THE RULES COMMITTEE
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4 December 2012
Minutes/06/12

Circular No. 110 of 2012

Minutes of meeting held on 3 December 2012

The meeting called by Agenda/06/12 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 3 December 2012 at 9:45 am.

1. Preliminary

In Attendance

Rt Hon Dame Sian Elias, GNZM, Chief Justice of New Zealand
Hon Justice Fogarty (the Chair)
Hon Justice Winkelmann
Hon Justice Asher
Judge Doherty
Judge Gibson
Judge S Thomas
Mr Andrew Beck, New Zealand Law Society Representative
Mr Brendan Brown QC
Ms Phoebe Dengate-Thrush, Private Secretary to the Attorney-General
Mr Bruce Gray QC, New Zealand Law Society representative
Ms Cheryl Gwyn, Crown Law
Dr Don Mathieson QC, Special Parliamentary Counsel, Parliamentary Counsel Office
Mr Kieron McCarron, Judicial Administrator to the Chief Justice
Mr Stephen Mills QC, New Zealand Bar Association representative

Bill Moore, Acting Chief Parliamentary Counsel, Parliamentary Counsel Office
Ms Paula Tesoriero, General Manager Higher Courts, Ministry of Justice
Ms Sarah Turner, standing in for Mr Frank McLaughlin

Ms Rita Lowe, Secretary to the Rules Committee
Dr Caroline Anderson, Clerk to the Rules Committee
Mr Tom Cleary, Incoming Clerk to the Rules Committee

Apologies

Hon Christopher Finlayson, Attorney-General
Judge Doogue, Chief District Court Judge

Confirmation of minutes

The minutes of 1 August 2012 were confirmed.

Matters arising

Justice Fogarty noted the apologies and welcomed Ms Turner from the Ministry, who was standing in for the new Deputy Secretary (Policy), and the Incoming Clerk, Tom Cleary. He also congratulated Mr Mills QC on his appointment as President of the NZBA.

2. Whiteboard discussion

The Committee briefly discussed future directions and issues. Mr Brown QC believed that a previous paper by the Attorney-General on the duty of counsel and parties could be instructively revisited and that the Chair's paper on the overriding objectives of the Rules was timely and should be further developed. Mr Beck was concerned that the topic of appeals from Associate-Judges had been dropped and needed to be addressed.

3. Proposed amendments to rules relating to applications for grant of probate and administration (Agenda item 6)

The Chief High Court Judge introduced this topic by stating that the Ministry sees an opportunity to better serve the community and simplify procedure by centralising the filing and processing of all applications for probate and administration in Wellington. Applications would then be sent to the appropriate granting registry. Ms Tesoriero explained that this proposal was one of several wider structural changes to court management, that staff as well as the NZLS, the Guardian Trust and the Public Trust had been consulted on. The feedback from consultation was positive, with the parties supporting the proposal. Ms Tesoriero noted that the Ministry already has a semi-centralised system in Wellington that processes approximately 2,000 applications a year out of a nationwide number of approximately 16,000. Only 19 applications last year went before a judge.

Asher J asked Ms Tesoriero whether other jurisdictions employ e-filing for probate or administration applications. Ms Tesoriero said that the Ministry had looked at overseas practice and that most jurisdictions do not file electronically as the original documents would still need to be sighted. However, a number of jurisdictions do operate with a centralised system similar to the Ministry's proposal.

In general the Committee supported the proposal but members expressed concern with the potential for fraud (given that the original wills would be posted and that these are important documents of tile) and the potential inconvenience caused for local litigants and lay practitioners if across the desk help was eliminated. In terms of systems-design, the Committee asked the Ministry to consider security issues carefully and whether simply posting the documents was sufficiently safe in respect of lay litigants. The Chair explained that the Committee was concerned that any process developed would protect rights of property. Dr Mathieson QC and the Chair both noted that there had also been an emphasis of practice in Christchurch for "DIY" probate applications. He felt that the Ministry would need to give some consideration to that practice.

The Committee authorised PCO to draft rules and asked the Incoming Clerk in conjunction with the current Clerk to research other jurisdictions' models. The Chair asked that the draft rules be circulated before Christmas and reserved its position until it could consider them.

