The Rules Committee

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21 October 2013
Minutes 05/13

Circular 94 of 2013

Minutes of meeting held on 7 October 2013

The meeting called by Agenda 05/2013 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 7 October 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
Hon Justice Gilbert
Judge Susan Thomas
Judge Doherty
Judge Gibson
Mr Bruce Gray QC, New Zealand Law Society representative
Mr Andrew Beck, New Zealand Law Society representative
Ms Phoebe Dengate-Thrush, Private Secretary to the Attorney-General
Mr Warren Fraser, Courts and Tribunals Policy Manager, Ministry of Justice
Mr Bill Moore, Special Parliamentary Counsel, Parliamentary Counsel Office
Mr Kieron McCarron, Judicial Administrator to the Chief Justice

Dr Warren Young, Consultant, Ministry of Justice
Ms Sara Dib, Policy Advisor, Ministry of Justice
Ms Beth Bowden, National Technical Advisor, District Courts & Special Jurisdictions, Ministry of Justice
Ms Stephanie Grummitt, Senior Policy Advisor, Ministry of Justice

Ms Jennie Marjoribanks, Secretary to the Rules Committee
Mr Thomas Cleary, Clerk to the Rules Committee

Apologies

Hon Christopher Finlayson QC, Attorney-General
Judge Jan-Marie Doogue, Chief District Court Judge
Mr Frank McLaughlin, Deputy Secretary, Ministry of Justice
Ms Cheryl Gwyn, Crown Law
Mr Stephen Mills QC, New Zealand Bar Association representative

Confirmation of minutes

The minutes of 5 August 2013 were confirmed.

Matters arising

The Chair welcomed Justice Gilbert to his first Rules Committee meeting. The Chair also welcomed Mr Warren Fraser from the Ministry of Justice who was standing in place of Mr Frank McLaughlin who was unable to attend the meeting.

In relation to membership, the Chair noted that Mr Stephen Mills QC has chosen Mr Andrew Barker as his alternate. Mr Barker will attend the Committee meetings when Mr Mills cannot attend.

Finally, the Chair farewelled Judge Doherty. Judge Doherty had been a member of the Rules Committee for 10 years, who was, along with Judge Joyce QC, responsible for bringing about the District Court Rules reforms, many of which had greatly improved how the District Court functions to the benefit of the profession and the public. The Chief Justice echoed these sentiments and thanked Judge Doherty for his industry, commitment and valuable contributions to the Rules Committee.

2. Appeals of interlocutory decisions

The Chair explained that the appeal pathway of interlocutory decisions had been a contentious issue for the Committee creating much debate. The Chair went on to explain inform the Committee that the decision about how to deal with interlocutory appeals had now been taken by Cabinet who had decided that, on the basis of a Ministry of Justice recommendation, appeals against interlocutory decisions would now require leave.

Action: no immediate action would be taken on the interlocutory appeals pathway would be taken at present. However, the Committee would discuss this further with the Ministry of Justice and wait to see how the pathway was provided for in the proposed Bill.

3. Rules for incorporating a reference to the Electronic Bundle into the Supreme Court Rules 2004 and the Court of Appeal (Civil) Rules 2005

These draft rules are aimed at incorporating, by way of reference, the Electronic Bundle Protocol into the Supreme Court Rules 2004 and the Court of Appeal (Civil) Rules 2005. The Chair stated that these draft rules were relatively straight forward and largely followed the amendments to the High Court Rules incorporating the Protocol that had been agreed to at the last meeting. This was intentional so there would be a consistent approach in using electronic bundles in the various courts.

If agreed to, these rules would require parties to consider whether to use an electronic bundle. The use of an electronic bundle was encouraged but was not be mandatory at the moment. However, if the parties chose to do use electronic bundles then these bundles should be consistent in format set out the Protocol.

Mr Warren Fraser raised an issue about commencement dates. At present the November commencement date would not provide sufficient time for the process to be gazetted. Instead, Mr Fraser proposed a March or April 2014 date. Mr Bill Moore suggested a 1 April 2014 date to which the Committee agreed. On this basis, the Court of Appeal (Civil) Amendment Rules (No 2) 2013 and the Supreme Court Amendment Rules (No 2) 2013 were agreed to.

Action: the commencement dates for the Court of Appeal (Civil) Amendment Rules (No 2) 2013 and the Supreme Court Amendment Rules (No 2) 2013 will be changed to 1 April 2014. The rules are agreed to and will be circulated for concurrence.

