



THE RULES COMMITTEE

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Wednesday 13 June 2007

Circular No. 57 of 2007

Minutes/04/07

Minutes of Meeting held on Monday 11 June 2007

The meeting called by Agenda/3/07 was held in the Chief Justice's Boardroom, High Court, Wellington, on Monday 11 June 2007 at 10am.

1. Preliminary

In Attendance

Hon Justice Baragwanath (in the Chair)
Mr Charles Chauvel MP
Hon Justice Chambers
Hon Justice Randerson, Chief High Court Judge
Hon Justice Fogarty
Judge Joyce QC
Judge Doherty
Dr David Collins QC, Solicitor-General
Mr Tanner QC, Chief Parliamentary Counsel, Parliamentary Counsel Office
Mr Ian Jamieson, Deputy Chief Parliamentary Counsel (Drafting), Parliamentary Counsel Office
Mr Hugo Hoffmann, Parliamentary Counsel Office
Ms L Sinclair, Deputy Secretary, Ministry of Justice
Mr A Beck, New Zealand Law Society representative
Mr J Orr, Chief Legal Counsel, Ministry of Justice
Dr D Mathieson QC, Special Parliamentary Counsel, Parliamentary Counsel Office
Mr K McCarron, Judicial Administrator to the Chief Justice

Ms G Smith, Secretary to the Rules Committee
Ms Dolon Sarkar, Incoming 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
Mr Brown QC

Confirmation of minutes

The minutes of the meeting held on Monday 2 April 2007 were confirmed.

Other matters arising

i. Final Rules Committee meeting for Mr Tanner

The Chair recorded the Committee's thanks, with great appreciation, to Mr Tanner for his service on the Committee.

2. Rules reform

The Chair thanked Judges Joyce and Doherty for their work on the project.

The draft District Courts Rules 2007

The Committee agreed that the draft Rules should go out for consultation, subject to some amendments.

i. Amendments

- Rule 1.7(5) will be deleted as it is adequately covered in rule 1.7(1).
- A reciprocal provision to rule 2.5, 'Court's discretion to allow plaintiff to proceed by filing statement of claim or originating application,' will be added somewhere around 2.5 to 2.9 for a defendant where they receive a Notice of Claim but do not think the case should proceed on that track.

Mr Jamieson will draft the provision, and the Clerk will circulate it to the Committee for approval via e-mail.

- Rule 2.5(5) – it may be useful to draft a specific/adapted Notice of Claim form equivalent to the Notice of Proceeding form in the High Court Rules advising the defendant what to do where the Court grants leave to proceed via an alternative route. This is because using the High Court Notice of Proceeding form may be misleading and require major amendments. It was suggested that there could be provision for alternative Notices of Claim in short and in long form.
- Rule 2.7(2) will be deleted. A party suing for defamation must make an application to proceed via a Statement of Claim.
- Rule 2.8 will be modified to empower the defendant to apply for change of track.
- Rule 2.9(3)(e) will be re-worded to read consistently with rule 2.7(1)(g).
- Rule 2.12(3)(d) and the defendant's mirror provision at rule 2.13(3)(e) will have footnoted as an option: 'include or attach will say statements for each witness of fact and expert witness if available.'
- Rules 2.12(3)(e) and 2.13(3)(f) will have 'essential' inserted before 'documents.'

ii. Issues to be highlighted for consultation or noted in the consultation paper

- The provisions concerning prohibition of summary judgment except in limited circumstances
- Rule 1.5, 'Duties of parties,' and the desirability or otherwise of parties having a duty to help the Court act in accordance with the Rules
- References to the High Court Rules are to the current High Court Rules and will be superseded.
- A contents part to help navigation of the Rules.
- The requirement for detailed transitional provisions.

iii. Other matters raised

Graduated filing fee process – it was noted that fee-fixing is the task of the Ministers. The consultation paper will express the Committee’s opinion that the filing fee for the Notice of Claim be nominal for reasons of access to justice. Ministry of Justice personnel take no position on the point.

Running of time while application being heard for proceeding via a Statement of Claim – the timetable for the Notice of Claim would have to stop running until the application for the alternative route is heard and fully disposed of.

Timing – the Rules will need to proceed in tandem with the High Court Rules due to the cross referencing.

Forms – the draft document does not include forms. There will be 6 new forms, with the rest as per those in the High Court Rules.

iv. Draft consultation paper

The Chair thanked Mr Jamieson for his draft consultation paper.

A revised version, to be prepared by Judges Joyce and Doherty, will amend the technical draft and will contain a bullet-point summary of the key changes, plus the Notice of Claim diagram.

