The Rules Committee

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23 April 2015
Minutes 03(2)/15

Circular 68 of 2015

Minutes of meeting held on 30 March 2015

The meeting called by Agenda 03/15 was held in the Chief Justice's Boardroom, High Court, Wellington, on Monday 30 March 2015.

1. Preliminary

In Attendance

Hon Justice Winkelmann, Chief High Court Judge
Hon Justice Asher, the Chair
Hon Justice Gilbert
Acting Chief District Court Judge Walker
Judge Gibson
Judge Kellar
Ms Jessica Gorman, Crown Law
Mr Andrew Beck, New Zealand Law Society Representative
Ms Laura O'Gorman
Ms Ruth Fairhall, Ministry of Justice

Ms Fiona Leonard, Deputy Chief Parliamentary Counsel
Mr Kieron McCarron, Chief Advisor Legal and Policy

Ms Kate Frowein, Secretary to the Rules Committee
Mr Paul McGregor, Secretary 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

Mr Rajesh Chhana, Ministry of Justice
Mr Bruce Gray QC, New Zealand Law Society representative
Mr Andrew Barker, New Zealand Bar Association representative
Ms Harriet Bush, Clerk to the Rules Committee

Confirmation of minutes
The minutes of 9 February 2015 were confirmed.

Matters Arising

The Chair welcomed Judge John Walker who was attending the meeting as Acting Chief District Court Judge and Mr Paul McGregor who is taking over the role of Secretary to the Committee from Ms Kate Frowein. The Committee thanked Ms Frowein for her effort and support over her time on the Committee and wished her all the best.

2. Access to Court Documents

At the last meeting the Committee discussed the draft consultation paper which has been prepared on the draft access to court document rules. At that meeting, the Chief Justice raised the question of what exactly was meant be the term "open justice" which is listed as a consideration to be taken into account when assessing an application for access to documents in r 8(1)(e) of the draft rules. The Clerk prepared a paper exploring how the concept has been defined in case law. Mr Kieron McCarron said that the Chief Justice had said she would like to amend the wording in both the draft rules and the consultation paper.

As the consultation paper was otherwise ready to be sent out, a full discussion was deferred until the next meeting. Judge Kellar questioned whether what was meant by "open justice" could be articulated more fully on the basis of the factors set out at [11] of the Clerk's memorandum. This notes that case law has defined the purpose of "open justice" as being:

a) to expose the courts' reasoning to public scrutiny;
b) to enable people to understand the courts' decisions;
c) to ensure that judges carry out their powers as efficiently as possible with fair and balanced application of the law;
d) to maintain public confidence in the judicial system; and
e) to provide judicial accountability and the principled exercise of judicial power.

Judge Kellar noted that many of the people seeking access to documents will be non-lawyers. The Chair said that if the wording was changed then there would be questions as to the purpose of the change and whether the rule should be interpreted differently. Justice Winkelmann noted that the purpose of changing the wording was to make the rules more accessible to people applying for access; in particular the media. Judge Kellar said that the media equates "open justice" with the right to know and that is not the point of "open justice". It was questioned whether some of the purposes listed in the Clerk's memorandum, in particular (b) understanding decisions, appear to be closer to the right to know. However, it is not necessary to have access to all the documents in order to understand a decision.

Mr McCarron asked whether members of the Committee could give their suggestions of possible wording before the next meeting. The Chair would discuss the matter with the Chief Justice.

Action points: Committee members to consider possible amended wording to the draft rules before the next meeting.

3. Affidavits and Oaths definition of "Registrar"

In December, the Committee received a memorandum from Mr John Earles which raised two matters in relation to the authority to swear affidavits in r 9.85 of the High Court Rules and r 9.75 of the District Court Rules. At the last meeting, the Committee deferred the discussion of whether a lawyer

who does not hold a practising certificate should be permitted to swear an affidavit. The current rule only requires a person to be "enrolled as a barrister and solicitor of the High Court".

