



THE RULES COMMITTEE

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22nd February 2006

Minutes/1/06

Circular No. 17 of 2006

Minutes of Meeting held on Monday 13th February 2006

The meeting called by Agenda/1/06 was held in the Chief Justice's Boardroom, High Court, Wellington, on Monday 13th February 2006 at 10 am.

1. Preliminary

In Attendance

Hon Justice Baragwanath (in the Chair)
Rt. Hon Dame Sian Elias GNZM, Chief Justice of New Zealand
Hon Justice Randerson, Chief High Court Judge
Hon Justice Fogarty
Judge Doherty
Ms K Clark, Deputy Solicitor-General
Mr G Tanner QC, Chief Parliamentary Counsel
Mr A Beck, NZ Law Society representative
Mr B Brown QC, NZ Law Society representative
Mr K McCarron, Judicial Administrator to the Chief Justice
Mr J Orr, Chief Legal Counsel, Ministry of Justice
Richard Living, Secretary to the Rules Committee
Ms Bernice Ng, Clerk to the Rules Committee

Mr H Hoffmann, Parliamentary Counsel (first half of the meeting)
Dr D Mathieson QC, Special Parliamentary Counsel (second half of the meeting)

Apologies

Hon Justice Chambers

Judge Joyce QC
Ms L Sinclair, Deputy Secretary, Ministry of Justice

Confirmation of minutes

The minutes of the meeting held on Monday 5th December 2005 were confirmed as an accurate record.

The Chair welcomed Mr Brendan Brown QC on to the Rules Committee.

2. Omnibus 5

Daily recovery rate

The Committee discussed whether the new District Court recovery schedule required an explanatory note in order to clarify reasons for the increase in the recovery rate. It was agreed that the explanatory note would explain that the increase was a review of rates set at year 2000 levels but only put in place in 2005. The submission to accompany Omnibus 5 would give a history of the determination and implementation of the original recovery rates.

It was noted that new figures in the daily costs recovery schedule were not rounded to the nearest 10. It was agreed that the figures would be rounded to the nearest 10.

Placement of proposed r 299A

Mr Brendan Brown pointed out that proposed r 299A did not "fit" in its proposed place in the Rules. The Committee agreed that the Steering Committee would be best suited to find the appropriate home for r 299A.

The Committee agreed that Omnibus 5 would proceed to concurrence.

3. Incapacitated persons

The Committee discussed the submissions from the Ministry of Health and the New Zealand Law Society with respect to changes to HCR r 82.

The Committee accepted that the potential consequences of the proposed changes were in fact substantive and not procedural. The Committee agreed that the Chair would accept Dr Chaplow's invitation to meet to discuss the matter further. Justice Randerson would write a letter to the Ministry of Justice and invite its policy group to look at the issue.

4. Court of Appeal- Filing of Civil Appeals

The Committee considered the suggested changes rules in Marian Hinde's letter to the Court of Appeal filing. It was agreed that Ms Hinde's suggestions would be looked at in the Committee's Electronic Filing project.

5. Misconduct of trial counsel

The Committee reviewed the Clerk's memorandum on implied waiver of privilege in the United States and Canada. After much discussion, it was agreed that issues of implied waiver entered territory that was substantive and hence outside of the Rules Committee procedural/rule making power.

The Committee invited Mr George Tanner QC to draft a rule dealing with the position of an appellant who is proposing to waive privilege expressly over certain communications in a criminal appeal. Implied waiver should be left to the courts to develop.

6. Leave to appeal interlocutory decisions and/or orders

Views on the Clerk's draft consultation paper were sought from Committee members.

Reviews of decisions of Associate Judges needed to be distinguished from interim injunctions. The Committee commented that there should be a right to appeal important interlocutory decisions or orders, and that there should be a mechanism to weed out unmeritorious appeals.

The Committee decided that it should examine the statistics and figures at the High Court (in particular abandoned fixtures) to see if leave to appeal interlocutory orders and/or decision was necessary given that the Court of Appeal had not experienced any problems.

