THE RULES COMMITTEE
P.O. Box 180
Wellington

Telephone 64-9-9169 755
Facsimile 64-4-4949 701
Email: rulescommittee@justice.govt.nz

22 February 2011

Minutes/01/11

Circular No. 10 of 2011

Minutes of meeting held on 21 February 2011

The meeting called by Agenda/01/11 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 21 February 2011 at 9:45 am.

1. Preliminary

In Attendance

Hon Justice Fogarty (in the Chair)
Hon Justice Chambers
Hon Justice Winkelmann
Judge Joyce QC
Ms Cheryl Gwyn, Crown Law Office
Mr Andrew Beck, New Zealand Law Society representative
Mr Andrew Hampton, Ministry of Justice
Mr Roger Howard, Ministry of Justice
Dr Don Mathieson QC, Special Parliamentary Counsel, Parliamentary Counsel Office
Mr Kieron McCarron, Judicial Administrator to the Chief Justice
Ms Briar Charmley, Private Secretary to the Attorney-General

Mr Patrick Davis, Secretary to the Rules Committee
Ms Sophie Klinger, Previous Clerk to the Rules Committee

Dr Caroline Anderson, Clerk to the Rules Committee

Apologies

Rt. Hon Dame Sian Elias GNZM, Chief Justice of New Zealand
Hon Justice Asher
Hon Christopher Finlayson, Attorney-General
Judge Doherty
Mr Brendan Brown QC, New Zealand Law Society representative

Confirmation of minutes

The minutes of the meeting of Monday 29 November 2010 were confirmed.

Matters arising

The Chair opened the meeting by expressing condolences to both Justice Asher and Mr Howard on the loss of their sons.

The Chair observed that as the Committee was nearing the end of the discovery project, this year's aim should be to integrate with discovery a whole package of reforms, including case management and written and oral briefs reform, as well as appeals against interlocutory decisions and strike-out/ summary judgments. This integrated reform package would also stop the profession being bombarded with a large number of sequential reforms.

The Chair also noted the congratulations of Justice Bruce Lander of the Federal Court of Australia on how the Committee has conducted its reform of discovery. Justice Lander is a commissioner of the Australian Law Reform Commission, which is currently conducting an inquiry into discovery. The ALRC was impressed with the process the Rules Committee has undertaken in New Zealand and intends to refer to this process and the draft rules in its upcoming report in a favourable light.

Lastly, the Chair welcomed Sophie Klinger back for the morning and thanked her for her tireless and continued efforts with the Committee and for facilitating the handover so well.

2. Input methodology appeals from the Commerce Commission – entry on the commercial list

The Chair noted that the initial inquiry into this issue had been sparked by the Attorney-General's memorandum expressing concern that cases from around the country could be transferred to Auckland by virtue of the commercial list.

The Chair reported back to the Committee that the Chief Justice preferred not to pursue this issue presently. Her Honour was reluctant to see rule changes being driven by a particular case problem and favoured leaving the issue to judicial administration for the moment. As the Committee did not have the support of the Chief Justice at this stage, it was agreed to leave the topic for the present.

The Chair noticed that the issue was currently with the Law Commission, and that it could be integrated with the topic of case management. Justice Winkelmann agreed that it would be useful to consider the issue in relation to case management Her Honour also observed that the Law Commission was looking into the issue of the commercial list.

Mr Hampton commented that his memorandum merely examined the operational implications of establishing a commercial list in Wellington and Christchurch. Should there be an agreement in the future to establish lists in the other centres it should be relatively straightforward to do so in Wellington. Although some changes would be required to implement a list in Christchurch, these changes were not impassable.

The Committee understood that implementing any such change would require a gazette change by the Chief Justice or the Attorney-General.

As an aside, Justice Chambers stated that prior to the Attorney-General's concerns he had advocated for some time that a commercial list in all three centres should be established.

3. Reform of case management

Justice Winkelmann introduced this topic and the proposed revision of r 7.3 and r 7.4 by explaining that a review had been conducted over the last 12 months by Justices Venning, Miller and herself of the Auckland High Court's management of the civil caseload. This review was based on three parts. The first part consisted of analysing data obtained from Auckland and Wellington registries between 2008 and 2010. Secondly, an Auckland Civil Pilot was launched to reduce time delays of hearings by giving a hearing date to cases of five days or less when they are ready to be heard. Finally, feedback from the profession and the experience of Associate Judges was gathered. This review and the success of the Auckland Pilot have led them to propose that there be an amendment of the rules relating to judicial case management conferences.

