



THE RULES COMMITTEE

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8 August 2008

Minutes/05/08

Circular No. 115 of 2008

Minutes of meeting held on Wednesday 6 August 2008

The meeting called by Agenda/05/08 was held in the Chief Justice's Boardroom, High Court, Wellington, on Wednesday 6 August 2008 at 10am.

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
Ms Rebecca Ellis, for the Solicitor-General
Mr Hugo Hoffmann, Parliamentary Counsel Office
Dr Don Mathieson QC, Special Parliamentary Counsel, Parliamentary Counsel Office
Mr Brendan Brown QC
Mr Andrew Beck, New Zealand Law Society representative
Ms Rebecca Ellis, for the Solicitor-General
Mr Jeff Orr, Ministry of Justice
Mr Pat McCabe, Ministry of Justice
Mr K McCarron, Judicial Administrator to the Chief Justice
Mr Andrew Hampton, Ministry of Justice

Ms Dolon Sarkar, Secretary to the Rules Committee

Dr Heather McKenzie, Clerk to the Rules Committee

Apologies

Rt. Hon Dame Sian Elias GNZM, Chief Justice of New Zealand
Hon Justice Chambers
Judge Doherty
Dr David Collins QC, Solicitor-General

Confirmation of minutes

The minutes of the meetings of 9 and 23 June 2008 were confirmed as true and accurate records.

Enactment of the High Court Rules

The Judicature (High Court Rules) Amendment Bill was introduced to Parliament on 5 August, and is scheduled for its first reading on 26 August. It is hoped that it will receive an expedited passage through the House.

High Court Rules

Mr McCabe spoke to his memorandum of 1 August 2008 summarising changes to the proposed High Court Rules.

i. Cross-border issues

Members of the Cross Border Sub-Committee were unable to reach a consensus on certain technical cross-border issues before the Bill went to Parliament. The Bill reflects prevailing advice to the Ministry, and the Rules Committee can suggest an amended approach at the Select Committee stage if desired.

The main area presenting difficulties relates to granting interim relief in New Zealand for overseas proceedings. While the Sub-Committee unanimously supports the need for such rules, the unresolved issue is the extent to which rules should be prescribed for this purpose, and to which there should be judicial discretion. The introduction of Part 32, 'Freezing orders,' and certain provisions therein was signalled as relevant in this context.

Work continues; and there will be a meeting of the Sub-Committee later in August. The Chair invited interested members of the Rules Committee to attend, and at this point attendees are: Randerson and Fogarty JJ, Dr Mathieson QC, Professor McLachlan, Mr Beck, Mr McCabe, and the Secretary. The Ministry of Foreign Affairs and Trade will consider the suggested approach to determine whether its concerns have been satisfactorily resolved. The Chair will ensure the Rules Committee is updated of developments by e-mail.

ii. Translation of documents into te reo Maori

In High Court rule ('HCR') 1.12, 'Translation of documents into te reo Maori, 'Maori' has generally been replaced by 'person.' This gives the Judge more discretion and avoids argument as to whether a person is Maori for the purposes of the rule. The 1985 Rules were written before passage of the Maori Language Act 1987 which made Maori an official language of New Zealand (s 3).

iii. Numbering of coversheet and first page

The Committee considered whether in HCR 5.9, 'Heading generally,' there should be an express requirement that both the coversheet and first page include the proper heading of the proceeding. This could be useful if a coversheet becomes detached from the other pages. On the other hand, such a requirement could delay process given the number of incorrectly headed coversheets, and might defeat the purpose of a coversheet given it would be duplicated. It is considered a matter of interpretation, and the rule will be left as it is.

iv. Transitional provisions

The Committee discussed the transitional provisions in clause 8. More particularly, it considered whether it is appropriate that proceedings already afoot when the Rules come into force essentially convert to the new Rules, save in the two exceptions in cl 8(4)(a) and 8(6). Not only could this cause difficulties in the event of any substantive changes to the rules, but it would afford the rules retrospective effect.

