The Rules Committee
Te Komiti mō ngā Tikanga Kooti

9 March 2021

Circular 1 of 2021

Minutes of Meeting of 30 November 2020

The meeting called by Agenda 04/20 (C 39 of 2020) began at 10.00 am on 30 November 2020 in the Conference Room at the Supreme Court Complex, Wellington.

Present

Rt Hon Dame Helen Winkelmann GNZM, Chief Justice of New Zealand (Until 11.44 am)
Hon David Parker MP, Attorney-General (Until 10.25 am)
Hon Justice Kós, Special Purposes Appointee and President of the Court of Appeal
Hon Justice Thomas, Chief High Court Judge
Hon Justice Cooke, Chair and Judge of the High Court
His Honour Judge Kellar, District Court Judge
Mr Rajesh Chhana, Deputy Secretary (Policy) in the Ministry of Justice as Representative of the Secretary of Justice (Between 10.00 am and 10.35 am and 10.50 am and 12.21 pm)
Ms Jessica Gorman, Senior Crown Counsel as Representative of Ms Una Jagose, Solicitor-General
Ms Kate Davenport QC, Special Purposes Appointee and New Zealand Bar Association Past-President
Mr Jason McHerron, New Zealand Law Society Representative
Mr Daniel Kalderimis, New Zealand Law Society Representative
Ms Laura O'Gorman, Special Purposes Appointee

In Attendance

Mr Kieron McCarron, Chief Advisor Legal and Policy in the Office of the Chief Justice and Registrar of the Supreme Court
Ms Fiona Leonard, Chief Parliamentary Counsel
Ms Andrea King, Group Manager (Senior Courts) in the Ministry of Justice
Ms Maddie Knight, Secretary to the Rules Committee and Policy Advisor in the Ministry of Justice
Mr Sebastian Hartley, Clerk to the Rules Committee and Judges' Clerk
Ms Kate Pierse-O'Byrne (Private Secretary to the Attorney-General)

Apologies

His Honour Judge Taumaunu, Chief District Court Judge
Hon Justice Dobson, Special Purposes Appointee and Acting Judge of the High Court

2. Improving Access to Civil Justice – Update on Subcommittee's Progress

Justice Cooke began by noting that, at its previous meeting, the Committee agreed to establish a judicial subcommittee to formulate the Committee's response to the numerous submissions received on the Committee's initial consultation on improving access to civil justice. He noted the subcommittee has

met twice and is still formulating a response. It is endeavouring to draw on the themes in the many high-quality submissions received to develop a set of proposals that develop the areas of agreement between submitters. This means the response may differ somewhat from that outlined in the initial consultation document. Some of the potential areas for further discussion relate to matters beyond the Committee's jurisdiction, such as the jurisdictional limit of the Disputes Tribunal. So, some of the subcommittee's response may take the form of advice from the Committee to the Executive.

So far as matters within the Committee's jurisdiction are concerned, at present, the subcommittee is considering a proposal that for all proceedings in the High Court other than particularly complex proceedings, an issues conference will be conducted at the outset of the proceeding. The judge would engage with the parties on the issues in the case. This builds on submitters' comments that early judicial engagement is useful to all parties in helping distil the issues in the case and identify the essential area of dispute. The subcommittee would envisage interlocutory applications being dealt with on the papers, discovery being refined so that it is limited to the disclosure of key documents and adverse documents at the outset of the proceeding only unless the Court is satisfied further disclosure is required. There would be greater emphasis on the documentary record than oral evidence, such that documents in the common bundle would be presumptively admissible as to the truth of their contents rather than merely their existence, and evidence would be given by way of affidavit and cross-examination on the affidavit. All trials would presumptively be conducted on the short-form model using the District Court model, building on the Bar Association's proposal. These are, Justice Cooke noted, only initial proposals, and are subject to further refinement.

The Attorney-General expressed concern that these proposals, as summarised, did not address what he considered the present failings of the District Court's civil jurisdiction, which he was concerned to address. He noted that there are presently very few defended civil trials in that Court, and considered it misguided to modify the High Court Rules (which would also apply in the District Court as part of the general alignment) to address the District Court's malaise. Quite simply, the costs of High Court litigation are unaffordable in District Court cases. It is important that Court functions. Increasing the Disputes Tribunal's jurisdiction to circumvent the issue at the lower end of the District Court's jurisdiction is inappropriate, given the importance of cases for significant amounts being heard by a judge. Accordingly, the Attorney said, radical reform is required in the District Court, even if only on an experimental basis. He voiced support for empowering District Court Judges to adopt an inquisitorial approach to cases, with civil list judges to be given broad power to determine which cases should be dealt with in that manner, and empowering judges to part hear matters, talk directly to witnesses, direct which witnesses they wished to hear, and to interpose witnesses' evidence as part of adopting a more inquisitorial approach.

The Chief Justice suggested several of these points were "hidden in the detail" of the broad summary given by Justice Cooke. For example, the issues conference is intended to be an inquisitorial-type venue for winnowing the issues for trial. Also, as it is, the District Court is already contemplating allowing for part-hearing of matters in more cases.

The Attorney-General acknowledged the possibility that there was more detail in the papers that he had reviewed but said that the current proposals still seem insufficiently radical.

