The Rules Committee

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16 November 2015
Minutes 05(2)/15

Circular 106 of 2015

Minutes of meeting held on 5 October 2015

The meeting called by Agenda 05/15 was held in the Chief Justice's Boardroom, High Court, Wellington, on Monday 5 October 2015.

1. Preliminary

In Attendance

Hon Justice Asher, the Chair
Hon Justice Venning, Chief High Court Judge
Hon Justice Gilbert
Mr Rajesh Chhana, Ministry of Justice
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
Ms Suzanne Giacometti, Parliamentary Counsel Office
Mr Kieron McCarron, Chief Advisor Legal and Policy, Office of the Chief Justice

Ms Brittany Whiley, Acting Secretary to the Rules Committee
Ms Harriet Bush, Clerk to the Rules Committee

Apologies

Rt Hon Dame Sian Elias GNZM, Chief Justice of New Zealand
Hon Christopher Finlayson QC, Attorney-General
Judge Doogue, Chief District Court Judge
Judge Kellar
Judge Gibson

Ms Jessica Gorman, Crown Law
Mr Paul McGregor, Secretary to the Rules Committee

Confirmation of minutes

The minutes of 3 August 2015 were confirmed. The Committee agreed that it was beneficial to keep recording full minutes of the meetings to enable members of the public and the profession to follow decisions made during the meeting and the reasons for those decisions.

2. Access to Court Documents

Consultation on the proposed Access to Court Documents Rules was completed in June 2015. The Committee had discussed some of the issues raised during the consultation at its last meeting. The Chair had now proposed further amendment to the Rules in light of the submissions. The Committee discussed the further amendments the Chair had made.

The Chair noted that a preliminary issue was the form that the proposed Rules were going to take. There had been several iterations of the Rules and the current approach is to provide two separate sets of rules in the High Court and District Courts Rules that will each apply to both criminal and civil proceedings. However, the Chair stated that the Rules Committee's jurisdictional basis for making rules in civil and criminal proceedings came from different sources. Ms Giacometti stated that it would not be a problem to refer to both sources of jurisdiction in the empowering provision referred to in the introduction to the rules. The empowering provision could refer to both s 51C of the Judicature Act 1908 and s 386 of the Criminal Procedure Act 2011.

Mr Beck stated that as a request for access to documents is considered to be a civil matter it makes sense to have the rules in the High Court Rules. An applicant would apply for access to documents in both a civil or criminal proceedings under the High Court Rules. Ms Giacometti said that the fact that access to court documents was dealt with in the High Court Rules could be flagged in the Criminal Procedure Rules to tell people where to go. A link to the High Court Rules could be provided on the New Zealand Legislation website.

The Committee agreed to provide a reference in the Criminal Procedure Rules to the High Court Rules.

The second issue was the proposed amendment to provide that the Rules apply to court documents transferred back to the Court from Archives New Zealand when a request for access is made. The Committee had discussed this issue previously and agreed that the proposed amendment was appropriate.

Thirdly, the Chair had inserted definitions of civil proceeding and criminal proceeding. The definition of criminal proceeding was taken from the current interpretation section in Part 6 of the Criminal Procedure Rules 2012, where the Criminal Access to Court Documents Rules are currently located. Venning J noted that he was concerned that this definition of criminal proceeding is too wide – for example it would apply to a bail decision or a pre-trial decision. Under r 5(2)(c) every person has the right to access a judgment, order or minute given by the court in a criminal proceeding. The Committee discussed r 7(a) which states that any right of access is subject to any enactment, court order, or direction limiting or prohibiting access or publication. The Committee queried whether this rule would protect a bail decision. This could depend on whether there is a difference between a restriction on access to a document and suppressing a document.

Mr Gray QC noted that the Access to Court Documents Rules deal with access requests by members of the public. They are not concerned with fair trial issues. Suppression of bail or pre-trial decisions is a different issue. The Chair stated that if there was concern about such documents being covered then the definition could exclude bail decisions or suppressed pre-trial decisions. It would be possible to amend r 5(2)(c) to state that every person has the right to access "any judgment, order, or minute of the court given in a criminal proceeding, including ant records of the reasons given by a judicial officer, *but excluding any bail decision or suppressed pre-trial decision*." Mr Gray QC queried whether conceptually it would

be better to deal with this issue under rule 8. Rule 5 is the gateway provision and the constraints on access are specified later in the Rules for particular reasons. Mr Gray QC considered that fair trial decisions were hinted at in r 8; if the Committee wished to set out restrictions in criminal proceedings it would be conceptually better here.

