



THE RULES COMMITTEE

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Wednesday 13th December 2006

Circular No. 127 of 2006

Minutes of Meeting held on Monday 4th December 2006

The meeting called by Agenda/7/06 was held in the Chief Justice's Boardroom, High Court, Wellington, on Monday 4th December 2006 at 10am.

1. Preliminary

In Attendance

Hon Justice Baragwanath (in the Chair)
Hon Justice Randerson, Chief High Court Judge
Hon Justice Chambers
Judge Joyce QC
Judge Doherty
Mr G Tanner QC, Chief Parliamentary Counsel, Parliamentary Counsel Office
Mrs K Clark, Deputy Solicitor-General, Crown Law
Ms L Sinclair, Deputy Secretary, Ministry of Justice
Mr B Brown QC, New Zealand Law Society representative
Mr A Beck, New Zealand Law Society representative
Mr J Orr, Chief Legal Counsel, Ministry of Justice
Mr K McCarron, Judicial Administrator to the Chief Justice
Ms G Smith, Secretary to the Rules Committee
Ms Bernice Ng, Clerk to the Rules Committee

Dr D Mathieson QC, Special Parliamentary Counsel, Parliamentary Counsel Office
Ian Jamieson, Parliamentary Counsel, Parliamentary Counsel Office
Suzanne Giacometti, Parliamentary Counsel, Parliamentary Counsel Office

Apologies

Rt. Hon Dame Sian Elias GNZM, Chief Justice of New Zealand
Hon Justice Fogarty

Confirmation of minutes

The minutes of the meeting held on Monday 2nd October 2006 were confirmed as an accurate record.

Other matters arising

The Committee welcomed Ms Heather McKenzie the 2007 Clerk to the Rules Committee, to the meeting.

2. Rules Reform

Search of Court records

In light of discussions by the Steering Committee and the Rules Committee, the Chief Justice had started appointing members of the judiciary onto a sub-committee to look at issues around the search of court records ahead of possible implementation of the Law Commission's proposals in its report.

Evidence Act and the definition of document

Dr Mathieson QC reported that the Evidence Act contained the Steering Committee's reworked definition of document. This definition will also be adopted in the revised High Court Rules.

It was agreed that both the current and revised rules would need to be checked for compliance with the new Evidence Act.

Electronic Court Services

The Committee discussed a memorandum circulated to members from the Ministry of Justice on the Ministry's progress with electronic court services.

The Ministry is currently working on a paper on electronic court services and hoped to discuss the substantive issues at the August 2007 meeting.

A report from Ministry officials on their visit to South Australia to examine their electronic court services will be circulated to Committee members before the end of the year.

A draft of Part 31 Electronic Filing was tabled at the meeting. The Committee agreed that rules on electronic filing and service should be with rules on hard copy filing and service.

The Committee agreed that it was undesirable for rules on electronic court services to come into force with the rest of the revised rules where the infrastructure has not yet been set up to support the processes set out in the rules. However, the rules on electronic court services will go out for consultation so that the profession and the public will have an opportunity to comment.

Service outside of jurisdiction

Professor McLachlan in his note to the Committee clarified the three methods available to litigants when serving documents outside New Zealand in the revised rules. Inquiry should be made as to whether Professor McLachlan's examples could be used in the revised rules for educational purposes.

The Committee agreed to write a letter to the Secretary for Justice recommending that the New Zealand accede to the Hague Convention.

District Courts Rules

Judge Joyce QC and Judge Doherty reported back on the District Courts Rules sub-committee's meeting with Ministry officials on the proposed District Courts Rules.

It was noted that the Ministry had a number of issues relating to the pre-filing regime. The Ministry did not have a problem with the changes to the other parts. However, the Ministry's operations and policy teams needed more time to investigate the effects of debt collection and small businesses.

The sub-committee stated that the aim of the pre-filing regime was to reduce costs and encourage litigants to resolve their disputes outside of the trial process and was not limited to debt collection. Access to summary judgment is available under the pre-filing regime, for example where a litigant failed to file a notice of response.

