THE RULES COMMITTEE

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11 December 2008

Minutes/07/08

Circular No. 152 of 2008

Minutes of meeting held on Monday 1 December 2008

The meeting called by Agenda/07/08 was held in the Chief Justice's Boardroom, High Court, Wellington, on Monday 1 December 2008 at 10am.

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
Judge Joyce QC
Judge Doherty
Hon Christopher Finlayson, Attorney-General
Ms Cheryl Gwyn, Deputy Solicitor-General
Mr Hugo Hoffmann, Parliamentary Counsel Office
Dr Don Mathieson QC, Special Parliamentary Counsel, Parliamentary Counsel Office
Mr Brendan Brown QC
Mr Jeff Orr, Chief Legal Advisor, Ministry of Justice
Mr Andrew Beck, New Zealand Law Society representative
Mr K McCarron, Judicial Administrator to the Chief Justice
Mr Andrew Hampton, Ministry of Justice
Ms Anthea Williams, Private Secretary to the Attorney-General

Ms Danielle Lee, Secretary to the Rules Committee
Dr Heather McKenzie, Clerk to the Rules Committee
Ms Sophie Klinger, Incoming Clerk to the Rules Committee

Apologies

Hon Justice Stevens
Ms Liz Sinclair, Deputy Secretary, Ministry of Justice

Confirmation of minutes

The minutes of the meeting of Monday 6 October 2008 were confirmed as a true and accurate record.

Other matters arising

i. Welcome to the Attorney-General

The Chair welcomed the Attorney-General back to the Committee. The Attorney-General said he was happy to be on the Committee again and looks forward to taking an active role in its deliberations. He hopes to be a conduit between the Committee and the Administration; and acknowledged the tremendous work of Justice Baragwanath, Dr Mathieson QC, and Mr Tanner QC in drafting and advancing the new High Court Rules.

ii. Welcome to incoming Secretary and Clerk

The Chair welcomed the incoming Secretary, Ms Danielle Lee, and Clerk, Ms Sophie Klinger.

iii. Letter to Law Commission regarding Committee's work on access to Court records

The Chief High Court Judge will draft a letter to the Law Commission regarding the Committee's work on access to Court records once its recommendation is finalised.

2. Supreme Court Amendment Rules 2008

The Judges of the Supreme Court met Messrs Brown QC and Beck to discuss the Rules.

The driver for change is allocating prompt fixtures which could be aided by receiving submissions earlier. Counsel should be required to state in their application their availability to meet fixtures, and Registrars could be more proactive in securing the commitment of counsel to fixtures.

Turning to the specific rules, rule 20.4 in the Supreme Court Rules 2004 (relating to supporting a judgment on other grounds) is of such importance that consideration will be given to elevating it to the status of a stand-alone rule.

A further round of consultation is not necessary. Mr Hoffmann will consider the proposed rules and liaise with Justice McGrath. Any emerging issues will be put before the Committee by the end of the year. The Chief Justice will follow up a Practice Note on what is required of Counsel. Proposals will first be considered by the Chief Justice and Messrs Brown, Beck, and Hoffmann before being circulated to the Committee.

3. Discovery in civil litigation

This has been on the agenda, but had fallen off because of its complexity and difficulty. The original impetus came from attendance of an AIJA seminar on discovery in August 2007 by Justices Baragwanath and Randerson and Judge Joyce QC.

Discovery can be used as an instrument of oppression given the costs involved and thus can become a barrier to access to justice (see, for example, Gleeson CJ, 'Some Legal Scenery' Judicial Conference of Australia, 5 October 2007). In addition to its scope, problems emerge because discovery orders are typically made at case management conferences relatively early and before the issues may have been refined, and within the time constraints of the conferences.

It might be necessary to look for innovation beyond the traditional jurisdictions (e.g. there are some potentially useful procedures in Dubai). There might need to be a 'cultural' change too amongst the profession given practitioners' anxiety to have all relevant information before going to Court.

At the heart of any consideration of discovery is how a discovery order should be tailored to the particular case. Rather than attempt to modify the *Peruvian Guano* test it might be more practical to investigate other routes and deal with discovery on a case-by-case basis. Options include:

- Appointing a Special Master in large cases to supervise, monitor, and resolve issues in the discovery process. The Special Master would be able to make rulings (subject to review by a Judge).
- Adopting a practice note similar to that issued by Chief Justice Black of the Federal Court of Australia setting out the expectations on the judiciary in relation to discovery.
- Considering costs measures such as fixing the amount recoverable in relation to discovery, limiting the amount recoverable to actual costs with no profit entitlement (e.g. disallowing the situation where some firms charge clients a higher rate for discovery than they pay the Clerk doing it), and shifting costs for discovery to the other party in instances where the party holding the documents does not consider them relevant.

Also, consideration of how the existing rules are used in practice might be useful. An extra hour spent on discovery at the case management stage could save many hours later down the track.

