



THE RULES COMMITTEE

**P.O. Box 180
Wellington**

Telephone 64-9-9169 755

Facsimile 64-4-4949 701

Email: rulescommittee@justice.govt.nz

12 October 2009

Minutes/05/09

Circular No. 111 of 2009

Minutes of meeting held on 5 October 2009

The meeting called by Agenda/05/09 was held in the Chief Justice's Boardroom, High Court, Wellington, on Monday 5 October 2009, at 10:00 am.

1. Preliminary

In Attendance

Hon Justice Fogarty (in the Chair)
Hon Justice Randerson, Chief High Court Judge
Hon Justice Asher
Hon Justice Stevens
Judge Joyce QC
Judge Doherty
Hon Christopher Finlayson, Attorney-General
Dr David Collins QC, Solicitor-General
Dr Don Mathieson QC, Special Parliamentary Counsel, Parliamentary Counsel Office
Mr John Marshall QC, New Zealand Law Society representative
Mr Brendan Brown QC
Mr Patrick McCabe, Ministry of Justice
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
Mr Hugo Hoffman, Parliamentary Counsel Office

Ms Sarah Ellis, Secretary to the Rules Committee
Ms Sophie Klinger, 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
Hon Justice Chambers
Mr Andrew Beck, New Zealand Law Society representative
Mr Andrew Hampton, Ministry of Justice

Confirmation of minutes

The minutes of the meeting of Monday 6 July 2009 were confirmed.

Matters arising

The Chair commented that it was important for the Law Society to send a substitute if one of its representatives was unable to attend a meeting.

The Committee discussed the option of starting the meeting earlier. Subject to the Chair discussing the change with the Chief Justice, it was agreed that the next meeting would begin at 9:30 am instead of 10:00 am.

2. Obligations on counsel to co-operate

The Committee discussed the opinion of Mr Douglas White QC (as he then was). Mr Marshall outlined the view of the New Zealand Law Society. There was agreement as to the desirability of a rule about obligations on counsel to cooperate; the main question was whether it should be in the High Court Rules or the Rules of Conduct and Client Care. The view of the Law Society was that the rule should be in the Rules of Conduct. The Law Society considered that any rule in the High Court Rules should not contain a reference to the Lawyers and Conveyancers Act.

The Attorney-General commented that a rule would be useful for educative purposes.

Justice Randerson also considered it desirable to have the rule in the Rules of Conduct rather than in the High Court Rules. It may be useful to have a cross-reference in the High Court Rules.

Justice Stevens endorsed this approach. He commented that any rule should include a definition of co-operation to increase the educative value. Mr Marshall agreed that subsection (4) from the draft rule could be included in the Rules of Conduct with minor redrafting.

Judge Joyce commented that a cross-reference in the District Courts Rules would also be desirable.

A further issue was whether the obligation ought to extend to parties as well as counsel. Justice Randerson J considered that the key obligation should be on the parties as set out in clause 37N of the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009. It states that the obligation is on the parties to the proceeding and that the lawyer's obligation is to assist the parties. There could be a dual obligation with an obligation on the parties as well as between the lawyers

themselves. It was necessary to prevent counsel from hiding behind their parties' wishes.

Justice Stevens noted that the Rules of Conduct and Client Care did not apply to unrepresented litigants, and so it would be useful to have a duty on the parties.

The Attorney-General suggested that clause 37M of the Australian Bill could be inserted into the Judicature Act. On the other hand, the Judicature Act may need a complete revision in the future rather than ad hoc amendments.

A sub-committee will be established, comprising Justice Fogarty, Justice Randerson, Justice Stevens, Mr Brown QC, Dr Mathieson QC, the Attorney-General or nominee, and Mr Marshall QC or nominee. Justice Stevens will lead the Rules Committee members and Mr Marshall will lead the Law Society members. The sub-committee will produce a draft rule for the next meeting on 30 November. The document will be circulated two weeks before the meeting.

Justice Fogarty thanked the Committee for the progress achieved on this issue.

