The Rules Committee

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14 of August 2013
Minutes 04/2013

Circular 79 of 2013

Minutes of meeting held on 5 August 2013

The meeting called by Agenda 04/2013 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 5 August 2013.

1. Preliminary

In Attendance

Hon Justice Asher (the Chair)
Rt Hon Dame Sian Elias, GNZM, Chief Justice of New Zealand
Hon Justice Winkelmann, Chief High Court Judge
Judge S Thomas
Judge Gibson
Mr Bruce Gray QC, New Zealand Law Society representative
Mr Andrew Beck, New Zealand Law Society representative
Ms Cheryl Gwyn, Crown Law
Mr Frank McLaughlin, Deputy Secretary, Ministry of Justice
Ms Phoebe Dengate-Thrush, Private Secretary to the Attorney-General
Mr Bill Moore
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 Gilbert
Judge Doogue, Chief District Court Judge
Judge Doherty
Mr Stephen Mills QC, New Zealand Bar Association representative

Confirmation of minutes

Two changes to the minutes of 15 June 2013 were made. First, Mr Frank McLaughlin pointed out that he had been incorrectly noted as attending the meeting. This attendance was amended. Second, Mr Andrew Beck stated that the record of item 4 recorded that the Committee had agreed to case managing judicial reviews brought under s 10 of the Judicature Amendment Act 1972 rather than under the High Court Rules. Mr Beck said this record indicated that he had agreed with this proposal which he had not done and still did not agree with.

With these amendments, the minutes of 15 June 2013 were confirmed.

Matters arising

The Chair noted the apologies.

2. Fixing the cross-reference to r 7.9 in the HCR

Mr Bruce Gray QC began by explaining why a rule change was necessary. When the new case management regime was introduced, r 7.9 which provided the power to seek and obtain directions was replaced with r 7.9 which related to cancelling case management conferences. However, several cross-references to r 7.9 were left in the High Court Rules, creating a lacuna which needed to be remedied. The Rules Committee had formed a working group comprising Mr Gray, Justice Asher and Mr Bill Moore to come up with a solution to this problem. The working group, Mr Gray explained, had taken a holistic approach in considering how to provide the necessary powers. Mr Gray noted that Part 7 of the High Court Rules did not have any substantive rule-making power. Instead most of the powers to make the required orders were contained in the particular rules themselves.

Mr Gray explained that the working group had considered that there should be a general power in Part 7 to provide powers to apply for and obtain orders. This is what the proposed r 7.43A would do. The working group had recommended that the cross-references to r 7.9 be amended to r 7.43A with the exception of certain rules. Rules 9.56(3) and 10.10(5)(a) would cross-reference to r 7.2 and 7.8, r 5.49 would not cross-reference r 7.9 or r 7.43 as this was redundant, and r 18.4(1)(b) would have the reference changed from r 7.9 to requiring applications for directions as to service or representation under r 18.7.

Mr Beck queried what r 7.43(1)(e) meant. Was it creating a new power to simply seek any new directions? Mr Bill Moore replied that paragraph (e) was necessary to provide a linkage to other rules that cross-reference r 7.43A. If this link was not there, rules providing for other directions that are not specifically mentioned in r 7.43A would not be able to be made under the power of r 7.43A. Paragraph (e) provided that such orders could be made, yet did not create an unfettered ability to seek directions as the directions had to be specified in the cross-referencing rule. The Chief Justice agreed that paragraph (e) was necessary but considered the paragraph could be reworded to state that “the court may make any order authorised by the rules”. The members agreed to this formulation.

The Chief Justice questioned the need for subclause (3) of the draft r 7.43A. Subclause (3) provides that following the close of pleadings, a party must obtain leave before seeking an interlocutory order under r 7.7. Mr Beck agreed that subclause (3) was unnecessary and should be deleted. Mr Moore expressed similar sentiments and the Committee agreed that subclause (3) should be removed from the draft rule 7.43A.

