The Rules Committee

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4 August 2015
Minutes 04/15

Circular 80 of 2015

Minutes of meeting held on 3 August 2015

The meeting called by Agenda 04/15 was held in the Chief Justice's Boardroom, High Court, Wellington, on Monday 3 August 2015.

1. Preliminary

In Attendance

Hon Justice Asher, the Chair
Hon Justice Venning, Chief High Court Judge
Hon Justice Gilbert
Judge Gibson
Judge Kellar
Ms Jessica Gorman, Crown Law
Mr Rajesh Chhana, 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
Mr Bill Moore, Special Parliamentary Counsel, Parliamentary Counsel Office
Ms Suzanne Giacometti, Parliamentary Counsel Office
Mr Kieron McCarron, Judicial Administrator to the Chief Justice

Mr Paul McGregor, Secretary to the Rules Committee
Ms Harriet Bush, 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 30 March 2015 were confirmed.

Matters Arising

The Chair welcomed Justice Venning, Chief High Court Judge, who replaced Winkelmann J. The Chair noted that it was a pleasure to welcome back Venning J who had previously been on the Committee for about seven years and had a wealth of knowledge of the rules. The Chair expressed the Committee's gratitude to Winkelmann J, who had been a central part of the working of the Committee. The Committee has benefited from her knowledge of the rules and ability to achieve constructive change and would greatly miss her. The Chair also welcomed Mr Channa, the representative from the Ministry of Justice, who had also previously been a member of the Committee. Finally, the Chair welcomed Ms Giacometti who will be taking over from Mr Moore as the representative from Parliamentary Counsel Office at the next meeting.

2. Access to Court Documents

Consultation on the proposed Access to Court Documents Rules was completed in June 2015. The Committee has reviewed the Rules in light of the experience since they were enacted in 2009. The proposed new rules are not intended to change the substance but aim to be more user friendly, reflect developments in case law, and iron out any glitches in process.

The Chair noted that there were some general themes in the submissions: media groups were in favour of greater access whereas submissions from legal groups favoured the status quo. The Chair suggested that the Committee could consider some of the major points made in the submissions and ask a number of people to revise the draft rules reflecting the Committee's view of the submissions.

The consultation paper had set out a number of questions concerning the operation of the current rules and the proposals. The first issue addressed was whether there should be a single set of rules for criminal and civil proceedings. The Committee had debated this in earlier meetings, and the proposition was supported by the majority of the submissions received.

Second was the issue of the automatic release mechanism during the substantive hearing. The Chair noted that although submissions from the media said they did not want to lose the current right of immediate release, this right was in fact a myth as Registrars always referred applications for access to Judges. The Committee agreed that it did not want to change its stance on this issue.

Mr Gray QC noted that the Commerce Commission had raised concern with a one day timeframe to object to applications during hearings, as it considered that this would often be too short. The Commerce Commission considered that a three day turn around would give a litigant more time to make a more considered response to the application for access. If a request is made during the substantive hearing, proposed r 6(4) provides that, after the Registrar has given the parties a copy of a request for access, parties must give written notice to the Registrar if they wish to object to the application before 3 pm on the first working day following the day on which they receive the copy of the request. This is a repetition of the timetable in the current rules. The Chair noted that he did not think it was possible to give parties a long timeframe to respond to requests during the trial: requests had to be dealt with quickly. Mr Gray QC noted that it would often be the case that a party would anticipate interest in a case and so be able to respond within one or two working days. Further, open justice requires reasonably contemporaneous release of the material. The Judge can provide for more time to respond if the Judge considers that would be appropriate. The Committee agreed not to change the rule to reflect the Commerce Commission's suggestion.

The next issue raised in the consultation paper was the Registrar's ability to decide requests for access to documents. The Chair noted that a key part of the revisions was to do away with this power because Registrars did not want to, and did not as a matter of practice, determine these applications.

The Committee then considered guidance as to the weighting of matters to be considered. The Chair noted that the Committee did not want to interfere with the case law that had grown around the existing rules. Guidance had never been provided on the weighting of the competing interests and the Committee considered that this should remain the case.