Justice Kós acknowledged that the subcommittee's focus has, to date, been primarily on the interface between the Disputes Tribunal and the District Court in terms of suggesting increases to the Disputes Tribunal's jurisdiction to address access to justice at the bottom end. However, he agreed the District Court's civil jurisdiction is not perceived as functioning adequately at the present time, and the introduction of short form measures there had not, to date, enticed litigation in that forum. Ms Davenport QC similarly observed that increasing the Disputes Tribunal's jurisdiction, unless the District Court's jurisdiction is also increased, will serve to further "squeeze" the District Court's jurisdiction.

The Chief Justice suggested a significant portion of the problems faced in the District Court at present are attributable to institutional issues, such as funding. The Chief High Court Judge agreed, noting the District Court Rules already provide for a significant amount of procedural flexibility, allowing proportionality of expense to be achieved in individual cases, but that until this is utilised, and is seen to work, lawyers will not advise their clients to go to the District Court. Judge Kellar also agreed with this view, noting that, at present, settlement conferences already provide a highly successful means of diverting matters from defended hearings. He identified that there is a willingness on the part of District Court judges to use the extant mechanisms to resolve matters quickly, efficiently, and cheaply. However, he agreed, there is insufficient resourcing at present to allow for judges to participate effectively in these processes. He noted that it is important, in making any changes, to ensure that procedural and substantive justice is still done in each case. Absent further judicial resourcing, this required the current model emphasising adversarial trials to be maintained.

The Attorney-General observed that is correct, but that if the costs of proceedings are too high, litigants simply cannot obtain justice.

Ms Davenport QC stated, and the other representatives of the profession present agreed, that there is simply no faith in the civil jurisdiction of the District Court at present, whatever mechanisms providing flexibility are nominally available. The Attorney-General agreed that this will likely have served to drive a lot of litigation to the High Court, decreasing access to justice.

The Chief High Court Judge reiterated that the rules are currently being well used in terms of judicial settlement conferences but reiterated that the right judges – in terms of skill sets and inclination – and enough time for them to prepare and engage fully, is required. The Chief Justice agreed and noted that registrars with appropriate expertise in civil procedure are required for effective case management, and the creation of the Central Processing Unit destroyed such expertise in the District Court's registries. The Attorney agreed with this comment so far as registrars is concerned.

Ms Davenport QC and Ms O'Gorman expressed support for greater use of issues conferences, provided they represent an effective use of resources. However, they suggested that, based on the present experience in the High Court, issues discussions at case management conferences are rarely useful, given practitioners hope for more clarity after discovery is complete, for instance. Therefore, as this illustrates, they suggest, it is essential that any reforms are well thought through. In particular, they noted, it will likely only be beneficial to have issues conferences in front of a Judge who is allocated to the particular proceeding to manage it through to trial, and maybe beyond. The Chief Justice agreed, noting that the problem with issues conferences on an inquisitorial footing require lawyers to properly prepare, and requires proper judicial resourcing and correctly trained judges.

The Chief Justice noted that the last reform in the District Court intended to increase flexibility and streamline procedure – the information capsule reforms – is widely, and properly, regarded as a disaster, and the District Court Rules being aligned more to the High Court Rules in 2014 was a response to demands from the profession. However, the Committee still did not fully align the two Courts' rules, identifying the appropriateness of greater flexibility in the District Court's jurisdiction. So, she summarised, there is both greater flexibility, but also an informed aversion to radical reforms in the name of flexibility. Those reforms, which were implemented in 2009, the Chief High Court Judge suggested, based on her experience as a District Court Judge sitting at the time, was the beginning of the profession "voting with its feet" and leaving the District Court's civil jurisdiction. She agreed those reforms went too far. Ms Davenport QC agreed the reforms were too radical a change and rendered practitioners unable to effectively engage in court processes.

Justice Cooke noted that the discussion reinforced the need for commensurate cultural and institutional changes in the form of a commitment by the profession to engaging in early resolution of issues, and a need for judges to be willing and able to prioritise usefully assisting with ensuring procedural obligations are kept proportionate to the value of disputes. Mr Kalderimis agreed, noting the Law Society considered it essential that any reforms elicit a commitment from judges and parties to thinking meaningfully, at an early stage, about how to efficiently conduct a proceeding.

The Attorney-General suggested, in this vein, that the subcommittee re-engage with the work of Dr Toy-Cronin as a strong proponent of an inquisitorial approach to case management. The judges present suggested the committee's current thinking, in substance, approaches that kind of approach.

The Attorney, keen for action to follow from these discussions, suggested that potential reforms on that basis serve as the basis of an experimental pilot in the District Court in the near future. As to that, the Chief Justice suggested that adequate resourcing would be required for any pilot to succeed.

The Attorney-General left the meeting at 10.25 am.

Mr Kalderimis noted that, in international arbitration, some arbitrators and arbitral tribunals have had success in using the Kaplan Opening as an inquisitorial-type procedure. In this procedure, a hearing is conducted after the first round of written submissions and witness statements, but prior to the main hearing itself. It is an opportunity for counsel to briefly introduce their respective positions to the tribunal. The parties may even be required or may otherwise wish to serve the tribunal with skeletal arguments in advance. The tribunal gains a better understanding of the case sooner, which facilitates its preparation, and enjoys the opportunity to engage in constructive dialogue with the parties at an earlier stage. This, the Chief Justice and Justice Cooke observed, has similarities to the envisaged issues conferences.