The Committee sought the views of the Law Society, the Bar Association and the Corporate Lawyers Association on the matter. The Auckland District Law Society and several members of the profession also provided their opinions. The Law Society's submission noted that there was a clear divergence in views within the profession. The Corporate Lawyers' Association supported the change in principle. On the other hand, neither the Auckland District Law Society nor the Bar Association supported the change.

The Chair asked whether the Committee thought that a change was necessary. Andrew Beck said that his personal view was that the status quo should be kept. The Committee agreed that no change was necessary. The Committee also agreed that Barristers should be able to take affidavits.

The Committee also discussed the ability to take affidavits overseas. The Chair asked for comments on whether there was any need to change the rule in relation to people living overseas. Ms Laura O'Gorman noted that affidavits are usually sworn before people authorised to take affidavits there, but occasionally the issue arises whether a New Zealander located overseas can take an oath. A declaration can be taken in this way, but the Oaths and Declarations Act does not provide for this in respect of affidavits. The Auckland District Law Society proposed in their memorandum that there should be some clarification on this issue, permitting affidavits to be taken by New Zealand solicitors overseas. The Chair asked whether people agreed with this proposal. The Committee noted that our rules could not regulate how affidavits were taken in foreign courts. Ms O'Gorman agreed to check what the problem was with the Auckland District Law Society and whether a non-practising solicitor has the ability to take an affidavit overseas. The Committee further noted that if there was a difference between the wording of the High Court and District Courts Rules then they should consider whether there was a reason for this or if the Committee should change the rules.

The Chair would thank all three organisations and Mr Earles for their comments and inform them that the Committee has decided that no change was necessary. The Committee would discuss at the next meeting whether any changes were necessary in relation to the taking of affidavits overseas.

Action Points: the Chair to send letters to the Law Society, Bar Association, Corporate Lawyers Association and District Law Society thanking them for their opinions. Ms O'Gorman to consult with the Auckland District Law Society about the issue of taking affidavits overseas raised in their memorandum.

4. Applications without notice

In January, Mr Nick Patterson 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, the Committee agreed that the wording of the entire rule should be changed and that a sub-committee, headed by Ms Jessica Gorman, would assess the matter and come up with a possible redraft of the rule.

Ms Gorman addressed the Committee on the sub-committee's proposed redraft of the rule. The redraft sets out the circumstances in which an application without notice may be made. Sub-rule 3 also provides that the applicant who makes an application without notice must file with the application a memorandum setting out (a) the background to the proceedings (including the factual basis for the proceedings) and (b) the grounds on which each order is sought. Sub-rule 4 provides that the failure to disclose all relevant matters to the court is a sufficient reason, by itself, for the court (a) to dismiss the proceedings or (b) if one or more orders have been made by the court, to rescind those orders.

Ms Gorman noted that there is currently a separate rule where the respondent can apply for the order to be set aside and this included where all relevant information had not been provided to the court.

However Ms Gorman wished the Committee to consider whether having the consequences of non-disclosure provided for up-front would emphasise the importance of disclosing all the relevant information and make the applicant aware of the consequences of not doing so. The Chair noted that it would not be mandatory for the Court to rescind an order where there has been failure to disclose information.

Ms Gorman also discussed the proposed amendments to Form G 32 which must be used when making a without notice application. Ms Gorman said that the proposed revision is intended to indicate to the applicant that they must put as much information in the application as possible: they must state the grounds upon which each order is sought which are those in the rules; what the application is made in reliance on; and specify why the application is made without notice. The proposed paragraph 5 contains new wording. It states that "*the applicant says that* the applicant has made all reasonable inquiries and taken all reasonable steps to ensure that the application contains all material that is relevant to the application, including any defence that might be relied on by the other party, or any facts that would support the position of the other party." This proposed wording is different from the current wording which relies on the concept of "certification". This wording was suggested by the sub-committee because they had been concerned about the degree to which a solicitor can inquire further as to whether their client has disclosed all relevant material if their client has told them that they have done so. Ms Gorman invited discussion on moving away from the concept of certification and whether the proposed wording has in fact moved too far away from the responsibility of disclosure being on the lawyer.

