THE RULES COMMITTEE
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9 December 2011

Minutes/06/11

Circular No. 86 of 2011

Minutes of meeting held on 5 December 2011

The meeting called by Agenda/05/11 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 5 December 2011 at 9:45 am.

1. Preliminary

In Attendance

Hon Justice Fogarty (in the Chair)
Hon Justice Winkelmann
Hon Justice Asher
Judge Doherty
Judge Susan Thomas
Mr Andrew Beck, New Zealand Law Society representative
Mr Brendan Brown QC
Ms Briar Charmley, Private Secretary to the Attorney-General
Ms Cheryl Gwyn, Crown Law Office
Dr Don Mathieson QC, Special Parliamentary Counsel, Parliamentary Counsel Office
Mr Kieron McCarron, Judicial Administrator to the Chief Justice
Ms Julie Nind, Ministry of Justice
Ms Paula Tesoriero, Ministry of Justice

Ms Rita Lowe, Secretary to the Rules Committee
Ms Patricia Ieong, Acting Clerk to the Rules Committee

Apologies

Rt Hon Dame Sian Elias, GNZM, Chief Justice of New Zealand
Judge Jan-Marie Doogue, Chief District Court Judge
Hon Chris Finlayson, Attorney General
Mr Stephen Mills QC, New Zealand Bar Association Representative

Matters arising

The Chair opened by welcoming Ms Marguerite Hill, a researcher from the Ministry of Culture and Heritage. Ms Hill took a photo of the Committee for the encyclopedia entry on "Government and Nation Theme on Constitution" for Te Ara, The Encyclopedia of New Zealand.

Ms Briar Charmley clarified that with the change of government, the Attorney-General was currently acting in a caretaker role, with limited capacities.

Confirmation of minutes

The minutes of the meeting of the Monday 3 October 2011 were confirmed with the following corrections: Dr Mathieson QC had been incorrectly listed as being involved in the drafting of the District Court Rules 2009 reforms when this should have been Mr Ian Jamieson; the name of the Marine and Coastal Area (Takutai Moana) Act 2011 under "General Business" had been corrected. It was confirmed the corrected version of the minutes would be put on the website.

2. Case Management Reforms

The Chair opened by explaining that the current draft of the case management reform rules was very much a work-in-progress, and had been reworked following various discussions amongst himself, Winkelmann J, Asher J, and the Associate Judges, with drafting work done by Dr Mathieson. Most policy issues had been settled following extensive consultation except for the reforms concerning default judgment, which had not yet been considered by the Committee. The Chair expressed that the goal was to have the rules in a form ready to go out for consultation with the profession on a limited basis (on the details only, not on policy) in a week's time.

Justice Winkelmann discussed the policy underpinning the reforms of having a tailored approach to case management. She observed that rr 7.1(1) and 7.2(3) were particularly illuminating as to the philosophy behind the rules — namely to keep the costs of the processes proportionate so that litigation can continue to be an effective means of resolving disputes. For ordinary defended proceedings, it is envisaged that case management would be light-handed and that there would be only one case management conference. This was already being done in Auckland using pilot conferences. For more complex proceedings, it is

envisaged that a more intense issues conference would be needed. These issues conferences would be more like judicial settlement conferences in the past where the parties focus on what the case is about and what needs to be proved. Judges would also get more involved in case management, not just Associate Judges.

Justice Winkelmann noted also that timelines were no longer set by reference to the setting down date but instead by reference to the close of pleadings. This places focus on the importance of pleadings. Her Honour also expressed that judges should be firmer that pleadings should generally not be accepted after the close of pleadings date and that they should not be so lenient with non-compliance with rules.

Justice Asher then turned to the significant changes to default judgments. His Honour observed that the current rules as to formal proof were very anachronistic and cumbersome, with specific rules applying to land and chattels. There was a chance now to simplify the process so that there was a two-stream process for liquidated and unliquidated sums. For liquidated sums, if no statement of defence had been filed, the plaintiff could get an administrative default judgment from the Registrar without swearing an affidavit. For unliquidated sums, the matter would proceed to formal proof, which would be listed in the duty judge list, proved by affidavit, and the plaintiff could be questioned by a judge as to both liability and damages. His Honour explained that this is largely already done in practice, but that it is not rule-specific and instead operates on an ad hoc basis, with claims for formal proof proceeding under the current r 15.12(3). It works as a matter of practice as undefended liquidated demands usually do not have complexities and no reasoning is involved. But unliquidated demands, such as a leaky building or copyright cases, even if undefended, are inevitably more complex and so warrant the attention of a judge. Justice Asher considered also that when the formal proof procedure were set down, a statement of defence should only be allowed to be filed out of time by leave, if it were in the interests of justice (either a reason for the delay, or an arguable defence). Currently, a statement of defence can be filed at any time before the hearing.

