THE RULES COMMITTEE

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22 July 2009

Minutes/04/09

Circular No. 75 of 2009

Minutes of meeting held on 6 July 2009

The meeting called by Agenda/04/09 was held in the Chief Justice's Boardroom, High Court, Wellington, on Monday 6 July 2009, at 10:00am.

1. Preliminary

In Attendance

Hon Justice Fogarty (in the Chair)
Rt. Hon Dame Sian Elias GNZM, Chief Justice of New Zealand
Hon Justice Chambers
Hon Justice Randerson, Chief High Court Judge
Hon Justice Asher
Hon Justice Stevens
Judge Doherty
Hon Christopher Finlayson, Attorney-General
Dr Don Mathieson QC, Special Parliamentary Counsel, Parliamentary Counsel Office
Mr Jeff Orr, Ministry of Justice
Mr K McCarron, Judicial Administrator to the Chief Justice
Ms Anthea Williams, Private Secretary to the Attorney-General
Ms Paula Tesoriero, Ministry of Justice
Ms Cheryl Gwyn, Crown Law
Mr Hugo Hoffman, Parliamentary Counsel Office

Ms Sarah Ellis, Secretary to the Rules Committee

Ms Sophie Klinger, Clerk to the Rules Committee

Apologies

Judge Joyce QC
Ms Rebecca Ellis, Crown Law
Ms Liz Sinclair, Ministry of Justice
Mr Andrew Hampton, Ministry of Justice
Mr Brendan Brown QC
Mr Andrew Beck, New Zealand Law Society representative

Confirmation of minutes

The minutes of the meeting of Monday 8 June 2009 were confirmed.

2. Access to court records

These have now been approved by Cabinet and came into force on 12 June 2009. The Committee considered the need for similar rules for the District Court (summary criminal) and the appellate courts.

Judge Doherty noted that the Criminal Procedure (Simplification) Project will cover summary criminal matters as the entire Summary Proceedings Act is being considered.

The Chief Justice and Justice Chambers will report back at the next meeting on the views of the Court of Appeal and Supreme Court as to whether rules are required for those courts.

3. Judicial Matters Bill

Two issues were discussed. The first was appeals against ancillary interlocutory decisions of the High Court. The possibility of introducing a leave requirement for appealing such decisions was discussed. Justice Randerson will consult with the High Court Judges as to their opinion on the proposal. Justice Chambers will consult with the Court of Appeal Judges. They will report back at the next meeting.

The second issue discussed was appeals against decisions of Associate Judges to the Court of Appeal, agreed at the last meeting. The Committee discussed the proposed amendment to allow appeals against decisions of Associate Judges to go directly to the Court of Appeal. Justice Chambers stated that he preferred to repeal s 26P so that s 66 would automatically apply to orders or decisions of Associate Judges in the same way that it applies to those of a High Court Judge.

Justice Chambers' second point was that the transitional provision could be made simpler; he proposed that the new appeal route apply to any decision delivered after the amendment comes into force, rather than depending on whether the proceedings commenced after the amendment.

Technical issues over the form of the change were left to Parliamentary Counsel Office to resolve.

4. Obligations on counsel to co-operate

The Committee discussed the draft rule provided by Dr Mathieson QC.

The purpose of the phrase "but does not include…" at the end of subsection (4) is to make it clear that there is no duty of care to the opposing party. Otherwise, the words are wide.

Dr Mathieson noted that the words "the Registrar and court staff" were inserted into subsection (1), to address issues such as the setting of the fixture time, which depends on close cooperation between counsel and court staff.

Justice Asher raised the concern that subsection (4)(e) could be used to force parties to negotiate or enter into ADR when it is not appropriate. Parties should not feel under any pressure to settle. Equally, there are cases where parties should be discussing settlement, but are not. It is a question of balance. The Chief Justice proposed that (e) be deleted since (d) is adequate to cover the issue. Justice Randerson considered that perhaps the section should be made more moderate, but it was important to have it in there in some way.

Justice Randerson also drew attention to the Access to Justice (Civil Litigation Reforms) Amendment Bill received from Chief Justice Black of the Australian Federal Court. Clauses 37M (Overarching purpose of civil practice and procedure provisions) and 37N (Parties to act consistently with overarching purpose), on pages 4 to 5 of the Bill, were relevant. Clause 37N puts the obligations on the parties, and then says that a party's lawyer has a duty to assist the party to achieve the purposes of the provisions. The draft rule currently under consideration by the Committee puts the obligation on the lawyers. The rule could put the obligation on the lawyers, the parties, or both.

The Committee decided to insert "counsel" into the definition of "lawyer" in (4). There can be alternatives included in square brackets to promote discussion and encourage the legal profession to engage. For example, (4)(e) could alternatively be phrased as "considering the resolution of the proceedings by alternative dispute resolution".

