The Rules Committee

PO Box 60
Auckland

Telephone: (09) 970 9584
Facsimile: (04) 494 9701
Email: rulescommittee@justice.govt.nz
Website: www.courtsofnz.govt.nz

20 December 2017
Minutes 05/17

Circular 64 of 2017

Minutes of meeting held on 4 December 2017

The meeting called by Agenda 05/17 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 4 December 2017.

1. Preliminary

In Attendance

Rt Hon Dame Sian Elias GNZM, Chief Justice of New Zealand
Hon Justice Courtney, Chair
Hon Justice Venning, Chief High Court Judge
Hon Justice Asher
Hon Justice Dobson
Judge Gibson
Judge Kellar
Mr Andrew Beck, New Zealand Law Society representative
Ms Jessica Gorman, representative for the Solicitor-General
Ms Ruth Fairhall, acting Deputy Secretary of Policy, Ministry of Justice
Ms Suzanne Giacometti, Parliamentary Counsel Office
Mr Bruce Gray QC, New Zealand Law Society representative
Mr Kieron McCarron, Chief Advisor Legal and Policy, Office of the Chief Justice
Ms Laura O'Gorman

Ms Regan Nathan, Secretary to the Rules Committee
Mr Daniel McGivern, Clerk to the Rules Committee

Apologies

Hon David Parker, Attorney-General
Mr Andrew Barker QC, New Zealand Bar Association representative
Judge Doogue, Chief District Court Judge
Mr Rajesh Chhana, Deputy Secretary of Policy, Ministry of Justice

Confirmation of minutes

Confirmation of the minutes of 2 October 2017 was deferred.

2. Representative actions

At its last meeting the Committee agreed to identify key areas relating to representative actions that it could address by amending the High Court Rules. It was thought that, given the Law Commission has undertaken to carry out a review of class actions, the Committee in the interim could promulgate rules to clarify the process for commencing a representative proceeding. Since that meeting, memoranda have been prepared by Dobson J, Mr Gray and the Clerk. Additionally, Ms Giacometti has prepared a concept draft which identifies how rule-amendments might be formulated.

Three key items were raised for discussion by the Committee at this meeting: the applicability of opt-in and opt-out procedures; litigation funding; and the use of the phrase "same interest" in r 4.24.

The Committee agreed with the suggestion made by the Chief Justice that representative proceedings and litigation funding ought to be approached as separate issues. There are some issues with litigation funding that properly arise in relation to costs, including the potential costs barriers to groups of impecunious litigants seeking to commence a representative proceeding in the public interest. The Committee agreed to put issues of costs to one side and to address matters predominantly focused on the procedure for commencing a representative action as a sole and separate issue.

Turning to the issue of opting in and opting out of proceedings, the Committee discussed the possibility of implementing a set of rules which expressly contemplated commencement under either procedure. Against this, however, is the Committee's previous view when it undertook its last review of this area, which was that an opt-out procedure required legislation for it to be put into effect because it addresses issues of substantive rights. In the present context, the Chair indicated that it might be wise not to address opt-out in the rules until the Law Commission has completed its work in the area.

The Committee agreed that there was little point in changing or amending the use of the phrase "same interest" as is currently used in r 4.24. The reason for this is that the courts already apply a liberal interpretation to that requirement and there is little purpose served by changing that wording given the courts have settled on a definition for it.

Mr Gray raised for discussion the fact that being a representative in this context can be a burdensome task and may at some stage be regarded as carrying fiduciary duties. The Committee agreed that given these burdens there ought to be provision in the Rules allowing a representative to apply to the Court for directions. The Committee then directed itself to consider Ms Giacometti's concept draft. One of the provisions in that draft provides that an application for a representation order may include applications for ancillary orders or directions concerning the proceeding.

Another matter addressed by the concept draft is time limits. There is provision that, for the purposes of the Limitation Act 2010, the representative proceeding is commenced by the representative, and those comprising the group represented, at the time the statement of claim is filed. The Committee did not agree, however, that the Committee could expressly refer to the Limitation Act in this way. To do so would risk interpreting what commencement means for the purposes of the Limitation Act which is a matter for judicial interpretation, and the Rules ought not to provide a mere snapshot of case-law at any given point. The Committee agreed that Ms Giacometti would come back to the Committee with a revised version of this provision, which does not encroach on matters of substantive law or judicial interpretation of substantive law.