The majority of submissions had favoured retaining the freedom to seek, receive and impart information as a matter to be considered by the Judge when determining an application. Mr Gray QC, who had initially opposed the retention of this factor, noted that the submissions had raised several persuasive arguments in favour of its retention. First, aside from open justice, all of the factors to be considered generally pointed against release of information. This has the potential to create an imbalance. Further, this freedom is something of a touchstone for the way in which community values are discussed including when talking about accessing court documents. The formulation of the Bill of Rights Act which includes the freedom to *seek* information probably weighs in favour of this remaining a factor to be considered.

The Committee then looked at the principle of open justice. There was a question of whether there should be a sentence in the rules explaining what the principle meant. The Committee discussed the suggested wording from ADLSi. Mr Barker considered that it might be beneficial to leave it without further explanation, so that case law can develop, rather than setting the concept in stone. Mr Gray QC agreed that this would allow for a more nuanced approach as the concept was considered on a case-by-case basis. The Committee agreed to leave this discussion for the time being.

The next question was whether the protection of private facts and confidential information should be a factor. This is not currently listed as a factor to be considered. The Committee agreed that this factor should be included. It was noted that case law was developing to include this consideration in any event.

BAUER and NZME had suggested that the public interest should also be included as an additional factor to be considered. The Committee discussed whether the public interest was different from the principle of open justice. Judge Kellar suggested that the two are a subset of the other: open justice allows a person to scrutinise documents where there is a public interest; if there is only a private interest then the other factors will outweigh the interest. On the other hand, there can be a public interest in private information. Mr Gray QC noted that there was an analogy in the Evidence Act 2006 in the provisions relating to claims of confidentiality which give the Judge a discretion as to whether to direct that information is not disclosed in a proceeding or alternatively to compel it to be disclosed and allow the information to become public information. Mr Gray QC considered that the inclusion of the public interest in the list of factors was something the Committee should think about.

Ms O'Gorman suggested that the public interest could be seen as part of the inquiry in 8(1)(d) relating to the protection of confidentiality and privacy interests. The balancing could be done in (d). The Chair queried how to distinguish "the public interest" from simply the fact that, for example, someone was famous. Ms O'Gorman noted that there was case law distinguishing the public interest from something that is interesting to the public; as with open justice Judges could rely on existing case law. Ms Gorman queried whether the inquiry could alternatively come within the freedom to seek, receive and impart information. Mr Gray QC noted that there is a known exception to the protection of confidentiality and privacy interests, where something, despite being confidential, is of sufficient public interest that it should nevertheless be released. This could mean that the public interest exception is already provided for and so only 8(1)(d) is necessary. Mr Chhanna agreed with this approach as the inquiry concerns confidentiality and privacy interests and what might outweigh these. Mr Moore agreed that just having the public interest listed as a consideration by itself could be used to represent a right to know which is what the Committee contrasted with the narrower right to understand when discussing the principle of open justice. Judge Kellar said that you cannot include confidentiality and privacy without considering the public interest. Mr Barker agreed that this was one of the principles that the Court might consider

in deciding whether information should be disclosed and since 8(1) is listing the relevant principles, it should be included. He considered that the public interest in the substance of a dispute could be different to the more abstract public interest in open justice. Mr Gray QC suggested that the rule could provide "the public interest in information which is otherwise confidential or private."

The Chair noted that there were a number of different ways to view the matter: first, there could be no change to the rules as the public interest is already provided for in the factors listed in 8(1). Second, a separate factor could be added. Third, the words "the public interest in information which is otherwise confidential or private" could be put at the beginning of (d) or immediately following. However, there was some concern that the third option might weaken 8(1)(d).

The Committee then considered ADLSi's suggestion that three Acts/situations should be added to the list of restricted enactments in r 8(3): legislation pertaining to national security; the Victims Rights Act 2002 and applications where a party or witness involved is under the age of 18 years or where a declaration under s 28 of the Births Deaths and Marriages Registration Act 1995 is sought. Mr Moore agreed to check whether these should be added to the current list of restricted enactments in r 8(3).

The Committee addressed r 8(2) which stipulates the three stages where access to documents might be sought: before the substantive hearing, during the substantive hearing or after the substantive hearing. Although case law has been developing as to the likely weight of different considerations depending upon the stage of the proceedings along the lines of the proposed rules the Chair noted that it could be said that, in the way it is currently drafted, r 8(2) was going too far. An alternative would be to flag the issue of the relevance of the stage without being prescriptive. The Chair acknowledged that the current drafting of the rule is going a long way in telling Judges what to do in an evolving area.