Distilling the themes that had emerged during the above discussion, the Committee generally agreed that the District Court Rules are, in themselves, more fit for purpose than the High Court Rules, and that the problems in the District Court are more institutional (in terms of inadequate resourcing and lack of appropriate expertise in the Court's registry) and cultural. The Committee agreed that any inquisitorial-type reforms would succeed only with adequate resourcing. Justice Kós noted that the case management reforms undertaken in the 1990s were "stress tested" in particular geographic areas before being rolled out nationally, suggesting a similar approach could be taken here to match available

resources. Justice Cooke noted these reforms, owing to limited resourcing, will likely be a longer-term process.

Justice Cooke noted that he and the Chief Justice would be meeting with the Attorney-General on 7 December as part of the subcommittee's consultation with relevant stakeholder and would further discuss the matters raised during the Committee's discussion. It was agreed the subcommittee would consider whether to change its thinking in response to the points raised by the Attorney.

Justice Cooke proposed that an executive summary of the consultations received for publication prepared by the Clerk for the subcommittee (C 49 of 2020) be published on the Committee's website. The Committee agreed with the paper's summary of the submissions, and approved the proposal, subject to the conclusion of the paper being slightly restated to express better the Committee's broad attitude to the need for rules reform hand-in-hand with cultural change and suggested institutional reform, as expressed during the course of the above discussion.

Subcommittee to continue formulation of response to initial consultation, based on further discussions with Attorney-General, and report back to Committee as soon as practicable.

Chair and Clerk to settle final form of executive summary of submissions received for publication on Committee's website, and publish that paper once confirmed.

1. Formal Agenda Items

The minutes of the Committee's meeting of 21 September 2020 (C 39 of 2020) were confirmed, and the apologies of the Chief District Court Judge and Justice Dobson received and accepted.

The Committee welcomed Mr Daniel Kalderimis, a member of the independent bar based in Wellington and lately a partner at Chapman Tripp's office in that city, to his first meeting of the Rules Committee. Mr Kalderimis had been recently appointed to a three-year term as a member of the Committee by the Chief Justice as the nominee of the Council of the New Zealand Law Society. Mr Kalderimis noted his excitement at his appointment, and his keenness to contribute to the work of the Committee.

Mr Chhana left the meeting at 10.35 am.

3. Costs for Lay Litigants – Response to Initial Consultation

The Committee received the responses to its initial consultation paper on reform of the costs regime with respect to the position of lay litigants (CC 41 and 41A of 2020), together with a brief summary the Clerk had prepared of the responses (C 49 of 2020). Justice Cooke noted that there was an even split of views as between submitters as to whether the primary rule precluding the award of costs to lay litigants should be abrogated, but almost unanimous consensus that, if the rule is abrogated, a modified scale approach should be used to award lay litigants costs. There was also universal consensus that, if the primary rule is not abrogated, the lawyer-in-person exception should be abolished as invidious. Views were divided, however, on whether, if the primary rule is not abrogated, employed lawyers should remain eligible for an award of costs.

Mr Chhana returned to the meeting at 10.50 am.

The Committee agreed that it was appropriate for it, rather than Parliament, to proceed to consider the issue, noting the clear indication from the Supreme Court in its decision in *McGuire* that the Rules Committee is the most appropriate body to undertake these reforms. Absent the Ministry of Justice taking the initiative in respect of these reforms – and it was agreed that was unlikely to occur in the near future – no other body had the relevant competence and would be likely to regard reform of this area of the costs regime as a priority.

Justice Cooke noted that, so far as the first question (regarding abrogation of the primary rule) is concerned, there is likely no "correct answer", it ultimately being a policy decision.

Justice Kós suggested the first question is not in fact the first question, but rather the first question is as to the conceptual foundation of the costs regime. That is, the first question is "what are costs?" He suggested that, if costs are viewed as an indemnity or partial indemnity for out of pocket expenses, the exceptions cannot be justified. If costs are viewed as an award of an amount deemed to be reasonable for particular items of work done that was required to be done to allow a party to prevail in litigation, then the primary rule is unjustifiable, as if a successful lay litigant has done that work, then they ought to be recompensed. He noted it is wrong to suggest, as some submitters did, that, if the primary rule is abrogated, then represented parties will not be compensated for opportunity costs while unrepresented parties will be so compensated. In fact, the Judge concluded, nobody will be being compensated for their opportunity costs. This, he says, flows from the definition of costs adopted.

Mr Kalderimis noted that this, in substance, was the view that had animated the side of the New Zealand Law Society in favour of the abolition of the primary rule.

Mr McHerron noted the arguments against repealing the primary rule voiced in submissions. Some of these centred on the unfairness of a litigant-in-person themselves unable to pay costs if unsuccessful being able to obtain an award of costs if successful. In response to this, other members noted that security for costs can address many of these concerns. Also, it was noted, that if a litigant-in-person succeeds, they ought to be able to claim an award of costs, just as could a successful impecunious party.

Mr McHerron also noted the argument, advanced by many submitters, that abolishing the primary rule will incentivise litigation by litigants-in-person, who burden the system and crowd out other court users. This was regarded as being in tension, as a matter of policy, with the importance of maintaining access to justice for those unable to be represented, and the value of equal treatment before the law. The Chief Justice noted that the preserve afforded to lawyers in older times, which had also generated the primary rule, was increasingly unsustainable given the clear recognition of the justice gap, and the high cost of legal services being part of that justice gap.

