The Rules Committee

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17 February 2015
Minutes 01/15

Circular 19 of 2015

Minutes of meeting held on 9 February 2015

The meeting called by Agenda 01/15 was held in the Chief Justice's Boardroom, High Court, Wellington, on Monday 9 February 2015.

1. Preliminary

In Attendance

Rt Hon Dame Sian Elias GNZM, Chief Justice of New Zealand
Hon Justice Winkelmann, Chief High Court Judge
Hon Justice Asher (the Chair)
Hon Justice Gilbert
Judge Gibson
Judge Kellar
Ms Jessica Gorman, Crown Law
Ruth Fairhall, Ministry of Justice

Mr Bill Moore, Special Parliamentary Counsel, Parliamentary Counsel Office
Ms Fiona Leonard, Deputy Chief Parliamentary Counsel
Mr Kieron McCarron, Chief Advisor Legal and Policy

Mr Thomas Cleary, Former Clerk to the Rules Committee
Ms Harriet Bush, Clerk to the Rules Committee

Apologies

Hon Christopher Finlayson, Attorney-General
Judge Doogue, Chief District Court Judge
Mr Bruce Gray QC, New Zealand Law Society representative
Mr Andrew Beck, New Zealand Law Society representative
Ms Laura O'Gorman

Confirmation of minutes
The minutes of 1 December 2014 were confirmed.

Matters Arising

The Chair welcomed Ms Harriet Bush to the Committee, who has taken over the role of Clerk to the Committee from Mr Thomas Cleary. The Chair also welcomed Ms Ruth Fairhall, who was attending the meeting on behalf of the Ministry of Justice. Ms Fairhall indicated that Mr Rajesh Chhanna would be the new representative from the Ministry of Justice and would attend the next meeting. Finally, the Chair welcomed Ms Fiona Leonard. Ms Leonard is the Deputy Chief Parliamentary Counsel, and will be attending the Committee meeting in March when Mr Bill Moore is away. The Chair acknowledged the important role that the Parliamentary Counsel Office and Mr Moore had in the work of Committee.

The Chair thanked Mr Thomas Cleary on behalf of the Committee for his work as Clerk over the past two years. The Chair noted Mr Cleary's outstanding contribution to the Committee, his competence, diligence, legal skill and humour, and wished him luck for his new job at Shortland Chambers.

2. Access to Court Documents

At the last meeting the Committee had proposed to have (a) combined High Court and District Court and (b) combined Civil and Criminal Access to Court Document Rules. The Chief Justice did not think that having the High Court and District Court Rules in a single document was a good idea. The Committee had agreed that if the Chief Justice did not support the proposal then the Committee would go back to two separate rules. The Consultation paper has now been drafted to reflect the two separate sets of rules.

The Chair said that question was when and in what form the consultation paper was sent out. The old rules were complicated so the idea of the redraft was to make the rules simpler and to identify the three stages that arise where documents are sought: pre-trial, during the trial and after the trial. The draft also includes a new substantive consideration at r 8(1)(c): 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 principle of open justice.

Justice Gilbert raised two questions about the structure of the rules. First, he queried whether r 8, which was about consideration of an application under r 6, and r 9, which concerned the procedure to be adopted by a judge when dealing with requests and objections, should be the other way around. His second question was whether r 8(3) should be in r 6 as this subclause pertains only to r 6 and operates as a restriction. Rule 8(3) provides that a person may not access a document, a court file, judgment or order that is related to a proceeding brought under a list of specified enactments, unless the Judge is satisfied that there is good reason for permitting access.

Mr Moore said that the only reason to leave 8(3) there was that the qualification "unless the Judge is satisfied" might take a reader back to the considerations listed in r 8(1) and (2). It was also noted that r 5(6) had a reference to 8(3). The Chair noted that he could see the logic in the current position. Justice Winkelmann noted that her preference was for rr 8 and 9 to stay the way that they were as this was the way the Judge would consider them when deciding the matter.