Mr Beck noted that the proposed new rules are different to the current rules which provide for automatic release at the substantive hearing stage. This means that the structure of the current rules presumes in favour of disclosure during the substantive hearing and presumes against disclosure outside of the hearing. Rule 8(2) was one way of reflecting the concern with removing this presumption: to provide nothing at all could result in the applicant having to guess as to what might be of importance in a particular situation. The proposed weighting does reflect what case law has said: but this is partly because of the presumption for disclosure in the substantive hearing. The Chair also noted that Judges do appreciate that as soon as there is a public hearing open justice becomes a principle of particular importance so that unless there are very compelling confidentiality and fair trial considerations there will be disclosure of a document. The Chair noted that he agreed with the Law Society submission that the word "particular" in the phrase "must have *particular* regard to" was unnecessary. Mr Gray noted that when the proposed rule was drafted, there was concern that the media often misuse the concept of open justice. The rule was intended to remind the media that open justice will not automatically apply at all stages of the proceedings. He was not persuaded by the submissions against r 8(2). The Committee agreed.

The next issue raised in the consultation paper was whether the rules should apply to documents held by Archives New Zealand. Mr McCarron stated that he had been involved with a group looking at the Public Records Act 2005. The objective of having the rules clearly applying to court documents which have been transferred to Archives was the group's intention and something that had been worked towards for some time, both informally and now formally. He noted that for criminal files that are 100 years old or less, or civil files that are 60 years old or less, part of the condition of the formal process of depositing the files at Archives is that the files must go back to the Court concerned if there is a request for access so that a Judge will make the decision about whether they should be released according to the rules. Providing for this formally in the rules would be entirely consistent with this process. Mr McCarron said that the wording "until they are transferred" should be reconsidered. The key consideration was whether the documents were under the control of the courts, which was the case with court documents even once they were transferred to Archives. Mr Moore agreed that this position could be reflected in the rules. Mr McCarron and Mr Moore agreed to look at this.

Finally, the Court considered other issues that were raised by the submissions. The Commerce Commission had raised the relationship between the Official Information Act (OIA) and the Rules. Mr

Moore said that he did not think that documents held within the Court were subject to the OIA. The Committee agreed that the information was under the control of the Court. Ms Gorman said that she would check the position the Ombudsman had taken on this matter.

The Committee also considered the position more broadly as to whether the parties to a dispute could provide copies of documents they hold to third parties. The grey area was whether a party could disclose the other parties' documents. Mr McCarron said he considered that the answer to this was not clear cut but would depend on the circumstances. The party disclosing the information would be the one taking the risk. The Chair noted that the rules had not previously addressed this issue before and he was not convinced that the rules should do this. Mr Barker said that there was a real issue that the parties could completely undercut the Access to Court Documents regime by providing a document to the media directly. There could be an action for contempt of court in that situation, but this would require someone to bring an action. A party can also seek a suppression order at the outset of a case. Ms Gorman said that Crown Law would be asked to provide a copy of its submissions to the media and the practice was not to release them until they presented their submissions in court. This is also a common practice for barristers.

The Committee agreed to leave the discussion for the time being. The Chair volunteered to take the lead in drafting further rules in light of the submissions and discussion at the meeting. Ms Giacometti, Venning J and Mr Gray QC also agreed to be involved.

Action points: The Chair to amend the proposed rules in light of the submissions and discussion. He would then liaise with and discuss the proposed changes with Ms Giacometti, Venning J and Mr Gray QC. Ms Gorman would check the point relating to official information. Mr McCarron and Mr Moore would liaise on the issue of documents referred to Archives. Mr Moore agreed to look at the restricted enactments proposed by ADLSi.

3. Possible Adoption of the Access to Court Documents Rules by the Supreme Court

The Chair noted that the Supreme Court has been receiving more requests from litigants seeking access to Supreme Court documents. There had been a suggestion that the Supreme Court could adopt the High Court Access to Court Document Rules with appropriate adaptation as had been done in the Court of Appeal. This item would be discussed at the next meeting.

