THE RULES COMMITTEE

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14 February 2008

Minutes/01/08

Circular No. 15 of 2008

Minutes of meeting held on Monday 11 February 2008

The meeting called by Agenda/01/08 was held in the Chief Justice's Boardroom, High Court, Wellington, on Monday 11 February 2008 at 10am.

1. Preliminary

In Attendance

Hon Justice Baragwanath (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 Fogarty
Judge Doherty
Ms Cheryl Gwyn, Deputy Solicitor-General
Mr Hugo Hoffmann, Parliamentary Counsel Office
Mr Brendan Brown QC
Mr Andrew Beck, New Zealand Law Society representative
Mr Jeff Orr, Chief Legal Counsel, Ministry of Justice
Dr Don Mathieson QC, Special Parliamentary Counsel, Parliamentary Counsel Office
Mr K McCarron, Judicial Administrator to the Chief Justice

Commander Chris Griggs, New Zealand Defence Force
Mr Andrew Hampton, Ministry of Justice
Ms Suzanne Giacometti, Parliamentary Counsel Office

Ms Dolon Sarkar, Secretary to the Rules Committee
Dr Heather McKenzie, Clerk to the Rules Committee

Apologies

Mr Charles Chauvel MP
Dr David Collins QC, Solicitor-General
Judge Joyce
Ms Liz Sinclair, Deputy Secretary, Ministry of Justice

Confirmation of minutes

The minutes of the meeting of Monday 3 December 2007 were confirmed with one alteration. The paragraph, under Item 2, 'Tax litigation and extension of the right to non-disclosure to the discovery phase,' has been amended to read:

> The consensus was that Parliament's policy is to safeguard the position of those who seek advice from a tax advisor rather than a lawyer. While this protection is expressly provided for until the pre-litigation phase of discovery by virtue of s 20B, the unique protection ought to continue beyond that stage. **If protection is to be extended**, this might be achieved by a narrow extension of the right where the subject matter of the proceedings concerns a claim by the Commissioner for the recovery of tax.
>
> (emphasis added)

Other matters arising
There were no other matters arising.

2. E-lodgement of court documents and on-line courts

These two items were discussed together.

E-lodgement of court documents
Mr Hampton spoke to the Ministry of Justice's scoping paper on e-filing. He noted that the Ministry has done further work since the paper was written.

The paper's five potential pilot jurisdictions or processes were discussed, these being:

Environment Court
District Court (summary criminal process)
Supreme Court
Court of Appeal (once AMS is fully implemented)
High Court (Associate Judge summary judgment process).

It would be difficult to implement and test all five simultaneously. On the one hand, the more extensive and expansive the trial the better, yet on the other attempting too large a test scheme risks the project becoming unmanageable. Any pilot scheme will achieve optimum success where it is both practically useful for the jurisdiction and educational with respect to its application to other areas. The Ministry is seeking to identify two pilot areas.

Each possible jurisdiction has potential benefits and detriments. For example, in the Environment Court the number of documents is often relatively small, the types of documents are conducive to electronic transmission, and the Bench and profession are already using e-filing. However, that Court may not be representative and testing in the District and/or High courts may be more useful in this regard as there would be a greater spread.

There is general agreement that one pilot should be in the District Court summary criminal process jurisdiction, and some debate over a second, more civil-focussed area. The Inter-Bench IT Committee prefers the Environment Court because of the immediate benefit to its procedures and hearings are comparatively small-scale.

To gain full benefit from any e-filing regime, documents must be able to progress electronically though the Court system. The primary challenge in creating and implementing any system is understanding the logic of current processes rather than their technology. A potential problem with testing the regime in the civil arena, then, is that it may require a conceptual revision of the processes; though the High Court Associate Judge jurisdiction may be able to be ring-fenced relatively easily. The short, typically transactional nature of proceedings means that a test could be done somewhat discretely and would not require changing many interfaces. Regarding the technological requirements, it may be desirable to buy the operating system from another jurisdiction and tailor it to meet the New Zealand context and specific courts' requirements.

Australia and New Zealand will have common interests in any system given New Zealand's new voluntary administration regime closely follows the Australian model. While Australia's processes are jurisdiction-specific, Trans-Tasman compatibility is important. Guidance may also come from other jurisdictions: for example, the Federal Bankruptcy Court of New York has mastered e-filing.