The Committee agreed that r 7.43A should added with paragraph (1)(e) amended, and subclause (3) deleted. The rules cross-referencing r 7.9 would be amended by deleting the references to r 7.9 in r 5.49, changing the reference in r 18.4(1)(b) from r 7.9 to requiring directions as to service and representation under r 18.7, modifying the reference to r 7.9 in rr 9.56 and 10.10 to rr 7.2 or 7.8 and r 18.7, and finally changing the remaining rr 7.55, 7.56, 29.10, 31.36 to cross-reference r 7.43A.

3. Signposting case management powers – r 7.1AA

Mr Moore explained that r 7.1AA was intended to provide a signposting rule to show how various proceedings are case managed. This rule had been the product of a working group set up following the previous Rules Committee meeting to create a specific signposting rule. The working group, comprising Justice Asher, Mr Gray, Mr Moore and Ms Cheryl Gwyn, considered r 7.1AA would direct parties to the relevant case management rules. The Committee thought that the rule provided a clear signpost and agreed to it, subject to two changes: first, case stated appeals should be specifically mentioned in relation to subclause (2) and, second, there was some concern about the way judicial reviews are case managed.

Mr Beck considered that it was best for applications for judicial review to be case managed under the High Court Rules, rather than rely on the limited powers in s 10 of the Judicature Amendment Act 1972. While Mr Beck agreed with the Chief High Court Judge that the current approach to case managing judicial reviews was quicker than normal case management, Mr Beck considered that the High Court Rules should provide specific rules for case managing judicial reviews. This would ensure consistency of approach.

The Chair commented that creating specific rules could be akin to the specific rules for case management of appeals. Such specific rules for judicial reviews could cover both applications brought under the Judicature Amendment Act 1972 and also prerogative writs. Ms Gwyn wondered, if there were specific rules, how would courts would deal with combined cases, involving judicial review and other claims, such as claims brought under the New Zealand Bill of Rights Act 1990? Would these be case managed under the normal case management rules or the specific judicial review rules?

It was agreed that Mr Beck would prepare a draft set rules for the case management of applications for judicial review to be considered at the next Committee meeting. At the same time the Committee agreed to amending subclause (5) of the draft r 7.1AA to stated that an application for judicial review may be subject to case management under s 10 of the Judicature Amendment Act 1972 and any rules relating to the case management of such proceedings. This was considered to provide latitude for the Committee to implement rules specific to judicial review if necessary without having to amend r 7.1AA in the future. Following this amendment, the Committee agreed to insert r 7.1AA.

On a more general point, the Chair expressed concern that having too many specific case management rules could lead to technical arguments about how the court should classify the proceeding. The Chief Justice agreed with the Chair, but suggested that incoming legislation would probably require different case management regimes.

Mr Gray suggested that the need for this signpost rule, and for different case management procedures, was created by the different procedural steps required by the High Court Rules. Mr Gray suggested that the Committee should consider having general powers to case manage all proceedings and reduce the myriad specific rules regulating getting different types of proceedings to trial. This would possibly reduce the need for specific rules for specific procedures.

The Chief Justice thought that this was a proposal the Committee should consider and this desire to simplify should be further developed and expanded to all the High Court Rules. The Chief Justice expressed some concern about tailoring rules for particular legislation and making the High Court Rules too prescriptive. The Chief Justice suggested the Committee consider a broader question of what is the purpose of rules of court and from this purpose derive the form and function of rules. For example, the Chief Justice wondered whether there should be a central architecture, akin to what Mr Gray was suggesting, with the specific steps and procedures set out as Schedules to the High Court Rules.

The Chief High Court Judge suggested that further thought needs to be given to what needs to be in the rules in light of the development of new technologies. The motivation behind the prescriptivism of the High Court Rules, the Chief High Court Judge lamented was the inability to access practice directions. However, now with the internet such things are more easily located.