The Chief Justice said that she would like to pin down what was meant by the concept of "open justice" in this context. The concept is invoked to represent a right to know, whereas she considered that what the rules are talking about is a right to understand: that there must be disclosure of material to make what is determined in Court intelligible. The Chief Justice was not convinced that this even extends to a right to understand the issues that are brought to Court, rather it is limited to the right to understand what the Court decides. She thought people should be able to bring disputes to court and as long as the court is not called on to make a determination

which a reader might need recourse to the material to understand, she was not convinced that there is a right in the name of open justice to have access to all the documents.

The Chair noted that the principle developed in part as a response to the excesses of the Star Chamber and other such closed courts, and it was called the "principle" of open justice not the "right" to open justice. The Chief Justice questioned what was meant by this. The use of the term in the media is about the right to see whereas here the concern is much more with intelligibility of the exercise of court authority. There are a lot of things which are not, in the end, related to the final determination.

The Committee considered the matters specified in r 8(1) but considered that the meaning of open justice is not limited by these. The Chair noted that 8(1)(e) provides that one of the factors to take into account is "the principle of open justice (including the encouragement of fair and accurate reporting of, and comment on, court hearings and decision)". He said that this was just an aspect of open justice. The Chief Justice asked why reporting is so important – anybody is entitled to understand the judgment: it is not simply because we want to encourage fair and accurate reporting.

The Chair noted that there was some case law which has built up around the concept. However, nobody has tried to define open justice, and open justice is just one factor considered by courts. The Chief Justice said that the concept is used in different contexts. Justice Winkelmann referred to the meaning in r 8(1)(c) which provides for "the right to bring and defend civil proceedings without the disclosure of any more information about the private lives of individuals or matters than is necessary to satisfy the principle of open justice". She agreed that it was important to refine the concept. Mr Moore added that the wording of this subclause had been problematic when it was drafted. Justice Winkelmann suggested that the consultation paper could ask people what their understanding of the concept of open justice and a fair hearing was. She considered that the current rules are obscure and problematic.

The Chief Justice questioned why we were worried about what is commercially sensitive. Mr Moore explained that commercial sensitivity and information about private lives were identified as factors that would inhibit people bringing court proceedings. Justice Winkelmann noted that notions of open justice had developed before the internet. Mr Barker was of the opinion that the starting position should be that everything is public but that in certain circumstances that will not work. The court provides a public service to resolve disputes but the flip side of this is that it is done in public. He did not think that this was limited to understanding the judgment. The Chief Justice asked why there was a legitimate public interest in having information when people have settled before going to the Court? Mr Barker said that this showed that the public service had worked. However, the Chief Justice believed that this would inhibit people coming to court. The Chair said that r 8(2)(a) specifically recognised the Chief Justice's concern. This subclause provides that before the substantive hearing the protection of confidentiality and privacy interests may require that access to court documents are limited.

The Chair said that the basis of the Committee's discussion about open justice was that it accepted that the names of the parties, the fact of a dispute and the nature of the dispute should be disclosed, unless there were extraordinary circumstances. The concern was about all of the details. There are quite a lot of decisions establishing that in a civil dispute you do not get suppression of names except for in special circumstances. For example, in family property and relationship cases initials or fake names are used and there are particular statues that compel name suppression.

The Chief Justice said that she would like to consider the wording of the rules more before the consultation paper is sent out. Mr Cleary confirmed that he wrote a paper last year on the rules in comparative jurisdiction and their approach to open justice.

Mr Moore suggested amending 8(1)(c) to say "no more than is necessary to understand the decision of the Court". Mr Barker said that this reflected a particular view. Mr Barker said that all things being equal, the Courts should be public. Justice Winkelmann said that open justice is a different thing to accessing everything that is on the Court file. Mr Barker disagreed and questioned why it should be so different. Justice Winkelmann said that there was a preliminary question of why

everything should be public. The Chief Justice said that the exercise of power should be public: open justice is about doing justice and this should be in public. However, preliminary material does not say much about the system just the people involved. Ms Gorman noted that people may want to access court documents for other reasons. The Chair said that this was why you had to say the reasons that you want the documents, however this only worked for the requester and there was no control over the documents once the first person had received them.

