The Rules Committee

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14 November 2016
Minutes 04/16

Circular 100 of 2016

Minutes of meeting held on 3 October 2016

The meeting called by Agenda 05/16 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 3 October 2016.

1. Preliminary

In Attendance

Rt Hon Dame Sian Elias GNZM, Chief Justice of New Zealand
Hon Justice Gilbert, Chair
Hon Justice Venning, Chief High Court Judge
Hon Justice Asher
Judge Gibson
Judge Kellar
Ms Ruth Fairhall, Acting Deputy Secretary of Policy, Ministry of Justice
Mr Bruce Gray QC, New Zealand Law Society representative
Mr Andrew Beck, New Zealand Law Society 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, Clerk to the Rules Committee

Apologies

Hon Christopher Finlayson QC, Attorney-General
Judge Doogue, Chief District Court Judge
Ms Jessica Gorman, representative for the Solicitor General
Mr Rajesh Chhana, Deputy Secretary of Policy, Ministry of Justice

Mr Andrew Barker, New Zealand Bar Association representative

Confirmation of minutes

The minutes of 1 August 2016 were confirmed.

2. Senior Courts (Access to Court Documents) Rules 2016

At its meeting in August the Committee agreed to circulate the Senior Courts (Access to Court Documents) Rules 2016 to the Court of Appeal and Supreme Court before circulating the Rules for concurrence. Kós P and O'Regan J had made a number of suggestions that had resulted in several further amendments to the Rules. Asher J addressed the Committee about the changes.

Asher J noted that there had been four significant changes made since the last meeting. The first change was that the Rules had been reordered so that they first set out definitions, then access as of right and then access only by leave. He considered that the new order worked very well. The second change was to get rid of the as of right access to the "case on appeal". The Judge noted access as of right to the case on appeal was provided for under the current Court of Appeal rules, however, it did not make sense to have the ability to access the case on appeal as of right because it might contain a number of documents that there would have been no right to access in the High Court. The Rules would now provide that the person seeking access would have to get leave to access the case on appeal. Thirdly, in the High Court it was felt that it was pointless to have Registrars determining access requests as in practice the requests would always be referred to a Judge. The Supreme Court also agreed that the determination should be made by a Judge. However, the Court of Appeal has said that Registrars routinely decide requests in the Court of Appeal. It would considerably add to the burden on Judges if they were required to determine all requests. Accordingly, Ms Giacometti had added r 11(6)(c) to provide that a Judge may refer a request to a Registrar for determination by that Registrar. Asher J considered there was no issue with this as the request would always be seen by a Judge first and then referred to the Registrar.

The Committee discussed these changes. Mr Beck questioned whether r 11(6)(c) would result in different appeal rights. The rule would mean that a decision made by a Registrar would be reviewed by a Judge and then there would be a right to appeal, whereas if the decision were made by a Judge then the review would be by three Judges. Mr Gray noted that given the workload of the Court of Appeal it might be better for only one Judge to review the decision. The Chair noted that this was the situation at the moment. The Chief Justice considered that there was no issue, the amendment just preserved options.

Mr Gray considered that in the High Court much of the reason for allowing access during the trial was because some of the affidavits and documents may well be excluded at the time of the trial, meaning that some of these will not form part of the case on appeal when an appeal is taken. He wondered whether the mechanism providing for objection by the parties would be sufficient to safeguard these documents. The parties to the proceeding would have participated in deciding what should be included in the case on appeal. Asher J considered that the parties would not necessarily be thinking about people accessing documents when putting together a case on appeal.

The final change related to the matters to be considered in r 12. Rule 12(a) had been amended to remove the phrase "open access to the courts". O'Regan J had queried why this phrase was necessary. Asher J had agreed; this concept was already covered: (a) refers to the "orderly and fair administration of justice", (c) refers to the right to bring and defend civil proceedings without the disclosure of any more information about the private lives of individuals, or matters that are commercially sensitive, than is necessary to satisfy the principle of open justice, and (e) referred to the principle of open justice. In addition, there might be confusion about what "open access" was. While access to the courts and open justice are different concepts, open access was sufficiently captured in the other paragraphs.

Asher J asked whether the Committee was happy with the changes. Ms Giacometti stated that the Rules didn't have a transitional provision. Venning J noted that it wouldn't matter if proceedings had already

started as the important date was when the request was made; if the request was made under the new rules it would be determined under those rules. Ms Giacometti agreed to double check the position. Asher J noted that transitional provisions often caused more difficulties than they fixed. The Chair queried the wording in r 11(2)(d) which refers to any conditions of the right of access that the person will accept. He asked whether "proposes" would be better. The Committee agreed to change this wording.