The Courts must not be identified with the Executive vis-à-vis the Police or Ministry of Justice. This may not be a problem as Police would e-file documents just like any other party; and there could be consideration of where the server is located.

Concerns were expressed regarding the Ministry's ability to manage such a complex project containing as it does considerable risks; the Police focus; out-sourcing; and the Ministry working with the flawed blue-print of CMS ('Case Management System'). In response, it was contended that the Ministry would be able to handle the project and that a system could allow for any later change to CMS. The option of changing CMS before implementing the pilot scheme would incur a significant delay.

New genres of risks created by e-filing would need to be managed. For example, hackers may access documents filed by the Police such as informations.

The process of checking documents by Registry staff and determining the date and time of filing are fundamental premises of the High Court Rules. There will remain a requirement for checking where substantive content is submitted electronically, but it may not be required where plain data is entered.

Issues also arise as to whether e-filing should be mandatory given the difficulties potentially encountered by user groups such as lay litigants. The American Bankruptcy Court has e-filing compulsory for practitioners but not lay litigants, while in Korea there are kiosks to help lay litigants.

The draft revised High Court Rules will retain their provisions relating to e-filing. The Court will need to make interim business practices should those rules come into effect before the courts have refined their systems.

The project is very resource intensive and further Government funding is required.

On-line courts

The prospect of certain types of hearings being conducted on-line may be over-extending the reach of technology. Presently, it is very useful for a Judge to hear the parties in person because courtroom debate can help illuminate the central issues of a case. This may be more

difficult if the Judge is required instead to view electronic media without physical access to counsel.

3. Court Martial Appeal Court Rules 2008

Commander Griggs and Ms Giacometti spoke to the proposed Rules.

The Rules are a step in implementing what has been a total revision of the military justice system in New Zealand. The current system largely dates from a 1950s British model. The Rules draw closely from the Court of Appeal (Criminal) Rules, and will require updating as changes to those rules occur.

Together with related statutes, the Rules proceed on the basis that military courts should operate in the same manner as civilian courts except where there is good reason for a departure. Broadly, a litigant in the military system should be able to anything they could in the civilian counterpart: for example, see provisions relating to rights of appeal. Driving factors include the New Zealand Bill of Rights Act 1990 and the opportunity to increase efficiency and tailor processes to the New Zealand environment.

The Committee discussed the implication in rule 44(b) that leave is required for the appellant to be present (rule 44 concerns right of audience). It was suggested the Rules make express provision for an appellant to be able to be present as of right. While Commander Griggs noted the rarity of appellants requesting to be present, and further the rarity of appeals, he indicated the Defence Force has no conceptual objections to appellants being present. A number of related issues arise though, some of which can be circumvented by using video link technology. There may be instances where it would be impossible or logistically very difficult and dangerous for the appellant to be brought to where the Court is sitting. The location is dependant on the particular case at hand and is informed by, amongst other things, the severity of the crime and importance of justice being seen to be done in the location where a crime was committed. A right to be physically present may be an incentive for personnel to appeal decisions in order to leave the theatre of war.

It was agreed to amend the Rules to clarify an appellant's right to be present at proceedings and to address the Court if not represented. These two separate points are somewhat rolled together in rule 44(b) which provides for the appellant to be able to address the Court where he or she has leave to be present. The right to be present will not be absolute, and will be subject to exceptional operational circumstances. Use of video-link could circumvent many such difficulties, and will also need to be provided for.

Rule 33, 'Delivery of judgments,' carries over the complexity of the Court of Appeal model. This may not be desirable due to factors including the difficulty of reconvening the Court. However, the rule ultimately leaves a choice as to the appropriate mode of delivery and need not be altered.

Rule 51(1) will be amended to extend the power to extend or shorten time appointed by the rules or fixed by order to 'a Judge.' Currently the power is restricted to 'the Court.'

The definition of 'lawyer' in the Lawyers and Conveyancers Act 2006 will be considered by Ms Giacometti. In a related vein, the Committee did not consider it necessary to include express provision for assistance of a 'McKenzie Friend' or similar given rule 50, 'Cases not provided for in rules,' and the fact that personnel essentially have access as of right to legal aid and counsel are very competent.