The Chair thanked Ms Gorman and noted that it would be necessary to consult the profession on the proposed amendments if the Committee agreed on new wording to the rule. The Chair noted that the revision to the rule started because of the increase in lay litigants and that the Committee believed it was better to articulate the substance of the certification process. He asked whether the Committee considered that this was the best way to do so. The Chair asked whether everyone was happy that 7.23(2) adequately set out the basis upon which a without notice application could be sought. Judge Kellar suggested that (2)(b) should say "any other party" rather than "the other party". The Chair agreed.

Justice Winkelmann said that she liked the language of certification because it was a well-ingrained notion that a lawyer should certify an application. She would prefer that the form used the word "certify" and kept the rest of the proposed wording. However, this would again raise the problem of what to provide for an unrepresented litigant. As a matter of English a lay litigant can still "certify" something. Justice Winkelmann was worried that if the language was changed it might imply that the obligation on the lawyer was no longer as serious or as onerous. The Committee agreed that "certify" was a much stronger word than "say".

The Chair then queried whether the other aspects in the form such as the reasons for seeking the application without notice should also be certified. Ms Gorman noted that the things in paragraph 4 of the form are all certified under the current rule where the lawyer is required to say that the application complies with the rules: this requirement extends to the substantive requirements. The Chair considered that requiring that the reasons for the application are also certified was necessary because the Judge would be relying on what the applicant is saying about the basis for the application. Ms O'Gorman suggested that paragraph 5 could say that "I certify the grounds set out in paragraph 4 and that all reasonable inquires had been made …".

Justice Gilbert noted that where a matter is routine or affects only the applicant there may not be any relevant defence or facts supporting the other party. However, in such a case there will not be "any relevant defence". The Chair asked whether there were many without notice applications in the District Court. There were a lot made in the Family Court but not many in the District Court. However, the Chair said that in the High Court an application would be turned down because the grounds had not been made out at least once a week; this was a common problem. He noted that this was one of the reasons for the change.

The Committee agreed to keep the word certify and then have two sub-paragraphs stating that: (a) the grounds set out in paragraph 4 on which the application relies are made out; and (b) all reasonable inquiries have been made and all reasonable steps taken to ensure that the application contains all material that is relevant to the application, including any defence that might be relied on by the other party, or any facts that would support the position of the other party." The Chair said that perhaps "all material that is relevant" was not quite the right wording and that this could be worded better. Ms O'Gorman suggested that this could be changed to "all material relevant to whether the application should be granted". The Chair agreed that this would be more focused and also suggested saying "in particular any defence".

The Committee then considered the proposed rule 7.23(4) which sets out the consequences of the failure to disclose all relevant matters. The Committee agreed that it was desirous to say something about the consequences. In particular this could be useful for lay litigants. The Committee agreed that (a) must state the "application" rather than the "proceedings". This subsection is intended to capture a situation where the application has been made, perhaps on a Pickwick basis, but no order has yet been made. In such circumstances the Court would refuse to hear the matter on a without notice basis. The Committee agreed to change "proceedings" to "application". Justice Winkelmann said that she would prefer the wording of 7.23 to say "a failure to disclose may result" in the Court dismissing the proceeding or rescinding the order to make it clear that this was not the automatic result.

Ms Gorman also noted that the subcommittee had discussed the ability to review a without notice application but considered that it was not necessary to go into this. The Chair noted that he believed that the power to review a decision would no longer exist once the Judicature Modernisation Bill was passed. The review power applied to without and on notice applications. The Committee agreed that this was a separate issue and that it was not necessary to address the review power.

The Committee discussed drafting a short consultation paper setting out the issue and asking for any views on the matter. The paper should also be made available on the Rules Committee website. Justice Winkelmann noted that it would be good to update the website to state that readers are invited to offer comments on rules or suggestions for substantive changes even where there are no particular consultation projects.

