THE RULES COMMITTEE

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Thursday 4 October 2007

Minutes/06/07

Minutes of meeting held on Monday 1 October 2007

The meeting called by Agenda/5/07 was held in the Chief Justice's Boardroom, High Court, Wellington, on Monday 1 October 2007 at 10am.

1. Preliminary

In Attendance

Hon Justice Baragwanath (in the Chair)
Hon Justice Randerson, Chief High Court Judge
Hon Justice Fogarty
Judge Doherty
Dr David Collins QC, Solicitor-General
Mr Hugo Hoffmann, Parliamentary Counsel Office
Mr Andrew Hampton, for Ms Liz Sinclair, Deputy Secretary, Ministry of Justice
Mr Brendan Brown QC
Mr Andrew Beck, New Zealand Law Society representative
Mr Jeff Orr, Chief Legal Counsel, Ministry of Justice
Dr Don Mathieson QC, Special Parliamentary Counsel, Parliamentary Counsel Office

Ms Nicola Bruch, standing in for Ms Dolon Sarkar, Secretary to the Rules Committee
Dr Heather McKenzie, Clerk to the Rules Committee

Apologies

Rt. Hon Dame Sian Elias GNZM, Chief Justice of New Zealand
Hon Justice Blanchard, Acting Chief Justice of New Zealand
Mr Charles Chauvel MP
Hon Justice Chambers
Judge Joyce QC
Ms Liz Sinclair, Deputy Secretary, Ministry of Justice
Mr K McCarron, Judicial Administrator to the Chief Justice
Ms Dolon Sarkar, Secretary to the Rules Committee

1. Preliminary

Confirmation of minutes
The minutes of the meeting of Monday 6 August 2007 were confirmed.

Other matters arising
The Committee thanked Dr Mathieson QC and Ms Nixon for their work drafting the various sets of wills rules.

2. Expenses and disbursements

Dr Mathieson QC and Mr Hoffmann will amend the rules to introduce a requirement of proportionality in addition to reasonableness and necessity. A judicial discretion will be restored which will go to the issue of proportionality; and the 100% rule will no longer apply. There will also be added the power for a Judge to order a report or assessment on any aspects of costs 'from a professional organisation or otherwise.'

3. Court of Appeal (Civil) Amendment Rules 2007

Chambers J participated in discussion via telephone link. The Court of Appeal is not tied to a commencement date for the Rules, and is amenable to further consultation.

The requirement of an upfront indication of the proposed costs category of the proceeding was considered sensible subject to the Court being able to change it should proceedings prove more complex.

Two issues were discussed in detail with Chambers J:

- First, the increase entails a significant leap from current recovery amounts. In support it was mentioned that recovery rates can be grossly low, and a driving force behind the changes was helping remedy this.

- Second, the rules envisage initial submissions on costs covering both the proposed category and any points of principle (the latter being rare in practice as the Court is generally left to determine where costs should fall). The Committee considered that such points are best argued during or after the hearing rather than before. In response, Chambers J mentioned the Court's reluctance to depart from the current proposition that there is one judgment from the Court of Appeal covering both the substantive result and costs. Reasons for the reluctance included the difficulty of reassembling the same three-member panel together given this will increasingly include High Court judges, and avoiding further handling of the case. Moreover, there need be nothing preventing parties from making additional submissions should they wish to do so in light of the oral hearing. Importantly, the Court wishes to discourage a regime as in the first instance Courts where submissions on costs are made after the judgment.

While proposed rule 53G(2) aims to strike a balance between a defaulting applicant and a respondent taking advantage of this assuming they would not be liable for costs, concern was expressed this could tip the balance in favour of the opposing unreasonable party. It was suggested, and agreed to by Chambers J, to delete the last clause ('in which event there will normally be no order as to costs').

Further consultation with the profession and wider community is desirable in part because of the potentially large increase in costs payable given this becomes a public interest question. While there has already been consultation, concern was expressed that submitters did not fully appreciate the extent to which costs may rise. The Clerk will liaise with Messrs Brown QC and Beck to circulate a note with a range of 3 examples of the potential increase in costs. The Crown will be notified via Crown Law and the Ministry of Justice via Mr Hampton.

4. Class actions

The Chair thanked Dr Mathieson QC for his work preparing the Bill distilling complex ideas and options.

Dr Mathieson QC outlined the key points of the proposed bill. Subsequent discussion included:

- The importance of costs not consuming an entire award - such an outcome would destroy the credibility of the procedure.
- Concern that New Zealand would be the only jurisdiction providing for both "opt in" and "opt out" procedures.
- The danger that interlocutory proceedings and/or the initial "opt in" or "opt out" classification may become gaming points for defendants via which to burn out plaintiffs by delaying or derailing proceedings. For example, appealing an initial classification could incur substantial delay.
- The Court may need powers to limit appeals. A parallel was identified with the voluntary administration regime.
- More generally, provision for a judge to have the power to make any orders he or she thinks fit may be useful.
- When attempting to shut down unmeritorious applications, language such as 'abuse of process' would best be avoided.
- The Court may not need to adopt an overly prescriptive approach to funding arrangements as long as it fulfils its duty to ensure that funding represents a fair 'trust' arrangement. This is linked to the Court's two pre-trial roles in this context as being akin to a trustee for the plaintiffs, and responsible for progression of the case.
- There may be a lack of consistency if individual judges decide or classify the nature of the class action as "opt in" or "opt out." It is hoped the appropriate classification would emerge as the shape of the action became clear.
- The detailed purposes section (s 3) is potentially constraining and may become a gaming point for defendants who could, for example, argue that the proceedings do not fall within the stipulated purposes or classes. The first three lines read well and may be sufficient, with addition of a possible reference to the purposes of the High Court Rules.
- Careful attention should be paid to the position or treatment of named statutory bodies such as the Commerce Commission. For example, if the Commission undertook an action under its own procedures (such action essentially being a class action), should this have to be consistent with the class action rules?
- Inconsistencies with Australian provisions may present difficulties as Trans-Tasman actions are a potentially common occurrence.
- The cut-off point of 7 members to constitute a class may warrant a dispensation power.