Action points: Item to be put on Agenda for next meeting

4. Affidavits and Oaths

The Committee then turned to the fifth item on the Agenda. At its last meeting the Committee had agreed not to change the current requirements for a solicitor to take an affidavit. In December, Mr John Earles had suggested that only barristers and solicitors who held current practising certificates should be permitted to take an affidavit. Rule 9.85 only requires a person to be "enrolled as a barrister and solicitor of the High Court." After receiving submissions from members of the profession, the Committee considered that the case for narrowing the class of people who could take an affidavit had not been made out.

Following the last meeting, Ms O'Gorman wrote a memorandum addressing two submissions raised by the ADLSi's submission. The first issue was the suggestion that barristers and solicitors admitted in New Zealand should be able to take affidavits outside of New Zealand. Ms O'Gorman said that a solicitor enrolled in New Zealand cannot currently take an affidavit overseas. There is a clear distinction in the rules between taking an affidavit within New Zealand and taking an affidavit overseas. Ms O'Gorman considered that there was a sound philosophical reason for this relating to the perjury consequences of taking an affidavit. Each jurisdiction should have its own regime for how affidavits should be taken and it is convenient enough to take an affidavit overseas using the methods provided for in that jurisdiction. Further, there is an additional ability for a New Zealand court to make orders as to how an affidavit can be taken in a particular case. Accordingly, Ms O'Gorman did not think that there was an urgent need to provide for the ability for New Zealand solicitors to take affidavits overseas. Although this could be more convenient, she considered that this convenience was outweighed with the fact that this was inconsistent with the idea of taking an affidavit being an action

with perjury consequences. Ms O'Gorman also noted that taking a declaration has historically been treated differently from taking an affidavit: the class of people able to take a declaration is much wider. The Committee agreed with Ms O'Gorman's proposal not to extend the rule.

The second issue concerned the restrictions on who can take an affidavit specified in r 9.85. Sub-rule 2 provides that "No affidavit, other than one sworn in respect of a non-contentious proceeding, may be read or used if it was sworn before a solicitor who, at the time of taking it, was acting as- (a) the solicitor of a party to the proceedings; or (b) a partner in, or solicitor employed or engaged by, the firm of the solicitor of a party to the proceedings; or (c) the agent of the solicitor of a party to the proceeding." This provision is a narrower exception than the provision in r 4.6.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (RCCC) which states that a lawyer must not administer an oath or take a declaration in any case where the lawyer lacks of may appear to lack the necessary independence. Ms O'Gorman suggested that the HCR should be amended so that it was consistent with r 4.6.1. This could be done by mirroring the wording of r 4.6.1 or by providing that the person taking the affidavit must be "independent of the parties and their representative". Although there is a difference in the result where an affidavit is taken in breach of the HCR, in which case the affidavit must be excluded, and in breach of r 4.6.1, in which case there is a discretion to admit the affidavit, Ms O'Gorman said that she considered that r 9.75, as it is currently drafted, is misleading.

The Committee agreed that the rule should be consistent with the RCCC requirements. Ms O'Gorman agreed to draft changes.

Action Point: Chair and Clerk to draft a response to the ADLSi and run this past Ms O'Gorman. Ms O'Gorman and Mr Moore to draft changes to bring the rule into line with the RCCC requirements.

5. Criminal Procedure Amendment Rules 2015

The Committee then turned to item 10 on the Agenda, the Criminal Procedure Amendment Rules that had been prepared by the Criminal Rules Sub-Committee. The Chair welcomed the Chair of the Sub-Committee, Simon France J, who had agreed to summarise the proposed amendments to the Committee.

Simon France J noted that the first substantive amendment was the amendment to r 2.8. This amendment allows the Registrar to approve processes of service generally rather than in a specific proceeding. The amendment to r 4.8 provides that a summary of facts must be included when a case management memorandum is filed. Simon France J noted that a summary of facts was normally included as a matter of course, but is not currently formally provided for. The amendment to r 4.14 related to offences that can be tried either in the High Court or in the District Court at the decision of the High Court. The protocol is the means by which input of the prosecutor and the District Court is obtained prior to the matter being referred to the High Court for a decision. This process was never formally provided for in the rules although it has been undertaken for some time. The amendment to r 4.14 seeks to regularise the process in line with existing practice.