The Committee agreed to defer this point and the Chair, Venning J, Mr Gray QC and Ms Giacometti would consult to form a final view on the best way of dealing with the issue.

The next issue concerned the appropriate definitions to insert in the rules. Ms Giacometti agreed to check the definitions already in r 1.3 of the High Court Rules and determine which additional definitions were required. As "lawyer" is defined in this rule a further definition here is unnecessary.

Bauer had suggested explicitly referring to suppression orders as a part of the formal court record. The Chair stated that the Committee had made a policy decision not to deal with suppression in the Rules. This would lead the Committee not to action the suggested change. The Committee agreed.

The next proposal was to amend the definition of "formal court record" to include any record of the reasons given by the Judge whether formally transcribed or not. The Chair noted that he did not think that this proposal was a good idea as there could be good reasons not to disclose a Judge's informal notes. The Committee agreed.

A definition of "court document" had been inserted under the definition of "document". The Committee felt that it would be better to provide a definition separately in alphabetical order. There could be a cross reference between the two definitions. The Committee provisionally agreed to have a separate definition.

Another submission had suggested providing for a right of access to the Notice of Appeal. The Chair stated that he was not comfortable with the proposal as a Notice of Appeal could include material that was abusive or suppressed. The Committee agreed not to make this change.

Bauer had suggested amending proposed r 5(6) which states that a Registrar, if the request relates to a document to which rule 7 or 8(3) relates, may require the request to be in writing. Rule 6(2) only allows for written access requests. The Committee considered that r 5(6) was useful as there would be circumstances where it would be good to ensure that there were records of the request and the reasons for the request. Rule 5(6) is aimed at requests where there might be a general right of access to the type of document however there are restrictions on access under r 7 of 8(3). The Committee agreed to leave the provision in r 5(6) allowing the Registrar to require the request in writing.

The Committee then turned to the suggestion that the Rules should specify that only the party or their lawyer may inspect the documents. The rules do not currently cover this. However, it is implied that if access is given to an applicant then it is given to that person or a representative. The Chair considered that it was undesirable to stipulate who may exercise the right. The Committee agreed.

A further submission proposed that the current provision in r 6(2)(d) should be deleted. This provides that the requested must "set out any conditions to the right of access (for example, restrictions on the ability of the requester to disclose the documents sought and the ability to view but not copy the documents) that the requester would accept". The Chair stated that there was a purpose in this sub-clause. Mr Moore agreed that it is a useful indicator that the requester will comply with directions and conditions. The Committee agreed to keep this sub-rule.

The Committee also agreed that it was unnecessary to specify a time frame for a Judge to provide a response to the request or for the Registrar to give a copy of the request to the parties.

The Committee then considered a proposal to provide for the person who has requested access to the documents to be provided with a copy of any objection to the request. Mr Barker queried whether it would be appropriate to give a copy of the objections when this might itself include sensitive or confidential information. The objection would provide some record of what was in the file. The Chair agreed that the proposal would create more complexity and slow things down. Mr Beck stated that on

the other hand there was an argument that this was a natural justice requirement. The Chair stated that the current practice is that objections are generally provided to the applicant; the amendment was meant to provide some formality to this practice. Mr Barker considered that while this was the case in most circumstances, there would be some situations where it would be undesirable to provide the objection. Whether the objection should be provided should be decided on a case-by-case basis. The Committee agreed that specific provision requiring a copy of the objection to be provided to the applicant should not be added.

Several submissions had raised the issue of providing documents to third parties. Venning J pointed out r 6(5) which gives the Judge the ability to impose conditions on access to a document. The Chair noted that the issue of the parties themselves providing documents to third parties was difficult and would add complexity to the Rules. The Access Rules do not deal with this issue which is dealt with, to some extent, by the law of contempt.

The Committee considered that the one day deadline provided for a party to respond to a request for access during the hearing is appropriate as short deadlines are inevitable.

The Committee agreed to the change to r 6(5) to make it clearer that the Judge may grant an application for access.

