THE RULES COMMITTEE
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12 October 2010

Minutes/04/10

Circular No. 63 of 2010

Minutes of meeting held on 4 October 2010

The meeting called by Agenda/04/10 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 4 October 2010, at 9:45 am.

1. Preliminary

In Attendance

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

Ms Sophie Klinger, Clerk to the Rules Committee

Apologies

Rt. Hon Dame Sian Elias GNZM, Chief Justice of New Zealand
Hon Justice Winkelmann, Chief High Court Judge
Judge Doherty
Hon Christopher Finlayson, Attorney-General
Mr Andrew Hampton, Ministry of Justice
Mr Patrick Davis, Secretary to the Rules Committee

Confirmation of minutes

The minutes of the meeting of Monday 2 August 2010 were confirmed.

2. Duty of parties to meet purposes of the Rules and counsel to assist

The Committee discussed the future direction of this project. Ms Charmley reported that the Attorney-General had expressed concern over whether a positive duty such as the one proposed in the last consultation might produce satellite litigation.

There was generally caution about moving forward with the proposals from the consultation (in particular the problems around privilege and costs on lawyers). Some members still favoured introducing a rule requiring party cooperation, to perform an educative function; however there were difficulties with how to enforce such a requirement. The Committee accepted that any reforms introduced must preserve a party's right to run a hopeless argument. Chambers J pointed out that r 1.2 of the High Court Rules was directed at judges interpreting the rules and not at individual parties; therefore any rule addressing parties was going to be a substantive change.

The Committee also considered the proposal in Kate Davenport's paper to require certification by counsel that an interlocutory application is arguable (rather than being brought merely to delay). The conduct of lawyers was covered by the rules of conduct and client care, which prevent lawyers from using court processes for ulterior purposes; these professional rules and disciplinary processes reduced the need for changes to the High Court Rules regarding lawyers.

The issue of duties on parties to litigation will be revisited in the future. The Chair will discuss this matter with the Chief Justice and the Chief High Court Judge and her committee on civil procedure. The Chair will also contact the Associate Judges (who are meeting in November) for their views.

3. Appeals against interlocutory decisions

The Chair reported on proposals regarding appeals against interlocutory decisions. This topic was discussed during 2009 and was reintroduced onto the agenda due to proposals from various parties: Miller and Venning JJ in their report on case management for the Chief High Court Judge had suggested that consideration could be given to limiting rights of appeal for non-determinative interlocutory decisions relating to discovery, interrogatories and particulars for example. The Attorney had also recommended review of the provisions for appeals against interlocutory decisions in his speech to the Bar Association in August. The Chief High Court Judge had suggested removing the requirement for reasons to be given for interlocutory decisions that were non-dispositive, unless called upon by counsel. The Committee acknowledged the problem of the time being taken between hearing cases and delivering judgments for interlocutories which can hold up the substantive proceeding.

Chambers J proposed that instead of appeal to the Court of Appeal there could be a review in the High Court (except for summary judgments and strike out decisions which could

continue to go to the Court of Appeal). The option of requiring leave to appeal to the Court of Appeal was also discussed. The Chair noted that leave to appeal was required in many other jurisdictions. However, leave hearings added another avenue for cost and delay.

The Committee also considered the requirement for giving reasons in interlocutory decisions. So that decisions could be given more quickly, they could be in a short form consisting of 4-5 bullet points, or 2 or 3 paragraphs, as demonstrated in decisions on leave in the Supreme Court. This short form could be implemented for non-dispository interlocutory decisions.

There could be difficulties in determining the difference between dispositive and non-dispositive interlocutory decisions.

The Chair recommended that this topic also be canvassed with the Associate Judges, and that Winkelmann J be consulted as these topics tie in with case management.

4. Vexatious litigants and strike out/summary judgment

The Committee discussed the effectiveness of the rules on strike out and summary judgment in relation to claims by vexatious litigants.

Ms Charmley reported for the Attorney-General that he considered that the summary judgment rules needed to be changed. In particular it was currently too difficult for a defendant to get summary judgment. The Attorney-General was also doing work outside of the Committee regarding vexatious litigants.

