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15 June 2011

Minutes/02/11

Circular No. 33 of 2011

Minutes of meeting held on 13 June 2011

The meeting called by Agenda/02/11 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 13 June 2011 at 9:45 am.

1. Preliminary

In Attendance

Hon Christopher Finlayson, Attorney-General
Hon Justice Fogarty (in the Chair)
Hon Justice Chambers
Hon Justice Winkelmann
Hon Justice Asher
Judge Joyce QC
Mr Andrew Beck, New Zealand Law Society representative
Mr Brendan Brown QC
Mr Ross Carter, Parliamentary Counsel Office
Ms Cheryl Gwyn, Crown Law Office
Mr Ian Jamieson, Parliamentary Counsel Office
Ms Anna Johnston
Dr Don Mathieson QC, Special Parliamentary Counsel, Parliamentary Counsel Office
Mr Kieron McCarron, Judicial Administrator to the Chief Justice

Mr Stephen Mills QC, New Zealand Bar Association representative
Ms Julie Nind, Ministry of Justice
Mr Jeff Orr, Ministry of Justice
Ms Pam Southey, Ministry of Justice
Ms Paula Tesoriero, Ministry of Justice

Ms Briar Charmley, Private Secretary to the Attorney-General

Dr Caroline Anderson, Clerk to the Rules Committee
Ms Rita Lowe, Secretary to the Rules Committee

Apologies

Rt. Hon Dame Sian Elias GNZM, Chief Justice of New Zealand
Judge Doherty
Mr Andrew Hampton, Ministry of Justice

Confirmation of minutes

The minutes of the meeting of Monday 21 February 2011 were confirmed.

Matters arising

The Chair opened the meeting by introducing the new members of the Committee: Mr Stephen Mills QC and Ms Rita Lowe. Ms Rita Lowe takes over the role of Secretary to the Committee. The Chair also welcomed the group from the Ministry of Justice and PCO (Ms Julie Nind, Ms Anna Johnston and Mr Ross Carter) who have been developing the rules and regulations necessary to give effect to the Trans-Tasman Proceeding Act 2010 and the proposed Treaty on the issue.

The Chair noted that today would be the last meeting that Justice Chambers would be attending as a full member. Chambers J has been a member of the Committee for some 16 years and during that time established himself as the "engine room" of the Committee, driving through reforms and raising issues with tireless energy. The Chair drew particular attention to the fundamental role the Judge has had in the discovery reform process, one of the most intellectually challenging projects faced by the Committee. Finally, the Chair expressed his thanks and deep appreciation for Chambers J's service to the Committee.

Lastly, the Chair welcomed the Attorney-General to the meeting.

2. Discovery

Justice Asher introduced the latest draft version of the new High Court Rules pertaining to discovery and noted that although these had been developed over the last three meetings, they were really a culmination of work begun in 2002. The renewal of the attempt to reform discovery began two years ago with a consultation paper issued in September 2009 and then another one last December. These latest consultations have provided the genesis for the current draft.

His Honour noted that the current draft encompasses four significant reforms:

(a) Initial disclosure. All documents referred to in the pleading and any other principal documents are to be served on other parties after pleadings are filed (draft rule 8.4);
(b) Increased emphasis on co-operation (draft rule 8.2 and the Discovery checklist and listing and exchange protocol);
(c) Replacement of the Peruvian Guano test with an adverse documents test bringing New Zealand into line with other Common Law jurisdictions;
(d) Changing to a default position of electronic discovery and inspection.

Asher J noted that prior to this meeting he had met twice with the Chief Justice, the Chief High Court Judge and the Chair to discuss the draft rules and the best mode of proceeding. The Chief Justice was comfortable with the substance behind the new rules and made a number of drafting changes which were currently being incorporated. Justice Asher proposed that the Committee members today considered the draft version and whether they were content with the policies behind it, but leave detailed drafting matters for individual comment afterwards. His Honour stated that, at the Chief Justice's suggestion and subject to feedback received today, a final draft version (v 1.17) be created this week. This version would then be sent out to all submitters inviting their comments on specific drafting issues as a means of final input from the profession. A deadline of one month would be given so that a target of implementing the rules early next year could be met.

The Chair then sought comment on the following issues:

1) Whether there was consensus from the Committee as to the policy of reform;
2) Whether drafting issues or suggestions could be forwarded to Justice Asher after the meeting; and
3) When, if there was consensus, the rules should and could become law?