The next issue was the protection of information contained in surveillance device warrants. Mr Moore considered that protection was already contained in the Search and Surveillance Act 2012. Ms Giacometti would check to see whether this was the case.

The Committee agreed that there was nothing in proposed r 8(1)(c) and (d) (which deal with the right to bring and defend civil proceedings without the disclosure of any more information about the private lives of individuals or matters that are commercially sensitive than is necessary to satisfy the interests of open justice, and the protection of other confidentiality and privacy interests) that would limit the considerations to the parties. These sub-clauses extend to confidentiality and privacy interests of third-parties. The Committee also agreed not to tinker with the reference to open justice in r 8(1)(c) as this had previously been carefully considered. The Committee's approach to the amendments had been not to change the factors to be considered in 8.

One submission had raised the interaction between the Access Rules and qualified privilege. Mr Gray QC considered that the privilege for fair and accurate reporting does not protect republication of a document.

The Committee decided not to make any change to provide for the public interest as an additional consideration to take into account under r 8(1). The Committee also agreed not to re-draft the rule using the wording suggested by ADLSi.

The Chair noted the submission that the guidance as to the weighting of the factors to be considered could be provided outside of the rules, for example in a practice note. The approach taken by the High Court Rules is to provide for everything within the rules. The Committee agreed.

The Committee agreed to remove the word "particular" from r 8(2). It was also agreed that there was no need to specify separate rules for when proceedings had been discontinued before trial.

ADLSi had suggested a number of additions to the list of enactments in r 8(3). Under this clause a person may not access a document relating to a proceeding brought under that enactment unless the Judge is satisfied that there is good reason for permitting access. Ms Giacometti agreed to look into these proposals. The first suggestion was "legislation pertaining to national security". The Committee agreed that it would be necessary to identify the specific Acts referred to. The second was the Victims Rights Act 2002; this would need to be considered in more detail. The third was applications where a party or witness involved in the document requests is under 18 years old. The Committee agreed that this was very general blanket exception. Mr Moore noted that most of these situations would be dealt with under the Family Courts Act 1980. The Committee agreed that it would be better to deal with cases involving children on a case by case basis.

The Committee agreed that r 8(4) which provides for a Judge to direct that orders, documents or files of any kind may not be accessed without the permission of the court, should remain: it relates to the Court's ability to administer its own affairs. It was also agreed that the clause should remain where it was.

The final submissions addressed were the suggestion to provide for non-parties to object to the request; the Committee agreed that this was unnecessary and a Judge could always give a non-party the opportunity to do so if it was necessary in the particular case. The suggestion to broaden r 9(b) to state the Judge may require the "requester or other person concerned to give notice of the request to any person who, in the opinion of the Judge, *may be* adversely affected by the request" was accepted as better drafting.

The Committee agreed to prepare a further draft of the Rules to take into account the decisions made at the meeting. The Committee considered the process of the Judicature Modernisation Bill and whether it would be desirable to delay the commencement of the Rules until this Bill had been passed. Mr Chhana advised the Committee that some aspects of the Bill were being discussed and it appeared that the Bill would not commence until late 2016 and early 2017. The Committee agreed not to delay the progress of the Access Rules at this stage; however Mr Chhana would keep the Committee informed as to the Bill's progress.

Action points: the Chair to prepare a further draft for the Committee to consider at the next meeting. The Chair, Venning J, Mr Gray QC and Ms Giacometti to liaise concerning access to bail decisions and suppressed pre-trial decisions. Ms Giacometti to look at whether the suggested enactments should be added to r 8(3).

3. Without notice application rule

Consultation on proposed amendments to r 7.23, applications without notice, had taken place prior to the meeting in August. The aim of the amendment was to make the rule more accessible for unrepresented litigants. Ms Gorman had agreed at the last meeting to consider the proposed amendment in light of the suggestions received by the submissions on the proposal.

The Clerk set out the current draft of the amendments prepared by Ms Gorman who was unable to attend the meeting. Proposed rule 7.23(2) sets out when an application may be made without notice. 7.23(2)(a) states the grounds on which a without notice application may be made. These are taken from the list of circumstances in r 7.46 where a Judge is able to determine an application may be heard without notice. The submission from ADLSi had suggested that r 7.23(2)(a) should cross reference this rule. However, Ms Gorman had recommended setting out the grounds in full in r 7.23(2)(a), as this sat better with the intention behind the amendment to facilitate the procedure for unrepresented litigants.