It was decided that a version of clause 37N would be put out for consultation along with the currently drafted 1.20A. Variations of the rules could put the duty on the parties and the lawyers, or on the lawyers only. There could also be variations as to whether the rule is phrased as a duty or a mere expectation. A background paper will need to accompany the rules.

Dr Mathieson will draft some options to go to the profession for consultation, along with comments on the position in other jurisdictions and some discussion questions. These options will be circulated to the Chief Justice, Justice Randerson, the Attorney-General and the Chair prior to consultation.

5. Court ordered mediations

Justice Stevens reported on this item. On 3 July 2009, the Ministers of Justice and Courts announced a pilot for Auckland involving the allocation of 50 days of mediators' time. A working group has been established. Members of the profession are included such as Ms Miriam Dean QC and representatives from AMINZ, LEADR, the Law Society, and the Bar Association. There will be a meeting on 22 July. A draft mediation agreement is being developed along with a proposal requiring parties

to report back to court following the mediation. There will be a panel of 12 to 15 mediators appointed. The anticipated start date is 1 November.

The Committee discussed the Crown Law opinion as to whether any legislative change was needed. The Committee agreed that no changes were needed at this point but if it is decided to make the process more widely available in the future, then this can be reconsidered.

The process will make mediation available to parties who would not have been able to afford it privately. Parties who can afford the process are still likely to pursue it privately so that they may have their choice of mediators.

6. District Courts Rules reform

Judge Doherty reported on this item. A set of forms have been designed to deal with counter-claims. The process is on track for the 1 November commencement date.

7. Discovery

Justice Asher reported on this item. At the last meeting it was decided that the paper on discovery would be modified and added to, and prepared as a draft consultation paper. The paper presents the three options discussed at the last meeting:

1. Retention of the status quo;
2. The abolition of the *Peruvian Guano* train of enquiry test, and a move to the adverse documents test, used in the UK and some Australian states; and
3. Requiring parties to disclose the documents on which they rely when they file their initial pleading, and thereafter discovery by way of application (preferably resolved by consent) for specific discovery.

The draft rule on the third option is attached. There is a New Zealand Bar Association conference and a Legal Research Foundation seminar, at which this proposal can be discussed.

The Chief Justice considered that the paper should be expanded. She also preferred the option of general discovery be available in appropriate cases. However, there was a concern this would become the default option for discovery, which was undesirable. This could be another option put forward in consultation. The paper could also state that the Federal Court has a more limited jurisdiction than the High Court. The relevance of discovery to access to justice could be emphasised.

The paper will be amended to reflect discussion at the meeting. The Chief Justice will send some comments to Justice Asher by email regarding areas for expansion. Justice Asher will seek input from Mr Beck and Mr Brown before the paper goes out for consultation. A further draft will be circulated to the Committee for comment, and then the paper will go out to the profession in the coming weeks. A three month consultation period was desirable, given the significance of the reforms proposed.

8. Daily recovery rates consultation

The Clerk reported that a letter proposing a change in the appropriate daily recovery rates had been prepared in accordance with Justice Chambers' memorandum of 4 June 2009. It will be sent to the New Zealand Law Society, the Auckland District Law Society, the Legal Services Agency, and the New Zealand Bar Association.

The Committee considered that the Ministry for Economic Development should also be consulted, along with any parties that had been consulted at the time of previous changes to the rates.

9. Rule change – changing address for service HCR 5.41

Change was required to the rules for changing representation and address for service, because currently a lawyer must pay $600 to file an interlocutory application. The proposal was to amend the fees regulations to include an exemption for that particular interlocutory application.

Ms Paula Tesoriero indicated that the Ministry of Justice agreed to the proposed amendment. The Chair will send a formal request to the Ministry of Justice from the Rules Committee in accordance with the proposal set out in Dr Mathieson's memorandum.

10. Schedule 3 of the High Court Rules and time allocations

This item was carried over until the meeting of 5 October 2009.

11. High Court Rules issues raised by registries and the profession

Dr Mathieson tabled a list of amendments to be inserted into the High Court Amendment Rules (No 2) 2009:

- Insertion of the new rule 1.20A (Obligations on counsel) will require consultation.
- Associate Judge Faire raised the insertion of the omitted rules on video links (old rules 72B-72E). These will be inserted into the relevant part of the new High Court Rules.
- The Judicial Vacations rule will be inserted (old HCR r 18).
- The term "a registry" will be corrected to "an office in r 8.20.
- In Schedule 4 "disagreement" will be corrected to "agreement".