Issues and concerns raised by the Committee included:

- How would the pre-filing regime affect the provision of legal aid? The Ministry stated that one of the issues that they would also be looking at was the possible impact on legal aid under the pre-filing regime;
- What is the effect of a notice of claim under the pre-filing regime under the Limitation Act and other such provisions under other Acts subject to the District Courts jurisdiction;
- What are the down stream risks for lawyers: for example a lawyer may be sued for negligence for failing to disclose or include a document in the information capsule, where that document or information would have been disclosed under the traditional process;
- The proposed objectives should be consistent with the objectives in the High Court Rules. These objectives should be highlighted for specific comment when the rules go out for consultation;
- There needed to be more cross-references to the High Court Rules to avoid duplication;
- The pre-filing regime could "front load" costs for litigants. Litigants and practitioners are likely to go to the High Court for summary judgment in order to avoid the perceived costs and delays of the pre-filing regime;
- The pre-filing regime did not articulate a requirement for the parties to outline the causes of action or affirmative defences they wish to rely on. Upon the exchange of the information capsules, there is a risk that the parties may miss important information necessary for trial;
- There was no rule stating to what extent parties were allowed to deviate from the information disclosed in the notice of claim, notice of defence or in the information capsules;
- There was no rule providing for the transfer of proceedings from the High Court to the District Courts.

The Committee reiterated its desire to have legislation underpin the enactment of the District Courts Rules.

A new sub (3) should be added to proposed r 2.3 to reiterate that where documents are to be served outside the jurisdiction, they are to follow the conventional approach. A new sub rule should be inserted in r 2.2A providing for the court to determine whether a notice of claim can be served outside the jurisdiction.

The Committee discussed a number of alternatives to address the issues identified by the Committee about the operation of the pre-filing regime: such as leave to opt out of the pre-filing regime, providing different options or tracks for litigants, or giving the court a discretion to grant a time extension.

The sub-committee will reflect on the issues raised at this meeting and will come back to the Committee with its thoughts and proposed changes to the revised rules at its next meeting in February 2007. Committee members who wished to comment on the revised rules may do so by contacting Judge Doherty or Judge Joyce QC directly.

The Chair thanked Judge Doherty and Judge Joyce for their excellent work on the sub-committee and the rules.

3. Incapacitated Persons

Ms Clark tabled a memorandum on whether the Committee had jurisdiction to amend the definition of minor to mean 16 years and younger, complying with the Human Rights Act 1993.

The Committee does have jurisdiction to amend the age so that it is different to what has been provided for under the Age of Majority Act.

The Committee will make the appropriate changes to the draft rules and a new draft will be circulated to members with comments to be sent to the Clerk via email.

4. Mediation

A number of people from Crown Law were consulted about proposals to introduce mediation into the High Court Rules.

Ms Clark's inquiry raised a number of questions:

- What was the number of settlement conferences that was being undertaken? What was the success rate?
- What was the driver for the introduction of rules on mediation?
- Is this a matter of access to justice? If so how would the introduction of such rules assist?
- What was the number and types of fora in which ADR in the UK was being practised?
- What are the implications for legal aid if (compulsory) mediation was introduced?

There was no specific driver for the introduction of mediation into the High Court rules. Due to the prominence of mediation in the United Kingdom, the Committee had to consider whether it should adopt the same practices in New Zealand, and if not, why not.

It was agreed that the Committee would ask David Williams QC for his advice for discussion at the February meeting.

5. Interlocutory applications, numbering of documents and HCR r 651

The Committee approved the draft rules with one exception: the number of working days under clause 4 of the High Court Fees Amendment 2007 is amended to 30 (thirty) working days.

6. Costs

Appeals and reviews from Associate Judges

Justice Chambers noted that at the time of his decision in *Berkhan v Herb Merkle Design Ltd* HC, Auckland, AP 142-SW99, 17 April 2000, items 13 to 17 of the Third schedule did not provide for the recovery of costs of appeals from the District Courts. At the time of Justice Winkelmann's decision in *Johnson v Johnson* HC, Auckland, CIV-2005-404-003123, 20 June 2006, those items did provide for the recovery of costs of appeals from the District Courts.

The Committee discussed the draft consultation paper. The relevant changes will be made to the consultation paper and the appendices.

Expert witnesses expenses

The consultation paper will make clear that the Committee is not predisposed to the suggested rule change. Alternatives will be presented in the consultation paper.

Costs in the Court of Appeal

The Committee agreed that the Supreme Court would be invited to look at the draft paper before it goes out for consultation.

Daily recovery rates

The Committee will review the Daily Recovery rates and consult with the New Zealand Law Society.

7. Originating applications

Brendan Brown QC and Andrew Beck reported back on the preliminary examination of the originating applications costs categories.

The Committee agreed that a more comprehensive review should be undertaken. Cross-references could be made to the costs allocations for summary judgment. Brendan Brown and Andrew Beck will liaise with Dr Mathieson on the review. Any changes will come into force with the revised High Court Rules.

8. Class Actions

The Committee will consider the consultation paper at the February 2007 meeting.

9. Service outside jurisdiction

The Committee considered a memorandum from Justice Lindgren, Convenor of the Harmonisation of Rules on Discovery Committee on the proposed harmonisation of rules on service outside the jurisdiction.

The meeting finished at 3pm.