Proposed rule 7.23(2)(b) sets out that an application may only be made without notice if the applicant has made all reasonable inquiries and taken all reasonable steps to ensure that the application contains all material that is relevant to the application, including any defence that might be relied on by any other party, or any facts that would support the position of any other party.

Mr Barker queried whether the wording of this sub-rule was correct. He suggested removing the word "application". In his view the information would be contained in the memorandum. Mr Barker also questioned whether this obligation was covered by r 7.23(3).

Mr Moore stated that the policy behind the clause was to ensure that the Court was not misled. The Clerk noted that the intention was to state a wider obligation to make inquires before making an application without notice; if an application was not contested then it would be unnecessary to deal with any defence or facts supporting the other party, as this would not be relevant.

Gilbert J expressed a view that the obligation to make inquires to ensure that the application contains all material that is relevant would only be necessary where the application is contested, in which case r 7.23(2)(b) was unnecessary as it was already provided for in r 7.23(3). Venning J agreed with Gilbert J. Mr Moore queried whether there was a gap if 7.23(2)(b) was removed. Mr Barker noted that 7.23(2)(b)

linked to the requirement in Form G 32 where the applicant or their lawyer has to certify that they have made these inquiries.

The Chair noted that the consensus was that r 7.23(2)(b) was unnecessary. However, as Ms Gorman was not at the meeting, the Committee agreed to defer the resolution until the next meeting.

Mr Moore stated that the other area of difficulty was how the proposed rule interacted with the probate rules. Rule 27.4 refers to the obligation to certify an application in r 7.23, the amendments move the certification to, Form G 32.

The Clerk noted that the final issue with the amendment was when a memorandum must be provided with the application. The proposed amendment stated that a memorandum is required where the application is of a kind that would be likely to be contested if made on notice. This requirement was adopted following the submission of John Earles who stated that the vast majority of probate applications received are uncontested; having a requirement to file a memorandum would be an additional obligation without providing any discernible benefit. The Clerk stated that proposed sub-rule (5) provided that a memorandum would not be required where a rule allows for an application to be made without notice with a supporting affidavit and queried whether this was another situation where the memorandum would not add anything to the application. The Committee expressed the view that a memorandum would be required in these circumstances. The memorandum would be the first thing that a Judge looked at and would set out the parties' submissions.

Action points: the Clerk to convey the Committee's views to Ms Gorman on the proposed amendments and Ms Gorman to liaise with Ms Giacometti to consider the amendments to be discussed at the next meeting.

4. Criminal Procedure Amendment Rules

The Chair informed the Committee that consultation on the Criminal Procedure Amendment Rules had been undertaken and several submissions received from NZLS, ADLSi, Mr Chrisnall and the Departmental Prosecutors' Forum. The Chair of the Criminal Sub-Committee, Simon France J, had informed the Chair that the Sub-Committee considered that no changes to the proposed rules were required as a result of the points raised in the submissions.

The Committee agreed that the Rules should now be circulated for concurrence with a likely commencement date of April 2016.

Action point: Rules to be circulated for concurrence.

5. Affidavits and Oaths

The Committee turned to the fifth item on the Agenda. In December 2014 Mr John Earles had suggested that only barristers and solicitors who held current practising certificates should be permitted to take an affidavit. Rule 9.85 only requires a person to be "enrolled as a barrister and solicitor of the High Court." After receiving submissions from members of the profession, the Committee had decided that the case for narrowing the class of people who could take an affidavit had not been made out.

The final issue in relation to this proposal was a suggestion to amend r 9.85 to make it consistent with the restrictions on swearing an affidavit in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.) These state that a lawyer must not administer an oath or take a declaration in any case where the lawyer lacks of may appear to lack the necessary independence. Following the meeting in August, an amendment was drafted to match the restriction in the RCCC.

The Chair asked the Committee whether it was happy with the proposed wording. Mr Beck considered that the restriction is very wide applying where the lawyer "may appear" to lack the necessary understanding. Mr Moore stated that while this was so, the standard came from the RCCC. If a lawyer took an affidavit in those circumstances then they would be in breach of the RCCC. Ms O'Gorman said in the UK the Civil Procedure Rules state that the lawyer must be independent.