Action Point: Clerk to draft a short consultation paper stating that the issue has arisen because of the increase of self represented litigants and the certification procedure does not apply to these litigants and that the Committee considered it desirable to substantiate the requirements. The insol group (now called RITANZ), the Law Society and any relevant organisation for trust companies should be consulted. The paper also to be made available on the website.

5. The lawyer for the child in family court appeals

Last year the Committee received a letter from the Family Law section of the Law Society asking the Committee to consider inserting a definition of Lawyer for the Child into the High Court Rules. At the December meeting, the Committee decided to ask Ellis J what the procedure is where a Family Court decision is appealed to the High Court. The Chair informed the Committee that Ellis J had confirmed that as appeals list Judge, she had followed the practice in which the Court could appoint a counsel for the Child. Although Ellis J considered that the role of counsel for the child and the traditional idea of an amicus had some differences, her Honour considered that the Court itself could set the parameters of the amicus role as appropriate in the case.

The Chair explained that lawyers for the child are regularly appointed by the appeals list judge when there is an appeal from the Family Court at the first appearance. The counsel for the child who has appeared in the Family Court will not always be appointed because sometimes the issues on appeal will not require any liaison with the children or any expression of the child's views. However, more often than not the same person will be appointed. The Court will appoint the lawyer under its inherent jurisdiction and the Judicature Act allows for the payment of the lawyer appointed by the Court. The Chair said that from his point of view as a High Court Judge this procedure worked and no change was necessary, but that it did not mean that this way was right. The Chair asked for the Committee's views on the matter.

Justice Gilbert pointed out that the Law Society did not just want the Committee to assess whether to make provision for a lawyer for the child but also to define the parameters of the role in the same way that the role is provided for by statute in the Family Court. Section 9B of the Family Courts Act 1980 provides, in short, that the role of a lawyer appointed to represent a child or young person in proceedings is to act for the child in a way that promotes their welfare and best interest, ensure that their views are communicated to the court, assist the parties to reach agreement on the matters in dispute and provide advice to the child.

Ms O'Gorman noted that the role in the High Court would be quite a different role; the Chair confirmed that the role could be more limited on appeal. Ms Gorman said that the role on appeal would have to be defined by the judge in that particular case. The Chair said that he was resistant to restrictive drafting in this context limiting roles, because this was not what the High Court Rules generally did. Justice Winkelmann said that the Law Society's point was that the role used to be undefined in the Family Court as well but that it had now been defined; does this mean that when the High Court appoints a lawyer for the child on appeal, the Court is appointing the lawyer to do the same things as specified in the Family Court Act? The problem was the lack of clarity as to what the Judge does when appointing a lawyer in the High Court. The Chair noted that on appeal, it will often not be necessary for the lawyer to revisit the child as required by the Act. However, the main matters set out in s 9B would apply as a matter of common sense. The Chair said that he could not think of any other rule in the High Court Rules which sets out the role of a lawyer in the proceedings.

The Committee decided that it was not necessary to define the role in the High Court Rules. The Chair said that he would contact the Law Society to let them know of this decision.

Action point: the Chair to contact the Law Society to let them know that the Committee did not consider that defining the role of the lawyer for the child was necessary.

6. The availability of summary judgment to defendants

The Law Society had drawn the Committee's attention to the fact that under r 12.12 of the High Court Rules a court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to a cause of action in the statement of claim or to a particular part of any such cause of action. However, the standard is not the same for obtaining summary judgment against the plaintiff: the defendant must satisfy the court that none of the causes of action in the plaintiff's statement can succeed. The Law Society questioned whether it would be desirable to have consistency in this matter.

At the last meeting, the Committee expressed a tentative view that it was not necessary to have consistency in obtaining summary judgment. However, the Committee deferred a full discussion of the matter until Mr Beck was present.