The transitional provisions were designed to provide certainty and clarity for practitioners regarding which rules they must follow; and to avoid the profession and its supporting framework (such as publishers) from needing to maintain and refer to two sets of rules. These concerns would endure for a considerable period given the length of some civil proceedings. Underpinning this approach is the fact that there are unlikely to be many areas which would present difficulties.

The Committee concluded that any changes having material effect could be dealt with as they arose. The situation would be analogous to the introduction of duties on expert witnesses. Furthermore, HCR 1.5, 'Non-compliance with rules,' could be of assistance were a new rule not complied with.

Dr Mathieson QC will consider inserting into clause 8(6) the words '... any execution or enforcement process that has **been issued but** not been completed before the commencement must be completed as if section 7 had not been enacted.' (addition in bold).

Judicature (High Court Rules) Amendment Bill

Mr McCabe presented changes to the Bill since the last version the Committee considered.

Clause 6 repeals s 52, 'District rules' of the Judicature Act 1908. The Chief Judge will liaise with Mr McCabe to determine whether an equivalent of 52(3) should be carried over. Section 52(3) reads:

52 District Rules

....

(3) Notwithstanding anything in subsection (1) of this section, any Judge may from time to time adjourn a sitting of the Court to any time and place the Judge may think fit; and in the event of a Judge not being present at the time appointed for a sitting of the Court, the Registrar may adjourn the sitting to such time as may be convenient.

If clarification is considered necessary, it could be by adding by inserting the words 'including where and when the Court sits' (or equivalent) into the corresponding provisions for the Chief Judge.

Messrs Brown QC and Beck will advise the New Zealand Law Society and the New Zealand Bar Association that there will be upcoming consultation on the Bill at the Select Committee stage.

Mr McCabe thanked the Chair, Parliamentary Counsel Office, and his colleagues from the Ministry of Justice for their assistance over the past several weeks.

The Chair thanked contributors for their significant work over the past few weeks, including Mr McCabe, Mr Hampton, Ms Nind, Ms Sarkar, Mr Hoffmann, and Dr Mathieson QC.

Access to Court records

With reference to the Mr Hoffman's memorandum of 31 July 2008, the Chief Judge outlined changes to the revised High Court (Access to Court Documents) Amendment Rules 2008 and Criminal Proceedings (Access to Court Documents) Rules 2008.

The scope of Registrars' decision-making powers relating to access requests during the trial phase where there is an objection has been narrowed. While this might increase the workload for Judges, it is what happens in practice and is a more appropriate decision-making process. The three working day time limit within which to raise an objection in r 68A(5)(b) was inserted to provide requesters for access, such as the media, certainty as to the timeframe in which they could expect a definitive answer to a request.

The Committee considered whether it was acting *ultra vires* if changing fees (for example, no fees are payable by a party or counsel for accessing records in r 68(1)). While it would be *ultra vires*, no such change has in fact been introduced given the proposed rules follow the existing ones.

The Rules Committee aims to have a finalised set of recommended access rules for the October meeting.

The Chief Judge will consult with Judges regarding the amended rules. Following that, there will be further consultation with organisations which made submissions to the first round of consultation. This will close at the end of September.

Justice Randerson and Mr Hoffmann will meet with representatives from Archives New Zealand to discuss some concerns Archives has about aspects of the rules intersecting with its work.

Justice Randerson and Mr Hoffmann will consider some minor drafting matters.

The Committee has finished its consideration of the first round of submissions, and agreed that these can be made publicly available (subject to any objections from submitters).

Appeals in Wellington

The Chief Judge spoke to the Clerk's memorandum regarding the preponderance of appeals in Wellington. This disproportionate number of appeals imports a higher workload on Wellington Judges, and also a higher proportion of difficult decisions which typically require substantive judgments.