The Attorney-General commented that he was very happy with the draft rules, although wondered at the length of time it had taken to form them. The Chair agreed that the process of reform had taken longer than expected but had been valuable in garnering feedback and support from the profession. No member raised any policy concerns with the draft rules. The Attorney-General did though raise a concern with the current definition of pleading in draft rule 8.1(2), in that a new course of action was omitted from the definition. Dr Mathieson believed that a change on the Chief Justice's suggestion to draft rule 8.4(8)(b) would correct such an omission, while Justice Chambers highlighted that a new course of action would be specifically picked up by the continuing obligations of discovery. Mr Brown QC, picking up on the Attorney's comment, questioned why counter-claim was not incorporated within the definition of pleading as it is within HCR r 1.3. Justice Winkelmann noted that third party notice, included within the 8.2 definition of pleading, was absent in the r 1.3 definition. The Committee agreed that the discrepancies in the definitions in r 1.3 and the current draft needed to be investigated and, if possible, matching.

The Committee then moved on to discuss timing issues for the implementation of the new rules. Ms Southey observed that given Parliament's sitting times, an Order in Council would probably happen early September. Dr Mathieson believed that the rules could then come into effect on the 1st of February 2012. As any rule change would not affect substantive

rights of parties nor raise access to justice issues, the Committee was agreed that transitional rules were unnecessary.

Given these dates, the Chair believed that an education programme on the rule changes was imperative and that workshops or seminars would be appropriate in November and December. The NZBA and NZLS are to be contacted by the Clerk in regards to this issue.

The Chair thanked Justices Asher and Chambers and the other members of the working group for their sterling work on this reform.

3. District Court Rules (agenda item 5)

Judge Joyce QC introduced his report on the implementation of the District Court Rules 2009 and highlighted that, unfortunately and despite requests, there had been very little feedback from the profession on the performance of the rules. However, the Courts Committee of the ADLS had prepared commentary on the Rules and the Judge has requested a member of that Committee to pass on any of its concerns.

Judge Joyce noted that although there was a groundswell of concern regarding the rules in some areas, particularly Wellington, other places (such as Christchurch) have been very receptive to them. Additionally, from anecdotal evidence at least, lay litigants were happy with the new rules.

His Honour then addressed key areas of potential reform. He believed that summary judgment was an area to revisit, and that the consultation amendment draft of the Rules by Mr Jamieson had extended summary judgment procedure to enable a person to recover any amount under section 24(2)(a) of the Construction Contracts Act 2002. The Judge did note that the rationale for refusing summary judgment for this area in the first place was that it was overused and that claims were better pursued with a statement of claim and proceeding. Several other areas were noted by the Judge. One was the issue of change by the profession and District Court judges, some were simply not familiar enough with the new rules (issues raised about discovery were an example of this) nor had properly adapted to them. Another area was the period of thirty days allowed for opposition to a claim, which many now believed was too long. Judge Joyce supported a reduction in this timeframe as per the original proposal. He also observed that the use of statistics in assessing the effects of the new rules was currently problematic: there have been problems with information gathering and more work as to what information is gathered and how it is done so needs to be resolved. How the figures are to be interpreted is another key area which needs to be addressed.

Overall, Judge Joyce would prefer a careful and measured appraisal of the efficacy of the rules given that they had been considered thoroughly and were the culmination of some six years' work.

The Chair invited comment from the Committee.

The Attorney-General raised concerns, based on reports from practitioners, as to the lack of summary judgment procedure and default summons. Winkelmann J also expressed concern as to the difficulty of obtaining summary judgment. The Attorney highlighted that the issue of default summons and increasing timeframes appeared to embody a very real concern that access to civil justice was dying. He believed that such a concern needed to be addressed promptly. Judge Joyce noted that the new rules enlarged the opportunities for default judgment.

The Chair observed that these issues needed to have a careful response as they were clearly important ones, although Judge Joyce was concerned as how best to review them and who should review them. The Judge noted that he had spoken to the Chief District Court Judge who was hoping to pass on nominees to establish an enlarged sub-committee able to review the rules. Justice Winkelmann noted that she had spoken to the Chief Justice about establishing a methods and performance sub-committee as discussed in the previous meeting, and the Chief Justice believed that such a sub-committee should be a stand-alone one. Such a group may be able to help with the review of the DCR.

Justice Asher raised the point that while a long-term review was necessary and important, it may be appropriate to conduct an urgent review of summary judgment and the functioning of the new default system more broadly. The Attorney-General was in favour of approach. Winkelmann J also believed that timeframes more generally in the Rules needed to be considered, such as the point at which a party can elect to transfer to the High Court. It was agreed that this urgent review should be reported back to the Committee at the next Committee meeting. The sub-committee for this review will consist of the original members (Judge Joyce QC, Judge Doherty, Ian Jamieson and Andrew Hampton), plus Andrew Beck, Brendan Brown QC, Paula Tesoriero, Cheryl Gwyn and any other nominees offered by the Chief District Court Judge. The Attorney-General, Justice Winkelmann and Briar Charmley have requested to be copied in to the sub-committee's work.