Having considered these points, the Committee nonetheless agreed in principle to abolish the primary rule and adopt expressly the rationale for the costs regime voiced by Justice Kós.

It was also agreed that lawyers who appear as self-represented litigants should be in the same position as all other litigants-in-person. This follows from the rationale for costs just described, and in any event the current distinction is unsustainable on policy grounds, as is incentivising lawyers to represent themselves. Even if the primary rule is not abrogated, the lawyer-in-person distinction ought to be.

As to how the quantum of lay litigants' costs is to be determined, Justice Cooke suggested that, if the Committee determined to award lay litigants some reward for work done that is deemed to be reasonable, the appropriate basis for an award of costs for lay litigants would be to introduce a new daily recovery rate for use with unrepresented litigants in accordance with the current scale. Mr Kalderimis noted that the fact New Zealand already uses a schedular approach of deemed reasonableness means introducing reforms involves much less radical change than it would in say, England, where taxation remains the basis of assessing costs. Ms Davenport QC noted the desirability of maintaining the current schedular approach to costs as much as possible, serving, as it does, as a predictable and expeditious means of fixing costs. The Chief Justice agreed that abolishing the primary rule would not be particularly radical, comparatively speaking, and in fact serve to align New Zealand with the position already in place in England and some Australian jurisdictions.

Justice Kós suggested three recovery rates – one for parties represented by independent counsel, one for parties represented by employed lawyers, and unrepresented litigants. He suggested a flat rate of daily recovery amounting to recovery of about $25/hour would be a suitable if "rough and ready" approach to fixing the rate of recovery. The Chief Justice, Ms O'Gorman, and Mr Kalderimis considered that, in fixing a recovery rate, any notion of recognising opportunity cost should be eschewed (which notion they observed featured in submissions).

The Chief Justice, Ms O'Gorman, and Mr Kalderimis further agreed some distinction should be drawn between parties represented by independent counsel and those represented by employed solicitors. Mr McHerron also noted that distinguishing between independent counsel and others supports one of the rationales seem by some New Zealand Law Society members to justify the primary rule; incentivising parties to seek independent legal representation.

The Chief Justice noted this entrenches a policy assessment, which she supports, that it is preferable for parties to be represented by independent counsel rather than employed solicitors. She observed, however, that "the ship has sailed" in terms of discouraging corporate entities from being represented by in-house counsel, such that she did not support treating parties represented by employed solicitors the same as unrepresented parties.

Ms O'Gorman agreed that parties represented by employed solicitors should not be treated the same as unrepresented parties, noting that a distinction between the two can be justified on the basis that organisations such as Auckland Council (who made a submission) recognise a real efficiency gain in employing in-house lawyers, and that they are still subject to ethical obligations as lawyers and officers of the Court.

The Chief Justice demurred from this assessment of in-house lawyers' independence in a true sense, compared to independent counsel, reiterating her view that it is preferable for the Courts to incentivise retention of independent counsel. She accepted however that the Crown Law Office are distinct in this sense from most employed solicitors, truly being an independent law firm within the government, such that they ought to be distinguished from litigants-in-person in any event. She expressed concerns, however, that using the independent counsel rate for employed solicitors would be significantly over-compensating their employers, given they do not have the same overheads incorporated in their charge-out rate (if that is ascertainable) as independent counsel.

Justice Cooke noted that it is not necessary, given the conceptual foundation noted above, to identify the opportunity cost associated with employing in-house counsel to off-set that through a costs award. Rather, like all other parties, an amount deemed to be reasonable would be paid to them. Mr Kalderimis noted that it is desirable to move away from any idea of indemnity or partial indemnity as being the basis for the making of a reasonable contribution. It should simply be a reward for work done deemed to be reasonable. Accordingly, there must be an overriding reasonableness cap.

This prompted discussion of whether it is necessary to maintain the indemnity principle embodied in r 14.2(1)(f), at least in respect of those represented by independent counsel, given their costs are very rarely less than the scale amount. Views on the Committee were divided on this point. Those in favour of removing r 14.2(1)(f) emphasised it is rarely the case that actual costs are less than scale costs, and that the true value of the cap on actuals is to encourage restraint, which an overriding reasonableness requirement would also achieve. Those against removing r 14.2(1)(f) thought the cap nonetheless had value in helping avoid excessive recovery and profiteering, and in encouraging restraint and efficient working by counsel. It was thought that a deeming rule for self-represented litigants and those represented by employed counsel could be instituted to change the law, simply and elegantly, while maintaining the current rules for those represented by independent counsel. Some concern was expressed to avoid over-complicating the costs regime in making any modifications.

Addressing other issues seen to arise from submissions, the Committee:

- noted the need to consider the position of prisoners, both in the practical respects seen to arise from the Department of Corrections' submissions, and in terms of any legislative constraints that might prevent prisoners from obtaining an award of costs.
- did not consider it necessary to promote any reforms to respond to Meredith Connell's submission that parties being represented pro bono who succeed should be entitled to a reform of costs. It was considered that, under the current rules, if a party is represented pro bono pursuant to a contingent fee arrangement or is invoiced on the basis that the invoice is payable only if the party succeeds, there is no prohibition on them receiving costs, r 14.2(1)(f) notwithstanding.

