitor cannot appear in court on a limited retainer in relation to one part of the proceeding without being the solicitor on the record. There was a degree of weariness about going on the record because of the responsibility it entailed.

Asher J noted that it was a pillar of the court system that there was a solicitor on the record responsible for the case. He considered that any amendment would have to be approached with caution. While the suggested amendment appeared simple it could raise other issues.

Mr Gray stated that the starting point was the Rules of Conduct and Client Care. He questioned whether it was an area that it was appropriate for the Rules Committee to take the lead on. The Committee agreed; it resolved to write back to Dr Toy-Cronin and state that the proposal amounted to a big change and the Rules Committee would want to know whether the Law Society supported such a reform before it initiated such an amendment.

Action point: the Committee to respond to Dr Toy-Cronin stating that the Rules Committee would be reluctant to undertake this change without support from the Law Society.

9. Time Allocations

The Committee has been considering a proposal from ADLS that the time allocations for the recovery of costs for trial preparation should be changed as the current fixed rate of recovery does not allow for accurate recovery in the majority of cases. A Sub-Committee consisting of Mr Barker, Mr Beck, Mr

Gray and Ms O'Gorman had been considering this issue. At the last meeting the Sub-Committee informed the Committee that it favoured returning to time allocations that were linked to the length of the trial, as this was likely to be the best indicator of the amount of time spent on the issue. The current allocations mean that in many cases the time allocated would be far less than the time actually spent on preparation. This did not accord with the objective of two thirds recovery. At the last meeting the Sub-Committee had agreed to come back to the Committee with a firmer proposal. The Committee had also wished to see why the change was made in 2011 to the current fixed recovery regardless of the length of trial.

Mr Barker noted that the change appeared to have been made to address a particular anomaly with the old rules, namely that due to the different way recovery was provided for depending on whether a case went to trial, in some cases the party could end up recovering more money for trial preparation where the trial did not go ahead than if the trial did go ahead.

The Sub-Committee had now come back with a firmer proposal. Mr Barker stated that they had come up with a formula whereby the party could recover double the hearing time for the first week of the trial, one and a half times for the second week of the trial and one week for the third or subsequent week of the trial. He noted that the clerk had provided a break-down of the amounts that would be recoverable using this approach and he considered that they matched the amount of time a lawyer would be likely to spend on preparation fairly well, which was the objective of the rules.

Mr Barker also stated that in their proposal the time for trial preparation would be split into two; 50 per cent would be allocated to the evidence and bundle, and 50 per cent to the preparation for the hearing itself. Gilbert J asked why it was helpful to separate trial preparation in this manner. Mr Gray considered that it was helpful – sometimes in settlement discussions there might be a conversation about costs – separating the two out would be helpful and avoid any argument later on as to how far the preparation had got. In preparing for trial these were two distinct phases of preparation; if you stopped in the middle you might have done the evidence and bundle but not the preparation for the hearing.

The Committee agreed that any changes made would need to be consulted on. The Sub-Committee agreed to look at the matter further and see if there were any other changes that would need to be made to the time allocations at the same time.

Action point: sub-committee to consider the matter further and look at other possible amendments.

10. Final Matters

The Chair thanked Ms Bush for her work as the Clerk over the past two years. He welcomed Mr McGivern to the Committee who would take over the role of Clerk from next year.

The meeting finished at 11:30 am.