The scheme of the rules is such that some parts which conceptually could reside closer together, do not (for example, rules 4, 'Application of Rules,' and 50). It was considered

preferable to retain the current order though given the most commonly used rules feature first, and it mirrors the scheme of the Court of Appeal (Criminal) Rules.

The number and scope of functions of the Registrar was discussed with reference to examples including serving notices of appeal and notices for applications for leave to appeal (s 10(3)) and obtaining and collating various documents as required in s 18(2). It was considered however that not only does this replicate Court of Appeal procedures, but in a wartime context the Registrar may be the person best placed to obtain and collate documents. Moreover, this is unlikely to be an onerous task given there has only been one appeal since 2001.

The Registrar will by default be the Registrar of the High Court at Wellington unless an alternative Registrar is appointed under the State Sector Act 1988 pursuant to s 5(1) of the Courts Martial Appeals Act 1953. This may be another example of a trend for proceedings to be based in Wellington by default. It is important that this increasing trend be addressed when and where it arises. It was pointed out that though that in this context the Chief Judge can determine where the Court sits under s 4(3) of the Court Martial Appeals Act 1953.

The Committee thanked Commander Griggs and Ms Giacometti for their attendance.

4. District Courts Rules 2007

Judge Doherty outlined progress and an anticipated timeframe. A sub-committee has been formed comprising Judges Joyce and Doherty, Mr Jamieson (PCO), Ms Hindle (Ministry of Justice), and the Clerk. It will meet on 17 and 18 March in Wellington to discuss submissions and the present draft.

The Clerk has summarised submissions by topic, and will further present submissions filtered by rule number and by submitter. She will also investigate whether comments have already been made and dealt with in previous consultation to avoid re-litigating points.

Judge Doherty noted that an article in the Auckland District Law Society Law News, 'Proposed Court changes too big says ADLS Courts Committee' (Law News Issue 01, 25 January 2008, p. 4), does not present anything beyond the ADLS' submissions. The Judge is attending a conference in late February and anticipates the opportunity to talk with members of the Society.

The Legal Services Agency Report on the 2006 National Survey of Unmet Legal Needs and Access to Services is a useful check on the reform process.

While it may be desirable for the District Courts Rules to come into force in tandem with the High Court Rules, it is unlikely this will happen. In particular, the Forms have not yet been drafted as they are dependant on the main body of rules. The High Court Rules can precede the District Court Rules, so this is unlikely to pose any significant issues.

The sub-committee anticipates having a final recommended version to circulate to the Rules Committee by 12 May for consideration and comment at the 9 June meeting.

5. The Hague Convention of the Taking of Evidence Abroad

The Committee selected Option Two regarding making a declaration under Article 8. Option 2 involves declaring that members of judicial personnel of the requesting authority may be present at the execution of a Letter of Request. It is a more liberal option than Option One which would require the prior authorisation by the High Court.

While various issues surrounding the role of the Executive and principles of international comity arise as to whether the High Court should have a discretion to permit a Judge from another jurisdiction to take evidence for foreign proceedings, it was agreed that the Committee has only been requested to nominate an option rather than to advise on this issue.

Secondly, the Committee agreed to make a declaration under Article 18. This Article concerns a diplomatic officer, consular agent or commissioner authorised to take evidence under articles 15, 16, or 17 applying for assistance to obtain evidence by compulsion. The Article does not guarantee such an application will be granted.

6. Class Actions and litigation funding

These items were discussed together.

Given the postponement of the proposed telephone conference, there was no progress to report. A face-to-face meeting is preferable over a telephone conference, and this will be arranged when the sub-committee is reconstituted which is required because the Chair is leaving the Rules Committee.

The sub-committee will also advance aspects of litigation funding because any class actions regime may be compromised if litigation funding is not worked through.

7. Court of Appeal (Criminal) Amendment Rules 2008

These Rules contain rules previously approved by the Committee and also provide for the new Court of Appeal approach to determining whether leave applications will be heard separately or together with the substantive appeal as set out in *R v Leonard* [2007] NZCA 452.