Mr Beck confirmed that the issue was an issue of principle as to why defendants should not be able to get summary judgment when they can show that one of the causes of action cannot succeed when a plaintiff can do this.

The Chair said that at the last meeting the point was made that there is a difference depending upon which party is applying: a plaintiff can succeed on one cause of action alone and the court will not need to deal with any of the other causes of actions. However, with regards to the defendant, just getting rid of one cause of action will often not determine the proceedings. This means that there could be a lot of time wasted in getting rid of one cause of action, but if others remain, the whole exercise will be rather futile. Additionally, the decision on one cause of action could then be appealed and the defendant could use this as a way to delay proceedings. It was also not clear that this procedure would significantly save cost or time.

It was noted that a defendant could apply to strike out one cause of action. However, a strike-out application will often be cleaner as it is not generally possible to go into factual issues.

The Committee agreed that it was not necessary to make any change to the availability of summary judgments to defendants.

Action point: the Chair to contact the Law Society to pass on the Committee's view.

7. Ability to not accept statements of claim on substantive matters

At the last meeting, the Chair raised a final issue concerning the power of the Registrar to not accept documents. Justice Winkelmann had expressed concern over whether the current rules adequately deal with situations of abusive filing of documentation, or huge volumes of documentation. Currently, the Registry can refuse a document which does not comply with the formal requirements, but it is not clear whether the Registrar could do anything about a document which complies with the formal requirements of the rules but raises substantive issues, such as that it is an abuse of process. Following the last meeting, Annie Cao, a Judges' Clerk at the Auckland High Court, prepared a paper on the power under the current rules and the powers provided in other jurisdictions. Justice Gilbert noted that Ms Cao's memorandum was clear and comprehensive.

The Committee agreed that there was a concern about the rare instances where documents are clearly an abuse of process. The Committee agreed that it would like to avoid the situation where a respondent has to respond to vexatious or ridiculous claims.

The Committee discussed the power provided for in New South Wales. These rules allow for a prima facie vexatious document to be referred to a judge to be struck out before it is filed, by way of a formal referral process. The Committee agreed that it would be good to look into this power, in particular, in regards to whether there was a right of appeal in relation to the decision. The Chair said that he could speak to NSW judges to ask further about this system. The Chair also agreed to consult with the Court of Appeal.

Ms Ruth Fairhall noted that the Ministry did not want to give the Registrars the proposed powers.

The Committee agreed that there would be a working group on the issue comprising of Justice Gilbert as the Chair, Mr Rajesh Chlana, who would look into whether any of the Ministry of Justice's work on vexatious litigants would be useful, and Ms O'Gorman. The Chair asked whether this was a significant problem in the District Court as well. Judges Kellar and Gibson confirmed that it was. The Chair said that it would be useful to have the perspective of the District Court. Judge Kellar agreed to provide this.

A draft rule and short consultation paper would be prepared. The Committee agreed that it should be made clear that the proposed power would not affect anything in the Judicature Modernisation Bill.

Action Points: the Chair to speak to NSW Judges about the system in NSW and Court of Appeal Judges. Draft rules and a short consultation paper to be prepared. Mr Chhana to look into the work undertaken by the Ministry of Justice on the matter of vexatious litigants.

8. Recovery Rate for costs in Schedule 2

Mr Beck had raised the issue that the daily recovery rates for costs had not been updated since June/July 2012. Mr Beck confirmed that the Committee assessed the recovery rates every few years in accordance with the changes to the cost for legal services reported in the Producers Price Index.

The Committee agreed in principle that it was appropriate to update the recovery rate. The Clerk would calculate what the percentage increase in the Producers Price Index has been since the recovery rate was last updated and liaise with Mr Beck on this issue.

Ms Gorman asked what the procedure was for the transition period. Mr Beck confirmed that the change would apply only to steps taken after the rule change was made and that there was case law on the matter. The rules could also set out how this would work.