One of applicable principles in the draft rules is that members of the class must have a common interest in the determination of some substantial issue of law or fact in the proceeding. However, that does not affect the powers of the court under its inherent jurisdiction or under the rules to make orders

or give directions necessary to ensure that the interests of justice are served when the common issues in the proceeding are resolved, for example in cases of damages brought on a representative basis. The Committee queried whether the latter clarification is necessary, especially if specific provision is made for directions to be sought from the Court. One reading is that it clarifies that it will not be a block to representative orders that everyone suffers damage in a different way, but to say that a common interest is not affected by people having different entitlements is interpreting what "common interest" is. Such an issue was considered more appropriately included in a definition of common interest.

Next, the draft rules provide that the use of a representative order *must* not (i) confer a right of action on a person who could not have asserted such a right in a separate proceeding or (ii) bar a defence that might have been available to the defendant in such a separate proceeding. The Chair suggested that the word "must" be changed to "does".

The Committee then addressed the level of disclosure required on an application to commence a representative proceeding. The draft rules provide for the filing of an affidavit detailing matters including the constitution of the class, an outline of the claims, the common issues of fact or law, and aspects of the involvement of any litigation funder. The issue was whether the Rules should require disclosure of the litigation funding arrangement in the event that a funder is involved. There is a tension between putting enough information before the Court for it to determine whether the arrangement amounts to an abuse of process and ensuring that confidential information or information that ought not to fall into the hands of the defendant is not disclosed. And while aspects of the arrangement could be summarised by way of affidavit, the difficulty is that that places an onus on the plaintiffs to arrive at an interpretation of the agreement which might not align with how a court might interpret the agreement. Dobson J suggested that there could be provision for redacted disclosure. Ultimately the Committee agreed to require disclosure of the fact that a litigation funder is involved and the identity of that funder, which would mean the defendant could then apply to the Court for disclosure of the agreement (perhaps on a redacted basis) with justifications.

The concept draft includes a provision clarifying that a ground on which the court may regard a funding arrangement as an abuse of process is where it amounts to an assignment of a cause of action to a third party in circumstances where that is not permissible. The Committee agreed to remove this because it is already known and there is little point including it in the Rules.

The Committee agreed that the definition of "litigation funder" ought to include anyone funding litigation who is not a party to it.

The Committee then turned its attention to the problem of costs and in particular the barrier that costs provides to public interest litigation in this context. In representative proceedings where a litigation funder is present, the plaintiffs are vulnerable only to the extent that the funder is not creditworthy. As for public interest litigation more generally, while there is a growing practice of not awarding costs in such cases, that cannot be relied on every time. The Committee did not identify any solution to this issue, as it is ultimately a matter for the Court whether an adverse costs order will be made against plaintiffs suing in the public interest. The Committee agreed to put this issue to one side.

The Committee agreed to have Ms Giacometti review her draft for discussion at the next meeting in February. The Chair noted that the Committee should be looking to put together an exposure draft for consultation.

Action point: Ms Giacometti to amend concept draft to reflect the Committee's discussion.

3. Civil Practice Notes

Over the last few meetings the Committee has conducted a review of the civil practice notes that remain in effect. The objective of this exercise has been to identify those practice notes that ought to be revoked and, of those that should, whether they should be replaced with corresponding amendments to the Rules.

The Committee's review is almost complete. The only practice note left for discussion is Practice Note 11.

Practice Note 11 is engaged where an executor or administrator no longer wishes to fulfil their duties and elects to have Public Trust or a trustee company appointed as sole or co-executor or as sole or co-administrator. The jurisdiction for a Court to order this derives from s 76 of the Public Trust Act 2001 and s 8(1) of the Trustee Companies Act 1967. The Court's consent is required before such an election can take place. Practice Note 11 addresses what information should be included in the affidavit when applying for consent to the nomination.