Discovery also interacts with the proposed fast track procedure practice note given parties can truncate discovery and other steps under the supervision of a Judge (see Item 7).

A discovery sub-committee will be revived. The Chair will convene and other members will be Randerson J, Asher J, Judge Joyce, the Attorney-General or nominee, an Associate Judge, Mr Brown, and Mr Beck. Mr David Williams QC is to be invited.

4. Access to Court records

The Chair thanked the Chief High Court Judge for his work on the access rules.

The Chief High Court Judge summarised further revisions to the Criminal Proceedings (Access to Court Documents) Rules 2008 and the High Court (Access to Court Documents) Amendment Rules 2008.

Of particular note, the revised rules refer to the 'formal Court record,' the definition of 'document' has been amended, and 'Court file' is defined as meaning a 'collection of documents' to avoid confusion between 'Court record' and 'documents.'

The remaining difficulties arise with respect to rules made applying to the collection of statutes relating to criminal matters covered in the criminal rules such as the Criminal Investigations (Bodily Samples) Act 1995. Problems are encountered regarding whether the Rules Committee has jurisdiction to make rules under these acts, and also whether it would be conceptually simpler for all access provisions to be in one set of rules.

One way to resolve the jurisdiction point would be for the criminal rules to be made by both the Rules Committee and the Governor-General. This would fill any possible gaps in the Committee's jurisdiction to make rules.

Turning to the second issue, given that requests for access are made to the Court in its capacity as a custodian of information and in this sense are civil in nature and the decision in *Mafart v Television New Zealand Ltd* [2006] 3 NZLR 18 it might be conceptually easier if civil and criminal applications were made under one set of rules. Such rules would have different sections for the two types of application given the different considerations (and in particular, the importance of a fair trial in the criminal context). The sections would largely replicate the two sets of existing proposed rules.

Justice Chambers questioned the appropriateness of having a right of appeal against a decision relating to access. Such a right could be used strategically to deliberately delay access, especially in cases where time is of the essence for, for example, media to have access to information for news purposes while still of interest to the public (the *Marfart* case is an example). It is hard for an appellate Court to automatically give such appeals priority. There are good reasons for the right of appeal, however, and it will remain. Strategic gaming would be the exception.

The Committee will discuss them again at the meeting of 9 February 2009. Justices Randerson (Convenor), Chambers, and Judge Joyce will prepare a report suggesting a route forward.

5. Commerce Amendment Act 2008 and appeals on input methodologies

The Sub-Committee has met and decided the High Court Rules do not need to be changed in the light of the appeal rights to the High Court contained in the Commerce Amendment Act 2008. The management of the appeals will be an administrative matter for the Chief High Court Judge once they begin to occur in 2010. The Chair will write to the new Minister of Commerce, Mr Simon Power MP, indicating this.

Two questions of interest are the likely number of appeals and how the Act's provisions for lay members will operate in practice. It is difficult to estimate the number of appeals. Regarding lay members, questions arise as to whether, for example, it will always be necessary to have two; what happens if a lay member is not expert in all issues of the appeal; and at what stage they should have input. New Zealand's proposed appellate model is different from Australia's where there is a separate appellate body (i.e. appeals are not heard in the mainstream courts).

The potentially large number of appeals and requirement for them to be heard simultaneously will require the Courts to monitor progress. There might also be issues relating to high demand for counsel given the specialist expertise required.

In addition to writing to Mr Power MP, the Chair will write to Mr Mike Lear from the Ministry of Economic Development thanking him for the information he provided.

6. Case management/ written briefs

Justice Asher spoke to the draft consultation paper on case management/ written briefs. Its proposals resulted from problems relating to how written briefs have become an elaborate and expensive branch of the legal process, and often case management conferences are not tailored to the case at hand due to time pressures on Associate Judges who must make discovery orders within the constraints of the conference. Moreover, an over-reliance on written briefs can erode the benefits of oral evidence in chief because, for example, a witness might only give oral evidence in the hostile environment of cross-examination. Lastly, there is the potential for more

cross-examination as there is more material subject to challenge which has not been culled by the Judge.

The paper's proposal involves a Judge making tailored directions relating to evidence at the pre-trial conference. This follows England and most Australian jurisdictions where there is some hands-on management by the Judge. The presumption in favour of written briefs, which arises from the way the High Court Rules are drafted, would not remain.

While the proposal might help alleviate some of the underlying issues outlined, in Auckland it would not be possible to allocate the same Judge to a pre-trial conference as to the trial itself. This might lead to the difficulty of the pre-trial conference Judge having a different view on how a trial should be run compared to that of the presiding Judge.

The paper will be amended to more neutrally discuss the desirability of change and the options it proposes. It will also note that the proposed regime would apply to full trials under the new District Courts Rules, but not to short or simplified trials. There will be a flow diagram to help ensure readers understand the concept.

The Committee agreed the amended consultation paper should be circulated to the profession. Consultation will close on Monday 16 March 2009 in anticipation of the 30 March meeting.