The Committee agreed in principle to abolish the primary rule preventing self-represented litigants from receiving an award of costs, with costs for self-represented litigants to be awarded according to the current scale at a new daily recovery rate, to be agreed. This follows from an express reconceptualisation of costs as a reward for work done in prevailing in litigation at a rate deemed to be reasonable, according to scale, without any reference to concepts of indemnity or partial indemnity. This avoids any requirement to reimburse parties for opportunity costs incurred in connection with participating in litigation.

The continued distinction between self-represented and represent litigants is considered justifiable by reference to the desirability of encouraging those able to obtain independent legal representation to do so while attempting to mitigate, to the greatest extent possible, inequality of treatment.

Some distinction may be drawn between those represented by employed lawyers (except the Crown Law Office) and those represented by independent counsel, reflecting the same policy justification. However, those represented by employed lawyers are not to be treated as self-represented for the purposes of the cost regime.

Lawyers-in-person are to be treated the same as other self-represented litigants for the purposes of the costs regime.

The Clerk is to prepare a policy paper setting out the Committee's new conceptualisation of costs, rationale for reform, and proposed reforms (at a general level) in the above terms, noting advice received from the Crown Law Office and Ministry of Justice on the issue of prisoners, and the options identified as to the scales on which awards of costs will be made to different categories of litigants, with a particular focus on the position of employed lawyers. The paper is to assume the Committee will decide to abolish r 14.2(1)(f), at least so far as litigants in person are concerned. This is to be ready for consideration at the Committee's next meeting.

4. Strike-Out on Own Initiative of Interlocutory Applications and Proceedings

Justice Cooke recounted the Committee's discussions at its last meeting as to whether the procedure in rr 5.35A-5.35C of the High Court Rules 2016 allowing proceedings to be struck out before service should be expanded to interlocutory applications, and, separately, allowing Judges to strike out of their own motion proceedings that ought to have been referred to them under r 5.35A before service but were not.

The Committee noted that the Clerk had provided copies of the records related to the promulgation of rr 5.35A-5.35C (C 38 of 2020) and the Clerk's summary of the same (C 40 of 2020).

Cooke J, having reviewed the records, considered the arguments for leaving the Rules as they are as being that rr 5.35A-5.35C were only intended to cover proceedings identified as abusive on filing, there are access to justice concerns about going further, that the ambit of the rules as promulgated in 2018 were recently and thoroughly considered, and that powers are available under the inherent jurisdiction. He identified the arguments in favour as extension as being that, since promulgated, rr 5.35A-5.35B have been used only in extreme cases, a clear test has been developed, that while other powers exist it is more transparent to have these in the rule, and that the limitations on 5.35A can be seen, as requests to expand their ambit reflect, as somewhat arbitrary.

Mr McHerron noted that there is a distinction to be drawn between the situation apprehended by rr 5.35A-5.35B, which rules serve to "nip in the bud" a plainly abusive proceeding before service, and that in the other situations under discussion, where a proceeding is already underway. That being said, Mr McHerron agreed that r 15.1 could be amended to clarify that the Court has the power to strike out proceedings of its own motion (spelling out the inherent jurisdiction preserved by that rule) and identified that it could potentially be expanded to include interlocutory applications. Ms O'Gorman agreed there was merit in this proposal.

The Chief Justice noted that r 15.1 contemplates service, and that the purpose of rr 5.35A and 5.35B is to avoid people being harassed. Mr McHerron noted amendments to r 15.1 could address this concern but accepted a further point from the Chief Justice that powers relating to the striking out of interlocutories might more logically be housed in Part 7 of the rules. It was agreed, however, that it would be logical for r 15.1 to be amended to clarify the power of judges to strike out proceedings of their own initiative that "get past the registry" but ought to have been referred to judges under r 5.35A.

The Committee agreed to insert a new provision equivalent to r 5.35B into Part 7 of the High Court Rules 2016 to address abusive interlocutory applications.

The Committee was less enthused about the proposal to introduce provisions into the rules allowing Judges to strike out of their own motion proceedings that ought to have been referred to them under r 5.35A before service but were not.

Members of the Committee noted that the present framing of r 5.35A was intended to respond to concerns that the unilateral strike-out power under that provision should not "hangover" the whole proceeding, the rr 5.35A-5.35B procedure having been intended to clarify, and impose clear time limits on, the existing administrative processes then in place.

Mr Kalderimis noted that the rr 5.35B and 15.1 standards for strike out were quite different, the r 5.35B standard being much more restrictive, such that anything that ought to have been struck out under 5.35B will certainly be eligible for strike out under 15.1. In that sense, he suggested, it is not significantly widening the ambit of r 15.1 to make it clear cases can be struck out of the Court's own motion under its inherent jurisdiction to avoid abuse of its processes, if this is seen as clarifying the extent of a r 5.35B type powers. Others noted that the r 5.35B power, being one capable of being exercised on the Court's own motion without notice, is intended to be narrower than the inherent jurisdiction preserved by r 15.1(4). Mr Kalderimis asked whether that meant the inherent jurisdiction referred to in r 15.1(4) is to be understood as applying only where r 5.35B would be satisfied – a significant narrowing of the inherent jurisdiction as it was once thought to apply.