It was agreed that the issue of the definition of the meaning of open justice should be flagged in the consultation paper. Committee members agreed to think further about the concept.

Action points: the Clerk to re-circulate the consultation paper and everyone will think about the meaning of the concept. Clerk and Chair to look at the consultation paper and add to it in the light of the discussion.

3. Affidavits and Oaths definition of "Registrar"

In December, the Committee received a memorandum from Mr John Earles which raised two matters in relation to the authority to swear affidavits in r 9.85 of the High Court Rules and r 9.75 of the District Court Rules. The first matter was the definition of "Registrar". Both rules state that Registrar includes a Deputy Registrar of the High Court, a Registrar of the District Court and a Deputy Registrar of a District Court. Neither rule specifically refers to a Registrar of the High Court. The Committee agreed that in the High Court Rules, it was unnecessary to spell this out as it went without saying. The term "includes" was used to extend the definition and not limit it. Judge Kellar indicated that he believed the definition in the District Court Rules was carried over from the High Court Rules into the 2014 amendments. The Committee considered that in relation to the District Court, it was not obvious that a High Court Registrar was included.

Mr Moore said that this was the conclusion he had reached and he had therefore drafted an amendment to the District Court Rules inserting into r 9.75 an additional definition so that Registrar includes "(aa) a Registrar of the High Court". The Committee agreed to amend the District Court Rules.

In his memorandum, Mr Earles also raised the definition of the term "solicitor" in both rules. "Solicitor" is currently defined as "a person enrolled as a barrister and solicitor of the High Court". Tthe Law Society had asked that the decision as to whether this should be amended to provide that a solicitor must be practicing lawyer be deferred because there were no representatives from the Law Society at the meeting. The Committee had a preliminary discussion.

Mr Thomas Cleary said that the current advice issued by the Law Society was that you only had to be enrolled as a barrister and solicitor. Mr Barker noted that barristers do sign affidavits and that if Mr Earles' proposed definition were adopted, barristers would still be able to do so. Mr Earles' proposal is to amend the definition to "enrolled and practising as a barrister or solicitor". Mr Barker said that he would raise the issue with the Bar Association.

Mr Moore noted that under s 378 of the Criminal Procedure Act the ability to take an affidavit was confined to someone holding a current practising certificate. It was noted that the Oaths and Declarations Act does not specifically cover affidavits. The Chair said that his instinctive position was that taking affidavits should be confined to practising lawyers as it was an important role and there were people who were admitted and never practised again. Ms Jessica Gorman wondered whether there would be access to justice issues in smaller centres.

The Chief Justice said that a solicitor who is admitted is subject to some summary discipline and questioned whether paying your dues to the law society affects the capacity to take an oath. The question was whether the discipline of the law society is important when this function is being exercised. The Chair said that in reality, the supervision of the Court may not be that significant a sanction to someone who had not had practised for 25 years and has forgotten about the law. A practising certificate was at least an indication of some commitment to the law, or understanding of what an affidavit is. The Chief Justice queried whether there was a parallel between someone who

was enrolled as a solicitor and a Justice of the Peace. A Justice of the Peace may be removed from Office for failing to perform their duties but is not subject a yearly renewal procedure.

The Corporate Lawyers Association was mentioned as having a potential interest in the issue as in-house counsel may not hold practising certificates. The Chief Justice said that this might show that there may be some sense in having to hold a practising certificate so that in-house counsel who are not subject to disciplinary sanctions are not swearing affidavits. It was noted that the current exception to the rule was that a solicitor could not take the affidavit if at the time of taking the solicitor was acting as the solicitor of a party to the proceeding or a partner in or solicitor employed or engaged by the firm of the solicitor of the party to the proceeding.