Ms Gwyn commented that the Committee should not lose sight of the normative effects of the rules of court. Rules of court did have the potential to influence the legal profession by setting clear boundaries and steps that had to be complied with. The Chief Justice queried how much of a normative impact the rules had. The Chair responded that the new case management regime largely relied on the binding force of rules for the regime's efficacy. So there was some normative force.

The Chief Justice considered that the Committee should look at the reason for having rules and what rules should do. The Committee needed to have a new look at what the High Court Rules should do, rather than merely tinker and continually add to the rules, which often led to increasingly fragmented procedures and specialised rules. The Committee agreed that this should be further investigated.

It was agreed that the Committee would begin to look at this matter. To assist, the Clerk will provide a literature review of what different academics and legal practitioners consider the purposes of the rules of court are. The Clerk will also look at what is happening in other jurisdictions, such as Canada and individual states in Australia, and prepare a paper presenting this comparative analysis. Mr Gray will prepare a short paper on what subject matter needs to be in the rules. These papers would be circulated around the Committee prior to the next meeting and other members were encouraged to add their comments.

The Committee agreed to insert r 7.1AA with amendments to include reference to Part 21 (case stated appeals) and also to clarify that case management of applications for judicial review brought under the Judicature Amendment Act 1972 is to be done under s 10 of the Judicature Amendment Act 1972 and any rules relating to the case management of such proceedings.

4. District Court (Civil Enforcement) Amendment Rules 2013

The Committee welcomed Mr Warren Fraser and Ms Angela Holmes from the Ministry of Justice for this item.

Ms Holmes explained that the District Court (Civil Enforcement) Amendment Rules 2013 implemented the changes brought about by the District Court Amendment Act 2011.The Rules provided extensive consequential amendments to the District Court Rules. The amendments also include a change in allocation of costs. These changes were made following consultation with the New Zealand Law Society and the New Zealand Bar Association.

The Committee had several questions about the changes, including those around contempt.

Ms Holmes answered that these changes were legislative changes and the contempt procedure allowed for appeal. Further, the debtor assessment could also be reviewed by a Judge, although from current data this was unlikely. These changes were done in the primary legislation and the rules imply implemented this. Judge Gibson confirmed that these changes were consequential to the legislative amendment and so should be agreed to. The Committee agreed.

The Committee thanked Ms Holmes and Mr Fraser for their hard work in preparing these rules.

The Committee agreed to the District Court (Civil Enforcement) Amendment Rules 2013.

5. Incorporating the Electronic Bundle Protocol into the High Court Rules

The Chair explained that the Electronic Bundle Protocol had been through a rigorous process and had been agreed at the last meeting. At the last meeting, the Committee had considered that the Electronic Bundle Protocol should be included as a Schedule to the High Court Rules. The draft rules provided for this.

Mr Moore suggested that it would be better if the Electronic Bundle Protocol was left as a protocol rather than incorporated as a schedule. This was for three reasons. First, the Electronic Bundle Protocol was worded as a guideline, yet putting the Electronic Bundle Protocol into the High Court Rules could elevate it into a rule and this might counter the intended effect and make the Electronic Bundle Protocol too rigid. Second, the direction to cooperate in r 9.4 would need to be rewritten as it could make the Electronic Bundle Protocol mandatory. Finally, the Electronic Bundle Protocol would be better placed as a protocol and then reviewed after a year to assess the effectiveness and whether the Electronic Bundle Protocol needed amending. This would be more easily done as a protocol rather than a schedule.

Mr Beck agreed with Mr Moore. The Chief High Court Judge suggested that if the Electronic Bundle Protocol should be issued as a practice note. As such, r 9.4(5)(d) should be amended to require that the parties have regard to any practice note on electronic formats issued from by the Chief High Court Judge.

The Committee agreed to amend r 9.4(5)(d) to specify that the parties have regard to any practice note on electronic formats issued by the Chief High Court Judge. The Electronic Bundle Protocol will be issued as a practice note and put onto the website.