Venning J raised for discussion whether such a prescriptive set of rules as is now found in Practice Note 11 is necessary. The procedure itself could be simply amended by including applications for consent as an originating application in r 19.2 of the Rules. The Committee agreed that a simple amendment to r 19.2 is all that is needed, as the rules do not need expanding and the courts are capable of managing such applications without such prescriptive guidance.

Action points: The Clerk to work with Ms Giacometti to prepare draft rules replacing practice notes agreed by the Committee to be incorporated into the Rules; and the Clerk to prepare letters advising the relevant Heads of Bench of the Committee's advice.

4. Expert witness conferencing

The New Zealand Law Society (NZLS) has written to the Committee expressing its desire to see a more structured approach in the Rules to expert witness conferencing (or, as it is commonly known, "hot-tubbing"). NZLS has provided some draft rules in this regard in the hopes that a protocol might inspire greater usage of the procedure.

The Committee agreed that hot-tubbing is an effective and efficient practice. An issue with the proposal which was identified by the Committee is that it requires the issue of hot-tubbing to be dealt with in advance of trial and no later than the pre-trial conference. The difficulty with this is that the pre-trial conference is not always conducted by the trial Judge. And in this regard it is sometimes difficult to anticipate exactly whether the procedure is appropriate or not, because the meeting between the experts before trial can influence how the Judge wants matters to proceed to trial.

Mr Beck explained that the concerns which led to this suggestion was that there was no trigger point that suggests that hot-tubbing is something that could or should be considered in particular cases. There is no guidance as to how it would operate, which makes the procedure less accessible.

The Committee agreed that, given the problem is simply that counsel are not familiar with the procedure or are worried about committing to it, the best option is to simply add hot-tubbing to the checklist in Schedule 5 when it comes to case management conferences. That way, hot-tubbing will be flagged as an issue for discussion when appropriate.

Action point: Ms Giacometti to implement the change to Schedule 5; the Chair to write to NZLS explaining the Committee's decision.

5. Regulatory Impact Statements

At the last meeting Mr Chhana offered to provide the Committee with information about Regulatory Impact Statements and how they apply to amendments submitted by the Rules Committee. In context, there is concern that there is now an assumption of an executive responsibility to help inform decisions taken by the Government in respect of the Rules.

Ms Fairhall prepared analysis for the Committee on how this procedure applies to amendments to the Rules. The Cabinet Impact Analysis supports and informs the Government's decisions on regulatory

proposals. The product of this is a Regulatory Impact Statement, which summarises advice given by agencies.

All Cabinet papers that include regulatory proposals, including Rules amendments, must be accompanied by a Regulatory Impact Statement unless an exemption applies. Exemptions are available for a range of technical or case-specific reasons. Treasury determines whether an exemption applies based on information provided in an application.

Minor or technical amendments to the Rules often fall within a "minor impacts" exemption. But where amendments are assessed as being more substantive an exemption may not apply. The Committee's concern is that its processes do not fit easily within this executive process. Ms Giacometti raised for discussion the new Treasury guidelines which now include a new discretionary exemption which may apply where the Government has limited statutory decision-making discretion for the content of legislation, which at first glance appears to fit Rules amendments. However, Treasury's position is that that exemption applies only to a particular aspect relating to the Ministry of Business, Innovation and Employment.

The Committee agreed to write to the Secretary for Justice to explain that the Committee ought to fit within this exemption.

Action point: Clerk to draft a letter to the Secretary for Justice.

6. Māori intituling

The Rules have been amended this year and now require filed documents to include the name of the court and registry in both English and te reo Māori. Venning J raised for discussion whether r 2.1(2)(a) of the Criminal Procedure Rules 2012 ought to be amended to formally enact this requirement in the criminal jurisdiction. As a matter of practice the High Court is already including te reo Māori on the intituling of criminal judgments. The Committee agreed to this suggestion.

An additional issue arose as to whether corresponding rule-changes are necessary to incorporate this practice at the District Court, Court of Appeal and Supreme Court levels. As regards the District Court, Judge Gibson explained that there is not yet confirmation of the te reo Māori names of all of the different District Court registries, and that matter is still being looked into in consultation with the geographic board. And as regards the Court of Appeal and Supreme Court, that is simply a matter of awaiting changes to the intituling template which at present does not have sufficient room for the addition.

