



THE RULES COMMITTEE

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8th September 2006

Minutes/5/06

Circular No. 90 of 2006

Minutes of Meeting held on Monday 4th September 2006

The meeting called by Agenda/5/06 was held in the Chief Justice's Boardroom, High Court, Wellington, on Monday 4th September 2006 at 10am.

1. Preliminary

In Attendance

Hon Justice Baragwanath (in the Chair)
Hon Justice Chambers
Hon Justice Randerson, Chief High Court Judge
Hon Justice Fogarty
Judge Joyce QC
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 H Hoffman, Parliamentary Counsel
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
Mrs S Giacommetti, Parliamentary Counsel

Associate Judge Faire attended via teleconference

Apologies

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

Mr G Tanner QC, Chief Parliamentary Counsel
Mrs K Clark, Deputy Solicitor-General
Judge Doherty

Confirmation of minutes

The minutes of the meeting held on Monday 3rd July 2006 were confirmed as an accurate record.

2. Interlocutory Applications

The Bar and the profession expressed concern about the introduction of a leave requirement. The current 40 working day deadline in HCR r 438AA is certain. There was also reservation about leaving the order to the associate judges' discretion.

Associate Judge Faire stated that there were three reasons for introducing a requirement to seek leave to file an interlocutory application after the last date. First, HCR r 438AA works only where there is one plaintiff and one defendant. Where there are cross-appeals or additional parties, then the setting down date is usually extended to 6 months out. Second, the problem is specific to Auckland. The reason is that there has been a 38% increase in the number of civil cases filed, but the number of associate judges and the amount of time to deal with these cases has not increased. This creates pressure on the parties and associate judges and usually results in the parties losing their trial date. Thirdly, interlocutory applications have been used as a tactical weapon to delay trial dates, with the plaintiff usually suffering a financial loss due to the loss of their setting down fee. Fourthly, there has been a history of some members of the bar being resistant to case management. In sum, it was a policy decision to introduce case management, and a practical problem arising from it needs to be addressed to ensure that case management worked effectively.

The requirement to seek leave to file an interlocutory application after the last date for doing so will depend on the particular case. The availability of such an order allows associate judges to tailor a setting down date in response to when interlocutory applications will be heard.

It was agreed that the problem affected Auckland only and did not affect other registries. The problem is mainly financial because the plaintiff would lose their setting down date fee if the date falls over and the plaintiff must pay another fee to set another date. The Rules Committee agreed that a more focussed discussion on the issue was required. A sub-committee made up of Justice Baragwanath, Associate Judge Faire, Liz Sinclair and Brendan Brown QC will address these issues and report back at the next meeting.

3. Mediation

Associate Judge Faire noted that the practice among associate judges was to ask whether the parties have gone to mediation, and if not why not. In most cases, where the parties have not gone to mediation, the associate judges will usually conduct a settlement conference where the associate judge will engage with the parties in a careful examination of the issues and come to a solution on a principled basis. Of the cases that go to a settlement conference, 80% of those cases settle. The non-mandatory nature of HCR r 442 is not a problem. Terminology is important. Mediation should not be confused with settlement conferences.

The Rules Committee agreed that careful consideration should be given to the type and nature of mediation to be adopted, the necessary processes, and whether judges and associate judges should get involved in mediation. However, public law cases especially those involving social policy issues would benefit most from mediation as it will deal with the underlying policy issues and bring in other affected parties or stakeholders.

The Committee will write to Crown Law and the Ministry of Justice Public Law group about the introduction of mediation for public law cases.

4. Costs of Appeal; Expenses and Disbursements; Costs on multiple issues

It was agreed that the hearing time had no relationship to the preparation time and the link between the two had to be severed. Self evidently, the more time spent on preparation meant less hearing time.

The costs sub-committee will present a report at the next Rules Committee outlining the problem and possible solutions to the recovery of costs on appeal, the recovery of witnesses expenses and disbursements and the recovery of costs on an issue by issue basis.

5. Incapacitated persons, HCR r 82

A key issue for the Rules Committee was how a court in its civil jurisdiction should establish whether one of the parties to the litigation has capacity. Consideration was given as to whether that should be left to the substantive law.

The Committee agreed that HCR r 81 (b) should be removed in light of the proposed changes to HCR r 82.

Another issue for the Committee was the age of a "minor" under the High Court Rules. In the Age of Majority Act a person cannot institute proceedings unless they are 20 years of age. This age is different from the age in which a person can enter into a legally enforceable contract (18 years of age, s 6 Minor's Contracts Act 1969) and the Bill of Rights Act and the Human Rights Act which states that a person cannot be discriminated against on the basis of age (16 years of age, s 21 Human Rights Act).

Jeff Orr and his team will look at the age of minors issue and liaise with Suzanne Giacommetti. Suzanne Giacommetti will redraft the rules in light of the Committee's discussion. A revised draft will be presented at the next meeting.

6. Class Actions

Justice Fogarty and Andrew Beck will produce a paper on the introduction of class action procedures into the High Court Rules and propose possible class action models. The Rules Committee will then develop this paper for consultation with the profession, judiciary and the government.

7. Page Numbering

The Committee agreed that rule 30 does need to be amended to make clear that the cover page should not be numbered, but the page immediately following the cover page should be numbered 2.

8. Rules Reform

High Court Rules

The work of the Steering Committee is subject to the agreement of the Rules Committee.

Dr Mathieson summarised the progress of the Steering Committee's work:

- Rules relating to patents remain a part of the HCR;
- Election constituency rules are a distinct set of rules;
- Execution is renamed "Enforcement";

- Prototype forms have been sent to the second stage;
- Publishers have no objection to the Steering Committee's work;
- Consideration has been given to transitional provisions; and
- All practice notes that were rules have been incorporated into the revised rules.

Donna Buckingham and Chris Finlayson MP will assist the Steering Committee's work on Electronic Filing.

Dr Mathieson is to also contact Mr N Gedye about their recommendations to the Steering Committee.

The harmonisation rules have yet to be incorporated. The practice notes should be kept as practice notes, as they provide information as to the operation and application of the harmonisation rules.

George Tanner QC and Hugo Hoffmann will review and check the draft before it goes out to Steering Committee members.

The Rules Committee agreed that a copy of the revised rules should also be sent to the Rules Committee members.

The Rules Committee expressed its thanks to Dr Mathieson for all his work so far.

District Courts Rules

A useful draft of the rules incorporating the proposed reforms should be available for the committee's next meeting. Judge Joyce envisages that it would be the new process sections that would go out for general consultation, as the rest basically comprises an update in terms of current day language and drafting techniques. As well as putting the pertinent (new process) rules out for general consultation, Judges Doherty and Joyce will be asking selected highly experienced civil practitioners carefully to examine them as to workability.

9. Definition of a document

It is desirable that the revised High Court Rules have the same definition of document as the Evidence Bill.

Dr Mathieson will check whether the Evidence Bill definition is appropriate for the revised rules and will report back to the Rules Committee.

10. Search of court records

The Committee agreed that there should be clear guidelines for Registrars and registry staff for dealing with requests to search court records. There should not be a formal procedure and requests to search court records should continue to be informal.

The work of the Committee on this matter has been overtaken by the Law Commission report on the search of court records. The matter is now up to the Chief Justice. It is recommended that a circular to Registrars and registry staff on procedures to deal with applications to search court records should be prepared.

Items 6, 8, 10 and 12 of Agenda/5/06 will be dealt with at the next meeting.

The meeting concluded at 1pm.