Action Points: send letters to the Law Society, Bar Association and Corporate Lawyers Association to draw attention to the fact the Committee is considering the issue and ask their views on the question.

4. Case Management Memoranda

In September, Tony Mortimer, a Registrar at the Auckland High Court, raised several issues in relation to case management memoranda. In response to the first concern raised, the Committee agreed to amend r 7.3 to provide that "any memorandum under this Part may be filed by fax or email transmission". Mr Moore drafted rules to reflect this change. Mr Mortimer has also suggested that there should be a further requirement in the rules for a further memorandum to be filed where a further case management conference is ordered. The Committee had initially thought that this could just be left to the discretion of the Judge. However, Mr Mortimer clarified that the current situation is causing a problem for court staff because counsel are failing to file a further memorandum and so his staff have to chase them up, which can be time consuming. Mr Mortimer said that an actual requirement to file further memoranda would alter counsel to the fact that they have to do this. He also noted that there was previously a requirement to do this.

The Committee agreed that this was a practical matter and a specific requirement to file a further memorandum would serve as a helpful reminder. The Committee agreed to make the change.

Action Point: Mr Moore to draft an amendment to the rule reflecting this change.

5. Initial disclosure in judicial review proceedings

At the last meeting the Committee debated the need for initial disclosure in judicial review. The Committee decided that there was a need for disclosure and accepted that this was desirable. Mr Cleary wrote a paper on the issue of whether the rules need to be clarified to address this. Schedule 10 sets out the matters to be addressed in a case management conference in judicial review. It does not refer to initial disclosure. Mr Cleary suggested that this should be amended to provide for initial disclosure to remind counsel that this is required as this is not stated explicitly any other rule.

The Chief Justice noted that the party providing initial disclosure would be the Crown and that usually there would not be many documents to disclose. The Chair said that this might be the decision, a letter if the applicant was relying on an expectation, or evidence of bias if that was the issue. In an immigration case there would be the decision the party is objecting to. So the disclosure requirement was not particularly onerous. Justice Winkelmann thought there would be some benefit in specifying disclosure was required. Ms Gorman agreed that it would be useful to know whether you had to give documents over again.

Ms Gorman queried [2.3] of Mr Cleary's memorandum which states that "previously, when an applicant filed a statement of claim, he or she would have also served an affidavit including the relevant documents." Mr Cleary said that this was a point that McGechan makes. The Committee noted that previously an affidavit had to be filed at the time the statement of claim was filed and that now affidavits can be filed later on. It confirmed that affidavits are still used. Ms Gorman said that she would check there was no misunderstanding surrounding this.

The Chair said it was arguable that initial disclosure was more important in judicial review because there is not usually discovery. The plaintiff will be helped more than defendants are helped. It may also speed up the process.

The Committee agreed to make a change to schedule 10.

The final point made by Mr Cleary in his memo suggested adding a reference to r 7.17 in r 9.56(3). However, he said that if, as the Committee had confirmed, affidavits are generally used in judicial review there is no need for the cross reference. The Committee agreed that the change was unnecessary.

Action Point: Mr Moore to prepare draft rules amending schedule 10 to specifically provide for initial disclosure

6. Definition of liquidated demand

When the new formal proof provisions were brought in the Committee added to a substantive definition of liquidated demand. However, this definition does not provide for a situation where a statute sets out a certain debt. Mr Barker said this appeared to be a matter of oversight. Prior to the 1986 rules there was a definition then in 1986 a broad definition was added. When this was fleshed out contract was talked about but the question of statute was left out. Some cases seem to assume that a statutory debt was included. The issue comes back to principle and there is no reason to treat statute and contract differently. Mr Barker noted that he takes no position on IRD debts. Whether these are liquidated would have to be worked out by case law. Penalty assessments may well not be sufficiently ascertained. But as a matter of principle there is no reason why amounts under statute would be treated differently. The Chief Justice queried whether it was desirable to let penalties be worked out in case law. Mr Barker said that the problem was without going through all of the tax legislation to work out what the penalties are, you cannot know this, as with a contract, it depends on whether a penalty clause in a contract is ascertainable or not.