While the wider issue of where to file all proceedings might be usefully looked into, this would be a major undertaking, and might be covered to an extent by the Law Commission and Ministry of Justice's joint work on tribunals (see, for example, 'Tribunals in New Zealand: the Government's Preferred Approach to Reform,' 14 July 2008). Progress can be made by limiting inquiry to the appellate stage. Also, consideration is usefully focussed on the place of filing because, while technically not always required, typically an appeal is heard where it is filed.

It was agreed High Court rule 708, 'Filing of notice of appeal,' is unsuitable in its current form. The Committee generally favoured a prima facie rule that notices of appeal are filed in the office of the Court nearest to the place where the proceedings were heard, subject to the ability of parties to apply for an alternative venue and a judicial discretion.

Underpinning any change is the principle that hearings and appeals should stay as close as possible to the 'home' of the proceedings. Not only is this usually desirable for the parties and their counsel, but there might be significant community interest in appellate proceedings. Forum-shopping should not be obliquely encouraged.

Any consideration of the issue is informed by the reality that statistics must be treated with caution, and appeals form an amorphous whole not readily apparent from the statistics. Appeals can relevantly be considered as those which are statute-driven (for example, under the Social Securities Act 1978); those where the hearing can be anywhere but an appeal must be in Wellington; and those which are not between a private party and the Crown.

The Chief Judge and the Clerk will produce a revised recommendation.

Supreme Court Amendment Rules 2008

The consultation paper has been issued and submissions close on 15 September 2008.

Class actions

Justice Stevens outlined progress of the Class Actions Sub-Committee.

In particular, work continues on how the term 'litigation funder' should be defined for the purposes of the legislation and the rules. Dr Mathieson QC's memorandum of 1 August 2008 will be considered by the Sub-Committee at its next meeting. While for practical reasons the Sub-Committee has limited consideration of litigation funding to a class actions context, it appreciates that the topic of litigation funding is more broadly based.

The extent and timing of judicial supervision of fee agreements also requires further careful consideration.

To help finalise the Sub-Committee's recommendations, the Sub-Committee will consult with the Legal Services Authority, the Ministry of Economic Development, and the Securities Commission. Following this and once a 'final' interim recommendation is made, there will be another round of broader consultation. Mr McCabe will initiate such discussions and keep the Sub-Committee Chair informed of progress.

A further telephone conference will be arranged before the end of August.

The Sub-Committee expects to present a package of its final recommendations to the Rules Committee for consideration at the 6 October meeting.

Schedule 3 of the High Court Rules and time allocations

This item was carried over until the 6 October meeting.

District Courts Rules 2008

Judge Joyce QC reported on progress.

Cross referencing

Mr Jamieson is inserting the cross references to the High Court Rules. The references can be updated if numbers change during the Select Committee process.

Forms

There are three groups of forms in the proposed rules: new forms, forms carried over from the current District Courts Rules, and those imported from the High Court Rules. The first set numbers about six to eight, and requires careful development as they must be user-friendly and intuitive for practitioner and lay litigant alike. The forms developed by the Collections Unit could provide a model, and Judges Joyce QC and Doherty have been liaising with Mr Fisher (District Courts General Manager) and Liz Sinclair (Deputy Secretary Operations) regarding the forms.

Training and education

Smooth introduction of the Rules requires extensive training and education. Antoinette Hindle (District Courts, Principal Analyst family and Civil) is leading a project team to coordinate and organise this.

The Chair decreed the proposed Rules to have been approved by the Committee. The Rules are expected to come into force on about 1 October 2009.

Official Information Act and Rules Committee documents

The Clerk will forward all requests to Mr Orr, Chief Legal Counsel of the Ministry of Justice. Mr Orr will produce an interim recommendation and liaise with Crown Law. This will go to the Chair and Chief Justice for their consideration.

The body of information held by the Committee for the purposes of the Act comprises all documents formally circulated to the Committee and e-mails copying in the Clerk.