The Rules detail the new procedures and do not include, for example, the criteria in [13] to [14] of *Leonard* (factors pointing towards and against granting leave). The Court had considered referring to the principles in *Leonard* to amplify the Rules, but it was concluded that the criteria will evolve and *Leonard* will not be the final word.

For the avoidance of doubt, it was clarified that the procedure in *Leonard* applies to all appeals including, in particular, s 381 appeals where the Court refuses to reserve the question.

The Committee approved the Rules, with the suggestion that 'lengthier' in rule 5G(3) be changed to 'longer.'

Rather than direct practitioners to follow *Leonard*, it is envisaged the Rules will come into force soon enough for these to guide practitioners. The expected date is 17 April 2008.

8. Access to Court records

The Committee discussed the proposed High Court (Access to Court Documents) Amendment Rules 2008 and Criminal Proceedings (Access to Court Documents) Rules 2008. Each contains two options for access by non-parties: Option One with a general presumption of availability of listed documents (the Judge can still order that the document or part of the document relating to the proceeding not be accessed without permission of a Judge), and Option Two requiring the permission of the Judge for all access.

Option 1 may be attractive to groups such as the media; and lessens the risk that Judges face the prospect of frequently ruling on questions of access to documents and especially if issues are trivial but procedurally must be traversed. Such issues may be especially marked in the District Court. On the other hand, a more open access regime potentially erodes privacy and a Judge is a more subtle arbitrator of questions of access than a rule presuming access. Moreover, people may attempt to pry into material not reported by virtue of the requirement that the media only provide a 'fair and accurate' report of proceedings.

The definitions of 'court file' (civil) and 'court record' (criminal) imply that any notes made for the Judge's personal use would be included in the file or record but for their express exclusion. The rules will be amended to remove this incorrect inference given the Judge's personal notes would never be discoverable.

It is desirable that there be one set of rules governing the civil and criminal systems respectively, rather than different rules for each court. Two single instruments may achieve this.

Dr Mathieson will re-insert provisions in the current High Court Rules into their revised counterparts given finalisation of the access rules may post-date the new High Court Rules. These new Rules can later be amended to update access provisions.

It was agreed that the draft Rules will be circulated for consultation with both options and an explanation of the arguments.

9. Costs in the Court of Appeal

Court of Appeal judges have produced a Practice Note essentially replicating their proposed costs regime. The Note was prepared as a holding arrangement. It was driven by the prospect of a possible delay incurred by working through a sub-committee coupled with a concern to help mitigate current practices regarding costs and the typically low recovery rates.

While the regime the Note prescribes was twice consulted on, it met some opposition from the Rules Committee given the potential sharp increase in costs. Consequently, specific costs examples were calculated and circulated, and a sub-committee had been formed to advance the issue. The increase is a particularly acute consideration in non-commercial cases where a greater discretion to depart from the 'costs follow the event' model may be desirable.

The Note has yet to be issued, and it was noted that it may be ultra vires. The Chief Justice will discuss the matter with Justice Young, President of the Court of Appeal.

Costs issues exist in the High Court too and will ultimately need to be addressed.

10. Constituency Election Petition Rules 2008

The draft Rules have been slightly altered by a re-ordering of the rules in s 5(1), 'Application of High Court Rules and practice of Court.'

With reference to the interaction between s 234 of the Electoral Act 1993, 'Rules of Court,' and s 51C of the Judicature Act 1908, 'Power to make rules,' there was discussion regarding whether the rules are made by the Governor-General in Council on the recommendation of the Minster of Justice or by the Rules Committee. The matter will be referred to the Solicitor-General through Ms Gwyn for advice.

In the interim, the Committee endorsed the form of the Rules.

11. Discovery in civil litigation

Discussion of the *Peruvian Guano* test was carried over to the meeting of 31 March.

12. Guidelines for provision of authorities

The title of these guidelines may require alteration because they cover documents and practices wider than authorities.

There is concern about the guidelines being mandatory given they place more onerous requirements on counsel than current provisions for other types of case. Also, they are generally followed in mainstream trials by competent counsel.