The Chief Justice questioned whether judgments by default in the District Court were being carried out by Collections. Judge Gibson confirmed that historically Registry staff would do this. The Chief Justice expressed concern about huge penalty judgments for the IRD being entered by somebody in Collections who thinks there job is to provide a service to debt collection agencies or departments. In the High Court the person is a Registrar. Ms Fairhall confirmed that the centralised collections unit has now picked up some of the District Court work. These people are not under the supervision of judges.

The Chief Justice queried why default judgments were not done by judges. It was agreed that the volume of cases, particularly in the District Court, was too large for this to be done. However, the Committee expressed concern as to who decides whether a claim in unliquidated or liquidated when it first comes in to the Registry. The Chair said that the issue was debated several years ago. In the High Court a formal proof will come before the duty Judge. A straightforward claim like a penalty will take a moment of the Judge's time. Nevertheless, it still takes up space on the duty Judge's list. The Chair said that he did not recall IRD debts coming before the duty Judge. Judge Kellar confirmed that this was because the District Court has jurisdiction over IRD debts regardless of the amount. Judge Gibson said some guidelines are being developed but that the problem was that you cannot analysis every statute. It was suggested that if the worry is about egregious situations the rules could specify that a liquidated demand does not include a penalty. However, this would still be very difficult as there may be default penalties.

The Chief Justice agreed that there should be a standard approach but said that before the decision was made she would like to find out how the system was operating at the moment.

Ms Fairhall agreed that the Ministry would prepare a paper on the size of the CPU and the interface between the Registry and the CPU.

The Chair expressed surprise at the concept that there are Registry staff who are not caught by a particular Registry hierarchy. Ms Fairhall said that there were offices in Wellington in Auckland and they were not in the Court building. She did not know whether this was because of space constraints or whether a policy decision had been made. The Chief Justice said that this function was seen as debt collection and had been consolidated under Collections because this department had experience collecting debts. One suggestion raised was to put a monetary limit on what the Registrar could deal with. The Chief Justice suggested that there could be a practice direction with the type of supervision required because the fact that the power is given to a Judge or Registrar indicates that summary judgment is a Court function and not a Ministry of Justice function. Another option suggested was to say that if there are penalty involved then it must be referred to a judge. It was noted that there has also been an issue with debt collection services claiming their costs as court costs.

Judge Kellar said that the District Court judges would discuss it in their own civil meeting as the problem particularly concerned the District Court. Mr Barker said that he had encountered a problem where proceedings were filed in the Registry and accepted over the counter then they were sent to the central processing unit and two weeks later the documents were rejected for filing. He questioned whether in this case the document was filed or not. The Committee thought that this would be filed for limitation purposes. The Chief Justice said that if this is going to be happening then the rules about how documents are filed would have to be changed as the assumption is that the people exercising this role are under the direction of judges and are located at the Court. The question concerned the proper role of the Registrar and their relationship with the Court. The Committee agreed that it would be helpful to have a paper from the Clerk on the history of the role of the Registrar, as at least in England, the role is still a para-judicial role, but New Zealand has moved away from this.

Action Points: Ministry of Justice to prepare a paper on the practice of the CPU. The Clerk to write a paper on the history and evolution of the role of the Registrar.

7. The availability of summary judgment to defendants

The Law Society drew the Committee's attention to the fact that under r 12.12 a court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to a cause of action in the statement of claim or to a particular part of any such cause of action. However, the Court may only give judgment against a plaintiff if the defendant satisfies the court that none of the causes of action in the plaintiff's statement can succeed. The defendant cannot get summary judgment on a single aspect. The issue is whether there should be this disparity.