Action points: Rules to be circulated for concurrence.

3. Striking out before service

The Chair informed the Committee that following the last meeting he and Venning J had met with representatives from the Law Society to discuss the proposed rules. The Law Society had expressed opposition to the proposal at the start of the meeting, however, he thought that in the end they had come away with fairly strong endorsement for Rules to clarify how these types of claims should be dealt with. This is because at the moment there is an inconsistency in process between different Judges deal with these types of claim. The Chair noted that the Law Society's main concern was that it should be clear that the rule only applied in very limited circumstances. The Judges had agreed to redraft the rule to provide that it only applied to cases where, on the face of a statement of claim tendered for filing, the claim is plainly an abuse of the process of the court. Confined in this way, the Law Society representatives supported the rule.

A further draft of the rule had been prepared to reflect these comments. The Chair stated that they had agreed to show the rule to the meeting and then go back to the Law Society.

The Chair queried r 5.35B(2)(d), which states that a Judge may ask for further documents such as "a witness statement, an amended statement of claim, or particulars of a claim". He considered that a witness statement might not be something that would cure the problem. The Chief Justice noted that it was only an example, and given that was the case, it might be better to delete it. It was not the most obvious example of a further document that a Judge might want to see. The Committee agreed to delete this.

Asher J asked whether, given the narrowing of the rule, the examples listed in r 5.35(2)(a) were still accurate. This sub-rule lists "incoherent or makes no sense, or sets out no facts indicating what the claim is about." The Chair considered that all of these examples in (a) should be deleted. The Committee agreed.

The Committee agreed to re-circulate the Rules to the Law Society and to other submitters.

Judges Gibson and Kellar were concerned that the Rules should extend to the District Court. The Chair stated that the Law Society was firmly opposed to the Rules applying in the District Court. This was because of the CPU. Judge Gibson stated that the Judge was still the person making the decision. However, the Chair said the concern was that this would be something that would routinely be checked in the CPU and could cause further delays. Ms Fairhall asked whether there would be other ways to manage this concern. Mr Gray stated that members had also expressed concern to him about the rule being adopted in the District Court. Their concern related to access to justice; while in the High Court the issue would be managed in a bespoke fashion, in the District Courts, because of the CPU and the volume in the District Court, there was a concern that the balance might be slightly different and the Rules could operate as an impediment to access to justice. Judge Kellar did not think there was any difference between the two courts that would warrant the Rules not applying. The Chief Justice said that while this might be so, if it were going to be an impediment to passing the Rules, it might be better to go ahead with the rule in the High Court for the time being.

Mr Gray stated that in terms of the procedure to be adopted, there was now relative agreement that the Rule was beneficial in the High Court, but disagreement over the Rules in the District Courts. He suggested the Rules could go ahead in the High Court but further consultation could be undertaken about the issues with the Rule being extended to the District Courts. The Chief Justice stated that the objection was clear: all that was being articulated is concern that it would result in further delay. Ms

Fairhall stated that it would be possible to follow this up with the CPU. Venning J considered the meeting with the Law Society had been helpful in progressing the Rules to the point where they could be enacted for the High Court. The Committee could keep going with the Rules for the High Court while at the same time getting further information from the CPU. Judges Gibson and Kellar could then meet with the Law Society. There was a difference because of the physical distance between the CPU and the registries and because the CPU was not set up for evaluative judgment.

The Committee agreed to progress the matter one step at a time and to proceed with the rule for the High Court for the time being. Mr Beck stated that it would be helpful to have a record of how many claims were struck out under this rule. Venning J stated that this could be done. The Chief Justice noted that if there were almost no uptake in the High Court, it might suggest that putting it in a court which deals with such volume of cases in a centralised way was not worthwhile.

Finally, Ms Giacometti stated that the requirement in the previous draft of the Rules for the Judge to state if he or she considered the claim to be wholly without merit had been removed. She asked whether this would work with the new rules concerning vexatious litigants. The Committee noted that there would be a decision and this matter could be referred to in the decision.

Action point: rules to be sent to the people who had provided feedback on the rules for final comments.