4. Draft rules for case managing judicial review proceedings

Mr Andrew Beck presented the Committee with a draft set of rules for case managing judicial review proceedings. These rules were an amalgamation of provisions relating to the case management of ordinary proceedings with provisions relating to the case management of appeals. In preparing these

rules, Mr Beck explained that he had tried to imagine what directions would need to be made at first instance and these directions were included in the schedule.

Mr Gray argued that, as a matter of principle, the Committee should consider whether to favour a unified procedure using a menu of case management options or whether separate case management procedures should be adopted for different types of procedures. While the draft rules would work in practice, Mr Gray considered that they would further add to the proliferation of rules and the fragmentation of procedures. Mr Beck agreed with Mr Gray that the Committee should attempt to create uniform processes and avoid separate procedures. However, these rules were drafted in response to the discussions at previous meetings addressing specific issues surrounding case management of judicial reviews.

Justice Gilbert queried whether, in practice, there were any problems with how applications for judicial review were currently being case managed. Judicial review proceedings would be heard by the duty judge who would then make appropriate orders relating to the proceeding. Justice Gilbert was of the view that, before any change was made, the Committee should have a clear idea of the precise problem that needed to be addressed. Mr Beck responded that at present the ordinary case management procedures applied to judicial review proceedings. These did not always provide the required speed or flexibility for dealing with applications for judicial review effectively. The Chair was concerned that the formal requirements in the draft rules might slow down dealing with proceedings. If there were too many structures, this would reduce the flexibility which was often essential when dealing with applications for judicial review.

The Chief Justice wondered how overlapping causes of action, some involving judicial review others perhaps involving New Zealand Bill of Rights Act 1990 issues, would be dealt with and whether having a separate case management regime for judicial reviews would create difficulties with timing. This was a problem created by separate procedures and the Chief Justice considered that the Committee should look at how to avoid proliferation and to simplify the applicable rules to create streamlined procedures. However, the Chief Justice recognised that this was a long term project and should not be rushed.

The Chair concluded that there were two questions being raised in the discussion:

1) Is the specific wording of the draft rules satisfactory?
2) Does having specific procedures for different types of proceedings create problems in fragmenting the rules?

The Committee agreed that each question needed to be more fully addressed. On this basis the Chair, Mr Beck and the Clerk agreed to write a paper addressing these specific questions.

Action: the Committee agreed that the Chair, Mr Beck and the Clerk to the Committee should prepare a paper to present to the next Committee meeting on 2 December 2013 addressing two specific questions:

1) *Are the draft rules and their specific wording satisfactory?*
2) *Are specific procedures problematic and should the Committee seek to move to a standard procedure for all proceedings?*

5. Orders under the High Court Rules

The Chair welcomed Mr Warren Young and Ms Sara Dib from the Ministry of Justice to speak to this issue relating to Public Safety Protection Orders, Victim Orders, Criminal Proceeds Orders and other Orders made under the High Court Rules. The Chair briefly introduced this item by explaining that new or proposed legislation would give certain powers for the High Court and District to make orders in relation to restricting the movement of people or limiting property rights. Ordinarily, many of these orders relating to personal liberty would be considered criminal in scope but under the legislation these orders are deemed to be sought under the High Court Rules or District Court Rules. Therefore, the issue needed to be addressed as how to the High Court Rules could and should provide for such issues.

Following this background to the item, Mr Young began by commenting that some authorities, including the Financial Market Authorities and Commerce Commission that would seek these orders had raised concerns that civil procedure rules requiring a statement of claim do not function

effectively. The Ministry was of the view that a new procedure should be adopted. Alternatively an originating application process could be used. The Chair asked where exactly the existing statement of claim or originating application procedures were inadequate. Mr Young acknowledged that it would be possible to place many of these orders in the list to be governed by originating applications and that this process would function satisfactorily. However, My Young went on to say that some enforcement authorities considered the originating application process as being somewhat ad hoc and would prefer more prescriptive and elaborate procedures. Mr Beck queried whether originating applications were in reality ad hoc and observed that originating application procedures were quite well understood.

The Chair pointed out that protection orders and restraining orders are presently made in the District Court. These have separate rules in the District Court Rules 2009. The Chief Justice asked whether these specific rules provided a possible precedent to the specific rules the Ministry sought. Judge Thomas explained that there were specific rules, but that the procedure was derived from statute. The Chief Justice considered that a similar approach should occur here with the statute providing the process to be used.

The Chair wondered whether the Ministry of Justice wanted a generic process for all the orders or specific processes for each type of order was being sought. Mr Young stated that the Ministry had no particular view on this. Justice Gilbert considered the orders were quite different species; those dealing with financial or pecuniary penalties were distinct from those restricting civil liberties. Therefore they should be considered differently. The Chair agreed and said that there was no generic way of dealing with these orders and that these two different types of orders were quite distinct categories.