The Chair said that the difference follows from the logistics of the situation: if you are a plaintiff seeking summary judgment on a single cause of action then you do not have to go any further. The defendant on the other hand has to disprove every cause of action. Justice Gilbert questioned what the situation would be when there were two claims, for example one under the Fair Trading Act and one in negligence, and both arose from a single set of facts, what would happen where you have judgment against you on one cause of action? Could you still go ahead with the other? This could lead to multiple judgments on the same facts, requests for costs and could be used oppressively. What about if the cause of action brings in huge amounts of other factual issues? This could be struck out. Should there be some sort of threshold? The Chair said that you could do this in the strike out jurisdiction but it was far from a given that the change should be made. The Chief Justice agreed that it was not self-evident that symmetry was desirable in this area.

The Committee agreed to defer the matter until the next meeting when Mr Beck could speak about the issue. The Chair would advise Mr Beck that the Committee had expressed reservations and set out the reasons for these.

Mr Barker noted that he had written a paper which touched tangentially on the issue. This was more concerned with the test for summary judgment which was an issue for the Courts. He agreed with the logic of the current rule. The only argument against it that was that you can achieve a similar result through strike out. The question was whether it would be desirable to expand the

process and allow you to do this by summary judgment as well. He considered that if this were done people would file these applications all the time.

Action Point: the Chair to advise Andrew Beck that the Committee had expressed reservations about the need to change the rule. Mr Beck can speak about the issue at the next meeting.

8. Amending the definition of "working days" in the High Court Rules

Following the introduction of the Holidays (Full Recognition of Waitangi Day and ANZAC Day) Amendment Act 2013, the District Court Rules were updated to provide for this change. However, the High Court Rules have not been updated. Mr Moore has drafted an amendment to the definition of working day in r 1.3 – this encapsulates the change that when Waitangi Day or ANZAC day falls on a Saturday or Sunday this will be recognised on the Monday.

The Committee approved this change.

Action point: the definition of working day in r 1.3 to be updated to reflect the new legislation

9. Certification of interlocutory applications without notice

The Chair explained that this issue, raised by Mr Nick Patterson, is whether the rule that you have to seek dispensation from the obligation to certify an interlocutory application should apply to an unrepresented litigant who, after all, is not qualified to certify anything. The Chief Justice asked why they had to get dispensation. Rules 7.16 of the District Court Rules and 7.23 of the High Court Rules say that an application without notice must contain a certificate that uses the words "I certify that this application complies with the rules" and is personally signed by the applicant's lawyer. The Chair noted that the whole rule seems to be predicated on the notion that the application will be prepared by the applicant's lawyer and it is expressed in mandatory language. Subclause (5) says that a Judge may dispense with the certificate if the applicant is unrepresented.

The Chair considered that the whole rule possibly needed some re-consideration. The Chief Justice suggested that the rule could provide that any lawyer acting has to certify the application and leave the rest of it so that a Judge does not have to dispense with it. The point of the certification is so that people do not have to check that the application complies with the rules. However, it was agreed that just stating this was not particularly helpful to counsel. The Committee agreed it would be much more effective if the rule actually stated what was being certified.

The Committee agreed that if the rule was worded to say that all relevant material that might support the other party was disclosed then the duty could in principle be imposed on the lay litigant as well. The word certified was not needed. If a lawyer says to the Court they have disclosed everything that is relevant then if this statement is not true there are going to be consequences whether or not they have actually certified it. The Chief Justice said that you need some sort of formal declaration. The important point was that an assurance was necessary. It was agreed that we would expect the reasons why the application was sought and that the applicant has disclosed all relevant material that could assist the defendant.

The Committee agreed to change the rule to encapsulate this. The Chair said that it would be good to try and start with the same wording for the represented and unrepresented litigant to begin with and to see whether that would work. The rule would work as a checklist so that it would make the unrepresented litigant think about disclosure, and hopefully provide for it. For the solicitor it would place a professional duty on them.