4. Subpoenaed witness

Ms O'Gorman addressed the Committee. She noted that the Committee was still considering whether it would be beneficial to have a rule describing an appropriate process if it is not possible to get a witness statement from a witness who is empowered to give evidence by subpoena. The concern is one of possible ambush, where no witness statement has been provided yet the party calling the witness has some, albeit imperfect, knowledge of what might be given in evidence. She thought the concept the rules were trying to capture was one of some mandatory disclosure at the time that the witness statements are due; for example disclosure of the fact that the witness is being called but the party is unable to get a brief and the attempts made to comply with the rules. The difficulty was what other information a party should provide to indicate the nature of the evidence to be called.

The Committee discussed what a rule should provide. Mr Gray thought it would be helpful to discuss whether the Rule would vest the discretion in the trial judge to make an appropriate order balancing the benefits of case management and pre-trial disclosure of the scope of evidence including the benefits of the lack of surprise, against the interest the parties have in calling witnesses even when they need to subpoena them and can't get a brief. He suggested that if it was too difficult not to be too prescriptive then the Committee should consider whether a rule was necessary. Mr Beck asked whether the problem was that the rules were prescriptive in the other way. Ms O'Gorman noted that there is no rule that explicitly allows a party to do this, so an issue had arisen in the case law where a party has objected. Ultimately she thought that it was clear that a party did have the right to call evidence orally. Asher J considered that there was a gap in the rules but agreed a new rule should not be too prescriptive; it should provide that if the party is intending to call a witness who has not provided a brief that party needs to give notice of this to the other side setting out the area intended to be covered and the reason for there being no written brief. The rule should then provide the power of the other party to object. The Chief Justice said that the other party could just seek orders to mitigate the prejudice.

Venning J noted that the current rules governing subpoeanas around r 9.52 don't require the name of the person that you are subpoeana. These rules should be tidied up.

Mr Gray clarified that a further draft of the rule should specify:

(a) that it should be by notice rather than by application for leave;

(b) at the time the briefs are due;

(c) should identifying to the extent that it is known the evidence they are expected to give; and

(d) the steps taken to obtain a brief.

The Committee queried whether the steps taken should have to be specified given that the party was not asking for leave. However, this would avoid gaming. Ms O'Gorman thought that the party would have to disclose the fact that they had made genuine attempts to comply. Asher J questioned whether the rule could say "if, in circumstances where genuine attempts have been made to obtain a written brief, and none can be obtained …" He thought that there needed to be a prerequisite. The Chief Justice stated that she thought that the party should have to give notice, and, if known, should have to give an indication of what the party expected the substance of the evidence would be. Aside from this the rule should just leave it to the judge to make the orders that are just and are required to meet the objectives of disclosure. Any non-compliance should be able to be met by things such as adjournments and costs orders. However, Mr Gray noted that adjournments are hard to get during the middle of a trial. And in practice these mechanisms are not always available.

Mr Gray stated that the goal was reasonably diligent compliance with the obligation of disclosure. The aim was not to prevent a party calling relevant evidence. He questioned whether steps should be specified. The Chair considered it would be better to state that it was permissible where genuine attempts had been made to obtain a witness statement and it had not proved possible. Mr Gray agreed that his preference was to leave it to the trial Judge. Asher J agreed that you would not want the efforts made to have to be disclosed; this might be privileged.

Ms O'Gorman and Mr Gray agreed to refine the draft further for the next meeting.

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

5. Case management conference allocation

Mr Barker had raised the issue of case management conferences not being allocated within the appropriate timeframe – 25 to 50 working days of the statement of defence. He identified a number of issues with this including compliance with the rule and a number of case management conferences not being held. The existing rule was not achieving its purpose and could be adding to delay. Mr Barker suggested that a possible solution would be to require counsel to file a joint memorandum within a certain time after the statement of defence had been filed addressing the particular issues raised at a case management conference. If the memorandum addressed everything then the Judge could make the orders on the papers and a conference could be allocated at a later date, such as after discovery or once third parties had been added.

Asher J noted that the objective of the case management reforms was that there would be one case management conference within 50 days which would be the only case management conference. Currently, some cases are being dealt with without any conference but a number of cases require second and third conferences. In this respect the reforms are not working.

Venning J suggested that he work with Ms O'Gorman, Mr Barker and Ms Giacometti to provide another draft for the next meeting.

The Chief Justice asked whether a more comprehensive assessment of case management was required. Members expressed the view that the proposal should address many of the problems. Ms O'Gorman noted that, in the example provided by Mr Barker where a case management conference had not be allocated within 50 working days, if there was a default requirement for a case management memorandum to be submitted within a number of working days after the statement of defence, the Registrar would have seen the memorandum and things would have been sorted out. Currently, when the memorandum is not required until a certain number of days before the case management conference, parties can just wait until it is allocated. Under the proposal the matter would be brought forward and counsel could advance the case. The memorandum could state a date that the parties would like the conference to be allocated. In addition this would hopefully avoid conference dates being allocated and then set aside at the last minute.