The Chief Justice agreed that the there were two types of orders and so a generic process would not necessarily be the best approach. However, the Chief Justice considered that the Committee should not begin to develop the processes the Ministry of Justice sought because this was outside the scope of the Committee's role and outside the scope of the High Court Rules. The High Court Rules were intended to provide consistency in the exercise of the HC's inherent jurisdiction to control its practices and procedures. If Parliament wanted to impose specific procedures and reforms which involved rights, the Chief Justice considered that Parliament should place those procedures into legislation. If the Ministry of Justice wanted to have the Rules Committee implement policy decisions then the Chief Justice considered this was outside of the scope of the High Court Rules and the Rules Committee. The Chair agreed and said that here the Rules Committee was being asked to decide a matter of substance, rather than of procedure. The Rules Committee was primarily focussed on procedure. Matters such as whether interrogatories should be allowed or what level of disclosure should be required were political policy issues, not procedure. As such, the Government was the appropriate body to determine policy matters impacting civil liberties, not the Rules Committee. The Chief Justice stated that the judiciary should not be co-opted into developing policy matters for constitutional reasons, including because the judiciary exercises a supervisory function.

After further discussion, the Rules Committee decided that the Committee would not develop these any separate procedures so long as the procedures were deciding matters of policy. However, the Committee expressed a desire to work with the Ministry of Justice in developing procedural rules once the necessary policy decisions had been made. The Ministry of Justice will identify procedural matters that will need to be addressed in due time for the Committee to consider whether specific rules are required for the procedural matters.

Action: the Ministry of Justice will identify the procedural matters and raise these with the Rules Committee.

6. Application of the Rules to Domestic Violence Service Provider Requests to Access Criminal Documents

The Chair welcomed Ms Beth Bowden and Ms Stephanie Grummitt from the Ministry of Justice to speak to this issue. Ms Bowden said the Ministry of Justice was seeking the Committees' advice for how domestic violence programme providers can better access criminal documents to allow providers assess the risk of violent offenders. The Ministry of Justice was concerned that the current regime would not adequately enable a provider of a programme to easily access the necessary documents. This was because the current rules require a judge to consider each application and this would

generate a significant increase in workload. To avoid this, the Ministry of Justice was investigating other options including whether a Registrar could review the application.

The Chair was of the view that access to court documents is a normal part of court work for judges. These applications are often decided on the papers once different views are received. The Chair considered that judges were better placed than Registrars in determining these applications.

Judge Susan Thomas questioned what exactly the Ministry of Justice thought providers would want. Would providers seek criminal history, psychiatric reports and pre-sentence reports which have some sensitive and confidential information within the reports? Ms Bowden explained that information in these reports provide the programme providers with invaluable information for how to deal with offenders and to ensure that the right treatment option is provided to the offender.

The Chief Justice stated that the court record belongs to the Court and it is not intended for being shared among agencies. This court information is only able to be released if the Court authorises this for a particular purpose. The idea that this information could be generally available to a service provider would be counter to this view and could create problems with how such information was controlled. Ms Grummitt stated that these providers required this information to determine how best to help the violent offender and to protect members of the public. In saying this, the Ministry of Justice agreed that it was not entirely certain about how best to control the information while enabling the service provider to effectively evaluate the person involved. This system would need to be developed more fully.

The Chief Justice considered it was inappropriate for the judiciary or the Rules Committee to help develop proposals alongside the Ministry of Justice. Instead the Committee should be able to critique the proposals or look at the proposals from an objective perspective. Further thought needed to be given to these proposals and to look at the wider effects on the privacy rights and personal dignity rights. Further thought also needed to be given to the relationship between the courts and the service providers. The Committee agreed that the Ministry of Justice will develop the proposals and should consult with the Chief District Court Judge, copying in the Chief Justice who will keep the Chief High Court Judge and the President of the Court of Appeal informed.

Action: the Ministry of Justice will develop some access to criminal documents rules or processes to present to the Rules Committee to consider.

7. Costs schedule in the District Court Rules relating to appeals and interlocutory matters

Mr Beck explained that the Committee had changed the costs schedule for appeals and interlocutory matters in the High Court Rules. However, this change had not been reflected in the District Court Rules. Mr Beck argued that there should be a consistent approach in both the High Court and District Court. Mr Beck had not allocated the same time as the High Court allocations, and explained that this was because the time allocations in the draft schedule were drawn from the existing District Court Rules.