Mr McHerron wondered if this distinction would actually arise an issue in practice. As a matter of practice, a Judge would call a telephone conference where thinking of striking out of their own motion under the inherent jurisdiction to hear from counsel from the other side, and the party affected/their counsel, if only briefly. Justice Cooke noted that may well be the case but had used the inherent jurisdiction without reference to the parties where he felt something ought not to have got past the registry without referral under r 5.35A.

Overall however, it was considered that too small a number of cases that ought to be being struck under r 5.35B were escaping referral under r 5.35A to warrant further action on this proposal. This on the basis that, pursuant to the Committee's guiding principles, modifying the rules to deal with a small category of cases is undesirable. This despite the argument from the perspective that introducing a clearer provision into the Rules would be consistent with the concern to make the rules of court as transparent as possible. Therefore, no modifications to r 15.1 allowing Judges to strike out of their own motions proceedings that ought to have been referred to them under r 5.35A before service but were not would be introduced, given this it could be achieved under the inherent jurisdiction anyway.

The Committee agreed in principle to introducing a provision into the High Court Rules 2016 allowing judges to strike out of their own motion abusive interlocutory applications before service.

The Committee did not consider it necessary to introduce a provision expressly authorising Judges to strike out of their own motion proceedings that ought to have been referred to them under r 5.35A before service, considering the small number of cases in which this situation arises can be properly addressed within the Court's inherent jurisdiction in a tolerably transparent manner.

Parliamentary Counsel Office to provide draft amendment rules for consideration introducing provisions analogous to r 5.35B into Part 7 of the High Court Rules 2016 to allow for striking out before service on the Court's own motion of abusive interlocutory applications.

Consideration to be given by the Committee in the future as whether to clarify the expansion of this power to abusive originating applications, which are not capable of being dismissed under r 5.35B. Parliamentary Counsel Office to provide draft amendment rules capable of achieving this reform for review by the Committee as part of this future consideration.

10. Court of Appeal (Civil) Rules 2005 – Proposals from the Court of Appeal Judges

Justice Kós tabled and commended to the Committee for consideration a memorandum from the Judges and registry staff of the Court of Appeal proposing significant revisions to be Court of Appeal (Civil) Rules 2005 (C 48 of 2020). He referred the Committee to his memorandum covering the draft rules changes for an explanation of the rationale for the proposed changes, and their intended effect.

The Chief Justice expressed concerns that certain new proposed rules might represent an access to justice impediment, creating barriers to justice for unrepresented litigants who might be unable to reasonably be expected to understand the process for applying for a waiver of filing fees or an exemption from having to pay security for costs, which would be required to be dealt with before the appeal could progress. Overall, she noted the confusing relationship between the rules for grants of legal aid, the security for costs regime, and the various procedural requirements for getting a hearing date for an appeal. She understood the proposed rules would prevent appeals from languishing, but considered there to be access to justice implications, and that the proposed reforms would likely cause significant work for the registry and for the judges in dealing with miscellaneous motions.

Justice Kós suggested that, since 2018, when the Chief Justice was last actively involved in administering these processes in the Court of Appeal, reforms had meant the security for costs process had seldom held up the allocation of a hearing date, and that the registry had become very good at explaining the labyrinth of relevant rules to appellants. He acceded however to the Chief Justice's request that he obtain the registry's view as to whether the "tripwires" the intersection of these aspects of the rules represents were causing problems in practice.

The Chief Justice otherwise expressed support for the proposals, as did the other members of the Committee, subject to:

- the views of the Court of Appeal registry on this point being canvassed;
- any vires issues relevant to the proposed r 4(3) (a general provision permitting the Court or a Judge to authorise a departure from the Rules in cases of urgency or where the interests of justice require) being addressed by the Parliamentary Counsel Office and Crown Law Office as part of the whole-of-government workstream on future emergency preparedness; and
- the correction of any minor cross-referencing and typographical issues.

Committee to further consider proposed reforms at its next meeting in light of further advice received in respect of issues identified above from Parliamentary Counsel Office/Crown Law Office/Ministry of Justice.

The Chief Justice left the meeting at 11.44 am.

6. Preparedness for Future Emergencies – Vires Issues

At the last meeting of the Committee, Mr McHerron expressed concerns regarding whether the Committee's proposed emergency preparedness amendment rules (drafts of which are contained in C 28 of 2020) are intra vires the Committee's rule-makings power, expressing concerns the proposed rules amounted to an unlawful delegation of legislative powers from the Committee to the Heads of Bench. Mr McHerron provided a memorandum (C 43 of 2020) developing these views.

The Committee agreed to Justice Cooke's suggestion that the advice of the Parliamentary Counsel Office and Crown Law Office be obtained with respect to the suggested vires issues, the Committee not being the appropriate place to resolve that legal question.

Justice Cooke to write to Parliamentary Counsel Office and Crown Law Office seeking an opinion on the vires issue identified by Mr McHerron in his memorandum C 42 of 2020, with Clerk to assist as required.

5. Electronic Filing in the High Court
8. Electronic Filing in the District Court

Mr Chhana referred the committee to C 42 of 2020, a memorandum from the joint Ministry-judicial working group updating the Committee as to its progress in addressing the administrative and operational issues touching on the implementation of electronic filing in the High Court.

Ms King spoke to the memorandum at a high level, noting the work of that working group represents a desire to build on the experience of electronic filing during the COVID-19 emergency and take advantage of the recently introduced File and Pay System, of which there was slow initial uptake, but which is being used by more and more court users and is apparently successful. She identified that, until a comprehensive electronic file management system is in place, the Court may be obliged to maintain a paper file, even while seeking to accommodate and encourage electronic filing.

