The Rules Committee

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8 October 2014
Minutes 05/14

Circular 84 of 2014

Minutes of meeting held on 6 October 2014

The meeting called by Agenda 05/2014 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 6 October 2014.

1. Preliminary

In Attendance

Hon Justice Asher (the Chair)
Rt Hon Dame Sian Elias, GNZM, Chief Justice of New Zealand
Hon Justice Gilbert
Judge Gibson
Mr Frank McLaughlin, Deputy Secretary, Ministry of Justice
Mr Bruce Gray QC, New Zealand Law Society representative
Mr Andrew Beck, New Zealand Law Society representative
Ms Laura O'Gorman
Mr Bill Moore, Special Parliamentary Counsel, Parliamentary Counsel Office
Mr Kieron McCarron, Judicial Administrator to the Chief Justice

Ms Vanessa Boyle, Ministry of Justice for Agenda Item 2.

Ms Kate Frowein, Secretary to the Rules Committee
Mr Thomas Cleary, Clerk to the Rules Committee

Apologies

Hon Christopher Finlayson QC, Attorney-General
Hon Justice Winkelmann, Chief High Court Judge
Judge Doogue, Chief District Court Judge
Judge Kellar
Mr Andrew Barker, New Zealand Bar Association representative
Ms Jessica Gorman, Crown Law

Confirmation of minutes

The minutes of 4 August 2014 were confirmed.

Matters arising

No matters arising.

2. Victims' Orders Against Violent Offenders Rules 2014

At the last meeting, the Ministry of Justice invited the Rules Committee to comment on the draft Victim Orders Against Violent Offenders Rules 2014 developed by the Ministry of Justice. These draft rules set out how victims of serious violent and sexual offences apply to the District Court for a non-contact order against the offender under the Victims' Orders Against Violent Offenders Act 2014.

The Committee set up a working group chaired by Judge Gibson to consider the draft rules and provide feedback to the Ministry on the rules. This feedback was relayed to the Ministry prior to the meeting and further draft rules were prepared and presented to the Committee. Vanessa Boyle from the Ministry of Justice attended and spoke to the draft rules. The Committee considered that the draft rules were too prescriptive and detailed and suggested that the rules give judges greater latitude to craft the process according to the matter at hand. Further, the District Court Rules 2014 could be relied on to a greater extent. The Committee also questioned the extent of some of the powers in the draft rules, including whether there was the power to clear the Court.

The Committee recognised that the rules did not require concurrence from the Committee and all comments were simply suggestions. It was ultimately up to the Ministry to develop the rules and for the Governor-General acting on the advice and with the consent of the Executive Council to make the rules.

The Committee thanked the Ministry for the opportunity to comment on the draft rules.

3. Access to Court Documents Rules

The Sub-Committee presented the draft civil and criminal access to court documents rules. These draft rules are shorter than the existing rules and have adopted a simplified structure. This is aimed to make it easier for lay persons to understand the rules. The draft rules also provide guidance on the different weight given to the factors depending on when a request is made to the court. This is intended to provide some indication of the likelihood of obtaining different documents. Doing so would help assist people in assessing whether to make an application.

The Chair noted that the Chair of the Criminal Rules Sub-Committee, Simon France J, had sent a note expressing reservations on the draft criminal access to court documents rules. In particular, Simon France J questioned whether Judges should be required to determine requests made during a trial even if there was no objection from parties. The Judge thought that this would increase the workload of Judges. The Chief Justice considered that accessing court documents was a matter for Judges to control and reliance should not be placed on counsel who may be extremely busy during a trial to object. If Judges find it difficult to deal with the application due to time constraints, then Judges can delay or put the matter off until later.

Turning to the substantive detail in the draft rules, Judge Gibson questioned whether the list of enactments automatically restricting access was sufficient. The Judge suggested adding the Law Reform (Testamentary Promises) Act 1949 to the list of enactments. Frank McLaughlin suggested that there should be a process by which the Ministry of Justice reviews such lists of enactments every three years to check whether the list needed to be updated in light of statutory amendments. The Committee thought that this was a valuable initiative and supported the Ministry implementing this process.

Andrew Beck recommended that the draft rules should specify when the substantive hearing stage was. The existing rules currently contain a definition. Rule 3.9(1) of the High Court Rules provides that the substantive hearing stage begins at the start of the hearing of the proceeding and lasts until the close of the 20th working day after the Court has given final judgment or the proceeding is discontinued. Rule 6.6 of the Criminal Procedure Rules 2012 provides that this stage lasts from when the proceeding is commenced by filing of a charging document until all applicable appeal periods have expired.