Action point: Venning J, Ms O'Gorman, Mr Barker and Ms Giacometti to provide a further draft of the rule for the next meeting.

6. 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. Venning J noted that these rules are aimed at the accuracy of the affidavit by ensuring that pages are not inserted later. However, the rules cause difficulties in copying large affidavits. Venning J asked whether the affidavits could be copied and then bound and one sworn and the other served on the other party. Ms O'Gorman noted that she had never been served an unsworn copy of an affidavit. Venning J thought it was important for the original affidavit to be a fairly secure document. Ms O'Gorman noted that her practice was to paginate all the exhibits, with the paginated documents indexed on the front exhibit note. However, lay litigants may not be able to paginate the documents.

The Chair asked the Committee whether it thought that the requirement for the affidavit to be bound should be dispensed with. Ms O'Gorman stated that she would discuss the issue with Ms Gorman and come up with a proposal.

Action point: Ms O'Gorman and Ms Gorman to provide a proposal for the next meeting.

7. Rule 27.14

The Ministry of Justice had asked the Committee to consider a minor amendment to r 27.14 which would allow Senior Deputy Registrars in the Wellington and Christchurch Registries to deal with probate matters. Rule 27.14 currently provides a number of powers of the court which may be exercised by all Registrars as well as Senior Deputy Registrars in the Auckland Registry. The proposal was to allow other Senior Deputy Registrars to exercise these powers as well. The Committee agreed to this amendment.

Venning J noted that he had raised two other rules relating to Registrars' powers: rr 2.5, and 2.6. These rules restrict the jurisdiction to Registrars. He considered it should also be considered whether the powers in these two rules should be exercised by Senior Deputy Registrars. Ms Fairhall noted that the Ministry was considering whether they supported this change.

Action point: amendment to be put forward for concurrence.

8. Review of Practice Notes

The Committee turned to the civil practice notes. Venning J had asked the Committee to consider whether all of the practice notes currently in force were necessary and had provided a list of the practice notes that Westlaw listed as in force. The Committee agreed that practice notes could be useful in some situations, such as where the area was continually changing, or where the practice note contained guidance for Judges. The recent Electronic Bundle Practice Note was an example. A large number of practice notes had been revoked in the early 2000s. Mr McCarron thought that some of the practice notes listed had in fact been revoked. He agreed to check which notes had been revoked.

Action point: Mr McCarron to confirm which practice notes have been repealed.

9. Section 84D of the District Courts Act

The Committee had received an email from Mr La Hatte about s 84D(7)(c) of the District Courts Act 1947. In his view, the reference in this subsection to the judgment debtor being represented by a barrister or solicitor was in error and the subsection should refer to the judgment creditor. The Committee expressed the tentative view that the reference did not appear to be in error given changes to the section at the Committee of the House stage, but that there might be a gap. The issue had been considered by the Ministry of Justice which considered that there was no error.

Action point: clerk to inform Mr La Hatte of the Committee's view.

10. Close of pleadings date

The Committee has been considering a proposal to specify a default close of pleadings date in the event that a close of pleadings date is not fixed by the Judge at the first case management conference as required by r 7.6(4). The Committee agreed at its August meeting that a default date would be useful. Ms Giacometti had drafted an amendment to r 7.6 to provide that if the Judge does not fix a date for the close of pleadings, the close of pleadings date is the later of 60 working days before the hearing or trial date allocated; or the date on which the hearing or trial date is allocated.

The Committee agreed to this amendment.

Action point: amendment to be put forward for concurrence.

11. Proper registry for probate

Mr John Earles had raised a matter with the Committee in relation to the proposed amendment to r 27.10 which the Committee had agreed to at the last meeting. He noted that the rule should refer to the place where the deceased "resided" rather than the place where the deceased "died", as this is what is relevant to determining the correct registry. The Committee noted that he was correct.

The second issue raised by Mr Earles was the reference in r 27.14(2)(g), which still provides that registrars have the powers of the court under r 27.10(6)(b) and 27.10(7). The Committee noted that when the amendment rule is passed this reference will match up and give the registrar the power to make an order specifying the registry or transferring the application or document to the proper registry.

Action point: changes to be made and the amendment to be put forward for concurrence.

The meeting finished at 11:45 am.