Mr Andrew Beck opined that he was quite comfortable with allowing a Registrar to give default judgment, whether or not the claim was liquidated, if a defendant never took steps to defend a proceeding after being served with a notice of proceeding, as that defendant could still apply under the draft r 15.9 to set aside the default judgment afterwards if it appears that there may have been a miscarriage of justice. The Chair pointed out that liquidated demands could also sometimes be problematic, giving an example encountered recently of a liquidated demand for money lent at an interest rate of 250% per annum compounding quarterly, under a contract that may be contrary to public policy. Justice Asher accepted that while there may be an argument that liquidated demands should be treated like the current procedure for unliquidated demands (having all claims go to formal proof), the reverse was undesirable. Justice Winkelmann agreed with this sentiment. Justice Winkelmann and Judge Susan Thomas also questioned whether it was right in principle for default judgment to be given without judges looking at a claim, even if that were done in practice.

The Chair queried what was done in the District Court, where most liquidated demands are received (because most are for claims under $250,000). Judge Doherty explained that the

position was effectively the same under rr 12.24 and 12.28, and that usually Registrars deal with liquidated demands but refer difficult cases to a judge. He recommended maintaining the position that Registrars deal with liquidated demands in the District Court simply because of the sheer volume of them. The Chair was also concerned that in a multicultural society where notices of proceedings are served in English and are difficult to read, it could be prejudicial to give judgment on a plaintiff's undefended claim without applying judicial judgement to it, in cases other than clear-cut claims. The Chair relayed that the feedback at the Manukau District Court was that many litigants and defendants are not proficient in English. Mr Brown pointed out that the form for the notice of proceeding currently provides that unless a statement of defence is filed, the plaintiff may proceed to a hearing in the defendant's absence. He expressed that this may cause confusion, especially for defendants who do not have English as their first language, as such a defendant might understand that to mean that there would subsequently be a hearing at which he could be heard. The actual documents may therefore need to be re-examined. Justice Winkelmann suggested that a link to the Ministry of Justice's website where self-represented litigants could get information in their own language may be helpful, and observed that the Ministry was currently working on a project developing information capsules for self-represented litigants.

It was agreed that the distinction between liquidated and unliquidated demands was important because of the very different processes for the two types of claims. Dr Mathieson queried whether the definition of "liquidated demand" in the draft r 15.7(4) was adequate. While rr 15.7(4)(a) and (b) were relatively straightforward, and (c) had been already been the subject of case law on what "sufficient" evidence of reasonable prices would be, (d) could be troublesome as there had not yet been case law on "not open to any real dispute or doubt". There was concern that this could open up a form of miniature-summary judgment. Justice Asher agreed that the distinction between liquidated and unliquidated claims could be unclear and hard to articulate conceptually and queried whether a definition should even be attempted.

Mr Beck noted that there had not yet been any consultation on this aspect of the case management reforms, and opined that the proposed changes marked a fundamental change in the law with the courts taking the side of the defendant and requiring that the plaintiff satisfy the judge of the claim. He was concerned that the rules effectively allowed the defendant to defend without filing a statement of defence and creating a mini-trial on the day of formal proof. Justice Asher disagreed that the proposed reforms were fundamental changes, and said that they would not make significant changes in practice, but are just tidying up the rules to reflect more transparently what is already being done, conflating the unliquidated demand procedure with the procedure for all other claims other than liquidated demands. It was agreed that consultation on this issue was needed and the Committee debated whether it should be separated out from the other case management reforms. Justice Winkelmann explained that these reforms do relate to case management, as a case management conference should not be needed for undefended hearings. If a conference were required for undefended unliquidated claims, that would drag out the formal proof process. Mr Brendan Brown QC pointed out that the profession was expecting the case management rules would be going out for consultation soon.

The Chair suggested that two separate consultations could be sent out together in December: the consultation on the core case management reforms would go out on a limited basis without submissions on the underpinning policy; the consultation for the default judgment and formal proof reforms would be a wider one including policy. It was important that the core case management reforms not be held up by the default judgment rules.

The Committee turned to consider other subsidiary issues on the details of the case management draft rules:

- It was agreed that the words "the plaintiff may seal judgment …" in r 15.7(1) should be amended to "the plaintiff may seek judgment …".

- Ms Paula Tesoriero pointed out that the draft rr 15.7(5) and (6) contemplates that liquidated demands go to a formal proof "hearing", but that liquidated demands are usually dealt with by the Registrar. She queried whether these subsections would instead fit better under r 15.8. Dr Mathieson agreed that the word "hearing" should be left out.

- The Chair noted that Associate Judge Faire had sent in a memorandum with some detailed comments on the draft rules. He asked for other detailed comments on the draft to be sent in memorandum form also. Ms Tesoriero indicated that the Ministry would send in a memorandum.