The amendment to subpart 6 of Part 4 of the Act inserts a note referring to the Crown Prosecution Regulations 2013. These Regulations govern the Crown assuming responsibility for proceedings from the Police and sets time limits for when this can be done. The Regulations allow the Crown to amend the charges as of right because the Crown solicitor may have a different view of the seriousness of the offending. The aim of the Criminal Procedure Rules was to be a one-stop shop for Criminal Procedure. This note makes references these regulations to alert people to their existence.

Simon France J explained that another aim of the Criminal Procedure Rules was to get rid of Practice Notes which are often out of date or unnecessary. The sub-Committee has been working to transfer the relevant practice notes into the Rules. The most significant practice note is the Sentencing practice note which was promulgated jointly by the Chief High Court and Chief District Court Judges. The Committee, with their agreement, has transferred the practice note to the new part 5A of the Rules. The bulk of the new part 5A simply reflects the existing practice note. However, 5A.1 – Summary of Facts and Applications for leave to amend summary of facts – is new. Simon France J noted that,

where a person pleads guilty, knowing what the person has actually pleaded guilty to beyond the charges often causes difficulty. This can result in an application to withdraw a guilty plea. The amendment seeks to prevent this difficulty from arising by making the summary of facts the governing document upon which a guilty plea is based. The proposed amendment provides that at the time that the defendant pleads guilty, the prosecutor must provide a summary of the facts about the offence and the defendant must advise the Court whether the summary of facts is accepted. If the defendant does not accept the summary of facts the defendant must identify the disputed facts and the defendant and prosecutor must try to resolve the issue. If the issue is not resolved it can be referred to the disputed facts procedure in the Sentencing Act.

Rule 5A.2 ties into a situation where a defendant pleads guilty and the proceedings are then transferred to the Crown for the sentencing and the Crown wishes to amend the summary of facts. When this happens the Crown must get leave from the Court. If leave is given, although not provided in the rules, what would then happen in practice would be that the defendant would be given the opportunity to dispute this or withdraw their guilty plea. Simon France J confirmed that this procedure was unlikely to give rise to any problems in practice.

The final clause of the Amendments relates to when a trial takes place somewhere other than where the charge was originally laid. In some cases there has been confusion as to where the notice of appeal should be filed. The sub-Committee considered that it should be filed where the charge was laid unless the formal procedures of the Act transferring the file to another court have been used. His Honour noted that files are not always formally transferred but for convenience are heard at another court. In this case, the proposed rule provides that the notice of appeal should be filed in the court where the charge was laid.

One further amendment is not currently in the Amendments and will be added. This relates to the timetables for steps – provision to the defence of all formal statements is currently 25 working days prior to the trial callover date. Applications for extension are currently routinely made and granted. It was considered that it would be preferable to extend the time to 15 days. This change has previously been consulted on.

Simon France J said that not all of the Rules had been consulted on. His Honour considered that, particularly the amendments relating to sentencing, should be sent out for consultation. Simon France J agreed to draft a short consultation paper. The Committee agreed to have a short consultation period for the Amendments so that they could be considered at the next meeting in October. The sub-Committee would informally consider the submissions. If there were any substantive issues raised by the submissions it might be necessary for Simon France J to address the Committee.

Finally, Simon France J noted that the Criminal Rules Sub-Committee has currently been meeting five times a year. He did not think that this would be necessary in the future as there were no pressing issues for the Committee.

The Chair thanked Simon France for attending the meeting.

Action Points: Simon France J to draft a short consultation paper and the rules to be released for consultation with submissions due in time for them to be considered before the October meeting. The Chair and Simon France J to liaise to assess whether it was necessary for Simon France J to attend the next meeting to discuss any of the submissions.

Note: the consultation paper has now been issued.

6. The ability to reject documents for substantive reasons

At the previous two meetings, the Committee had considered whether the Rules should make specific provision for rejecting documents which conform with the formal requirements of the rules but raise substantive issues, such as where a statement of claim is patently frivolous or vexatious or an abuse of process. At the last meeting, Gilbert J agreed to write a paper exploring how such a rule should be formulated.