7. Fast track procedure

While new rules are not required because the procedure goes no further than existing rules, the Committee's general feedback was sought. The procedure would formalise procedures currently available, be an educative tool for Judges and counsel, and aim to focus counsel on the possibility of this type of faster resolution.

The impetus came from exposure to the 'rocket docket' system used in the Federal Court of Australia at the AIJA conference in August 2007, and from substantial criticism of delays in Court which emerged, in particular, at a civil litigation conference in Auckland earlier in 2008.

The procedure would apply to all classes of civil proceedings with an estimated duration of no more than 7 days, in all Courts. It is designed to enable cases which could be ready for hearing comparatively early not to have to wait until an allocated hearing time, which is typically more than 12 months away. Both or all parties must consent to the proceedings being on the track and this could be signalled at the time of initial filing.

Clause 4.7 enables discovery to be limited to documents on which a party intends to rely and which have 'a significant probative value adverse to a party's case.' The words 'significant probative value' might be redundant given 'adverse to a party's case' and is a value judgment. Also, the jurisdiction of the Federal Court is very limited whereas the practice note is intended to have a wider application. On the other hand, the practice note is intended to be an educative tool and value judgments will be required in any event. Limiting the clause to 'adverse to a party's case' gives counsel more leeway and it might be desirable to expressly direct them to 'significant probative value.'

There will be consultation, and any regime would be reviewed after 18 months with a focus on its usefulness and whether there should be any changes to the High Court Rules.

8. Filing of notice of appeal

Two main issues were raised with the proposed amendment to rule 20.8 and Schedule 6.

First, the proposed amendment to Schedule 6 means every case management memorandum would have to state the Registry in which the appeal should proceed irrespective of whether there has been a transfer. Secondly, it might be desirable to add the words 'venue for the hearing of the appeal' to rule 20.8(4)(b).

The Chief High Court Judge and Dr Mathieson have liaised and resolved these points. With respect to the first, there is no significant difficulty if counsel have to state in their memorandum whether the appeal is to proceed in the Registry in which the appeal is filed or whether it should proceed elsewhere. The purpose of the amendment to Schedule 6 is to bring the issue to the parties' and the Court's attention.

It is not necessary to amend proposed r 20.8(4)(b) by adding the proposed words. The transfer to another Registry envisaged by r 20.8(3) relates to the transfer of documents to the new Registry, the filing of any further documents, and the hearing of the appeal. All of that is covered by the existing wording of r 20.8(4)(b) and the addition of the words suggested would limit the purpose for which a transfer would take place.

A concurrence version of the changes will be circulated to the Committee for approval.

9. Class actions

The Chair updated progress of the Class Actions Sub-Committee in the absence of its Chair, Stevens J.

There has been a further round of consultation and some submissions are yet to be received. Submissions so far are supportive and helpful.

The Sub-Committee has not yet met to discuss submissions, and will report to the Rules Committee next year. Dr Mathieson has been consulting academics. Comparison with overseas models is of limited assistance because provisions tend to be significantly coloured by the types of local conditions which would result in an action.

The Ministry of Justice is working on litigation funding.

10. District Courts Rules

There is an indicative set of Forms which will be forwarded to the Ministry of Justice for discussion. Professional drafters are needed to ensure Forms are user-friendly.

Otherwise, the focus has been on education.

The publishers of *McGechan on Procedure* and *Sims Court Practice* have raised an issue relating to technicalities of the current formatting of the District Courts Rules which presents difficulties where High Court Rules are imported. The publishers are liaising with Mr Jamieson who will report to the Committee after the formatting has been finalised.

11. Search orders

The issues surrounding the possible disconnect between rule 33.2, 'Search order,' and Form G39, 'Search order,' are complex. At their heart is the question of what happens if permission is refused to enable a searcher to enter the premises: should the applicants be able to enter, or should they have to apply to the Court for an order for contempt of Court? Making a searcher return to the Court would potentially run counter to the purpose of search orders given time is of the essence and the focus is on preserving evidence (this is strengthened by the fact that most applications are made *ex parte*). On the other hand, mandating someone to permit a searcher to enter the premises would run counter to a long line of authority which does not permit automatic

entry upon attaining a search order. Considerations of privacy and under the New Zealand Bill of Rights Act 1990 could be engaged. In a related vein, the searchers could be vulnerable.

The Chair will write to Mr Katz QC thanking him for notifying the Committee of the issue. The Chair and Clerk will liaise to facilitate work on the issues.

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

This item was carried over until the meeting of 9 February 2009.

13. Other matters

The Chair acknowledged the service of the Secretary Dolon Sarkar, and in particular her help with the passage of the High Court Rules. The Chair then acknowledged the service of Dr Heather McKenzie, the Clerk. He said that her work rate had been tremendous. He mentioned in particular her important assistance to the preparation of the District Courts Rules.

The meeting closed at 1.10pm.