4. Review of rules relating to registry venue – HCR 5.1 and 10.1 (Agenda item 2)

Dr Mathieson introduced version 1.3 of a redraft of r 5.1 and outlined the six main changes it made as:

- reducing the plaintiff's choice of registry where the plaintiff is suing a single natural defendant to either the registry nearest the defendant or the registry closest to the "source of the proceeding";
- abolishing the reference to the defendant's registered office in case of a company, as this can be artificial;
- introducing the concept of "source of the proceeding" and providing examples of how it worked;
- introducing criteria for transfer from one registry to another;
- changing the rule dealing with where the Crown is a defendant to where the source of proceeding was, and
- making a minor change to cases where there is no applicable governing rule.

Dr Mathieson observed that the drafting deliberately favoured a policy that the convenience of parties was more important than administrative efficiency.

The Chair thanked Dr Mathieson for his work and excellent drafting, and asked Mr Brown to comment. Mr Brown stated that he had always thought the current formulation of r 5.1 was overly generous to plaintiffs in terms of choice of filing and that the preponderance of large companies having their registered office in either Wellington or Auckland seemed to

add to the problem of oversubscribed registries identified by the Attorney-General. The redraft of r 5.1 and development of a "source of the proceeding" concept aimed to reduce choice of the proper place of filing as well as establish a more significant link with the place of filing and the issues of the case. However, Mr Brown thought that Mr Gray QC's concept of drawing on the private international law test of "real and closest connection" was a worthwhile one.

Mr Gray agreed with the Attorney-General's concerns that cases were allocated to where there are available court resources, subject to party consent. He questioned whether further definition could be given to the concept of "source of the proceedings" and stated that he had suggested the idea of a "real and substantial connection" as a test because it had a substantial body of settled law that could be usefully employed.

Mr Beck stated his concern that the elimination of the "material cause of action" test, and its associated jurisprudence, by a new "source of the proceeding" formulation was likely to create a lot of dispute and uncertainty.

The exceptions of in sub-clauses (d) and (e) were discussed and the Chair requested that the Ministry cross-check whether there were any other specific Acts that needed to be referred to in r 5.1.

Judge Doherty questioned draft r 5.1(f) as to why the court should be bothered in cases where a resident plaintiff is filing against a non-resident: in such cases he believes the plaintiff should be able to choose the registry without having to make an application to the court. Mr Beck was in agreement although Dr Mathieson explained that he would be uneasy about having a rule presumed on place of residence and that the source of the proceeding location would apply if there was any doubt. Judge Susan Thomas similarly wondered whether it was necessary to require an application to change the registry venue, as under the existing rule such matters can be dealt with more informally and perhaps more conveniently by way of case management.

Justice Asher queried whether this reform addresses the Attorney-General's concern that court resources and judicial time be more efficiently utilized and whether the redraft advances the existing r 5.1. In respect of the former, the Judge questioned whether it could not be better met by revisiting r 10.1. He also expressed concern that draft sub-clauses (2) – (4) were unnecessary and were already adequately governed by the current (4) and (5). If the Committee did decide that such a fundamental reform of this rule is in fact required, then there would need to be full consultation with the profession. Along with other members he also noted the equivalent DCR 3.1 and its brevity.

The Chief Justice and Chief High Court Judge expressed similar reservations to this proposal as it was insufficiently focussed on the Attorney-General's concerns. The Chief Justice's view was that it was easier to progress cases by dealing with transfer at a later stage and that it was in reality immaterial where parties file, a point with which Mr Mills was in agreement. Her Honour also did not believe that it was appropriate to import a private international law concept into r 5.1 and she was concerned that some of the examples given to define "source of the proceeding" could be argued alternatively. Justice Winkelmann

worried that the redraft added complexity and should not be progressed at present, especially given the Ministry's intention to move towards electronic filing.

Ms Dengate-Thrush questioned whether or not the operational side of having registries offer parties alternative venues at an earlier date had been progressed. Ms Turner noted that this matter has been commenced, but its completion had been delayed by Mr Chhana's change of role. The Ministry would report back to the Committee before its February meeting.

5. District Courts Rules 2009 Reform (Agenda item 3)

Judge Thomas updated the Committee on the sub-committee's progress and noted that its first meeting with the new representatives of the profession as members took place in early November. The meeting was very positive and constructive, with the members first discussing the options for reform and agreeing with the Committee's position. The current successes of the DCR (early JSCs and the different forms of trial) would be preserved while certain areas of concern, such as the forms and a return to pleadings, will be addressed. The sub-committee noted the new discovery regime instigated in the HCR and believed that a similar approach could be taken in the District Courts by requiring parties to identify principal documents in the statement of claim. Where reference in the Rules is made to the HCR, the sub-committee favoured providing all of the relevant rules for ease of reference and understanding. The information capsule would be abolished but will-say statements will be required for short trial.