Gilbert J discussed his conclusions with the Committee. His Honour noted that the Court has the inherent jurisdiction to prevent its processes being abused. The ability can be expressed as a duty to do so. Under r 5.2, the Registrar can currently reject documents for filing when they do not comply with the formal requirements for the form of the documents. However, there is no provision for documents which do comply with the formal requirements but appear on their face to be frivolous, vexatious or otherwise an abuse of the court's process to be rejected for filing by the Registrar or for the Registrar to refer the documents to a Judge. Currently, the list Judge deals with the proceedings that are plainly vexatious within the existing rules which do not explicitly provide for such a situation. The first question is whether the Rules should provide for this situation. Gilbert J considered that they should. He noted that Australia, the United Kingdom and Canada have various rules dealing with the issue. The next question is which procedure should be adopted in New Zealand. At the last meeting the Committee expressed the view that it would be undesirable to give Registrars this power and it should be a Judge who makes this decision. In Australia, the Registrar has the power to reject such documents as an administrative act. The Registrar also has the power to refer the matter to the Judge. The Full Court of Australia has found that the Judge's decision to reject the document is an administrative decision and not capable of being appealed. The Judge is assisting the Registrar with an administrative act and so there is no decision affecting anybody's rights. Gilbert J stated that he thought this approach was quite harsh and preferred the English approach. This approach is that the documents are accepted for filing by the Registrar who can refer the matter to the Judge. The Judge has the power to strike out the document of his or her own initiative, with or without hearing from the parties. This means that the Judge may dismiss the proceedings without hearing the defendant and without the documents being served. Where a Judge strikes out the proceedings they must advise the plaintiff of their right to appeal the decision. Where this process is involved the document is filed and issued by the Registrar but the need to serve the document is deferred pending the Judge's decision.

Gilbert J considered that the proposed rule raised a number of questions the Committee would have to address: (1) should we have a rule; (2) should the act be an administrative act or a judicial decision giving a right of appeal; (3) should the rule extend only to statement of claims or to other documents that are vexatious or scandalous; and (4) the format of the rule. Gilbert J also noted that the rule would have to provide for its effect on the requirement to serve the document.

Venning J noted that the current practice in the Registry is that if a document is recognised as being frivolous and vexatious then it is transferred to a senior Registrar. The Registrar will hold on to the document and not direct it for service but refer the matter to a Judge. Adopting this part of the procedure would therefore not raise any difficulties in practice.

Mr Gray QC noted that this procedure was analogous to when a private prosecution was filed: the matter is referred to the Chief District Court Judge who may direct that it is not received for filing. There is some law developing around whether the private informant and the intended defendant have a right to be heard and whether there is a right of appeal. The procedure is that the private informant files the document which is referred to the Chief District Court Judge who can reject that it not be accepted for filing. There are appeal rights in respect of this decision although the law is still developing in terms of who has a right to be heard.

The Chair considered that the utility of specifically providing such a procedure would be if the rule was very quick and saved the defendant from having to respond to abusive claims or get involved in the process in any way: otherwise the current strike-out procedure could just be used.

Venning J considered that the types of case that the rule would apply to would be statements of claim that are so patently abusive that the Court has an obligation not to allow its process to be abused. This would be a very limited number of cases.

The Committee discussed the logistics of explicitly providing for this procedure. A number of issues were identified as having to be addressed. The rules would have to be linked to the vexatious litigant procedure so that a litigant could still be picked up by that process if a number of their claims had been struck out using the proposed new rule. If the decision is made by a Judge then there would probably have to be an appeal right. This would be problematic as it would create an additional layer of litigation

and increase the workload of the Court of Appeal. The benefit of having the Judge make the decision after the document is filed is that there would be some formality in the process, so that it is not just done in a minute. It is necessary to have a proper record of the decision. The relevant test to strike out the proceedings was also considered. The Chair considered that the current strike out procedure would be hard to improve upon.

Venning J proposed that the decision be made by a Registrar so that that decision could then be reviewed by a Judge. A senior Registrar could have legal training and in any event, the situations that the proposal is aimed at are situations which are so clear that a Registrar might feel comfortable making this decision. A similar situation is a Registrar's decision not to grant a fee waiver which is subject to review by a Judge.

The Committee agreed that two draft rules reflecting the suggestions should be prepared and then considered to assess the consequences of each proposal in terms of matters such as rights of review and appeal, whether the document should first be accepted for filing and the implications on service. Ms Giacometti agreed to draft the rules with Venning and Gilbert JJ. Mr Channa suggested that it would be useful to receive input from a Registrar at some stage of the process.