Justice Randerson undertook to obtain information on how many High Court fixtures are lost through parties filing appeals of interlocutory orders and/or decisions.

7. Costs in Public Interest Litigation

The Committee reviewed Ms Clark's letter. It agreed that Ms Clark would draft a letter on behalf of the Committee setting out the Committee's views and current intentions, and invite the Attorney-General to express his views on how issues surrounding costs in public interest litigation might be addressed.

8. Costs on Appeal

The Committee reviewed the cases circulated to members by the Clerk. It was unclear whether a rule change is necessary. The introduction of a rule could potentially be more problematic than the current approach, which is to examine the issue of costs on appeal on a case by case basis.

The Committee decided that a consultation paper should be prepared in order to determine whether there was public support for a rule change.

9. Expenses and disbursements

The Committee determined that a consultation paper should be prepared on the issue of whether there should be rules specific to expenses and disbursements, particularly with respect to expert witnesses.

The consultation paper should address two questions. The first, is the extent of the court's discretion to determine whether expenses and disbursements of expert witnesses are recoverable in the first place; and the second, is the proper amount of recovery of a *reasonable* fee. The preliminary view of the Committee was that the courts should retain the ability to ultimately decide each issue in the particular case.

10. Jurisdiction of Associate Judges

The Committee examined the judgment of Justice Venning in *Cardova v Wenzel* (HC, Akl, Civ-2005-404-003120, 22nd December 2005). The Committee acknowledged that the position was

still uncertain and the jurisdiction of Associate Judges in an application for summary judgment needed to be clarified.

The Committee agreed that a letter should be drafted to the Minister of Justice asking for the issue to be considered.

11. Insolvency Law Reform Bill

The Committee considered the invitation from the Ministry of Economic Development to assist in facilitating changes to the High Court Rules.

In order to ensure that the form and style of the High Court Rules is maintained, the Committee with the consent of the Chief Justice will invite Justice Heath to act as a delegate of the Rules Committee to assist the Ministry of Economic Development in drafting changes to the High Court insolvency rules.

12. Rules Reform

The Chair thanked Dr Mathieson QC for all his work to date on the Rules Reform project.

Dr Mathieson summarised the work of the Steering Committee thus far. A team of 4 parliamentary counsel had been given guidance as to the look and style of the rules, and the redrafting process was well underway.

Judicature Amendment Bill 2006

Dr Mathieson tabled a redrafted Judicature Amendment Bill, and summarised the changes and differences from the first draft circulated to Rules Committee and Steering Committee members. It was emphasised that the amendments should ensure that only procedural changes were made to the way administrative actions were brought to the court. The development of the substantive law should remain with the courts.

Numbering

Dr Mathieson outlined that the objective of the re-numbering of the High Court rules is to ensure:

- that the Rules are user friendly;
- that particular/specialist rules follow general rules; and
- that Rules are simplified according to modern drafting practises;

The drafters were asked to give careful consideration to issues relating to parts and subparts and citation of the Rules in court.

Action Plan

The Committee perused the Action Plan of the Steering Committee. The Committee approved the Action Plan.

13. Electronic Filing

Carol Abernethy (General Manager, Technology and Services, Ministry of Justice) and Tony Fisher (General Manager, District Courts, Ministry of Justice) conducted a presentation on their trip of the Courts Technology Conference in Seattle on 13-15 September 2005.

14. Irish Working Group on Legal Costs

The Committee will meet with members of the Irish Working Group on Legal Costs if they visit New Zealand.

15. Harmonisation of Rules of Discovery

Privilege against self-incrimination

The Committee confirmed its opinion that the draft rules should be finalised. It reiterated its position on the use of Practice Notes.

16. Rules Committee web site

The Committee agreed that an annual report should be produced in conjunction with a new section on the web site, which details current and/or upcoming Rules Committee meetings, papers and rules.

The Committee will write to the Ministry of Justice requesting that the web site incorporate the proposed updates section.

17. Visit to meet the Attorney-General

The Committee attended on the Attorney-General on his invitation. The Attorney-General expressed a continuing and keen interest in the work and role of the Committee.