Ms Giacometti said she has included the change in the Supreme Court (Amendment) Rules but suggested that a transitional period could be included to ensure that it is not put into effect until the electronic template has been updated in March.

Action point: Ms Giacometti to draft amendment to the Criminal Procedure Rules 2012 and look into implementing changes at the Court of Appeal and Supreme Court level with appropriate transitional provisions.

7. Miscellaneous amendments

Ms Gorman has identified several minor issues with the High Court Rules:

(a) Rule 30.3(4) still refers to the Judicature Amendment Act 1972.
(b) Rule 9.30 refers to s 100(1) of the Judicature Amendment Act 1908 and should now refer to s 44 of the Senior Courts Act 2016.
(c) The compare notes in the Rules still refer to the Judicature Act 1908.
(d) Form G 1 prescribes the use of both English and te reo Māori on the intituling of documents as follows:

In the High Court of New Zealand

I Te Kōti O Aotearoa

There may be an inconsistency by not having "Te" and "O" in lower case form.

The Committee agreed to have issues (a)-(c) rectified. Issue (d) would remain subject to a check to see whether a change is necessary.

Action point: Ms Giacometti to work with Clerk to rectify identified issues.

8. Headings on documents

Auckland District Law Society wrote to the Committee, identifying a perceived inconsistency in r 5.13 of the Rules. That rule states that the heading of a document to which neither rr 5.11 nor 5.12 applies *may* be abbreviated in four various ways. Two of them, however – the places of residence and the descriptions of persons; and the names of corporations – are expressed to be mandatory.

The Committee agreed to record this issue on a register for it to be revisited on a future rewrite of the Rules. For now, however, no direct action is necessary.

Action point: Clerk to note down issue on register; the Chair to write to ADLS explaining the Committee's decision.

9. Electronic Courts and Tribunals

This agenda item was first raised at the Committee's last meeting. Essentially, the issue is whether the Electronic Courts and Tribunals Act 2016 is sufficiently prescriptive to apply as it is or whether additional rules are necessary. Since the last meeting, Ms O'Gorman has engaged in a telephone conference with Miller J at the Court of Appeal.

The Court of Appeal has progressed running a protocol enabling electronic filing of documents. The Ministry of Justice is preparing an opinion on what rule changes need to occur to allow for the Court of Appeal pilot protocol to be given effect if that moves forward. Work on those recommended rules will therefore need to await the outcome of that analysis. Ms O'Gorman explained that in terms of preparing rules to underpin the Act, it will be a matter of assessing what Rules can achieve with respect to resourcing and how rules can be made universally appropriate.

The Chief Justice noted that the courts are to undergo a modernisation programme, and requested that there be a liaison between the progression of that programme and the Committee.

Action points: Item to be kept on agenda.

10. Time allocations

Mr Gray led the discussion of this agenda item in Mr Barker's absence. At the Committee's last meeting it was agreed that the sub-Committee reviewing this issue would come back with proposals addressing hearings that proceed on affidavit evidence. The premise of having new schedules for affidavit hearings is that these hearings are often of an intensity that is not reflected by the overall length of the hearing.

Because of the varying degrees of preparation time necessary for affidavit hearings, the sub-Committee's approach has been to band costs within affidavit hearings to give Judges a discretion. The next step will be for Mr Gray to liaise with Ms Giacometti to work out how to implement the proposed schedules in the Rules. The Committee agreed with the proposed schedules and was content for Ms Giacometti to begin work on it.

The Committee noted that when the it begins considering consultation in respect of representative actions it may need to decide whether to add an additional consultation in respect of time allocations. The Committee agreed to revisit this matter at its next meeting.

Action point: Sub-committee to work with Ms Giacometti on implementation of proposed changes.

11. General business

Mr Beck noted that the daily recovery rates have not been increased for some time. Increases are usually based on the Producer Price Index (PPI). The Committee agreed that allowing a PPI adjustment would be a step towards getting back to a higher rate of recovery if that is what is intended. The Clerk agreed to gather PPI information for consideration by the Committee.

Ms Gorman indicated that she may look into preparing a memorandum regarding service on the Crown.

Action point: Clerk to gather PPI information.

The meeting finished at 12.10 pm.