The review was initiated because of concerns expressed by the profession as to management of civil proceedings and because of unacceptable delays in Auckland in the hearing of even short causes. As at the beginning of last year, a short cause case would have to wait until 2012 before it could be heard at the Auckland High Court. One of the causes for this delay was the early allocation of a hearing date for cases which would not end up proceeding to trial, thereby creating a 'fictional' waiting list for hearings. The figures from the case analysis undertaken by the Ministry of Justice revealed that most cases are short causes with a large number settling in the immediate pre-hearing window: around 90-96%. However, 27% settle shortly after commencement and before entry in the ready list. If short causes do proceed to hearing, they are usually heard on the date originally assigned. This can be compared to long causes which are often adjourned several months out, yet which take up a disproportionate amount of time on the roster. The effect of the adjournment of long cases frustrates the Court's ability to allocate judge time.

The Pilot has confirmed that if a hearing date is allocated early, cases will still settle around the same rate, but at an earlier point. The Court has been able to hear those that have gone through to hearing. Early hearing also seems to be limiting the proliferation of issues. Feedback from the profession is to the effect that the current case management regime is too formalistic and rigid, and that issues are not identified early enough.

Two critical means identified by the judges in improving case management (consistent with feedback from the profession) are to isolate the issues early on, and to limit the extent of discovery. These methods have also been shown in studies overseas to be the most efficacious means of improving case management.

The proposed shift in the date of the first conference should allow parties to identify the issues and have the relevant discoverable documents before that conference. In straight forward cases, this would allow a proximate hearing date to be assigned immediately, limit the number of interlocutory applications, reduce the amount of hearing time, and encourage settlement. Given these suggestions, Justice Winkelmann proposes moving back the first conference date to allow adequate time for party preparation and a more accurate estimation of hearing dates. For straight forward cases, a hearing date appropriate for the case would be allocated at that time.

However, these reforms focus particularly on complex or long cases which, given their potential to disrupt the roster, justify a greater level case management. With long or complex cases it may well be necessary to move to a second conference, where there will be a more rigorous analysis of the issues and where, preferably, judicial direction can be given.

In regards to the attendance of parties and senior counsel at the second conference, the Committee recalled a pilot scheme that took place in 1994 which required parties to be present at initial conferences. Although this aspect of the pilot was subsequently abandoned, Justice Winkelmann proposed that the Rules provide that judges may direct the attendance of senior counsel and parties at the second conference to facilitate the identification of issues and settlement. For complex cases, the second conference is likely also to be conducted by a Judge, rather than Associate Judge.

Justice Winkelmann also highlighted the third proposed reform which is closer case management during the pre-trial window, where parties are most likely to settle. This management should be done in a way that does not increase the costs. However, if there is to be a pre-trial conference it should be led by a Judge, not as is currently the case in Auckland, by a judicial liaison officer.

Her Honour's final recommendation was that pre-trial processes should be extended back from the pre-trial date. This would likely allow for better management of the roster because it would bring forward the key window of time for settlement. This would enable the Court to allocate fixtures with greater confidence.

These proposals would necessitate the amendment of r 7.3 and 7.4 and Schedules 5 and 8.

The Chair opened up the floor for discussion of these ideas. Ms Gwyn believed them to be very useful suggestions and a good means for going forward. Mr Beck agreed and noted that it was important to tailor case management to individual cases.

Justice Winkelmann further noted several other means of improving the current system. One would be to amend the roster to enable greater connection between the trial judge and the file. Another issue arises in relation to settlement conferences. Judicial time is a scarce resource and a significant proportion of Associate Judge time is currently spent doing judicial settlement. An issue is whether Associate Judges should be doing this or whether parties should bear the costs themselves of alternative dispute resolution processes, except for particular limited categories of case (for example, the model in Victoria).

Justice Chambers supported the reform and the proposed rule changes. However, he perceived that these changes could have been easily implemented under the existing rules and the fact that they had not been was largely a result of Associate Judge's unfamiliarity with the rules.

The Chair believed that the rule changes justify postponing the first conference in order to make it a substantive one, although Justice Chambers cautioned that Associate Judges must use it constructively. Judge Joyce QC recalled that a similar system used to be employed in the District Court and that it worked well provided that judges prepared properly for the conference.

The Chair noted that changing the rules is only part of the answer; there must be a change of culture both by the bench and the bar. However, he believed that the reforms proposed by Justice Winkelmann would put us alongside more progressive approaches such as those in Victoria and the United Kingdom. Put alongside the discovery reforms, the Chair believed that these reforms have the potential to transform the case management process.