Mr Beck considered that as the factors setting out the different weighting to be applied to the factors centred around the concept of the substantive hearing, then having this defined in the rules would be beneficial. The Committee agreed and discussed the concept of a substantive hearing in both civil

and criminal proceedings. The Committee considered that during a hearing or trial the principle of open justice applied strongly as the public could normally attend the hearing and would hear the evidence and submissions. The media acted as the public's surrogates in enabling those who were unable to attend to know what was going on. However, after the hearing or trial the public could no longer simply attend the hearing and so the same principle of open justice did not apply as strongly. From this principled basis, the Committee considered that the substantive hearing stage should be tailored around when matters were heard in court as this is when the guidance states that open justice applied strongly. Recognising this, the Committee decided that in civil proceedings the substantive hearing stage would be defined as beginning at the start of the hearing and finishing when the hearing concluded. In relation to criminal proceedings, the substantive hearing stage should begin when the trial started and finish when the sentence was delivered.

Mr McLaughlin suggested amending the privacy and confidentiality interests factor in relation to the criminal access rules to make it clear that the court should also focus on the personal safety of complainants, defendants and witnesses. The Committee agreed.

Other drafting matters were raised. The Chief Justice stated that the rules should provide "every person may" rather than "every person has the right" as the right is qualified. Further, r 3.7(3) of the draft rules provides a person may inspect under the supervision of an officer of the Court. This could be too broad and instead that should be changed to Registrar or person appointed by the Registrar. It was also decided that in r 3.10(1)(f) and 3.11 the term "appropriate" should be used rather than "just". Finally the Committee determined that in r 6A.6 of the criminal access rules, rather than referring to "any person may request access to other court documents" the heading should be "other person may request access to court documents" as the focus is on who requests rather than the type of documents.

Finally in relation to the form of the rules, the Chief Justice considered that that there should be one set of rules covering access rules to both civil and criminal court documents rather than two separate sets of rules, as there is currently. As the Supreme Court explained in *Mafart v Television New Zealand Ltd* [2006] NZSC 33, [2006] 3 NZLR 18, the decision to grant access to civil and criminal court documents is part of the Court's civil jurisdiction. The Chief Justice considered that having a single set of civil rules covering both criminal and civil court documents in the High Court Rules would make it clear that deciding whether to grant access was a civil decision. However, the Chief Justice recognised that this was a significant change and this needed to be discussed in the consultation document issued along with the draft rules. The working group was tasked with creating one set of rules encompassing access to both civil and criminal documents.

The Committee decided to make these changes and then, if possible, release the consultation document along with amended draft rules.

Action point: Amend the draft rules to include the protection of persons in the principle of protecting privacy and confidentiality interests. Insert a definition of the substantive hearing stage. Make further changes in wording. Amend the draft consultation document and prepare draft access rules combining rules regulating access to civil and criminal documents.

4. Progressing Protests to Jurisdiction

At the last meeting the Committee had considered how protests to jurisdiction should be progressed along with adjournments sine die. When a protest is filed it acts as a road block to the proceeding. The plaintiff can apply to set aside the protest or the defendant, who filed the protest, may apply to have the jurisdiction determined. But if neither party takes any steps the proceeding remains live but stagnant.

While this could lead to stagnated proceedings, the Chair was not aware of any there being any real problem. Registry had been contacted and they did not think there was any practical issue arising in terms of court resources. Laura O'Gorman agreed that this was not a problem for the functioning of courts. No judicial resources were taken up as a result of the proceeding remaining parked by the parties. The only problem related to the impact on performance statistics. Mr McLaughlin agreed and considered that the court statistics should only measure the performance of the courts and not delays

caused by parties themselves that did not impact on court resources. In addition to protests to jurisdiction, other examples of party-caused delays would be where a stay was granted on the basis that parties advised the court that they were seeking to settle the dispute. Recording such delays as time taken for the proceedings to be progressed through the court would not properly reflect the performance of the court. Mr McLaughlin considered that the Ministry should look into how these statistics were recorded to ensure that party-induced delays did not factor into court performance statistics. The Committee agreed.