The Committee discussed whether it would be desirable to allow the Judge to have some discretion, for example, in urgent cases. Ms O'Gorman noted that this would have to be explicitly provided for in the rule. The rule could provide that "*without leave*, no affidavit, other than one sworn in a non-contentious proceeding, may be read or used if it is sworn before a lawyer who lacks or may appear to lack the necessary independence." On the one hand, this would still be wider than the requirements in the RCCC and lead to a breach of the Rules. However it would be less of a conflict, the Committee would effectively be adopting the RCCC approach with a qualification. Mr Gray QC considered that evidence has to be properly sworn and there was no reason to dilute the protections inherent in the requirements. Venning J stated that there might be circumstances where it would be in the interests of justice to allow something such as an injunction on the basis of such evidence.

Having discussed the matter the Committee agreed to qualify the amendment by adding the words "without leave".

Action Point: Amendment agreed to and ready to be included in the rules for concurrence

6. Rejection of documents for substantive reasons

The Committee had been considering whether the Rules should make specific provision for rejecting documents which conform with the formal requirements of the rules but raise substantive issues, such as where a statement of claim is patently frivolous or vexatious or an abuse of process. The Committee has considered the position in Australia and the United Kingdom where provision is made for these rare cases to be struck out or documents not accepted at the first stage of filing proceedings or before service.

At the last meeting, Ms Giacometti had agreed to prepare two draft rules reflecting the possible ways of making provision for rejecting documents for such reasons in the Rules.

Ms Giacometti stated that, having looked at the matter, she did not consider that there was jurisdiction to treat rejection of documents as an administrative act, as is done in Australia. Accordingly, she had provided one draft for the Committee following the approach taken in the United Kingdom; whereby a document could be accepted but struck out before it is served on the other party.

Ms Giacometti set out the proposed new rule she had drafted as r 5.35A.

Sub-clause 1 provides that the rule would apply where the Registrar believes that a statement of claim tendered for filing may fall within one or more of the grounds for striking out a pleading set out in r 15.1(1). Sub-clause 2 states that the Registrar must accept the document for filing if it complies with the formal requirements set out in rules 5.3 to 5.16.

Ms Giacometti had provided two options for the wording for the Registrar to refer the statement of claim to a Judge. The first option, Option A, provides that the Registrar may decline to release the statement of claim and notice of proceedings for service before the Registrar has referred the statement of claim to a Judge and refer the statement of claim to a Judge for consideration under the rule. The second option, Option B, simply states that the Registrar may refer the statement of claim to a Judge for consideration under the rule before issuing it for service. Sub-clause 4 provides that where the statement of claim is referred to a Judge under the Rule, the Judge may exercise all of the other powers under the Rules to dispose with the document appropriately by making an order to ensure that the claim is disposed of, including an order under r 15.1. Ms Giacometti queried whether it was necessary to list all of the orders that it is possible to make in this rule as she currently had.

Proposed sub-rule 5 states that r 7.43(3), which provides that before a Judge makes an interlocutory order, the Judge must give the parties an opportunity to be heard, does not apply. This sub-rule is intended to clarify that the decision to strike out the statement of claim under the proposed new rule will be made on the papers without a hearing.

Venning J noted that in practice such a statement of claim would be referred to the list judge or judge in charge of civil files and not be referred to an Associate-Judge. However, he considered that it should

be made explicit that the jurisdiction under this rule only applies to Judges. Ms Giacometti agreed that it would be more appropriate for a Judge to make these decisions.

Proposed sub-rule 6 states that if the Judge strikes out the statement of claim and considers that the claim is without merit, the Judge's order must state that fact. Ms Giacometti stated that she had included this provision so that the procedure could link into the threshold for barring a vexatious litigant included in the Judicature Modernisation Bill which requires a litigant to have brought at least two proceedings that were totally without merit. Ms Giacometti considered that, for this reason, it should be mandatory for the Judge to explicitly state that the claim is clearly without merit.

Mr Barker queried whether the current wording that the Registrar could "decline to release the statement of claim and notice of proceedings for service" was an accurate description of what happens when the party files a statement of claim. The Registry does not release the statement of claim, what they release is the notice of proceedings. Although in the District Court the process is that the Registry does take the statement of claim. Venning J suggested that the wording could be changed to "decline to issue the notice of proceeding for service". Gilbert J considered that it was important to retain a reference to the statement of claim as this was the document that the rule was concerned with. The wording could be "decline to endorse the notice of proceeding".