The Chair asked Dr Mathieson QC if he could start taking this process forward and integrate it with both discovery and where the Committee had progressed to with written briefs. The goal should be to work all the strands into one document before the next meeting on the 4th April. The Chair drew Dr Mathieson QC's attention to the numbering of the rules, and advised that the rules dealing with discovery should logically come before those relating to interlocutories.

4. Discovery

Justice Winkelmann reported back to the Committee on the first public consultation meeting on February 14th at Auckland. Justice Asher first outlined the history of the reforms. Ms Laura O'Gorman followed and gave an excellent presentation on the new proposals, with Ms O'Gorman and Mr Andrew King then explaining the new procedure through sample documents.

A crowd of around sixty people attended and there was a lot of lively discussion. Andrew Barker voiced a concern that the test would be ineffective and that people would simply continue to use the current Peruvian Guano test. Her Honour stressed that for the adverse documents test to work, Judges needed to be resolved to use it. Another concern raised by an audience member was that scanning documents would lead to increased costs and more work: however, this concern was believed to be largely ungrounded as the cost and work involved in scanning was equivalent to, if not less, then photocopying. Although one practitioner was very opposed to the idea of initial discovery, it was clear that the majority of attendees supported this initiative. Perhaps a more valid concern was the issue raised by some practitioners that several obsolete rules are simply being carried forward without justification.

Dr Mathieson QC questioned whether Andrew King's statement that 90% of documents in cases are in electronic form is accurate and, in particular, whether the figure corresponds to the reality of smaller cases. The Chair said that this figure probably only captures larger commercial litigation and may decrease to 50% in other cases. However, he believed that the vast majority of communications are now commenced electronically.

Justice Winkelmann also noted that large commercial cases will have a proportionately larger number of electronic documents and that files will therefore be easier to retrieve electronically. It may be harder to extract files electronically in smaller cases, but as the Chair noted smaller cases will have a smaller number of documents anyway.

The Chair highlighted the excellent submissions received by Duncan Cotterill and also noted that Bell Gully had stated that they will be providing a submission. Justice Asher and the working group will provide a report on changes that result from these submissions and the results of the meetings, and will send the report directly to Dr Mathieson QC.

5. Proposal to amend agreed bundle of documents rules

The Chair introduced his memorandum proposing the reform of agreed bundle of documents ('ABDs'). He noted that although r 9.13 provides that the plaintiff is to supply the index and prepare the bundle 15 days after the exchange of briefs, parties do not have to serve and file them until five working days before the hearing (r 9.13(3)). He suggested amending the rule by having parties prepare the ABDs 15 working days after the exchange of briefs plus *exchange* and *serve* it at this time as well. The aim of this amendment would be to ensure that every document initially briefed was in the bundle, in turn enabling parties to see the gaps in a case which need to be discovered.

The Chair highlighted how this reform forms part of a wider obligation on the parties to co-operate. In particular it dovetails with the obligations on parties to co-operate with discovery. More specifically, it also relates to initial discovery and electronic discovery as both these would make ABDs more practical by allowing for quicker retrieval of documents. The ABDs reform further relates to, and would facilitate the proposed reforms regarding case management conferences.

The Chair also believed that a chronology would be desirable, but noted Justice Asher's previous opposition towards this on the basis that it was too ambitious.

There was agreement to this proposal.

The Chair remarked that a huge advantage of electronic discovery is that ABDs will come out of a common database. This database will be able to be easily organised into chronological order or by topics at the convenience of counsel presided over by a trial judge. This in turn will not only provide for greater accessibility of documents, but will also would force the parties to concentrate better on the issues.

The Chair directed Dr Mathieson QC to amend r 9.13 by adding the requirement of service between parties 15 working days after the exchange of briefs and to look at the part of r 9.16 dealing with ABDs. Dr Mathieson QC is to look into inserting into r 9.13 the requirement of party cooperation in preparing a common bundle as the rule does not currently require this.

6. Appeals against interlocutory decisions and review of strike out/ summary judgment

Ms Charmley spoke to the Attorney-General's memorandum on the reform of strike out and summary judgment procedures. She noted that of all the options the paper canvassed, the Attorney-General had no preference but believed it would be germane to form a sub-committee to decide on the best solution.