6. Rules 12.7 – Extending the period of service for interlocutory applications for summary judgment

The Chair explained that this matter had been brought to the Committee's attention by Associate Judge Doogue. Associate Judge Doogue had suggested that the 15 working day period for serving an application for summary judgment in r 12.7, once taking into account the three day period prior to court where the opposition had to be filed under r 12.9, left only 12 working days to prepare and file an opposition. This was often too short a time.

As a result, Associate Judge Doogue stated that many counsel appear at the first call seeking an extension of time. This delays matters and wastes time. On this basis Associate Judge Doogue suggested increasing the time period to 25 working days. The Committee agreed that this was sensible change. In addition, the other periods relating to service needed to be changed in r 12.5 to 25 working days.

The Committee agreed that the periods in rr 12.7 and 12.5 should be increased from 12 to 25 working days.

7. Amending r 15.10 – Setting aside default judgments

The Chair stated that r 15.10, providing for setting aside default judgments, mistakenly did not include the ability to set aside a default judgment obtained under r 15.9. This mistake arose due to the late addition of r 15.8 (default judgment in relation to land) which displaced default judgment in relation to unliquidated sums from r 15.8, as it was then, to r 15.9. This change in cross-reference had not then been updated in r 15.10. The Chair suggested that this be remedied promptly and r 15.10 be amended to refer to r 15.9. The Committee agreed.

The Committee agreed that r 15.10 should refer to judgments obtained under r 15.9 as well as those obtained under rr 15.7 and 15.8.

8. Initiating bankruptcy and liquidation proceedings

Mr Beck explained that the basis for the differences between bankruptcy proceedings and liquidation proceedings were largely a historical accident. However, Mr Beck stated that the concept of "acts of bankruptcy" was established in statute and many of the procedures were dictated by the Insolvency Act 2006 and the Companies Act 1993. So any change to how these proceedings are initiated is outside the scope of the Committee's power.

Mr Gray considered that the differences might be important in that bankruptcy laws were designed to protect private individuals, whereas liquidation laws were designed to benefit creditors. So there could be some basis for differences in procedure. That being said, Mr Gray agreed with Mr Beck that the matter was outside the Committee's power and so it should be left untouched.

The Committee agreed that any change to these proceedings was a matter for the legislature and not the Committee as this was outside the scope of the Committee's power.

9. Whether the overseas service of bankruptcy notices is ultra vires

The Chair referred to the Clerk's paper on whether the service of bankruptcy notices overseas is ultra vires. The Chair explained that the paper had argued that overseas service (or non-personal service) was permitted under s 17 of the Insolvency Act 2006. The Committee agreed.

At the same time, Mr Beck raised an issue that r 24.9 should be amended to provide that bankruptcy notices should be served in accordance with the High Court Rules. Mr Beck explained that there were no specific service rules and so it was not entirely clear how bankruptcy notices should be served. This amendment would clarify this. The Committee agreed.

The Committee agreed that r 24.9(4) should be added providing that a bankruptcy notice must be served in accordance with Part 6 (Service).

10. Methods of service

The Chair explained that this was a consequential matter following the Committee's decision at the last meeting to allow unrepresented litigants to specify alternative methods of service. In doing so, the Committee had not amended rr 5.40 and 5.42 to also allow a represented

person who decides to no longer be represented and act in person to be served using these other methods. The Chair considered that the proposed amendments were common sense and should be agreed to. In addition, there was a typographical error in r 6.6(1) which referred to r 6.1(d) but should refer to r 6.1(1)(d). The Committee agreed to these consequential changes.

The Committee agreed that rr 5.40 and 5.42 should be amended to allow an unrepresented litigant to specify an address for a method of service under r 6.1(d). Further, there was a typographical error in r 6.6(1) which should be corrected.