It was agreed that Justice Asher and Mr Beck would draft the paper on default judgment and formal proof reform and the Chair on the case management reform. These papers would be circulated by the 16th of December, preferably, or if necessary, in the last week of December. The draft default/formal proof paper would be sent to Ms Tesoriero so the Ministry could have input.

3. District Court Rules 2009 Reform

The Chair reported that the sub-committee had met up since the last meeting and handed over to Judge Doherty. Judge Doherty explained that his memorandum details the further changes made to the District Courts Rules.

The time periods under rr 2.12, 2.14, 2.15, 2.22, 2.27 and 2.30 had been revised down from 30 working days to the original 20, in accordance with feedback from the profession that 30 working days was too long.

The draft relaxes the restrictions on the amendment of pleadings, to allow for the quite frequent situations where plaintiffs file a claim for default judgment but subsequently realised they could recover more than they had pleaded. The newly proposed r 2.38A allows a claimant to amend pleadings that have been filed and served within 10 working days if no defence has been filed and no trial date has been allocated, or with leave of the court in other cases. This would incentivise defendants to file responses promptly. Any amended pleadings must be served on the defendant again.

Judge Doherty explained also that an issue encountered previously was that people would use the summary judgment procedure for straightforward cases suitable for default judgment and claiming the higher costs that are often available under summary judgment. Under the revised r 2.43, special rules apply for agreed settlements under rr 1.7 or 2.47 and for recovery of debts under the Construction Contracts Act 2002, where an application for summary judgment can be made without waiting for a response to be served. In other cases, the plaintiff can apply for summary judgment only after a response is served. If a response is not served within 20 working days, the plaintiff can apply for default judgment. Justice Winkelmann observed that in cases where a defendant does serve a response, this creates a delay before the plaintiff can apply for summary judgment but considered that it was a reasonable compromise. It was further agreed that r 2.43.7 should be amended from "… the court must, on giving judgment …" to "… the court must, on giving reasons …".

Judge Doherty turned to draft replacement r 2.42.4 and particularly the concept of "unmeritorious". The Committee agreed that the term could be misread by judges. It was noted that the High Court Rules did not have any equivalent and that rule was unnecessary, as it could be dealt with pursuant to the general costs discretion. The Committee agreed the r 2.42.4 could be removed.

Ms Tesoriero noted that the draft rules had not been consulted beyond the profession and strongly recommended consultation with other affected entities such as banks, insurance companies, finance companies, debt collection agencies, Citizens' Advice Bureaus, etc. She advised that Cabinet would look for this consultation given the costs involved — such as the sitting time of District Court Judges being reduced from 4,600 hours to 3,500 hours upon the summary judgment procedure being removed — and it was expected the Minister of Justice would be conscious of this. Ms Tesoriero pointed out that if the rules were put to Cabinet as a package next year (alongside case management and daily recovery rates reforms), there is time to do a meaningful consultation. Judge Doherty explained that the changes in the current draft were already the result of consultation (albeit with the profession only) and that the reinsertion of the summary judgment procedure had been at the suggestion of the Attorney-General. The Chair respected the views of the Executive branch and agreed that the strong recommendation from the Ministry should be followed.

The Committee agreed a consultation with the non-legal community should be started in a week's time, with a paper prepared by the Chair and the Clerk, to be circulated to Judges Doherty and Thomas, followed by Ms Tesoriero. The consultation will be very limited in scope, dealing with the summary judgment proposals only. The closing date for submissions will be Monday 30 January 2012, which would allow for discussion of the results at the February meeting. If nothing unexpected arises, the reforms could receive concurrence the following week and then go to the Cabinet Committee.

4. High Court (Trans-Tasman Proceedings Act 2010) Amendment Rules 2011

The Chair spoke about the issue of reciprocity raised by the Chief Justice at the earlier meetings. It was noted that for a New Zealander wishing to file a document in Australia, the

document would have to be signed by the client rather than by his/her New Zealand lawyer, as those lawyers cannot file documents in Australia unless registered. However, after that, the New Zealand lawyer can appear and represent the client at video conferences, etc. so there is reciprocity in all other respects. The Chair noted that the lack of reciprocity as to filing was relatively minor and that there was reciprocity in substance, and that the Chief Justice was satisfied with this. The Chief Justice had also previously been concerned whether New Zealand should push forward with the rules in light of enactment of rules in the states/territories of Australia being behind. Her Honour had since discussed the matter with Chief Justice Keane in Australia and was satisfied that New Zealand could go ahead.