Ms O'Gorman asked whether the rule only applied to statements of claim or whether it extended to originating applications. The Committee noted that the documents that the rule was aimed at could not be identified as an originating application; the question was really whether they could possibly be described as a statement of claim.

The Committee discussed whether Option A or Option B as to the Registrar's powers on receiving such a document was more appropriate. Venning J considered that the wording in Option A was very helpful. Mr Chhana agreed. The intention behind this Option was to provide specific words for a Registrar to point to if necessary when declining to endorse the notice of proceedings for service. The Committee agreed to retain Option A in the draft.

Finally, the Committee discussed whether it was necessary to set out the Judge's power on receiving the statement of claim under sub-clause 4. It was agreed that it was helpful to provide the examples of what the Judge may do.

The Chair suggested that the next step would be to release the draft rules for consultation. The Clerk agreed to draft a consultation paper setting out the mischief and the proposal to address this. The consultation paper should refer to the United Kingdom and Australian approaches. This would be approved by the Chair, Ms Giacometti and Gilbert J who would report back to the Committee at the next meeting.

Action Points: the Clerk to prepare a short consultation paper and a final recommended draft rule to be prepared for the next meeting.

7. Substituted service on overseas defendants and protests to jurisdiction

The Committee had received a number of emails from Mr Chris Chapman relating to substituted service and protests to jurisdiction. Mr Chapman had suggested that the situation where substituted service is ordered on a defendant who is overseas should be clarified and the rules amended to explicitly provide whether substituted service within New Zealand on such a defendant amounts to service within or out of New Zealand. Mr Chapman also raised the question of where the burden of proof lies where the Court's jurisdiction is disputed under r 5.49. At the last meeting, Mr Gray QC, Ms O'Gorman and the Clerk had agreed to discuss the proposals.

The Clerk stated that the Sub-Committee had considered that r 6.8 could usefully be amended to clarify the place where substituted service is deemed to be effected. To this end they had proposed an amendment providing that a document served by substituted service is treated as having been served at the place at which the document is likely to have come to the notice of the person to be served. This proposal addresses Mr Chapman's concern with substituted service on an overseas defendant; service

will be considered to have occurred out of the jurisdiction and the procedure governing the ability to dispute the Court's jurisdiction over an overseas defendant will apply; r 6.27, 6.28 and 6.29.

Ms O'Gorman stated that the proposed amendment was not a substantive change; substituted service is not intended to change how the party is treated for jurisdictional purposes. This amendment is aimed at clarifying the current position to look at where the person is.

Mr Gray QC noted that the issue concerns proceedings where enforcement can happen within the jurisdiction. If enforcement is required outside of the jurisdiction then usually substituted service will not be adequate and the proceeding will not be enforceable outside of the jurisdiction. So the issue concerns the small category of cases where a potentially foreign party may have an ability to challenge the jurisdiction of the courts in New Zealand or may wish to argue that New Zealand is not the appropriate forum for the dispute. These parties should not lose the ability to challenge the proceedings but nevertheless are a party against whom enforcement proceedings can be taken in New Zealand if the claim is successful. Mr Gray QC stated that the one clarification that could be made was to say that the relevant place is the place where the document is likely to be brought to that person's knowledge so that if they have the ability to challenge jurisdiction then substituted service does not affect their ability to do this.

The Committee agreed to the proposed amendment.

Action point: amendment to be put forward for concurrence

8. Changes to intervention rule for barristers sole – meaning of "solicitor"

Following the changes to the intervention rule which allow a barrister sole to receive direct instructions to act in civil proceedings where the client is legally aided, the Committee considered whether it was necessary to change some of the references to solicitor in the Rules.

Mr Moore had drafted initial amendments to consider updating the references in the High Court Rules from "solicitor" to "lawyer". It was noted that the Rules currently maintain a distinction between "solicitor" and "counsel" which is predicated on the distinction between the solicitor on the record and the counsel appearing in the proceedings. Mr Moore questioned whether it was desirable to maintain this distinction. Following the changes a barrister could be the lawyer on the record and send another counsel to appear. The Trans-Tasman Proceedings Act also uses the term "solicitor" so this would have to be borne in mind and may need to be maintained.