Action point: Mr McLaughlin will check how protests to jurisdictions and stays requested by both parties are recorded to ensure that these do not impact on performance statistics.

5. Dispensing with Security for Costs in the Court of Appeal and Supreme Court

The Committee turned to consider whether registrars should decide whether to dispense with security for costs. This matter had been raised at the last meeting on 4 August 2014 following the Supreme Court's decision in *Reekie v Attorney–General* [2014] NZSC 63. That decision dealt with, among other matters, who should decide whether to dispense with security for costs in the Court of Appeal. At [22] of the Judgment the Court had recommended that Judges rather than Registrars should be responsible for making such a determination.

Draft rules reflecting this suggestion had been prepared and were presented to the Committee. The Committee discussed the rules and the practical impacts this change would have. It was accepted that adopting this change would take up a greater amount of Judges' time. A Judge would determine the application and then there could be an application for review made to three Judges. Only after this could leave to appeal the decision to the Supreme Court be made. There was a potential impact on resources and the Committee decided to seek further comment from the Court of Appeal.

Action point: Court of Appeal to be invited to comment on the proposed change.

6. Criminal Procedure Amendment Rules 2014

The Criminal Procedure Amendment Rules 2014 amend the Criminal Procedure Rules 2012 to make it clear that written notice of the joining of charges under s 138 of the Criminal Procedure Act 2011 must be served on the defendant and counsel affected. They also amend r 2.8(5) to clarify that process servers can be granted approval to serve documents in general. Finally, a statement of facts is required to be included with case management memoranda.

The Committee agreed to these changes and approved the amendment rules.

Action point: The Criminal Procedure Amendment Rules 2014 are to be sent out for concurrence.

7. Admiralty Rules

The Auckland District Law Society's Civil Litigation Committee had suggested three changes to the admiralty rules: first, allowing for undertakings rather than full security to be paid to allow for a warrant of arrest; second, specifying what happens if additional security is requested but not paid; and, third, providing a mechanism for arranging the release of a ship after hours where parties have reached an agreement.

These were discussed at the last meeting and a response was sought from Registry staff experienced in the admiralty rules. Tony Mortimer provided a memorandum looking at these three suggestions. Mr Mortimer considered that it was not necessary to explicitly state that undertakings rather than full security could be provided. Rule 25.34(4)(b) provides that security to the satisfaction of the Registrar can be requested and can be set to zero if the Registrar is confident that funds for security will be received. In relation to stating the effect of failing to pay additional security, Mr Mortimer considered that Registrars could request the assistance of the Court to determine the consequence and setting out guidance was not required. Finally, in relation to releasing a ship after hours, Mr Mortimer said that releasing a ship after hours could give rise to some difficulties and associated expenses. Staff and service providers may be hard to contact after hours and it would be necessary to bring staff into work after hours. This would incur costs. It also may cause issues with determining amounts owing,

required before the ship is released, as service providers may not be available. Further, people who wish to lodge a caveat cannot do so when the Court is closed. For these reasons Mr Mortimer recommended the suggestions were not adopted by the Committee.

The Committee agreed with Mr Mortimer's very helpful analysis. On this basis, the proposed changes were not agreed to. However, the Committee wished to thank the ADLS for making these suggestions and will reply formally in due course.

Action point: The Chair will thank the ADLS for its suggestions and outline the reasons for not taking further action.

8. Insolvency Rules

The Auckland District Law Society's Civil Litigation Committee had identified two apparent conflicts in relation to the insolvency rules. Ms O'Gorman was asked to consider the suggested changes and then identify other people who could form a working group chaired by Ms O'Gorman to analyse any issues arising and provide a recommendation to the Committee.

Action point: Ms O'Gorman to review the suggestions and lead a working group.

9. Four amendments to the High Court Rules

Associate Judge Osborne provided the Committee with a memorandum outlining four possible changes to the High Court Rules. These were: first, reviewing assumptions about service of letters that are posted; second, specifying the font size in documents; third, requiring registration numbers for Companies in the intituling; and, fourth, specifying where caveats and statutory demands would be attached in originating applications.

The Committee thanked Associate Judge Osborne for making these suggestions. In relation to the first suggestion, regarding assumptions about service of posted letters, the Chair considered that a review was needed as the rules assumed time frames for postal service. With the proposed changes to postal delivery times, these may need to be rethought. The Chief Justice recommended that the Committee reconsider post as a method of service in full alongside other forms of service. The Committee agreed. However, Mr McLaughlin pointed out that the Electronic Transactions Act 2002 requires consent to use electronic means for providing or receiving information. How this related to service needed to be determined alongside the proposed changes to the post service. The Ministry of Justice would look into this and report back to the Committee on the use of electronic means in serving documents.