The Committee agreed to set up a sub-committee to address these issues. It will consist of the Chair, Asher J, the Attorney-General, Ms Paula Tesoriero, and Ms Cheryl Gwyn. Venning J will also be approached to join the sub-committee. The sub-committee will obtain information about the rate of defendant summary judgment as opposed to plaintiff summary judgment, and on claims from vexatious litigants. The sub-committee will report back on its initial ideas at the next meeting.

5. Electronic discovery

Asher J reported from the sub-committee on electronic discovery. At a previous meeting, Chambers J had proposed to integrate electronic discovery with the reform of existing rules on discovery. Asher J has been working with a group consisting of Chambers J, Ms Laura O'Gorman, Mr Andrew King, and Ms Lynn Holtz. The group had produced a set of draft rules on discovery and electronic discovery.

The rules relating to the test for discovery (bringing in the adverse documents test as standard discovery and including options for non-standard discovery) were the same as approved by the Committee earlier in 2010.

Regarding the process for discovery, the working group had considered that it was desirable to have the electronic regime apply to all discovery and inspection, as the vast majority of documents are already in electronic form and the remainder can easily be converted into electronic form by scanning. The documents will be required to be listed in a certain format so that the list can be adapted for other purposes. There is a rule requiring parties to co-operate during discovery and inspection. There is a discovery checklist in Part A of Schedule 9, and a listing and exchange protocol for complex cases in Part B.

Asher J also reported that the working group had had a discussion via video conference with Master Whittaker in the United Kingdom. Their sub-committee on electronic discovery had

wanted to have a system that was entirely electronic but this proposal was defeated at Rules Committee level.

The Committee thanked Asher J, Dr Mathieson QC, and the working group members for their time and effort spent in preparing these draft rules.

The Committee considered that workshops in Auckland and Wellington might assist in communicating with the profession about the proposals.

Initial disclosure has been retained in these draft rules (r 8.18) but requires further debate. Initial disclosure documents are currently positively excluded from the list of documents (per r 8.24(3)) but in reality they will need to be added into the list. This aspect could be drawn to the attention of practitioners. It was not necessary to require that documents in initial disclosure be given in electronic form.

Chambers J raised several drafting points:

- Rule 8.25 – Chambers J considered that the onus was too high in the rule requiring solicitors to ensure that parties comply with discovery obligations "to the best of the solicitor's ability". However this wording is the same as in the current rule. Chambers J favoured "reasonable care to ensure".
- Whether rr 8.29 (Inspection of document referred to in pleading or other document) and 8.39 (Inspection of documents) could be simplified into one rule about inspection, as they seemed repetitive; Dr Mathieson will consider whether some rationalisation of these two rules is required.
- Subrules (3) and (4) of r 8.29 needed to be added into r 8.18 so that privilege and confidentiality are addressed.
- Rule 8.42 (Right to make copies) – there needs to be provision for parties to access the hard copy/original version of a document, as of right, so that if there are marginal pencil notes or similar, these are not left out. Asher J considered that this point should be added in to r 8.39.
- In the draft protocol on page 23, paragraph 2.1, field 2, line 2, another 'Y' needs to be inserted so that year is represented by 'YYYY'.
- Chambers J enquired about the meaning of 3.2(b) of the protocol, as he had understood it was agreed only to list the top-level email, per 3.2(a). Asher J will check this point with the working group members.
- The glossary needed to be checked to ensure that all of the terms within it are still being used elsewhere in the document. Dr Mathieson QC will check this.

Dr Mathieson QC will amend the draft rules accordingly.

Dr Mathieson QC noted the following points in the draft rules:

- There is provision for lay litigants to apply to a Judge for an exemption to the electronic discovery regime if it was impractical or for any other reason. However there is no such provision for exemption of a lawyer.
- The application of these rules to the District Court needed independent consideration. Mr Ian Jamieson has already started identifying the rules affected.
- The Committee should be aware that these rules require that in every case, large or small, there will need to be a discovery order. Although this would ordinarily take place at a case management conference, these may be dispensed with so there still needs to be provision for an order regarding discovery. A proceeding is deemed to be non-standard if a party claims it is non-standard, so in these instances an order in respect of discovery should occur as soon as possible. The Chair will flag this issue

with Winkelmann J. The discovery reform needs to be integrated with other case management reform.