A sub-committee had previously been set up last year dealing with strike out/ summary judgments. It consisted of the Chair, Justice Asher, the Attorney-General, Ms Paula Tesoriero and Ms Cheryl Gwyn, with Justice Venning to be approached to join. This sub-committee never met and the Committee reconsidered the composition and the topics it should encompass.

After consideration, the Committee decided that the sub-committee was to deal with interlocutory appeals, strike out and summary judgments. The members agreed upon were: the Chair, Justice Chambers, Andrew Hampton, Justice Joyce, Ms Cheryl Gwyn, and a nominee of the Attorney-General (who might be Ms Anthea Williams). Dr Mathieson QC will need to become involved once the sub-committee reaches the drafting phase.

The Committee then moved on to consider the statistics obtained from the Ministry as to appeals to review interlocutory decisions made by Associate Judges. While comment was made that the time to deal with these applications was extraordinary, Justice Winkelmann drew the Committee's attention to the fact that the figures did not represent the median case length and were based on a sample of only 37 appeals. The Chair instructed the Clerk to liaise with Justices Winkelmann and Chambers on this issue and obtain more information about the figures, the nature of the appeals, and the Associate Judges who decided them. Justice Winklemann also highlighted that a full analysis of this issue needs to take into account the filing fee structure, which raises access to justice issues.

Justice Winkelmann raised a concern about the Committee's approach generally to statistics and how the performance of rules is being assessed. She believes that the Committee needs to be clearer at the outset as to what are the Committee's questions and goals in relation to specific topics and what methodological framework can be deployed to measure them.

Justice Chambers recalled that the original driver of the reform was to treat Associate Judges' judgments the same as those by Judges. At present the system was a lottery as to which court would hear the appeal.

The Chair held that there should be a teleconference of the sub-committee to sort out the issues involved in the next two weeks. This would make what data was needed much clearer.

7. Trans-Tasman Proceedings Act

The Chair expressed concern over the remit of the Trans-Tasman rules in relation to the statutory regulations and asked if Dr Mathieson QC could keep him informed as to the substance of the latter. Mr Howard noted that the rules would be formulated according to the Legislation Advisory Committee Guidelines and not according to a Ministerial policy as such.

The Chair also wanted to ensure that the Committee was kept up to date with the progress of the regulations and was consulted as to their content before the legislation was fixed. He believed that a member of the judiciary should look into this issue. Dr Mathieson QC assured him that he would undertake to send draft rules well in advance of any changes. Justice Chambers commented that the reason for the regulations may simply be that the Australian end is forced to use them given that they do not have an overarching Rules Committee as in New Zealand. Mr Howard agreed with this, further noting that in Australia regulations were a practical solution to the large number of disparate courts and tribunals throughout the many states and territories. If regulations were not promulgated it would necessitate manifold versions of rules which would cause difficulties locating key forms and requirements. It was noted that paragraph two on page two of Ms Julie Nind's letter of 19 November 2010 raised these points.

Dr Mathieson QC added that the rules were largely concerned with the service of documents and that the special regime will be in the rules and subpart 4 of the rules. He agreed to send the latest version of these and the Chair decided that he would talk to Ms Nind in the next week or so and deal with any future concerns with Dr Mathieson QC.

8. Form C 2 of the High Court Rules and applications under section 174 Companies Act 1993

Mr Beck introduced his memorandum on this issue, noting that he looked at the purpose of the proceedings and the rules. He believed that s 174 disputes belonged with ordinary

company litigation and that while Associate Judge Faire's concerns related to instances where there was a real possibility of litigation, these situations represent a very limited number of cases. Given this, Mr Beck observed that it makes no sense for s 174 proceedings to be advertised in accordance with Part 31 of the High Court Rules. It would be preferable to have s 174 proceedings treated as applications under Part 18 of the Rules, and thus the same way as other forms of litigation seeking remedies under the Companies Act.

Justice Winkelmann queried what would happen if creditors are not advised. Mr Beck said that general liquidation theory concerns would apply. Her Honour agreed with Mr Beck that while liquidation is always on the cards it is rarely ordered and that the current system is particularly ill-suited to the nature of litigation involved.

Justice Chambers was convinced that Mr Beck was correct and that s 174 applications should be dealt with in accordance to Part 18. He believed that there will not be many cases where creditors need to be informed, but when there are it can be done at case management meetings. Ms Gwyn also agreed with Mr Beck. The Committee held that Mr Beck's position should prevail.

Dr Mathieson QC is to change the rules to suit this decision.