Ms Cheryl Gwyn commented that agreement had already been reached with other proposals in the rules and that these had been the main outstanding issues. Mr Ross Carter had dealt with Mr Stephen Mills' concern about forms and some tweaks were still being done. Ms Julie Nind noted that a few other minor drafting changes were still being sorted. It was noted that timing had been pushed out due to the election and that the rules could go to Cabinet and Executive Council around March. This would give some time for Australia to put in place its corresponding State/Territory Rules, Federal Rules already being in place. The Chair thanked Ms Gwyn and Ms Nind for their work and noted that the rules could move to concurrence once the drafting details were sorted.

5. Consultation on Time Allocations and Daily Recovery Rates

Mr Brown reported that the old Schedule had grown incrementally and that the revised version was more streamlined in terms of subject matter so that reviews, for example, were included under the heading "Interlocutory Applications" which included applications for summary judgment and reviews of those decisions, as opposed to having a separate section for "Appeals and reviews of Associate Judges" as in the old Schedule.

Mr Brown explained that the draft Schedule 3 had been revised with new items 12A and 12B inserted to respond to the more nuanced approach envisaged for case management. He clarified that the phrase "issues management conference" in 12A was supposed to be simply "issues conference". Justice Winkelmann agreed that the rates assigned for items 12A and 12B were reasonable. It was confirmed that the assumption is no preparation or appearance is needed for category A proceedings.

The Chair suggested that the time allocated for filing memoranda under item 10 was an underestimation, and that parties should be encouraged to spend more time on this. It was proposed an item could be inserted before item 10 for preparation for the first case management conference, with rates of 0.2, 0.4 and 1. If parties agreed, a joint memorandum could be filed; if parties disagreed, separate memoranda should be filed. In either case, time should be spent trying to reach agreement. The Committee agreed.

In terms of changes needed to align with the discovery reforms, Justice Asher observed that item 18 allowed for costs for production of documents in discovery, but that with electronic discovery, this should become an administrative act that involves little or no substantive input from lawyers. Justice Winkelmann posited that different costs could apply for

electronic versus non-electronic discovery, at least at the stage when electronic discovery was still being phased in. Dr Mathieson pointed out that item 34 could cover the situation of non-electronic discovery if item 18 were to be removed. There was agreement that if item 18 were left in, the rates could be revised to 0.3, 0.6 and 1, recognising that production is expected to be a relatively perfunctory task.

The Chair and Mr Brown suggested that items 17, 18 and 19 should be considered together. The Chair queried r 14.6(3)(a) might be used to allow increased costs if item 18 were removed or amalgamated with 17. One problem was that the Court of Appeal in *Holdfast* had said that costs should not be considered during case management, even though case management necessarily involves costs management. The Chair also noted that there was a judicial gloss on increased costs with cases fixing a maximum uplift of 50%, but this was only for misbehaviour and that uplifts under r 14.6(3)(a) were unfettered.

Mr Brown observed the Bar had pressed quite strongly for the increase in item 17C for listing documents in a complex case. He suggested that the rate should be increased to 7 to reflect that more time is spent in preparing a list of documents than inspecting it.

The Committee agreed that Mr Brown, Mr Beck, Justice Winkelmann, Justice Asher and the Chair could sort out these issues. Mr Brown would revise the Schedule again for discussion at the next meeting. The Clerk is also to update the consultation paper to account for changes to the Producers Price Index for the quarter ending September 2011.

6. Place for Filing Proceedings in Urgent Matters

The Chair explained that the Committee had received a letter from Mr John Katz QC expressing concern over the rules as to the required place of filing for urgent matters. Mr Katz had a case where a client wanted urgent ex parte interim orders to stop forfeiture of lease. He prepared the voluminous papers required in Auckland but the rules dictated that he had to file in Invercargill, whether physically or electronically. The documentation involved was too extensive for electronic filing, and the logistics involved combined with the fact that there was no judge sitting at Invercargill on the day made physical filing unfeasible. In the instant case, the application was filed in Invercargill, and immediately referred to Fogarty J, who recused himself because of a conflict and handed it to Whata J, who made then made orders on the same day. Mr Katz wondered whether an amendment to the Rules should be considered to enable filing in a Registry other than the proper one for urgent matters, with a direction that subsequent non-urgent steps should be taken in the proper Registry.

Justice Asher was mindful that changing the current position could carry huge implications for Registries and could create opportunities of "forum shopping". Judge Doherty pointed out that Mr Katz's problem with electronic filing seemed to be that the application was very voluminous, but noted that he could simply first file the application electronically, with the other documents to be filed subsequently.

The Committee agreed that no change to the Rules was needed. The Chair will write a letter to Mr Katz reporting the discussion at the Committee.

7. CPRAM

Justice Winkelmann reported that the CPRAM sub-committee had been working away on the rules and was meeting up later in the week to look at a couple of ideas on the draft rules. The draft is expected to go out for consultation early next year.

8. General Business

There were no general business items discussed.

The meeting closed at 1.00 pm.