Mr Brown noted the practical points that colour copies will be required in some instances, e.g. coloured plans, so these need to be provided for. He also considered that there was a disjunct between rr 8.44 (new) and 8.46 (old) as in 8.46 the party is deemed to have admitted authenticity.

The Clerk will prepare a first draft of a consultation paper to accompany these rules when they are sent out to the profession for consultation, and send this to Asher J for review. The Clerk will also prepare letters of thanks from the Committee to the external members of the working group.

The Chair will consult the Chief Justice and the Chief High Court Judge to obtain their approval of the consultation paper and the draft rules.

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

Asher J reported on discussions with Faire AJ. At previous meetings the Committee had considered whether to move applications under s 174 Companies Act from Part 31 to Part 18. Practitioners including Mr Beck had considered it should logically be put into Part 18. Faire AJ had preferred it stay in Part 31 where there is a requirement for advertising. It was decided that Mr Beck will talk to Faire AJ directly and contact Dr Mathieson QC regarding any changes required to the High Court Amendment Rules (No. 2) 2010.

Ms Tesoriero suggested that the Ministry of Economic Development may need to be consulted about this change. Ms Tesoriero will liaise with Mr Beck.

7. Tauranga/Rotorua registries issue

The Committee discussed and approved the proposal by Doogue AJ and Mr John Earles to delete (2)(d) from Rule 31.6, regarding the place for hearings for liquidation proceedings filed at Tauranga. The change will be included in High Court Amendment Rules (No. 2) 2010.

8. High Court costs allocations

The Committee noted that a consultation paper for reform of Schedule 3 has been drafted; this item is likely to be resolved at the 29 November meeting.

9. Applications for pecuniary penalty orders

At the last meeting the Committee considered the letter from the Law Commission/Legislative Advisory Committee on the need for specialised rules for applications for pecuniary penalty orders. Mr Brown QC reported on discussions with Mr George Tanner QC regarding the Committee's concerns about cl 42(6) of the Securities Trustees and Statutory Supervisors Bill. The Law Commission has decided to review the area of pecuniary penalties and consider whether a discrete set of rules is needed.

The Committee nominated Mr Brown QC to continue to liaise with the Law Commission, particularly Professor John Burrows QC.

10. Marine and Coastal Area (Takutai Moana) Bill

This Bill was introduced on 6 September, and will repeal the existing foreshore and seabed legislation. The Committee discussed membership of a sub-committee to address rule

changes that will be required by the Bill. The sub-committee will consist of the Chief High Court Judge, the Attorney-General, Ms Gwyn, Ms Tesoriero, and Mr Beck.

11. Rule change for Immigration Act 2009

The Committee discussed and approved the change that is required to rule 5.1 of the High Court Rules consequential to the Immigration Act 2009, to specify the proper registry for proceedings involving classified information. The change will be included in High Court Amendment Rules (No. 2) 2010.

12. Rule changes for Limitation Act 2010

The Committee discussed amendments to Rules 1.17(3) and 17.9 of the High Court Rules, and Rule 1.16.3 of the District Courts Rules and a related proposal regarding s 80 District Courts Act 1947. These were technical changes consequential to the Limitation Act 2010. The Committee agreed to these changes, subject to final approval by the Chair once he has reviewed the amendments again.

13. Court of Appeal (List Election Petitions) Amendment Rules

These were technical amendments updating the exclusions of some High Court Rules from the conduct of list election petitions. They are the same rules as were excluded by the Court of Appeal (List Election Petitions) Rules 1998, but updated by reference to the current High Court Rules. The Committee approved these amendments.

14. Court of Appeal (Civil) Amendment Rules

Chambers J reported that these amendment rules addressed applications for leave to appeal. They introduced a process for abandoning applications for leave to appeal, and also provided that applications are deemed to be abandoned if a waiver of fees is requested and not granted, and no further action is taken. The latter procedure was taken from the Supreme Court Rules. The Committee approved the rules.

15. General business

Dr Mathieson QC reported that he was meeting with the Attorney-General on 5 October to discuss class actions.

The meeting closed at 1.10 pm.