The working group's indicative proposal of how to promote these objectives is set out, Ms King explains, in C 42 of 2020. These generally correspond to the proposals previously outlined in CC 13, 19, 23, and 27 of 2020 as discussed by the Committee on 29 June and 21 September 2020.

In summary, it is envisaged that the Committee will amend the rules to correspond with the emerging operational position by:

- maintaining a technology-neutral definition of electronic filing be maintained, to allow for new systems and processes to be implemented operationally without precipitating continual rules reform;
- authorising all documents other than original copies of wills being able to be filed electronically;
- requiring that documents be presumptively filed electronically (from which requirement lay litigants would be exempted);
- providing for the issuing of Chief Judge's practice notes on an administrative basis to clarify the operation of electronic filing systems as these are introduced and upgraded from time to time, in accordance with the emphasis on operational flexibility noted above;
- maintaining clear provisions determining when documents are to be treated as having been filed;

- maintaining the current formal requirements for the formatting of documents will be maintained, recognising that these are familiar, and many documents will still be looked at by judges in hard copies.

The Committee agreed in principle with the broad outline of a rules response to the work of the joint Ministry-judicial working group, subject, members of the profession requested, to the rules regarding electronic filing of large documents being clarified in any practice direction eventually issued.

Mr Chhana spoke to a memorandum from the Ministry of Justice (C 45 of 2020) proposing that the District Court Rules 2014 be amended to authorise the File and Pay system being used in the District Court by avoiding the need for duplicate physical submissions to be filed to comply with the Rules. He identified an issue remains as to how to shape any amendment rule, as File and Pay is only being used for only certain types of documents in the District Court at the moment (whereas in the High Court it is available across the board). He identified a rule being shaped that allowed the Chief Judge to dispense with a general prohibition on using documents for electronic filing by practice note was one option, and another was to list in the rules the type of applications able to be filed electronically (which list, he noted, would need to be regularly updated and may become unwieldy). It was noted that both approaches have obvious disadvantages, and that it was best further considered as part of the same workstream addressing the implementation of electronic filing in the High Court.

The Committee agreed to the amalgamation of these items moving forward.

The Committee received with thanks the updates contained in C 42 of 2020. The joint Ministry-judicial working group will provide the Committee with more detailed proposals for rules reform for consideration by the Committee at its next meeting.

The Committee received with thanks the advice contained in C 45 of 2020 and will receive further advice from the Ministry when progress is made on formulating a framing of the necessary amendments to the District Court Rules.

7. Update on Progress to Concurrence of Previously Agreed Amendment Rules

Mr Chhana provided the Committee with an oral update on the progress to concurrence of previously agreed amendment rules. He noted that the current package of Amendment Rules as approved previously by the Committee is comprised of the:

- District Court Amendment Rules 2020;
- High Court Amendment Rules (No 2) 2020;
- High Court (Personal Property Securities) Amendment Rules 2020;
- Court of Appeal (Civil) Amendment Rules 2020;
- Court of Appeal (Criminal) Amendment Rules 2020;
- Supreme Court Amendment Rules 2020; and
- Criminal Procedure Amendment Rules 2020.

Concurrence has been received for all sets of Amendment Rules except the District Court Amendment Rules and High Court Amendment Rules (No 2). These have not yet been circulated for concurrence because the possibility of further amendments related to electronic filing being progressed in the immediate future was raised at the Committee's meeting of 21 September 2020. However, the

Amendment Rules as they currently stand will now be circulated for concurrence and immediate progression because, as just discussed, the amendments related to electronic filing will instead be progressed at a later date as part of a separate reform package.

The Ministry advises that the delay in obtaining concurrence for these two sets of amendment rules has not affected the progression of the other rules described above through Cabinet because of the impact of the General Election, which has resulted in limited Cabinet time being available (which is also being reduced by priority being given to matters related to the COVID-19 pandemic).

The Ministry advises that, once formal concurrence is received, it is anticipated that all of the amendment rules noted above will be able to progress through Cabinet in a single package and should be able to come into force in early 2021.

The Committee received with thanks the oral update from the Ministry as to the progression of these previously agreed amendment rules through concurrence to Cabinet and promulgation.

9. Representative Actions and Litigation Funding Reform

At its previous meeting, the Committee agreed in principle to work alongside the Law Commission in its present review of the law in this area. Justice Cooke referred the Committee to C 47 of 2020, a memorandum detailing his interactions with the Law Commission since the Committee's last meeting.

Justice Cooke asked the Committee to determine how best to interact with the Law Commission in collaborating in this manner. He noted that the groups represented on the Committee will have separate interactions with the Commission, which this collaboration is not intended to supplant.

The Committee considered it would be most useful to invite the President of the Commission, who is the Commissioner responsible for this area of work, to attend the Committee's 22 March 2021 meeting to discuss areas for potential collaboration arising from the Commission's Issues Paper, which is due for release in the near future. This was considered preferable to the appointment of a sub-committee as a means of interacting with the Commission. It was suggested this would allow the Committee to offer its views to the Commission while the Commission is in the process of establishing its preferred approach so far as any suggested changes to the Rules are contemplated by the Committee.