Action Points: Two draft rules reflecting the possible different approaches to the rules were to be drafted by Ms Giacometti in consultation with Venning and Gilbert JJ. The consequences of adopting each proposal to be assessed by these Committee members.

7. Substituted service and protests to jurisdiction

The Committee had received a number of emails from Mr Chris Chapman relating to substituted service and protests to jurisdiction. Mr Chapman had suggested that the situation where substituted service is ordered on a defendant who is overseas should be clarified and the rules amended to explicitly provide whether substituted service within New Zealand on such a defendant amounts to service within or out of New Zealand. Mr Chapman also raised the question of where the burden of proof lies where the Court's jurisdiction is disputed under r 5.49.

The Chair noted that Mr Chapman had helpfully raised difficult issues and suggested that several Committee members could look at the issue in more detail and report back to the Committee. Mr Gray QC and Ms O'Gorman agreed to prepare a paper for the Committee. The Chair noted that the rules surrounding service outside the jurisdiction had recently been amended and were working well. Australia was in the process of adopting them for their Uniform Code of Procedure. Accordingly, this task was confined to the issues raised and was not the opportunity for changes to be made to the rules surrounding service outside of the jurisdiction generally.

Action point: Mr Gray QC and Ms O'Gorman to write a report on the proposals to be presented at the next meeting.

8. Process for surviving spouse to obtain letters of administration

The Committee had received a suggestion from Peter Fantham concerning the process by which a surviving spouse or de facto partner can obtain a grant of letters of administration on intestacy or with will annexed. Mr Fantham suggested changes to make this process, which is currently a two-step process, simpler.

The Chair considered that it would also be desirable for a Committee member to look into this issue in more detail. Mr Barker agreed to do this.

Action point: Mr Barker to consider the proposals and make a recommendation to the Committee at the next meeting.

9. Changes to intervention rules for barristers sole

The Committee considered whether the changes to the intervention rule, allowing barristers sole to take direct instructions in a greater number of situations, required any changes to the High Court Rules.

Mr Beck suggested that the rule providing for a "solicitor on the record" might need to be amended. He agreed to look at this with Mr Moore.

Action point: Mr Beck and Mr Moore to consider whether any changes were required and draft the necessary amendments.

10. District Courts Rules Schedule 4

Mr Beck addressed the Committee about a minor change proposed to the District Court Rules by the Law Society. Schedule 4 of the District Courts Rules, which lists the time allocations for each step of the proceedings, refers to several steps in proceedings which were undertaken under the 2009 District Court Rules but are no longer steps under the 2014 rules. Mr Moore had noted that some proceedings are still governed by the 2009 Rules. There were thought to be at least 600 proceedings commenced prior to the 2014 rules. Part 17 of Schedule 1 of the rules provides that costs for a step taken in a proceeding before the coming into force of the 2014 rules must be determined in accordance with the 2009 rules. Mr Beck, Judge Kellar and Mr Moore were to discuss how the Schedule should be amended and report back to the Committee at the next meeting.

Action point: Mr Beck, Judge Kellar and Mr Moore to liaise and provide draft changes to the Committee for the next meeting.

11. High Court Rules Form B2 – Bankruptcy Notice

The Committee received a suggestion from Mr Cunningham that paragraph 2 of Form B2 of the High Court Rules which states that the Judgment Creditor claim costs against the judgment debtor, including a fee for filing the bankruptcy notice and a fee of $150 for serving the notice, should also include a fee for obtaining a certified copy of the judgment or order on which the bankruptcy notice is based. Rule 24.8 provides that the certified copy must be attached to the request for the issue of a bankruptcy notice.

Mr Barker stated that the certified copy was a separate document which cost about $40 to obtain. A separate process has to be followed to get this copy. Mr Barker and Mr Channa agreed to liaise to decide whether a change was necessary.

Action point: Mr Barker and Mr Channa to determine whether this proposal should be adopted.

12. Representative Actions

Mr Gapes had written to the Committee suggesting that it amend the rules to provide for developments in case law surrounding litigation funding. The Chair reminded the Committee that it had prepared a Draft Class Action Bill and Rules in 2008 and referred these to the Secretary of Justice but no progress had been made on the Bill. The Chair also noted that there had been a recent seminar in which members of the profession expressed wide-spread dismay about the lack of explicit rules governing class actions. The existing rule in High Court Rules providing for representative actions has been used as a basis to allow class actions and litigation funding with the Courts noting some requirements for bringing these actions. Litigation funding is not nearly as common in New Zealand as in other countries such as Australia, partly because it is difficult to predict how the litigation is going to work. The Chair noted that some people consider that this is a good thing and that litigation funding should not be encouraged.