The Committee agreed that the Clerk would prepare a paper on what the Court has said about the rationale behind without notice applications and the duty of solicitors in this area. The paper would also look at comparative jurisdictions – do they have a certificate, and how do the rules provide for unrepresented litigants? When the background paper was prepared, Mr Barker, Ms Gorman, Mr Moore, the Clerk and the Chair would liaise to try and come up with a draft rule providing for these factors.

Ms Gorman asked what the process was where a person has raised an issue with the Committee. The Chair confirmed that the Committee writes back to the person who raised the issue thanking them and letting them know what the Committee has decided to do in response to the issue. The Committee agreed that it was very well served by people writing in and that it would be good to mention to the profession how valuable this was. The Chair suggested that a sentence could be added in the publication being prepared reminding lawyers that they can write to the Committee with any concerns.

Action points: the Clerk to draft a paper on the rationale behind without notice applications. Ms Gorman to chair a group comprising of Mr Barker, Ms Gorman, Mr Moore, the Clerk and the Chair which would determine what the rule should say and draft rules encapsulating the rationale and criteria for without notice applications. A sentence to be added to the publication reminding the profession that the Committee values feedback.

10. District Court Rules – Item 24A

Roderick Joyce QC raised an error in the District Court Rules in Schedule 4, item 24A, where the decimal point had been put in the wrong place. Mr Moore had drafted rules to fix this.

The Committee agreed to the amend this.

11. Amending form 106 in the District Court Rules from "15 working days" to "10 working days"

This item also concerned a minor amendment to the District Court Rules: Schedule 2, form 106 said "15 working days" instead of "10 working days". Mr Moore had prepared rules correcting the error. The Committee agreed to the amendment.

Schedule 2, forms 96 and 97 also referred to form 19 instead of from 91. The Committee agreed to amend this.

12. Methods of service

The Chair explained the final matter on the agenda which was whether, following the changes to the frequency of postal delivery in urban areas, the High Court Rules surrounding service would have to be updated. From July 2015, New Zealand Post will only be required to provide three postal deliveries a week in urban areas. This issue was raised by Associate Judge Osborne. The Committee's initial reaction was that a change was necessary. However, Ms Annie Cao, one of the High Court Clerks, had spoken to New Zealand Post and confirmed that the delivery within a minimum of three working days, which has always pertained, would continue to pertain. The Chief Justice queried whether this was the right question to ask. She said that r 6.6 was a deeming provision. Previously the provision that a document was deemed to have been served on a party on the third working day after it was posted provided some leeway as you could expect to receive the mail within a day. Therefore, the same amount of leeway should be provided for, so the rule in r 6.6 should be change to the fifth working day.

Ms Cao had identified several other rules where service by post was deemed, it was agreed that these should also be amended in the same manner. Mr Moore would identify all of the rules affected, including the District Court, Court of Appeal and Supreme Court rules, and prepare draft rules.

Action Point: Mr Moore to identify the affected rules and to draft amendments that providing the same amount of leeway (two days) in light of the change in delivery to three days per week.

13. Power of Registrar to not accept documents for filing

The Chair raised a final issue which was not on the agenda concerning the power of the Registrar to not accept documents. Justice Winkelmann had expressed concern that the current rules could adequately deal with the filing of abusive filing of documentation, huge volumes of documentation. She said that currently the Registry can refuse a document which does not comply with the formal

requirements. However, where a document complied with formal requirements but contained abuse or no particular point the Committee was unsure as to whether the Registrar could do anything about it. The Chair acknowledged that the point was difficult: at what point can the Registrar not accept a document which might contain a cause of action.

The Committee wanted a paper on the powers of the Registrar. Justice Winkelmann agreed to find some relevant cases for this. Justice Winkelmann also said that the Committee would need to consider whether empowering the Registrar to do this was cost effective: Registry staff are already using huge amount of time dealing with this. The Committee agreed that the matter raised questions of whether the party should be given notice, as well as the issue of whether such a power would circumvent the vexatious litigant procedure.

Action Points: the Clerk to prepare a paper looking at the power of the Registrar under the current rules.

The meeting closed at 12:15 pm.