Judges Joyce and Doherty will revise the current draft consultation paper early in the week of 18 June with the Clerk’s assistance if necessary. The revised version will be forwarded to the Chair, from whom it will be circulated to the Committee to approve by e-mail within a week, and then it will be released.

High Court Rules

Dr Mathieson will collate and index submissions on the revised High Court Rules. Submissions are due to the Clerk by 30 June 2007.

3. High Court Amendment Rules (No 2) 2007

The Committee endorsed the High Court Amendment Rules (No 2) 2007.

4. High Court Amendment (Wills Act 2007) Rules 2007

Discussion was deferred until the meeting of 6 August to facilitate internal Ministry of Justice discussion.

The issue was raised of the appropriateness of the extended powers given to Registrars in, for example, aspects of clauses 14, 19, and 31, and whether some of these belonged in the domain of the High Court judges.

A sub-committee will deal with this set of Rules, and will comprise Mr Chauvel, Justice Randerson, and Margaret Nixon (PCO). The sub-committee will produce a memorandum responding to the final bill which will be circulated to the Committee for response by e-mail.

5. Costs consultation papers submissions

The Committee discussed the ‘necessary and reasonable’ criteria. It was generally concluded that clarification is desirable of the meaning and focus of ‘necessary and reasonable,’ and of where any flexibility should apply. The sub-committee will report further.

Costs in the High Court, in the Court of Appeal, and multiple costs

A sub-committee comprising Justice Chambers, Justice Randerson, and Mr Brown QC will deal with these matters.

6. Proposal by Chief Judge for amendment of search rules – amendment to rule 66

Discussion was deferred from the meeting of 2 April pending the Government's response to the NZLC paper. The Government's response does not address the merits of the paper and has referred the paper to a Select Committee.

Issues raised by the Committee include whether the individual's right to privacy should, post-trial, trump that of the wider community's to explore Court processes; and whether the High Court should have exclusive jurisdiction over control of its records, or whether there should be a right of appeal from a High Court judge's decision given that flow-on effects could be used tactically due to the elapse of time which would be incurred.

A sub-committee was formed to create a draft rule which will either be circulated for comment by the Committee, or used by the Chief Justice and Chief Judge in the submissions they will make to the Parliamentary Select Committee on behalf of the judiciary. The sub-committee will comprise, subject to their agreement: the Chief Justice, Justice Randerson, Dr David Collins QC (and/or his nominee), Hugo Hoffmann (PCO representative), Bruce Gray QC (media law expert representative), Andrew Beck, and Robert Lithgow QC (criminal law expert representative). The Chief Justice and Chief Judge will confer as to who will convene the sub-committee.

7. Incapacitated persons rules

The Committee approved both the District Courts Amendment Rules 2007 and the High Court Amendment Rules 2007.

A minor amendment will be made to what will be s 98(2) District Courts Rules 1992 to clarify that 'that person' refers to the minor who has attained full age, not to his or her litigation guardian. This will be circulated for the Committee's approval.

The Chair asked Mr Tanner to pass on thanks to Ms Giacometti for her work drafting the rules and in doing so remedying what was an error of principle.

8. Allocation of duties between the Secretary and the Clerk

Discussion was carried over from the meeting of 2 April 2007. Ms Sinclair tabled a document reflecting the current practice of allocation between the Secretary and Clerk.

The following two amendments were agreed to clauses concerning the Secretary's role (additions in italics):

'Accompanying the Chair or member of the Rules Committee attending before the Regulations Review Committee and other such bodies where appropriate' (also for Clerk's role).

'Liaising with the Ministry of Justice to facilitate Rules changes through the Cabinet process.'

9. Provision of authorities and trial directions in affidavit evidence cases

Item 11, 'Trial directions in affidavit evidence cases,' was discussed with 'Provision of authorities.' Discussion centred around what was to be required, by when, and for what type of trial.

The Chair and Clerk will produce draft guidelines for consideration by the Committee.

10. *Smith and Grace & Ors v Covington Spencer Ltd & Ors* [2007] NZCA 224

The Chair noted that *Smith and Grace* indicates the need for consideration of class actions. Discussion was deferred until discussion of feedback on the class actions consultation paper (submissions due: 31 July 2007).

11. Reprint of Judicature Act 1908 and High Court Rules

Mr Tanner QC brought to the Committee's attention a re-print of the Judicature Act 1908 and the High Court Rules, both incorporating amendments.

12. Secretary to the Committee

The in-coming Secretary to the Committee, Ms Dolon Sarkar, was welcomed. Ms Smith was farewelled and wished well for her OE to England.

The meeting closed at 2.10pm.