Judge Doherty stressed that the rationale behind the differences between the DCR and HCR was based on proportionality, as the average value of claims in the District Courts is $20,000. He further noted that the introduction of the information capsule was for the ease of judges as well as parties although he agreed that there were other methods to provide facts and documents to parties. The Judge remarked that he had recently visited Singapore where the Subordinate Courts are assessing a proposal to implement pre-action protocols and compulsory ADR.

Mr Beck expressed his misgivings to throw out many aspects of the reform and he was concerned to see that the short trial processes and provision of evidence statements/ briefs at an early stage were retained. Mr Mills relayed that the proposed reforms appear to address the consistent feedback he has received that pleadings be brought back, that issues are defined more crisply, and that there is more consistency with the HCR.

The Chief High Court Judge and Justice Asher were in favour of adopting a more consistent approach with the HCR where possible, while Dr Mathieson observed that third parties would be greatly helped by service of documents.

Judge Thomas ended by noting that the sub-committee had instructed PCO to begin drafting the rules, and it would begin working through the draft in detail once it had been received. Once the draft Rules had been refined, they would circulate them to the public. The sub-committee would then consult with the profession in venues around the country in the first

quarter of next year to gather direct feedback from the profession and other interested parties. Justice Asher requested that the full Committee view the draft Rules before they were publically circulated and Judge Thomas said that they would aim to get a copy circulated to the Committee in time for its April 2013 meeting.

6. CPA 2011 – related amendments to existing Court of Appeal (Civil) 2005 and Supreme Court Rules 2004 (Agenda item 7.5)

The Committee noted Justice Chambers' memorandum on amendments to the SCR in respect of criminal appeals and the changes identified as necessary to the CA(C)R and SCR by the Ministry as a result of the Criminal Procedure Act 2011. The Committee asked that the Ministry be responsible to combine the changes into one package and give a draft set of rules to the Committee in advance of either its February or April meeting next year. Ms Turner explained that in terms of timing the rules will need to come into effect at the same time the remaining provisions of the Act come into force next July.

Mr Gray stated that Chambers J's proposed amendments would be a welcome reform.

The Chief Justice reiterated her desire that the Ministry enable the Supreme Court to move to electronic casebooks.

7. Review of unless rules and orders (Agenda item 5)

The Committee discussed the issue of the remaining four deemed abandonment provisions, two of which are contained in the Supreme Court Rules 2004, one in the Court of Appeal (Civil) Rules 2005 and one by virtue of s 74 of the District Courts Act 1947. Mr Beck observed that these issues should be dealt with by case management and not by such sledgehammer provisions. Justice Asher was unconvinced that there was an issue with the security of costs provisions as they do not cause injustice. The Chief Justice believed that the current deemed abandonment provisions were not problematic given how few rules there are and that any issues can be dealt with on a principled individual basis. Mr Beck strongly disagreed with this position and argued that they do cause injustices, and quite regularly so in the Court of Appeal. Automatic strike-out should not be written into the rules for procedural non-compliance. A much more principled approach is to deal with the issue by way of unless orders. The Chair agreed with Mr Beck's views.

Mr Gray considered that this was part of a bigger issue of what are the appropriate sanctions for procedural non-compliance. Justice Winkelmann agreed and believed that this was a fundamental subject in relation to case management and could not be addressed in isolation. However, she agreed that s 74 of DCA gives rise to real access to justice issues, especially given that it only applies in respect of appeal from the District Courts. Her Honour noted that she had previously written a paper on this provision for the Committee.

The Chief Justice recommended that a paper be written advocating for change and identifying what problems in practice are caused by the current provisions. Justice

Winkelmann and Mr Gray are to write a paper with the assistance of the Incoming Clerk, Mr Cleary.

8. Draft electronic bundle protocol (Agenda item 4)

Justice Asher informed the Committee that the consultation round on the draft protocol had recently finished and that seven submissions had been received. The submissions were very helpful and generally in favour of the draft protocol. The submissions identified some issues with the protocol, including the need to articulate more clearly the intention that the protocol is voluntary and the primacy of the hard copy remains. They also made sensible suggestions that would be incorporated into a redraft, e.g. increasing the number of documents that is needed for there to be a presumption that a protocol should be needed.