Ms Paula Tesoriero will consult with the registrars to see if they have encountered further issues in the Rules that need to be amended urgently. Another set of amendments encompassing all of the issues raised by the registrars will be made later in the year.

12. Sentence indications

Justice Chambers reported that the Court of Appeal Judges' view was that the Rules Committee should not become involved in sentence indications at this stage. Sentence indications are part of the Criminal Procedure (Simplification) Project, and there is a discussion document by the Law Commission on the development of a formalised system. Legislation may be required in any event.

The Chair will report back in a letter to the Criminal Practice Committee to inform them that the Committee will not take this further as another agency has it under active consideration at the moment.

13. Originating applications

Mr Hoffman tabled a proposal to insert a new rule 19.10A into the High Court Rules. This is in response to the issue raised by Judge Osborne about using addresses of creditors as an address for service in the case of statutory demands and applications for the removal of caveats.

The Committee approved the rule and agreed to insert "or address for payment" after "creditor's address" in subclause (2) of the new rule.

14. Rule 7.39 of the High Court Rules

This issue relates to synopsis of argument in interlocutory applications. After the last meeting, Justice Randerson consulted with the judiciary in respect of Mr Beck's proposals to dispense with the requirement in rule 7.39 for synopses of argument in respect of all defended interlocutory applications, and the bundle of documents to accompany the application.

Justice Randerson reported that the Judges and Associate Judges are firmly of the view that the rule is very helpful in most cases. It can be dispensed with where the matter is so insignificant that the rule does not need to be complied with. The rule should not be changed.

15. Trans-Tasman Proceedings Bill

The Committee noted the letter received from Ms Julie Nind at the Ministry of Justice advising of forthcoming consultation on the Trans-Tasman Proceedings Bill.

16. Class actions

The final version of the Class Actions Bill was circulated on 29 June 2009. It included changes discussed at the June Rules Committee meeting. One further change will be made: "fixation" will be changed to "fixing" on page 15 of the Bill.

The letter from the Chair to the Secretary for Justice has been prepared. The Chair will send the letter along with a copy of the finalised Bill.

The Chief Justice commented that the letter needs to flag that there is a great deal of consultation that has not yet been undertaken because it is not the responsibility of the Committee, for example around compliance cost for business.

The Clerk is preparing a folder of materials on class actions including reports, consultation materials, and submissions to the consultations, to hand over to the Ministry of Justice.

The Chair thanked all those involved for their work on class actions. It has been a very complex project. He extended particular thanks to Justice Stevens and Dr Mathieson for their scholarship and professionalism. Justice Randerson thanked the Chair for his involvement in the project.

17. Case management/written briefs

Justice Asher reported on this item. At the last meeting the Committee had debated Justice Asher's proposal for reform involving the use of will-say statements instead of written briefs. At that meeting it was considered that the reform proposed would not be effective, and that will-say statements would turn into written briefs with added complications as to their use at trial, and the savings intended might prove illusory.

The third option in Justice Asher's memorandum would not save the costs involved in written briefs. It is accepted that all evidence should be by way of written brief. However, it does address the issue strongly felt by High Court Judges that there should be a very specific and widely understood discretion on the part of judges to direct that part of the evidence to be presented be presented orally. There is general approval of option three amongst High Court Judges. The concept is that judges have a discretion to be exercised in the directly weeks before trial, after written briefs have been exchanged, ideally at a pre-trial conference, as to what evidence will be led orally. That evidence is likely to be where there are issues of disputed fact. The written brief will at that stage be put to one side and the witness will then be led through the evidence of that particular part that is to be given orally.

Another matter discussed was the need for a specific rule specifying what should and should not be in written briefs. Material that should not be in written briefs includes submissions, repetition of contents of letters and documents, inadmissible evidence, etc.

The Committee will put out a paper for a second consultation, setting out the history of the matter, and the three options that are to be considered:

1. Retention of the status quo;
2. Full reform; or
3. The option outlined keeping the existing rules requiring the preparation and serving of written briefs, but setting up a procedure whereby trial Judges could direct that contested factual evidence be given orally. Draft rules could accompany this option.

Justice Chambers commented that the Committee would need to ensure that a draft rule along the lines of CPR 32.1(2) and (3) are within the jurisdiction of the Rules Committee, given the Evidence Act. He also considered that the paper should flag that this proposal may add to costs.

The Chair considered that there could be a cross-reference to the power in the Evidence Act to exclude repetitive evidence. The Committee discussed the issue of the Judge seeing the written briefs while ruling which parts should be led orally.

Justice Asher will prepare a draft consultation paper and a draft rule with Dr Mathieson. These will be circulated to the Committee for feedback. Once finalised, they will be put out to the profession for consultation.

18. General business

There were no items of general business.

The meeting closed at 12.45 pm.