The Rules Committee

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9 April 2014
Minutes 02/14

Circular 29 of 2014

Minutes of meeting held on 31 March 2014

The meeting called by Agenda 02/2014 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 31 March 2014.

1. Preliminary

In Attendance

Hon Justice Asher (the Chair)
Rt Hon Dame Sian Elias, GNZM, Chief Justice of New Zealand
Hon Justice Gilbert
Judge Gibson
Judge Kellar
Ms Cheryl Gwyn, Crown Law
Mr Bruce Gray QC, New Zealand Law Society representative
Mr Andrew Beck, New Zealand Law Society representative
Mr Andrew Barker, New Zealand Bar Association representative
Ms Laura O'Gorman
Mr Bill Moore, Special Parliamentary Counsel, Parliamentary Counsel Office
Mr Kieron McCarron, Judicial Administrator to the Chief Justice

Ms Jennie Marjoribanks, Secretary to the Rules Committee
Mr Thomas Cleary, Clerk to the Rules Committee

Apologies

Hon Christopher Finlayson QC, Attorney-General
Hon Justice Winkelmann, Chief High Court Judge
Judge Doogue, Chief District Court Judge
Mr Frank McLaughlin, Deputy Secretary, Ministry of Justice

Confirmation of minutes

The minutes of 10 February 2014 were confirmed.

Matters arising

The Chair was delighted that Judge Gibson had been re-appointed to the Committee, this time as the District Court Judge representative. The Chair also welcomed Judge Kellar who has been appointed as a member for special purposes. The Committee was pleased to have Judge Kellar appointed to the Committee, with Judge Kellar being well qualified for many reasons, including having recently been on the sub-committee that produced the new District Court Rules.

2. Report on the New District Court Rules

Judge Gibson updated the Committee on the progress of the new District Court Rules. The new District Court Rules received concurrence on 13 March 2014. Currently the rules were with the Ministry of Justice and it was expected that an Order in Council would be made soon with the Rules coming into force on 1 July 2014. This commencement date would be checked with the Ministry.

The Committee discussed whether it would be helpful to run seminars on the new District Court Rules in the major centres. This would enable practitioners to understand the differences between the District Court Rules and the High Court Rules. Judge Gibson agreed to investigate this further.

3. Interlocutory Appellate Pathway

At the last meeting the Committee decided to make a submission on of cl 57 of the Judicature Modernisation Bill. Clause 57 would require leave to appeal any interlocutory decision. The Chair explained that submissions had been drafted but following further discussions the Committee decided not to make a submission. This was because of the Committee's role, and its membership. There has been a submission filed by the Chief Justice in consultation with the Heads of Bench. While the Committee had not made a submission, the Committee will continue to have a keen interest in the Select Committee's decision regarding a leave requirement for interlocutory appeals. The Chair thanked Ms Laura O'Gorman and Mr Andrew Barker for their work.

The Committee turned to consider an example of where the existing interlocutory appellate pathway proved problematic. Ms O'Gorman gave a recent example of where strike out and summary judgment applications had been filed together. The applications were heard together by an Associate Judge. Following the Court issuing its decisions, a party then sought to appeal against both decisions. The problem was that the strike out decision was heard in the Chambers jurisdiction and so could only be reviewed by a High Court Judge. while the decision granting summary judgment had to be appealed to the Court of Appeal. Ms O'Gorman considered this bifurcate appeal process problematic. The Committee agreed. However, this problem was caused by the Judicature Act 1908 and so it was a legislative problem that the Committee could not fix. The Committee looked forward to this and other similar problems being remedied by the Judicature Modernisation Bill.

4. Case Management of Judicial Review Proceedings

Mr Andrew Beck presented the draft rules for the case management of judicial review proceedings to the Committee. Mr Beck explained that these draft rules were modelled on the rules for case managing appeals and incorporated amendments arising from discussions with Cooper J, the judicial review list judge at the Auckland High Court. The draft rules reflect the Auckland practice of having a case management conference as soon as possible after the proceeding has been filed and before a statement of defence is filed. This is necessary in order to address critical matters such as who the defendants are, what orders are required to have the record of the decision-maker produced, and whether any applications for interim relief are to be made. While the rules provided some direction, Mr Beck stressed that the draft rules retained sufficient flexibility as to how judicial review proceedings were managed.

The Committee provisionally agreed to the draft rules with the following amdnements. The Committee considered that the reference to a "judicial review list" in draft r 7.17(2) should be deleted. Only the Auckland High Court had a judicial review list and not all Courts would have such a list. The Committee also considered that discovery should be added at (d) to the list of possible directions in r 7.18 to make it clear that discovery orders could be made at the case management conference.