9. Correspondence regarding interim orders in burial dispute cases

The Committee decided to wait until the Court of Appeal's decision of *Clarke v Takamore* before giving a formal response to the Ministry, but both Justice Winkelmann and the Chair noted that there was a clear distinction between the effectiveness of the rules and problems as to their execution these particular rules.

10. HCR 10.24 – 10.26 and Courts (Remote Participation) Act 2010

The issue of whether rules 10.24 - 10.26 have been rendered redundant by the 2010 Act is to be left to Dr Mathieson QC. If they are, then Dr Mathieson QC is to put them in the bundle of reforms. Justice Winkelmann highlighted that the Evidence Act should also be considered in respect of these rules, as it provides for evidence to be taken in different ways in subpart 5 (ss 102 – 106).

11. District Court Rules Reform

Judges Joyce QC and Doherty and Mr Hampton had met the previous week to discuss the reforms. Judge Joyce CQ reported back that summary judgments had been reviewed with updated High Court impact figures. In the year from November 2009, there was a 1% increase in applications compared to the previous year. Mr Hampton noted that while Associate Judge-work had increased 1% in the year from November, summary judgments had risen in the High Court from 77 per month between October 2008 and November 2009 up to 81 per month since. A question was whether Associate Judges were being loaded with summary judgments. Justice Winkelmann commented that there has been a slight

increase in the numbers filed in the High Court, and Mr Hampton stated that there needs to be an analysis as to why the numbers have been increased. Justice Winkelmann wondered whether the initial fall-off in summary judgments in the District Court was the cause for this increase. Justice Joyce believed that it was too early to pinpoint the cause accurately and that the Committee should start afresh with the new data in a year's time to investigate the issue further. The Chair advised him to consult with Justice Miller on the best ways of collecting fresh data.

12. Measuring consequences of reform

Justice Winkelmann reiterated her concerns that the Committee must think in advance when launching reforms as to how to measure their success. Mr Hampton agreed and commented that it was standard process for any governmental change to lay out a clear set of expected benefits and patterns as well as the framework for assessing them. This requires systematic monitoring. While the Ministry of Justice is data rich, it is information poor, meaning that questions will need to be established at the beginning in order to create the appropriate structure to retrieve the desired information. Given resource and time constraints, it was agreed that the Committee should chose a few projects to analyse and for which to develop an appropriate means of assessment. Justices Winkelmann and Chambers both observed that data and information will also have to be gleaned from the profession. In regards to the issue of e-discovery and case management reform, Justice Winkelmann posited that it would be useful to have several representatives from the profession as participants giving feedback to the Rules.

The Committee agreed that a sub-committee should be formed to decide on the projects and methods, consisting of Mr Hampton and the Secretary to the Committee, Mr Beck, and with Justice Miller approached to join. The Secretary is to assume primary responsibility for co-ordinating this sub-committee.

13. District Court Rules Reform Returned

The discussion then returned to the issue of the District Court Rules, with Judge Joyce QC stating that he has asked Mr Jameson to add the obligations created under the Construction Contracts Acts 2002 as an exception to the summary judgments rules. Judge Joyce QC also noted that the timeframe of 30 working days for a response to a claim, or for the provision of an information capsule, was now believed by some practitioners to be too long. However, he did not perceive this as an issue that needs to be pursued at this stage, and it would be more sensible to wait until more information had been gathered. What might need amending is the rule that if the Plaintiff fails to serve an information capsule within 30 days the proceedings come to an end and can only be re-filed if the limitations have not ended. Judge Joyce QC is in favour of allowing an extension of time for this. Several other issues for reform were raised by the Judge. He stated that Mr Jamieson was looking into judgments on admission as well as drafting a provision that allows for amendments in claims before they come into Court. Craig Walker was looking into tidying up several small points with the new District Court forms, which had otherwise been well-received.

14. General Business

Ms Charmley relayed the Attorney-General's view that there was need for a sub-committee to look into issues arising from the Marine and Coastal Area (Takutai Moana) Bill. The sub-committee originally appointed in the October 2010 meeting was comprised of the Chief High Court Judge, the Attorney-General, Ms Gwyn, Ms Tesoriero, and Mr Beck. The Chair suggested that there should be a closer analysis of whether a change of rules was required in regards to this Bill. Mr Hampton stated that if the issue does not get closed off with the Attorney-General then it can be brought back to the Committee.

15. Daily Recovery Rates

The Clerk is to prepare the daily recovery rates review for the next meeting on April 4 and also work with Mr Beck and Mr Brown QC to deal with the review of High Court costs at this meeting.

The meeting finished at 12.22 pm.