Justice Cooke also referred the Committee to C 50 of 2020, a copy of the Supreme Court's recently delivered decision in *Southern Response Ltd v Ross* [2020] NZSC 126, pending the delivery of which the Committee had previously decided to suspend its own work on amending r 4.24 of the High Court Rules 2016 (which was first suspended in late 2019 following the decision of the Court of Appeal in *Ross*).

The Committee agreed that it may be appropriate for the Committee to resurrect that workstream and promote rules reforms in advance of any eventual legislative response to the Commission's work, given the desirability of a clearer regulatory scheme than that provided by r 4.24 being put in place before a legislative response is implemented, which could take 3-4 years. Co-operation with the Commission will help the Committee ensure any reforms implemented in the interim are consonant with the Commission's proposals and respond appropriately to the policy concerns identified therein. Mr Kalderimis offered his view that the profession will likely support the Committee staking such a step.

Justice Cooke to write on behalf of the Committee inviting the President of the Law Commission to attend the Committee's 22 March 2021. In anticipation of that meeting, the Clerk is to circulate Law Commission's Issues Paper in respect of this area once that is published.

Committee, following discussions at its 22 March 2021 meeting with President of the Law Commission, to consider promoting rules reforms providing a more detailed regulatory scheme to govern representative proceedings, based on the Committee's previous work in this area, until such a time as any proposals by the Commission are enacted. Clerk to circulate relevant documents ahead of the next meeting of the Committee.

11. Contributions to Costs of Court-Appointed Counsel

The Committee considered Judge Tuohy's recent judgment in Carmody v Bishop, which the Judge has forwarded to the Committee for consideration (C 44 of 2020). In his brief judgment, the Judge expresses the view that the District Court has no power to order a contribution by a party towards the costs of counsel appointed by the Court to cross-examine a witness on behalf of an unrepresented litigant pursuant to s 95(2) of the Evidence Act 2006, so far as civil matters are concerned. The Judge thought the Rules Committee might wish to consider whether that position should be altered.

Judge Kellar spoke to the judgment, considering the view at which the Judge arrived – that he had no jurisdiction to order a contribution by a party towards the costs of counsel appointed by the Court to cross-examine a witness in a civil matter – was correct. He noted that the position would be the same in the High Court, and that legislative amendments would be required to alter the position.

By way of background, Judge Kellar noted that the s 95 procedure is routinely used in the District Court's civil jurisdiction in Harassment Act matters, and that the costs burden for parties ordered to make contributions could be significant, given hearings in such matters can last for as long as five days. He observed that, in the Family Court, since 2014, there has been a presumption that the parties to Care of Children Act matters will pay two-thirds of the costs for lawyer for the child, except in cases of serious hardship or other exceptional circumstances. He notes that presumption is presently under review.

The Committee agreed that, given the points noted by Judge Kellar, this was a matter best addressed by the Ministry of Justice.

The Committee determined to invite the Ministry of Justice to consider whether to propose Parliament amend the Senior Courts Act 2016 and District Court Act 2016 to afford the High Court and District Court jurisdiction to make a costs contribution order against parties to proceedings in which counsel is appointed pursuant to s 95(2) of the Evidence Act 2006.

12. Manner of Bringing Applications Under ss 316 and 317 of the Property Law Act 2007

The Committee considered correspondence from Ms Storey, a junior barrister in Auckland, inviting the Committee to consider whether r 19.2 of the High Court Rules 2016 should be amended to require applications to modify or extinguish a covenant under ss 316 and 317 of the Property Law Act 2007 to be brought by way of originating application (C 37 of 2020). Ms Storey suggested such an amendment may be appropriate because, it appears from her research, that leave is routinely granted, and it might therefore be appropriate for parties to be spared the inconvenience expense of having to apply for leave to proceed under Part 19 when leave will very likely issue in any case.

The Committee agreed to Ms Storey's suggestion, considering it entirely apt.

Responding to a comment made by Ms Storey in her correspondence, Justice Cooke raised the question of whether there are any other types of applications that should be brought within r 19.2. The Ministry advised that it is already in the process of looking for other applications that should be brought within r 19.2. The members of the profession present agreed to seek comment from other practitioners on whether any other types of applications should be added.

Parliamentary Counsel Office to incorporate amendments including applications under ss 316 and 317 of the Property Law Act 2007 in the list in r 19.2 of the High Court Rules 2016 in the next omnibus amendment rules.

Ministry of Justice to report to Committee on other applications that might usefully be included in the list in r 19.2 at the Committee's next meeting, and practitioner members of Committee to seek input from profession as to any potentially useful additions to that list.

13. Thanks to Outgoing Committee Members

The Chair acknowledged the service of Justice Venning, who had resigned his special purposes appointment shortly before the meeting. He acknowledged Justice Venning's many years of service to the Committee, including during his tenure as Chief High Court Judge, and in particular the Judge's extensive knowledge of the rules and valuable insights into the administration of the High Court.

The Chair also acknowledged Justice Dobson's imminent departure from the Committee. Justice Dobson retired as chair following his retirement as a Judge of the High Court in July but having agreed to remain as a special purposes appointee until the end of the year. Justice Cooke acknowledged Justice Dobson's years of service to the Committee, including as Chair.

The meeting closed at 12.21 pm.

The next meeting of the Committee is scheduled to begin at 10.00 am on 22 March 2021.

Justice Francis Cooke
Chair