While agreeing to the substantive rules, the Committee questioned the need for a further schedule setting out what issues needed to be addressed in the case management conference. Mr Bruce Gray QC observed that when the Committee was formulating the new case management rules, the Committee intended the rules to provide a menu of powers for a judge to exercise as appropriate. While it was necessary to have separate rules for the case management of judicial review proceeding, the new Schedule 10 overlapped significantly with Schedule 5. The matters in Schedule 5 were intended to provide a detailed set of matters that could be addressed at a case management conference. Rather than create a new schedule, Mr Gray suggested the Committee first look at Schedule 5 and see whether it lacked any matters that the proposed Schedule 10 included. If not, was it possible to avoid introducing a new schedule. The Committee agreed that it was preferable to not insert a new schedule if possible and this needed to be looked at.

Action point: The Committee provisionally agreed to the draft rules with the amendments to the draft rules: deleting r 7.17(2) and including (d) "scope of discovery" in r 7.18(d). The Clerk will look at Schedule 5 and the matters listed to see if all the matters needed to be addressed had been as well as the order making power in r 7.43A. The Committee will return to this topic next meeting.

5. Access to Court Documents

The Chair explained that applications to access court documents were made frequently to the Auckland High Court. The media often seek to see files after a proceeding to glean information about someone or something and an interested party may seek information from the court file for their own purposes or edification. Frequently such applications provided only minimal details about the purpose of the request. While applications are made frequently, it was considered that the rules are not clearly structured and that it would be desirable to clarify the rules so that applicants could better understand the requirements and comply with the formal requirements such as including the purpose of the request.

The Committee agreed that it was desirable to clarify these rules. Various members in the Committee questioned whether the existing rules or the proposed draft rules struck the right balance between allowing persons to have access to documents while maintaining the courts' control over documents and protecting parties' privacy interests. As Mr Gray pointed out, the purpose behind allowing others to access court documents was to facilitate open justice. However, often documents that are in the court file may not have been relied on in evidence or may have actively been discredited and so the purpose of open justice does not apply so much to these documents. Further, open justice does not demand that all documents are released as that may be tempered by privacy interests and the need for balance and seeing the documents in context.

A further concern that the Committee had was with the presumption of release of documents during a hearing. Under both the existing and draft rules, upon an application, unless a party objects or unless a Registrar transfers the application to a Judge, the Registrar must release the documents to the applicants within three days. Various members considered that this presumption of release was incorrect and that the rules placed the Registrar in a difficult position. The Committee agreed that this raised a substantive issue that needed to be addressed by the working group.

Action point: The working group will consider substantive issues involved in the rules and prepare a report for the next meeting. This report and the draft rules, along with amendments, will be discussed at the next meeting.

6. Part 27 (Wills): applications to declare wills valid and "personal representatives" in wills

The Chair explained that there were two discrete matters under this agenda item. The first related to creating a procedure for applications to declare wills valid under ss 14 of the Wills Act 2007 and applications to correct a will under s 31. The second related to the reference to "personal representatives" in wills and whether this phrase needed to be inserted into the High Court Rules.

In relation to the first issue, the Committee considered that a solution would be by providing that applications to declare wills valid and to correct a will be made by way of originating applications. This could easily be accomplished by adding these applications to the list of matters in r 19.2. The Committee agreed that this option would be preferable to creating a new procedure. The Committee

decided that it would be best to seek comment on this proposed solution from MacKenzie J and registry staff who have experience in probate matters.

Action point: Comment will be sought from MacKenzie J and various registry staff on whether including applications to declare wills valid and to correct a will should be included in r 19.2.

In relation to the second matter, Fogarty J had written to the Committee pointing out that Part 27 only provided for "executors" of wills and not "personal representatives". This created a difficulty when a person named in a will as a "personal representative" applied for probate to the Court in that it was unclear which process applied to the application. Was it an executor making an application or was no executor named? Mr Bill Moore had prepared a brief paper on this issue and put forward possible amendments. Mr Moore commented that while the Wills Act 2007 referred to "personal representatives" and "personal representatives" included "executors", the term "executor" was still retained under the Wills Act 2007. Mr Moore further noted that "executor" was referred to multiple times in the High Court Rules and so the Committee should further consider this matter and the impact of including reference to a "personal representative" before agreeing to any rule change. The Committee agreed.

Action point: the Clerk and the Chair will find out current formulations in wills and whether "personal representative" is commonly used. The Clerk will then prepare a paper outlining the need for change to be presented at the next meeting.

7. Indexing exhibits included in affidavits

Kós J had suggested that the Committee amend r 9.77 to require indexing of exhibits in affidavits where the exhibits ran to more than 30 pages. The Committee noted that copies of the exhibits as they appear in the common bundles of hearings will be paginated (see r 9.4) and this should alleviate the problem in most cases. Practitioners would ideally recognise that pagination of large affidavit exhibits will be helpful in some cases, but mandating this approach was not regarded by the Committee as warranted given the inconveniences of compliance and the problem of multiple pagination numbers. Therefore no rule change was required.

8. Purpose of Rules of Civil Procedure

Mr Barker presented a short document outlining the purposes and principles of civil procedure. While the document would not provide an answer to the questions that arose before the Committee, it could assist the Committee in its approach, and suggest the factors to consider in making a decision. The Committee approved the document and thanked Mr Barker and Ms O'Gorman for their work on this topic.

The meeting closed at 11.45 am