The Chair questioned whether the Committee could justify a difference in time allocations between the High Court and the District Court. Judge Gibson suggested that for appeals a difference in time allocations could be justified but for general litigation, including for interlocutory matters, no such difference could be justified. Judge Thomas suggested that the Committee should seek the legal profession's view on the draft costs schedule amendment. This could be done as part of the District Court Rules reform project and could be noted in the consultation document that goes out to the profession. However, as Judge Thomas pointed out, this process could delay the consultation process which had been scheduled for November. Instead, it was suggested that the costs schedule amendment could be consulted on as a separate matter. The Chief Justice agreed and suggested that an initial consultation with the New Zealand Law Society and the New Zealand Bar Association might assist the Committee with examining the proposed costs schedule and would avoid delaying the wider consultation process. The Committee agreed to this proposed course of action.

Action: the costs schedule is deferred to the next meeting. The Committee will send out a short consultation letter to the New Zealand Law Society and the New Zealand Bar Association seeking their preliminary views.

8. Criminal Rules Subcommittee

The Chair reported back that a small Subcommittee had been set up. The Subcommittee is chaired by Justice Ronald Young and the other members are: Justice Winkelmann, Judge Davidson, Mr Mark Harborow, Mr David Jones QC. The Subcommittee provides specialist input from the profession and judiciary in preparing

Mr Fraser suggested that as the Ministry of Justice had been largely involved in creating the Criminal Procedure Rules, it might be helpful to have a Ministry official attend to assist the Subcommittee. The Chief Justice agreed that it would be useful to have a Ministry official to attend, although that would be a matter for Justice Ronald Young to decide. The Chair said he would pass this offer on to Justice Ronald Young.

9. District Court Rules 2013 Reform

The Chair began by explaining that as a matter of policy the District Court Rules should vary from the High Court Rules only where necessary. There are various areas where such variance is necessary, however there are other areas where the variance might not be justified. Judge Thomas agreed and addressed her memorandum dated 7 October 2013 which set out six categories of differences:

1) *First Category:* Rules where the draft District Court Rules retain the District Court Rules 2009 despite variance because the particular District Court Rules 2009 is seen as appropriate. In this category are the r 1.3 (Objectives) and the r 5.1 (Proper Registry) rules;
2) *Second Category:* Where procedures in the District Court differ from the High Court. For example: forms of trial, discovery, case management;
3) *Third Category:* Where the District Court lacks the jurisdiction;
4) *Fourth Category:* Where a deliberate decision has been made for good reasons including better ordering;
5) *Fifth category:* Ongoing work is necessary including appeals process; and
6) *Sixth Category:* where final editing is required to clarify the rules or to make the District Court Rules more consistent with the High Court Rules.

These categories provided the Committee with a framework for deciding whether the differences were justified and should be retained or whether they should be removed. Following this framework, the Committee proceeded to address specific issues relating to the draft rules.

Rules 1.3 and 1.4 - Objectives

In relation to the first category, the Subcommittee had decided to keep certain District Court Rules 2009 where certain rules function effectively. For example the expanded objectives in r 1.3 and the rules in relation to the proper registry in r 5.1 were more simplified than the comparable rule in the High Court Rules. In relation to r 1.3, Mr Gray expressed concerns about the broader objectives and what the objectives in r 1.3(2)(a), (b), (c)(iv) and (d) meant. The Chief Justice considered that the Committee should standardise the District Court Rules and High Court Rules as much as possible. Judge Thomas agreed and thought that (2) should be removed to make the objectives the same. In relation to proportionality, Justice Gilbert considered that proportionality is encompassed within "just" in the objectives so no separate principle of proportionality is required.

The Committee discussed whether r 1.4 should be retained or deleted from the draft District Court Rules. Judge Thomas considered it was no longer necessary to include a rule stating that the draft District Court Rules should be interpreted to further the objectives in r 1.3. The High Court Rules had no such provision. Judge Doherty explained that r 1.4 was necessary when the District Court Rules were reformed in 2009 to ensure that the rules were applied to further the objectives. However, now such a rule might not be required. The Chief Justice agreed that the rule had served a useful purpose but the need for it might now be reconsidered. The Committee agreed that the District Court Rules should be interpreted according to the objectives. However, the Committee considered that there was no need for a specific rule to provide for this. The Committee concluded that, for the sake of consistency, r 1.4 should be removed.