It was pointed out though that some counsel do not proceed in a manner consistent with the proposed guidelines. Moreover, there is a distinct benefit for Judges to have authorities in advance and marked to help prepare for a hearing, and marking relevant passage may help focus counsel and lessen the chances of authorities being presented where they are not of material relevance.

The correct vehicle will need to be considered for introducing the guidelines, and options include a practice note or schedule.

Messrs Brown QC and Beck will advise on achieving consistency between the proposed guidelines and existing provisions. The Chief Judge and Clerk will work on producing a revised set.

13. High Court Rules

Service outside the jurisdiction
The Chief Judge's suggested changes to proposed rules 6.28 and 6.29 are considered a distinct improvement. They were generally approved by the Committee with some further amendments. The revised rules will be forwarded to Mr Goddard QC, Mr Finlayson, Mr Angelo, and Professor McLachlan for consideration and comment; and to the Australians. If these experts do not suggest any changes, the rules will proceed in the form cited later.

The Committee again discussed the imposition of an onus on the plaintiff to show, amongst other things, that there is a 'serious issue to be tried on the merits' where jurisdiction is protested (r 6.29(1)(b)(i)). It considered this to be justified on the basis that it is inappropriate for New Zealand to exercise long arm jurisdiction against an overseas defendant in relation to a case with no merits. Service without leave should be for very clear cases and where it is not clear, the plaintiff should apply for leave. Moreover, the onus is needed given New Zealand has circumvented the requirement in jurisdictions such as England for leave to serve outside the jurisdiction under rule 6.27.

Though the Committee supports the onus lying where is presently does in the proposed rules, it does change the law and will be flagged for consultation.

It might be a potentially heavy requirement for a plaintiff to show that granting leave would 'accord with international principles of jurisdiction' (this wording is from Justice Randersons's draft). This will be flagged for consultation with the experts, and the wording was changed to help lessen this to read as below at 6.28(5)(ii).

There will need to be provision for instances where the appropriate forum differs for different parts of the case. Dr Mathieson will consult Mr Goddard QC, Mr Finlayson, Mr Angelo, and Professor McLachlan on this point.

Proposed rules 6.28 and 6.29 will read:

> **6.28 When allowed with leave**
> (5) The Court must dismiss an application for leave unless the applicant establishes that:
> (i) there is a serious issue to be tried on the merits; and
> (ii) to give leave would not be inconsistent with international principles of jurisdiction; and
> (iii) it is arguable that New Zealand is the appropriate forum for the trial; and
> (iv) any other relevant circumstances support an assumption of jurisdiction.
>
> **6.29 The Court's discretion whether to assume jurisdiction**
> (1) If service of process has been effected out of New Zealand without leave, and the Court's jurisdiction is protested under rule 5.49, the Court must dismiss the proceeding unless the party effecting service establishes:
>
> (a)
> (i) that New Zealand is the appropriate forum for the trial; and
> (ii) that there is a good arguable case that the claim falls wholly within one or more of the paragraphs of rule 6.27; and
> (iii) that the Court should assume jurisdiction by reason of the matters set out in rule 6.28(5) (i), (ii) and (iv); or
>
> (b)
> (i) that leave would have been granted if it had been sought under rule 6.28; and
> (ii) that it is in the interests of justice that the failure to apply for leave should be excused.

Forms
The Committee thanked Dr Mathieson for producing the Forms, and noted his enormous dedication and the marvellous result.

Dr Mathieson sought direction on whether it is necessary to include the 'I/we' alternatives throughout the forms given this may compromise their elegance, simplicity, and hence usability. Probate forms include both given the nature of probate proceedings. The Committee agreed it is not necessary to include the alternatives throughout.

The Committee endorsed Dr Mathieson to proceed with the Forms given senior Registrars have been involved in their formation.

14. Justice Baragwanath's term as Chair of the Rules Committee

This meeting was the last that Justice Baragwanath will attend given his appointment to the Court of Appeal.

The Chief Judge thanked the Chair for his work on the Rules Committee and remarked on his strong leadership, enormous talent, and conscientiousness. Together these qualities have encouraged the Committee to grapple with major law reform issues such as litigation funding.

The Committee congratulated Justice Baragwanath on his appointment, and wished him well in his new role.

The meeting closed at 3.30pm.