Turning to the second matter raised by the Judge, relating to font size, the Committee accepted that there was an issue about some pleadings where font size was manipulated to fit within the page limit. For this reason, the Court of Appeal (Civil) Rules 2005 and the Supreme Court Rules 2004 specified what font size could be used. However, the Committee did not want to be unduly prescriptive in the High Court where page limits were not normally imposed. Further, Ms O'Gorman pointed out that fonts were differently sized and that Arial 10.5 pt was the same size as Times New Roman 12 pt. Therefore font size was a crude tool to achieve limiting of pleadings. Bruce Gray QC considered that the issue was not so much the number of pages or font size but the number of words and whether this was proportionate to the issue at hand. Page limits and font size were crude estimates of this. The Committee saw some merit in this proposal and decided to consider this further at the following meeting.

In relation to the third issue relating to company registration numbers in the intituling, Ms O'Gorman considered that the usefulness of company registration numbers was in tracking the company in correspondence rather than in the court documents. In Australia legislation required companies to state their registration number on letters. This enabled the company who wrote the letter to be identified even where it subsequently changed its name. New Zealand did not have a comparable provision. Ms O'Gorman suggested that this should be changed but this could not be done by the Committee. The Committee decided that this suggestion will be passed onto the Ministry for Business, Innovation and Employment.

The Committee then considered the fourth suggestion relating to specifying where caveats or statutory demands should be located in originating applications. The Committee considered that this step would be too prescriptive and that Judges could give direction specifying the location of documents if required.

Action point: The Ministry of Justice will report back on the issue of electronic service. The Committee will look at page limits at the next meeting. The suggestion about company registration numbers will be passed onto the Ministry for Business, Innovation and Employment. No change will be made to specify where caveats or contracts would be placed.

10. Case management conference memoranda

Mr Mortimer had emailed the Committee suggesting that the High Court Rules should specify how case management memoranda should be filed and also requiring a joint memorandum or separate memoranda to be filed for any further case management conference. The Committee asked the Clerk to prepare a paper on these suggestions to be discussed at the next meeting.

Action point: The Clerk will prepare a memorandum looking at service of case management memoranda and whether memoranda should be required for further case management conferences.

11. The Definition of Liquidated Demand

The Inland Revenue Department had written to the Committee recommending that the definition of liquidated demand in the District Court Rules 2014 be amended. Prior to the 2014 Rules, a tax debt had been a considered liquidated demand. However, the definition of liquidated demand was amended in the District Court Rules 2014 to make it consistent with the High Court Rules. Under the District Court Rules a statutory obligation was not defined as being a liquidated demand. As a result the demand for payment of tax debt required using the formal proof procedure. This created a higher workload for the Court and for the Department.

The Committee accepted that this was an unintended consequence and came about as a result of aligning the District Court Rules with the High Court Rules. It needed to be addressed perhaps in both sets of rules.

Mr Gray asked whether there were other statutory debts with similar processes and whether the Committee should take a broader look. Mr Gray suggested that the definition should be amended to state that a sum arising from a statutory obligation is a liquidated sum. The Committee thought that this was a good solution and asked Mr Moore and the Ministry of Justice to look into this further and report back at the next meeting.

Action point: The Ministry of Justice and Mr Moore will discuss amending the High Court Rules and District Court Rules to provide that a debt owing under a statutory obligation is a liquidated sum.

12. Granting leave to appeal

In the interests of time, this item was left until the next meeting. Mr Beck agreed to prepare a memorandum setting out his thoughts.

Action point: Mr Beck to prepare memorandum on this issue.

13. District Court Amendment Rules

The District Court Amendment Rules made minor changes to the District Court Rules. Provision was made for the Mondayisation of certain public holidays in the definition of working day, the rules around case management conferences were clarified to make it clear that conferences are not required when applications for summary judgment are made, and a new form was inserted while an existing form that duplicates information contained in another existing form was deleted. These last two matters had been agreed to at the last meeting.

The Committee agreed to these rules.

Action point: The District Court Amendment Rules 2014 will be circulated for concurrence.

The meeting closed at 1.10 pm