The Judge explained that the next step would be for the working group review the protocol in light of the submissions and submit a final draft to the Committee for approval at its February meeting. Justice Winkelmann suggested the Judge contact Sandra Potter, who is an IT consultant. She would check with IBIT as to funding for this.

9. Costs Rules (Agenda item 7.3)

The Chair tabled Gary Harrison's letter opining that the current costs regime does not sufficiently recognise the work required for defending a summary judgment application.

Mr Beck stated that the new schedules (HCR Schedules 2 and 3) had not changed the position in this respect: summary judgments have always been treated as interlocutory applications, but in cases where more extensive work has been done costs could be recovered on a category C basis or according to the discretion of the Court. However, the Chief Justice asked the Committee whether this position is the best one and Justice Asher expressed his view that it may no longer be appropriate to treat summary judgment applications as interlocutory ones for the purposes of costs. Mr Gray supported Asher J's view, and wondered whether the current cost rules adequately captured the effect case management has had in frontloading proceedings. Although Justice Winkelmann and Mr Beck noted that they had taken into account the effect of case management, it may be that the regime was insufficient in this respect. The Clerk then raised the fact that she has received several queries from practitioners about the costs regime and that it would helpful for the Committee to clarify several issues at the next meeting and review the rules.

More widely, the Chief Justice asked whether the summary judgment process had itself become more ambitious and whether the current procedure was still appropriate. She observed that there have been a number of cases applying for summary judgment even though it was clearly wrong to do so. The Chief Justice raised whether there was perhaps a need for an intermediate process between summary judgment and full trial. The Chief High Court Judge responded by noting that the number of summary judgment applications has increased dramatically in the High Court. However, it was difficult to get any sense of whether the process itself was being abused: the number of unsuccessful applications would need to be gathered. Judge Doherty stated that in the District Courts the success

rate was around 30%, although Justice Asher believed that that figure would be considerably higher in the High Court.

Justice Winkelmann suggested that the NZBA and NZLS be approached for feedback, and that the Clerk prepare a short paper looking at the different costs regimes and send it to Asher J and Mr Brown to develop. Mr Beck and Mr Mills would raise the issue with their respective organisations and ask for comment from members.

10. Last Meeting of Dr Mathieson QC

Before the Committee broke for morning tea, the Chair noted that this would be Dr Mathieson's last Committee meeting as he was retiring from PCO. The Chair thanked Dr Mathieson for his outstanding and tireless service on the Committee, which was marked by his patience, learning and professionalism. He noted that he has been continually astounded by Dr Mathieson's ability to resolve problems so quickly and with such unfailing grace and insight. Dr Mathieson's achievements are remarkable: amongst other things he has been recorded as counsel in over 170 cases reported in the New Zealand Law Reports, has taught as a professor at law, and is the general editor of *Cross on Evidence*. Justice Fogarty stated that it has been an immense privilege to have worked with him on the Committee and that his presence would be deeply missed. The Chief Justice then thanked Dr Mathieson and remarked that he was universally cherished and held in great esteem as a scholar and lawyer, and that she would always remember being opposing counsel to him in one of her first court appearances.

Dr Mathieson then explained to the Committee that his first engagement with civil procedure began through meeting Sir Tom Eichelbaum and a case in which he was defence counsel, *Victoria University of Wellington Students Association Inc v Shearer (Government Printer)* [1973] 2 NZLR 21 (SC Wellington). This case was an action for mandamus against the Government Printer to compel him to print and supply copies of the Code of Civil Procedure, in which Sir Wilfred Sim, of *Sim on Procedure*, was also accused of plagiarising the first civil procedure text in New Zealand: Pennefather and Brown's *The code of civil procedure in the Supreme Court of New Zealand* (Edwards and Green, Wellington, 1885). Dr Mathieson explained that a highlight of his work on the Committee was the production of the new High Court Rules, which eliminated a large number of technicalities and dramatically simplified interlocutory and Part 31 applications. One regret is that no Class Actions Act has yet eventuated as this is an area of law that needs statutory reform, and he asked the Committee to keep a check on the progress of the Bill.

The Chair also noted that this was the last official meeting Dr Caroline Anderson as Clerk to the Rules Committee, and thanked her for her outstanding work over the last two years. Dr Anderson will be succeeded from January 2011 by Mr Tom Cleary.

Meeting ended 12:40pm.