Benefits of the proposed bill include that a system allowing for both "opt in" and "opt out" actions is more desirable than a rigid regime restricted to one or the other. It also makes resolution quicker for defendants who are potentially spared defending numerous proceedings. Lastly, the Courts' workload may be reduced.

Irrespective of the final details of the bill, it was agreed that the class action procedure is a tool which could well serve the litigant in New Zealand.

A sub-committee was formed to progress the matter comprising Randerson J, Baragwanath J (in the Chair), Fogarty J, Dr Mathieson QC, Dr Collins QC or a representative from Crown Law, and Mr Brown QC.

A memorandum has been sent to members of that committee outlining the issues and proposing a programme for action.

5. Discovery in civil litigation

Discussion was deferred to the meeting of 3 December by which time the Committee will have had the benefit of reading the Chief Judge's report on the seminar in Melbourne (C 99b).

Committee members agreed that discovery is a major issue in need of consideration due to its potentially burdensome scope being misused for tactical reasons. Attendance at a forthcoming conference in London on discovery will be considered.

6. Provision of authorities

There was discussion about the desirability of requiring counsel to provide authorities to the judge in advance of the hearing. It included:

- Whether having authorities in advance would be a valuable educative resource for a judge who may be acting outside their area of expertise or experience, or simply require more reading which may later prove unnecessary
- The issue of imposing another pre-trial obligation on counsel
- The potential gains in efficiency, which may lead to costs savings for the parties, where a judge who has read the authorities is familiar with the law before the hearing
- The practicality of provision: the reality of busy counsel is that often points of research are left to the end

There was also debate as to the form of any guidelines. Here concerns included:

- How to eliminate authorities being given to support obvious points of law, and
- Given the undesirability of more than one copy, how passages to be relied on should be marked where more than one counsel wish to mark the same authority

The Chair and the Clerk will work on the draft, to obtain feedback from judges and the profession.

7. Judicial settlement conferences

Judge Doherty tabled an introductory paper prepared in May 2005 outlining issues and recommendations authored by a sub-committee comprising France J, Gendall AJ, and himself.

The Clerk will research whether the confidentiality of judicial settlement conferences is assured under the Evidence Act 2006. If it is, Dr Mathieson will add an educative reference to the Act to the relevant section of the proposed High Court Rules.

8. Summary Proceedings (Electronic Transactions) Amendment Rules 2007

The Committee did not have any comments on the Rules or accompanying explanatory paper.

9. District Courts Amendment Rules (No 2) 2007

The Committee did not have any comments on the Rules or the accompanying paper. Mr Hampton signalled two minor points he will discuss with the Ministry directly.

10. High Court Rules revision project

The Committee discussed Mr Goddard QC's memorandum on the project.

Comments relating to e-filing and service out of New Zealand were left to the Steering Committee to consider at its meeting on 2 October 2007.

The desirability of having consistency with the Electronic Transactions Act 2002 was expressed; as well as the need for minor, but important, adjustment of the proposed High Court Rules to ensure that processes which can presently be served out of New Zealand with leave are still able to be.

There has since been a telephone meeting of the Australasian Harmonisation Committee on service outside the jurisdiction in the context of the Hague Convention. That too requires consideration.

11. Single joint expert witnesses

Discussion was deferred to the meeting of 3 December by which time the Committee will have read Randerson J's report on the discovery seminar referring to joint experts (at para 17).

Introducing such a regime merits consideration. The Committee noted the desirability of a flexible regime, with any orders being tailored to the individual case rather than a 'one size fits all' proposal.

12. E-lodgment of Court documents

The Rules Committee is concerned that New Zealand not be left behind in this area and provisions throughout the new High Court Rules reflect this. A practice direction in the English Civil Procedure Rules regarding the 'Money Claims On-line' procedure was tabled for the Committee's information, and Mr Hampton was invited to report back at the next meeting as to New Zealand's progress relative to Australia and England.

The Ministry is identifying pilot areas for expanding electronic filing, and a scoping document is presently before the Inter-Bench IT Committee. Feedback from that committee is expected in early November, and it is anticipated the Rules Committee will have a revised document to consider at the December meeting.

Possible areas for expansion include in the District Court (for example, informations laid by the Police in the summary jurisdiction), the High Court (especially Associate Judges' work which can be transactional in nature), and in specialist jurisdictions such as the Environment Court. There is already limited e-filing in the Court of Appeal and Supreme Court which could be expanded relatively easily (that is, without the need for legislative change) and with significant benefits. Expanding e-filing in the District Court in comparison would require

significant legislative change. A challenge is meeting the desirability that e-filing filter through all levels of the Court system.

13. Access to Court records, amendment to rules 66 – 68

The Chief Judge outlined the proposed rules, noting that they have not yet been considered by the Chief Justice.

Reform of the rules assumes urgency in light of *Mafart v TVNZ Ltd* [2006] NZSC 78 where the Supreme Court essentially merged application of the civil and criminal rules. The sub-committee has met several times and received feedback from the profession.

The Committee is keen for the rules to go out for consultation as soon as two points are tidied up. These are how to proceed or deal with the criminal rules; and why proposed rule 67 singles out the Administration Act 1969: it was suggested that consideration also extend to the Arbitration Act 1996 given the public interest in keeping arbitration documents confidential.

Letters of thanks have been written to members of the Committee for their work on the rules.

The meeting closed at 2.05pm.