Rule 7.2(4)(d) – judicial settlement conferences

Justice Gilbert raised an issue about the use of judicial settlement conferences. As the draft Rules provide, under r 7.2(3)(d), if the trial is not a short trial there must be a judicial settlement conference. Justice Gilbert argued that requiring parties to attend alternative dispute resolution or judicial settlement conferences before the case would be heard was wrong in principle. Judge Gibson pointed out that, as a pragmatic matter, judicial settlement conferences disposed of many proceedings without the need for a trial and so saved the District Court significant resources. Judge Thomas agreed and said from personal experience these conferences assisted with the just, speedy and inexpensive determination of proceedings. Judge Doherty explained that, while many proceedings will settle prior to trial, judicial settlement conferences assist with early settlement and this is generally a good thing. Judge Doherty pointed out that the profession considered that these judicial settlement conferences should be retained and so it was not simply the District Court judges who were in favour of having judicial settlement conferences in the District Court.

Justice Gilbert accepted that there might be a practical benefit in having the judicial settlement conference. However, as a matter of principle the courts are there to determine the law and disputes not to encourage settlement by saying the law is unclear. Justice Gilbert considered that the courts should focus on providing an efficient mechanism to determining disputes, not to simply settling proceedings. If parties want to have a judicial settlement conference, Justice Gilbert considered they should be able to. However, requiring a judicial settlement conference could be too onerous and wrong in principle.

Judge Thomas said that the District Courts Rules 2009 were aimed at early resolution of disputes and the rules were oriented around this. To change this principle would mean that many of the 2009 improvements would be lost. The Chief Justice accepted that such a change in principle would require much more discussion. As an alternative, the Chief Justice suggested leaving judges with much more discretion to decline to hold a judicial settlement conference. While the default position would be that a judicial settlement conference is held, a judge could direct otherwise. The Committee agreed that this discretion would be a good thing and on this basis, it was agreed to rewrite r 7.2(3)(d) to simply provide that a judicial settlement conference will be held "unless the judge directs otherwise".

The Chief Justice suggested that the high threshold of "exceptional circumstances" for not requiring a judicial settlement conference was too high. Judge Thomas explained that the purpose of this exception to provide that not having a judicial settlement conference was the exception not the rule. An example of when a judicial settlement conference might not need to be held was where there were two lawyers who were well versed in their clients' case and both concluded that a judicial settlement conference would not assist either party with settling the dispute.

Mr Gray had misgivings about judicial officers acting as mediators. Judge Thomas agreed, but considered that judges did not act as mediators but were trained to help parties to see the merits of the proceedings. Mr Gray, while expressing reservations, said that if the profession wanted judicial settlement conferences then the Committee should take heed and consult fully on this.

Mr Moore questioned whether this test would provide an easy way out of having a judicial settlement conference. Judge Thomas considered that so long as there is a presumption that a judicial settlement conference will be held as there is at present, then giving a judge discretion to decide not to direct a judicial settlement conference would not override this presumption.

Rule 7.3(7)(d) – discontinuance following judicial settlement conference

Justice Gilbert queried the prescriptive nature of r 7.3(7) in relation to discontinuance. If a settlement is arrived at the judicial settlement conference then the discontinuance provision in r 7.3(7)(a) could be problematic. Judge Thomas accepted this, but stated that in practice often parties do not file a discontinuance and so it is beneficial to have the proceeding deemed to be discontinued so long as a party has the ability to reinstate the proceeding. Justice Gilbert accepted this point.

Rules – Consultation

The Committee agreed that the consultation document should go out to the profession. If there are problems then the rules should be modified following consultation.

Action: 1.3(2) is to be deleted. So too r 1.4. In relation to r 7.2(3)(d)(i), Rule 7.2(3)(d) will be deleted and changed to "unless the Judge directs otherwise". The Committee agreed that the draft District Court Rules should go out to the profession and for the input of the profession.

The Chair and Justice Gilbert and Judges Thomas and Gibson agreed to stay on and go through the remaining variations between the High Court and the District Court Rules to ensure there were good reasons for those differences, and if necessary to change the rules to avoid needless differences.

10. Purpose of court rules

The Chair explained that the purpose of rules item would be delayed until the next meeting due to Mr Andrew Barker being unable to attend and members wished to consider Mr Gray's paper.

Action: delay the purpose of rules discussion to next meeting on 2 December 2013.

11. Other matters

The Committee noted advice from the Ministry of Justice that the High Court Rules would be added as a Schedule to the Judicial Modernisation Bill, to be introduced into Parliament later this year. Members went on to discuss the advantages and disadvantages of including the High Court Rules in the Bill and agreed to discuss this matter again if it proves necessary or desirable to reconsider the issue.

The meeting was closed at 1:25 pm.