11. Review of appeals of interlocutory orders

The Chair began by commenting that the appeal pathways of interlocutory orders has been a thorn in the side of the Committee for quite some time. Currently there is a patchwork of rules, some allowing judicial review of the interlocutory orders and others appeals of such orders. Further, in the Commercial List there is a recent Court of Appeal decision saying that leave of the Court is not required to bring an appeal.

The Chair considered that there is a strong argument for having one single approach to appealing interlocutory orders. This should be appeal by leave, subject to being able to appeal by right if the interlocutory order is a final determination. This would be a significant change, and any prospective change should also consider the rules relating to review of interlocutory orders made by Associate Judges.

Mr McLaughlin commented that this issue about appealing interlocutory orders made by Associate Judges, and in general, had been discussed by the Law Commission. The Ministry of Justice was currently preparing briefing papers to present to Cabinet based on the Law Commission's recommendations. Therefore, Mr McLaughlin suggested, the Committee should wait until the next meeting when there would be a fairer idea of what Cabinet might do regarding this issue. The Committee agreed that the best course of action would be to delay the matter until the next meeting, where the Ministry of Justice would prepare a brief paper outlining the current position and Mr McLaughlin would brief the Committee.

12. District Court Rules Revision 2013

Judge Thomas presented the draft District Court Rules. The reason that the draft rules, while still a work in progress, were presented now was to avoid presenting a fait accompli to the Committee in the October meeting. The draft District Court Rules provided a rough outline of the what the final draft District Court Rules would look like.

Judge Thomas explained that the rationale behind the draft District Court Rules was to keep the draft District Court Rules as similar to the High Court Rules as possible. She considered that the draft District Court Rules did this while also retaining the successful elements of the existing District Court Rules. Judge Thomas then proceeded to explain to the Committee the major variances including the short, simplified, and full trial procedures, the different case management provisions, including the more extensive use of Judicial Settlement Conferences, and also the exchange of a list of documents rather than the actual documents themselves when serving the statement of claim.

Judge Thomas informed the Committee that at the next meeting, the Committee will have the final draft rules. The Chair volunteered the Clerk to complete a comparison between the High Court Rules and the final draft District Court Rules to assist the Committee fully

consider the final draft District Court Rules when they come before the Committee again for full consideration.

The Chair thanked Judges Thomas and Gibson and to the other members of the Sub-Committee for their continued hard work and diligence in preparing the draft District Court Rules. Ms Phoebe Dengate-Thrush also passed on the Attorney-General's comment about being pleased at how well the reform of the District Court Rules is going.

13. Other matters

i) *Rule 11.22 – the "best price" standard*

The Chair explained that the "best price" standard in r 11.22 had been picked up by the District Court Rules Sub-Committee as a potential issue. *McGechan on Procedure* states that the standard sets too high a standard and provides considerable room for argument about whether the best price was obtained.

Mr Gray considered that the best price standard was adequate and the rule intentionally did not refer to reasonable steps at the time as this created even more uncertainty. The Chair wondered whether there was any actual problem identified and the Chief Justice considered that there could be unwanted consequences if there was such a change. The Committee resolved that no change was necessary.

The Committee agreed to not amend r 11.22

ii) *Change to District Court Scale Costs for interlocutory applications and appeals*

Mr Beck explained that the High Court had reviewed the costs scale last year in relation to interlocutory applications and appeals. However, the District Court had not. Currently in the District Court payment of two times the hearing time is the costs. This can often be inappropriate.

Mr Beck suggested a new schedule in the District Court Rules in relation to costs. Judge Thomas stated that she could understand the rationale for this proposed change. Judge Gibson said that he would like to see the proposed scale before commenting fully. However, he considered that many appeals in the District Court involve self-represented litigants but agreed that ACC appeals often involved counsel and so the limited costs were potentially a problem.

Mr Beck volunteered to prepare a possible scale to present at the next meeting.

The meeting ended at 1:00 pm.