Mr Gray QC considered that in the existing case law the courts had been cautious in this area and the requirements and ability to take class actions had not conclusively been agreed upon. Other members thought that the procedure to be followed was more settled.

The Committee noted that it would not want to overstep the role of the rules as opposed to what should be provided in legislation: it might be that it was not possible to do anything useful in the rules.

However, it was possible that the rules could provide for the procedure to be followed; the question was whether provision should be made for this procedure within the existing rules. The Committee agreed that it would be helpful to have a paper setting out the state of the law and what the leading cases seem to identify as the procedural requirements.

Action points: the Clerk to draft a paper setting out the procedural requirements for bringing a representative action as stated by cases.

13. Applications without notice

The Committee turned back to Agenda Item Four. In January, Mr Nick Patterson had raised the issue of the procedure for an unrepresented litigant to bring an application without notice. The current rules require such an applicant to seek dispensation from the obligation to certify an interlocutory application. This is because rr 7.16 of the District Courts Rules and 7.23 of the High Court Rules provide that an application without notice must contain a certificate that uses the words "I certify that this application complies with the rules" and be personally signed by the applicant's lawyer. However, sub-rule 5 says that a Judge may dispense with the certificate if the applicant is unrepresented. At the last meeting, a sub-committee, headed by Ms Gorman, had presented a proposed re-draft of the rule. The Committee had approved the re-draft with some changes and had then undertaken a period of consultation.

The Chair noted that several submissions had been received which, while supporting the proposal, had made some helpful suggestions. The Committee discussed a number of the proposals. Duncan Cotterill had raised a concern with the use of the Pickwick procedure and suggested that the rule should specifically provide that where the Pickwick procedure is used the requirements of a without notice application must still be complied with. The Committee agreed that the requirements should still be complied with but queried whether it was necessary to specifically provide for this. Venning J considered that a without notice order should only ever be a holding position until both parties can be heard. Another issue raised by the Bar Association was whether the certification requirement currently proposed was sufficient. Finally, Mr John Earles and Duncan Cotterill suggested that the proposed requirement to file a memorandum setting out the basis on which the application was sought without notice, which is a new proposed requirement, should not apply to some without notice applications such as applications for probate or substituted service. Ms Gorman noted that an exception could be non-contentious or procedural matters, or each species of application would have to be set out. Mr Barker also suggested that the memorandum should address any possible defences. Ms Gorman agreed to look at the issues raised and amend the rule in light of the submissions. Mr Moore agreed to help with this process.

Action Point: Ms Gorman and the Clerk to look at redrafting the rule in light of the suggestions made by the submissions. Mr Moore to help with drafting the changes.

14. The Central Processing Unit

The final issue on the Agenda was the operation of the Central Processing Unit (CPU). Judge Gibson said that he had visited the CPU with Judge Kellar. They considered that, although there had been some teething issues, the CPU had the potential to develop useful expertise and provide consistency in practice. They were developing guidelines for the CPU which would hopefully be available to the Committee at the next meeting. Judge Kellar noted that the Committee had received a short summary of the main functions of the CPU and considered that it would be helpful to have a more detailed memorandum setting out all of the processes to give the Committee a better understanding of the functions undertaken by the CPU.

Mr Gray QC noted that the media, in the access to Court document consultation, had raised the submission that it would be useful to have a central register of suppression orders. He considered that if there was now the ability for this to be developed this could be useful.

Venning J asked why the Committee was looking at this matter. The Chair confirmed that it had come about because the Ministry of Justice has asked the Committee to pass a number of amendments

allowing for central filing documents. This has resulted in several complaints from the profession. The CPU now played an important role in civil procedure. Although there were no amendments proposed at this stage the Committee had also been interested in the level of judicial oversight over the CPU.

Action points: Judge Kellar and Mr Channa to discuss the CPU again at the next meeting. Mr Channa would also arrange for a more detailed memorandum on the functioning of the CPU to be provided.

The meeting closed at 1:40 pm