3. Appeals from Associate Judges

Justice Chambers had proposed to allow appeals from Associate Judges to go directly to the Court of Appeal rather than having review by a High Court Judge first. Parliamentary Counsel Office tabled a draft rule.

The Committee discussed whether there should be a leave requirement, in particular for interlocutory decisions such as strike-outs. Concerns were expressed over long delays from appeals of interlocutory decisions.

There was also a question of whether there could be a right of review only but not appeal.

Justices Asher and Fogarty and Mr Brown will work on this. Justice Fogarty will ask Clive Lansink to do a review of other benchmark jurisdictions, to look at the leave and review/appeal points, and decisions refusing to strike out and refusing summary judgment. The intention is to have a paper produced in around a month. It may be desirable to get some statistical information from registries to present to the Court of Appeal.

Justice Chambers will also be consulted about this issue.

4. District Courts Rules reform

Judges Doherty and Joyce reported on the new District Courts Rules. They will come into force on 1 November 2009. The Judges have been involved in workshops run by the New Zealand Law Society. There has been good attendance at these and positive feedback about the Rules. The Judges have been working with the Ministry of Justice to develop a website and brochures. New Fees Regulations have been drafted and will come into effect on 20 November 2009.

Judge Doherty thanked Mr Ian Jamieson from the Parliamentary Counsel Office for his involvement in drafting the Rules. Justice Fogarty thanked Judges Doherty and Joyce for their work on this significant project.

Dr Mathieson commented that three sets of fees regulations were in preparation: the District Courts Fees Regulations 2009, which replace the 2001 regulations; the amendment to the High Court Fees Regulations; and the Criminal Proceedings fees which will apply to the District Courts and High Court Rules.

5. Daily recovery rates review

The Committee considered the submissions to the daily recovery rates review from the New Zealand Law Society, the Auckland District Law Society, and the New Zealand Bar Association.

The New Zealand Law Society advocated selecting an appropriately rounded figure in the region of the indexed increase. They proposed the following rates:

Category 1	\$1,250
Category 2	\$1,880
Category 3	\$2,780

The Auckland District Law Society proposed higher rates than the indexed increase, while the New Zealand Bar Association accepted the Rules Committee's proposal regarding the indexed increase.

The Committee decided to adopt the New Zealand Law Society proposal. The District Courts Rules rates will be set at 80 percent of the High Court Rules rates.

6. Rule 7.39 of the High Court Rules

This item was held over until the meeting of 30 November 2009.

7. Discovery

Justice Asher commented on preliminary responses to the consultation paper on discovery. There had been a positive response at the recent Legal Research Foundation conference.

8. Court of Appeal (Access to Court Documents) Rules

The Committee discussed the Court of Appeal (Access to Court Documents) Rules. Mr Hoffman stated that Dr Mathieson had made some minor drafting suggestions which will be incorporated. When the Rules are circulated for concurrence Mr Hoffman will include a memorandum setting out the changes.

The impact of the Rules on Victim Impact Statements were also discussed. There was a concern that these might be disclosable from a case on appeal unless a judge directs otherwise. Mr Hoffman will check whether this is the case.

9. Rule change – changing address for service HCR 5.41

The Committee noted that the Chair has sent a letter to the Ministry of Justice from the Rules Committee recommending that the Ministry amend the Fees Regulations, to create an express exception so that applications under r 5.41 attract no filing fee.

Dr Mathieson commented that there was a proposal to exempt counsel from this filing fee under the incoming Fees Regulations. This will also be carried into the District Courts Fees Regulations.

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

Mr Brown reported on this item. There were a number of issues regarding Schedule 3 including the original issue raised by Mr Mason and Mr Palmer and Justice Chambers' memorandum in response. There was also the revised schedule proposed by Mr Beck and Mr Brown.