The Committee agreed to continue looking at these amendments as a work in progress. While these changes will require significant changes the Rules are now out of step with the current terminology and require updating.

Action point: Item to be listed for next meeting

9. District Courts Rules Schedule 4

The item was adjourned until the next meeting.

Action point: item adjourned until the next meeting

10. High Court Rules Form B2 – Bankruptcy Notice

The Committee received a suggestion from Mr Cunningham that paragraph 2 of Form B2 of the High Court Rules which states that the Judgment Creditor claims costs against the judgment debtor, including a fee for filing the bankruptcy notice and a fee of $150 for serving the notice, should also include a fee for obtaining a certified copy of the judgment or order on which the bankruptcy notice is based. Rule 24.8 provides that the certified copy must be attached to the request for the issue of a bankruptcy notice.

Mr Barker had considered the proposed change and recommended that no change was necessary. The form for obtaining a certified copy of the judgment (form 35 of the District Court Rules) states that the specified amount is due under the judgment/order and that amount includes the costs of the certificate. Accordingly, the cost of obtaining a certificate providing that the copy is a true copy of the judgment is already provided for.

Mr Barked had identified one amendment that needed to be made to Form B2 which refers to item 17 of the time allocations in sch 3 rather than item 44.

Action point: The clerk to draft a letter thanking Mr Cunningham for his proposal. The amendment to change the reference to item 17 in the Form to item 44 to be put forward for concurrence.

11. Representative Actions

Prior to its meeting in August, the Committee had received a letter from Mr Robert Gapes suggesting that the Committee consider making provision for representative actions in the High Court Rules following recent developments in case law in the area. In 2008 the Committee prepared a Draft Class Actions Bill and Rules and presented them to the Minster of Justice. However, the Bill has not been considered.

Following the August meeting the Clerk drafted a paper setting out the case law for bringing proceedings on a representative basis under r 4.24.

The Chair considered that it would be best to defer discussion of whether it would be desirable to provide for the representative action procedure in the rules until the Chief Justice was present.

Action points: item deferred until the next Committee meeting.

12. Central Processing Unit

Mr Chhana provided a memorandum to the Rules Committee which sets out the tasks that the CPU undertakes and who performs the task in an Appendix. He confirmed that the CPU had been discussing its work in relation to liquidated demands and default judgments with District Court Judges. The idea was to develop a practice note by the Chief District Court Judge dealing with liquidated demands.

The item was left to be discussed at the next meeting when Judges Kellar and Gibson were able to attend.

Action Point: item to be considered again at the next meeting.

13. Probate in solemn from

The next issue on the agenda related to the proper registry to file an application for probate in solemn form.

Venning J addressed the Committee on this issue. Prior to 2013, all applications for probate were filed at the nearest registry to the deceased's place of residence at the time of their death. In 2013 a central registry within the Wellington High Court was created. Rule 27.10 applies to "an application, and all other documents, filed under this part" and provides that irrespective of the place where the deceased died, the application and documents must be filed in the registry of the court at Wellington.

However, r 27.6, which deals with applications in solemn form, provides that Part 5 applies to the application. Rule 5.1 states the proper registry, which would require applications for probate in solemn form to be filed in the registry nearest to the registry of the first named defendant. Venning J stated that currently some applications in solemn form are filed in Wellington but are sent back and told that they have been filed in the wrong place. There is confusion in practice. From a work point of view probate solemn form are received in Wellington but referred for hearing by a Judge in the relevant court.

The Chair considered that it would be desirable to clarify what the position is. Mr Chhana said that he would inquire as to the Ministry's view. If the Ministry considered that the rules needed to be amended then Mr Chhana would inform the Chair before the next meeting.

Action points: Mr Chhana to inquire as to the Ministry's position and inform the Chair prior to the next meeting.

14. Letters of Administration

The Committee had received a request from Mr Peter Fantham in relation to the process whereby the surviving spouse can obtain letters of administration. Mr Barker had agreed to consider the matter following the last Committee meeting.