Action point: the Clerk to calculate the percentage increases in costs to legal services and the appropriate increase in daily recovery rates.

9. The reference to "chartered accountant" in the High Court and District Court Rules

The Committee received a request from the Ministry of Business, Innovation and Employment asking it to consider amending the term "chartered accountant" and replacing it with "qualified statutory accountant (within the meaning of section 5(1) of the Financial Reporting Act 2013". This is because, as of 1 July 2015, the Financial Reporting Amendment Act 2014 will replace most legislative references to "chartered accountant" with "qualified statutory accountant" or "qualified statutory auditor", reflecting a policy of allowing members who have reached the equivalent standard to a chartered accountant, but who belong to another accredited professional accounting body, to perform the same accounting and audit functions as chartered accountants.

The Chair noted that the changes to the rules would be small, reflecting the broader definition that is now in general use. The Committee agreed to make the change and that the change should be implemented by 1 July 2015.

The Committee then turned to the current draft High Court Rule changes. These draft rules contained a number of minor proposed changes that the Committee had agreed to such as updating the definition of working day, dates for service by means of post, filing of case management memoranda. It agreed that the small changes in the draft rules should be made, but that the proposed "application without notice" rule should be removed as it would take a while to finalise this rule. The Committee agreed that the rules should be circulated once this rule had been removed and the daily costs recovery rate updated.

Action points: draft rules to be updated and circulated for concurrence

10. District Court Rules – r 5.12

This matter had been brought to the Committee's attention by several practitioners as well as the New Zealand Law Society who were concerned that documents that had filed with a heading on the cover page only had been rejected for filing by the Central Practicing Unit (CPU) because of the Ministry of Justice's new policy that r 5.12 required a heading on the first page of the document. Judge Gibson noted that he had written to Nick Patterson and said that he disagreed with the Ministry's interpretation of the rule. Ms O'Gorman also confirmed that she had received a note from the Ministry saying that documents would be accepted with either one or two headings.

The other issue that had been raised at the last meeting by Andrew Barker was that he had had documents taken at the Registry and then rejected for filing several weeks later. Judge Gibson said that he had been told that the Central Processing Unit would no longer do this: if documents were to be rejected this would only occur when they were handed in for filing.

The Committee then turned to discuss the CPU more generally. Concern was raised about there being a delay. Judge Kellar said that he and Judge Gibson had drafted a set of guidelines for the CPU which would form the basis of a practice note for the CPU. Justice Winkelmann said that the Unit raised a much more fundamental issue of whether the processing of documents should be done somewhere which is away from the Court. She considered that there would be an argument that default judgments that have been issued by the CPU are not judgments issued by the Court as the CPU cannot be considered the Court as it is not located at the Court.

The Chair said that it was arguable that any change of procedure should be brought before some sort of judicial body. Ms Fairhall confirmed that the Ministry was currently consulting with the Courts Consultative Committee. The Committee agreed that the Rules Committee did have an interest in being briefed about changes in practice as these might mean that changes had to be made to the rules.

The Chair asked Ms Fairhall to provide the Committee with a summary of all of the Court functions that have been centralised.

Ms Gorman noted that this issue came out of the issue of the definition of a liquidated demand. At the last meeting, the Committee was happy with the proposed definition to be inserted of a sum that is "quantified in, or can be precisely calculated on the basis of, or by reference to, an enactment relied on by the plaintiff", but did not decide the issue. The Committee agreed that this change should be made.

Action points: Ms Fairhall to provide the Committee with a summary of the centralisation of court functions.

11. Amending form G 36 in the High Court Rules

This matter related to form G 36 of the High Court Rules which refers to r 8.14 when it should refer to r 8.47. The Committee agreed to make this change.

12. Amendments to Criminal Procedure Rules

The proposed amendments had not been received by the Committee so the item was adjourned.

13. Role of the Registrar

The Committee agreed to leave the discussion of this matter until the next meeting.

The meeting closed at 12:50 pm.