A more fundamental issue was whether preparation costs should continue to be fixed to the duration of the hearing. It was often the case that the better and more thorough the preparation, the shorter the length of the hearing. Some hearings were short but required a great deal of preparation. Parties should not be disadvantaged by good preparation and should be compensated adequately for preparation time. Preparation time and hearing time could be separated or "de-linked". However it was undesirable for a judge to make assessments of preparation time. Any new regime would need to have certainty but also some flexibility. Preparation and hearing time should not be "de-linked" for trials.

There might also be scope for expanding the categories set out in the Schedule for different types of hearings, as had occurred with interlocutory applications.

The Committee decided to ascertain the professional associations' views. Mr Brown and Mr Beck through the New Zealand Law Society will consult with the Auckland District Law Society and the New Zealand Bar Association with a view to establishing what practitioners would like to see in the regime. They will report back to the Committee in early 2010.

Justice Chambers will also be consulted about this issue.

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

Dr Mathieson reported that Ms Paula Tesoriero had established that the changes raised by the registrars were not urgent.

Dr Mathieson and Mr Hoffman will prepare a complete schedule of the changes suggested by registrars for the next meeting. Where there is a question over style, generally the change will not be made.

12. High Court Amendment Rules (No 2) 2009

The Committee discussed the High Court Amendment Rules (No 2) 2009. This contained a number of minor corrections and insertions already discussed by the Committee. The amendments regarding Associate Judge appeals will be removed because of the Committee's view that this requires more development. The Rules will be circulated for concurrence within a week.

13. Sentence indications

The Committee noted that the Chair has sent a reply to the Criminal Practice Committee stating that the Rules Committee considers that it should not become

involved in sentence indications at present, as sentence indications are currently being addressed as part of the Criminal Procedure (Simplification) Project.

14. Originating applications

Judge Osborne had raised an issue about using addresses of creditors as an address for service in the case of statutory demands and applications for the removal of caveats. This is being resolved in the High Court Amendment Rules (No 2) 2009. Mr Hoffman will refer the amendment to Judge Osborne.

15. Trans-Tasman Proceedings Bill

The Rules Committee was consulted by the Ministry of Justice about this Bill. Mr McCabe advised the progress of the New Zealand Bill has been delayed while consultation takes place in Australia, so there is the opportunity for the Committee to make further comments. The issues identified so far have been regarding terminology rather than substance.

Justice Fogarty will request that Ms Nind keep the Rules Committee up to date with the progress of the Bill.

Justice Fogarty raised the issue of inter-court protocols for New Zealand and Australian courts and may put forward some issues for the Committee to consider in 2010.

16. Subpoenas and Form G25

The Committee discussed memoranda from Dr Mathieson and Justice Randerson on issues raised by Wild J about subpoenas and Form G25 of the High Court Rules. Justice Randerson had proposed that the Form G25 be amended to clarify that the leave of a judge is not required for the issue of a subpoena. The Committee agreed to this amendment. This amendment is included in the High Court Amendment Rules (No 2) 2009.

17. Criminal Proceeds (Recovery) Act

The Secretary reported that concurrence had been received for this Rules amendment.

18. Cultural Property (Protection in Armed Conflict) Bill

The Committee discussed the letter from the Ministry of Culture and Heritage on proposed amendments to the High Court and District Courts Rules for the Cultural Property (Protection in Armed Conflict) Bill. The Committee approved the proposals. The Parliamentary Counsel Office will draft the necessary amendments for the next meeting on 30 November 2009.

19. Local Government Amendment Act

The Secretary reported that concurrence had been received for this Rules amendment.

20. Powers of the Registrar and Deputy Registrar

The Committee discussed the issue raised by Justice H Williams about the powers of the Registrar as set out in rule 2.5 of the High Court Rules, and whether this rule should be extended to Deputy Registrars. The powers included adjourning a trial.

Justice Randerson stated that in practice any application for adjournment goes to the List Judge, who exercises discretion over whether to grant the adjournment, which was a preferable arrangement. Justice Randerson did not favour widening the application of the rule. The Committee agreed not to change the rule.

The meeting closed at 1:00 pm.