The current position is that before applying for administration the surviving spouse must first attend a lawyer to make an election under the Property Relationships Act as to whether they wish to choose Option A – to make an application under the Act for the division of relationship property, or Option B – to receive their beneficial entitlement under the will or under the intestacy laws. In order to obtain letters of administration with will annexed or upon intestacy the spouse must affirm the relevant form before a solicitor, Registrar, Deputy Registrar or Justice of the Peace. This means that the spouse applying for probate must undertake a two step process. Mr Fantham had suggested an amendment to allow both steps to be undertaken at the same time.

Mr Barker stated that he agreed with Mr Fantham's proposal. However, he had suggested alternative wording to allow for this as he did not consider that the wording proposed by Mr Fantham correctly addressed the issue as conceptually, the spouse must first make a choice and the words "I am choosing" were ambiguous. Mr Barker suggested amending the wording to provide "I choose option B under section 61. I lodged a notice of choice of option under section 65(2)(c) in this Court on[date]/ at the same time as I file this application [delete which is applicable]".

Mr Moore had provided for the suggested amendment in the current High Court Amendment Rules. The Committee agreed that the change should go forward for concurrence.

Mr Barker then addressed the second issue which was where there was a small estate. Under s 77 of the Administration Act, the entirety of a small estate will pass to the surviving spouse or partner. Mr Fantham suggested that in this case, the surviving spouse should not still be required to make an election.

Mr Barker stated that he did not support the proposal to amend this. While it is unlikely that the surviving spouse in this situation will choose Option A, it would be undesirable to constrain their choice. In certain cases the estate might turn out to be worth more than it was initially thought. More importantly, the change would essentially be waiving a requirement imposed by the Act. The Act states that an election is required, and in his view it would not be possible to subvert the need to make an election by amending the Rules. While there is a cost associated with an election where it may be unnecessary, this is the legislature's decision. The Committee agreed.

Action Point: Clerk to draft a letter to Mr Fantham thanking him for his proposals. The change to provide for the first proposal to be put forward for concurrence.

15. Costs in pro bono cases

The point was raised at a recent Bar Association conference that when a retainer provides for a contingency fee agreement and the client is not charged or not charged full fees unless they succeed, an award of costs is not covered by the current wording of r 14.2(f). The Chair stated that his initial response to this was that the Judge would find a way to read the rule robustly to allow them to award costs in such cases, the Supreme Court in *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* doubted whether costs could be ordered in such case. The Committee received a letter from Mr Jason McHerron proposing that the Committee consider clarifying the issue by amending the rule. The Chair considered that the current wording does require a Judge to push the meaning of the words if

they wished to award costs in such cases. The Chair asked Ms Giacometti to draft an amendment along the lines of r 44.1(3) in the United Kingdom Civil Procedure Rules to clarify the position.

Action point: Ms Giacometti to draft amendments

16. Reviews under s 75 of the Coroners Act 2006

Mr Graeme Edgeler had written to the Committee to ask it to consider making specific provision for the procedure to commence a review of certain Coroner's decisions in the High Court. Mr Edgeler had proposed providing an informal procedure akin to that used when dealing with access to court records. The Chair noted that he did not favour this approach. The other approach suggested by Mr Edgeler was to specify that a review under s 75 was commenced by way of originating application listed in r 19.2.

The Committee agreed that it would be desirable to specify a way. Ms Giacometti would propose a draft and send to the Chair who would then write to the Chief Coroner asking for her view.

Action points: Ms Giacometti to draft an amendment to provide for reviews under s 75 and send this to the Chair. Chair to contact the Chief Coroner to ask for her view.

17. Page numbering of judgments

Marian Hinde has suggested providing page numbering in judgments and minutes. The Chair stated that it is quite rare to get a page of quotations where there is no paragraph number for a long period of time. There had been a decision made to use paragraph numbers in judgments, and library systems and templates for judgments operated on this basis. The Chair was of the view that adding page numbers would not simplify matters.

The Committee agreed not to make this change.

Action point: the clerk to draft a letter so send to Marian Hinde thanking her for her proposal.

18. Thanks

Finally, the Chair thanked Mr Moore on behalf of the Committee for the drafting work and contributions he had made during his time on the Committee. Mr Moore had attended 35 meetings and has been on the Committee since October 2012. Mr Moore had been a skilful, patient and valued member of the Committee over the past three years.

The meeting closed at 12:50 pm