4. Trans-Tasman Proceedings Act: Rules and Regulations

This topic was introduced by Julie Nind from the Ministry alongside Anna Johnston and Ross Carter. Ms Nind explained that the background to the draft rules tabled was the proposed Treaty between New Zealand and Australia agreeing upon procedural reform to simplify litigation and the Trans-Tasman Proceedings Act which was passed in 2010 in both Australia and New Zealand. The Act does several key things: it provides for service as of right, it expands the range of judgments enforceable in both jurisdictions (including certain criminal fines), it introduces a common statutory test on forum non conveniens, and it encourages the use of electronic technology for appearances.

The delegation from the Ministry presented four documents which had been drafted to support the new regime:

1) Trans-Tasman Proceedings Regulations and Rules 2011 (v 1.7)
2) High Court (Trans-Tasman Proceedings Act 2010) Amendment Rules 2011 (v 7.4)
3) District Courts (Trans-Tasman Proceedings Act 2010) Amendment Rules 2011 (v 1.3)
4) Evidence (Trans-Tasman Service of, and Compliance with, New Zealand Subpoenas and Australian Subpoenas Issued in Criminal Proceedings) Rules 2011 (v 1.3)

Ms Nind explained that the Trans-Tasman Proceedings Regulations and Rules were a composite document combining rules and regulations which will apply to the High Court, the District Court, the Family Court and certain other tribunals. She explained that the rules support the detail set up by the regulations. The primary rationale behind using regulations is because of the federal domestic regime of Australia, in that regulations are easier to implement uniformly across Australia, whereas rules are more easily transformed to fit in with local State variations.

In response to questions from members, Ms Nind explained that the rules can be used as a toolbox when trans-Tasman issues arise. The actual drafting of the rules by Ross Carter has been done by working closely with instructing officers and his Australian counterparts. Mr Carter clarified that there will not be exact reciprocity with the New Zealand rules and their Australian Federal and state counterparts as each place has a different procedural setting and the rules need to be tailored accordingly.

In regards to the High Court (Trans-Tasman Proceedings Act 2010) Amendment Rules, Anna Johnston explained that as these rules allowed New Zealand proceedings to be served and defended in Australia as of right, special provisions have been set up to protect defendants. These rules therefore allow for an address for service in Australia, the ability to apply for a stay in Australia, procedures for acting remotely, and the ability to have an Australian lawyer for representation if leave is obtained (something already contemplated by s 27 of the Lawyers and Conveyancers Act 2006). To give effect to these provisions, some consequential changes to the HCR will be necessary, e.g. r 6 of the Amending Rules amends HCR r 5.36 and the requirements of a New Zealand Practising certificate for the filing of documents.

The Group also explained that the Act has provided for a standardised forum non conveniens test between both countries of whether another forum is more appropriate, bringing it into line which with the New Zealand test and also the domestic test within Australia. The Chair wondered about work being done by the Hague Conference on Private International Law as to the possibility of convening different jurisdictions together by video-link (a practice already possible in certain cases between Canada and America), and whether this could fit with a trans-Tasman regime of civil litigation. Ms Nind responded by stating that because of the cross-vesting issues in Australia and constitutional reasons, it would not be a viable option in Australia.

Overall the Committee appeared comfortable with the policies behind the changes, but the Chair believed that it was important for the Committee to consider individual provisions critically. Several members were concerned that the Regulations and Rules should be made more technology neutral in conformance with the Act. Ms Nind stressed that the date of their implementation (1st September) was a notional date, and that further work tweaking the rules was envisaged. The Chair was to head up a sub-committee to look further into the reforms. This sub-committee would include Stephen Mills QC and Andrew Beck in their capacity as representatives of, respectively, the NZBA and NZLS , as well as Cheryl Gwyn. Ms Nind is to formally approach the NZBA, and the Clerk is to link up the members and any

of the Association or Society's representatives by email and set up a video-conference as needed. The short nature of the deadline was highlighted.

The Chair thanked the team for their work on the issue and their presentation to the Committee.

5. Case management (agenda item 3)

The Chief High Court Judge introduced the new materials circulated regarding case management and recapped the previous changes suggested at the last meeting. The overall focus of the proposed changes is to provide a more tailored system focussed on issue identification plus revisit Judicial Settlement Conferences ("JSC"). Her Honour described how cases could be divided into short cases (which were usually straightforward and required light case management) and complex cases. Regarding the latter, Winkelmann J believed that it would be appropriate to institute an "Issues Conference" of a quarter to half day duration presided over by a Judge and attended by senior consul involved in the case, and if directed, the parties. This type of conference would allow for trial issues to be mutually identified and refined at a much earlier stage. In terms of JSCs, her Honour questioned whether resources were always being well spent in this area. She noted that in the State of Victoria "mediations" (the equivalent to our JSCs) were much more circumscribed and focused, typically only taking place if private mediation had failed, the parties were ill-funded, or if the issue was going to trial.

Lastly, Winkelmann J referred to her memorandum suggesting that there be a presentation of the proposed reforms to the profession, covering the general approach to case management and the use of JSCs. The basis behind such a presentation is to effect a change in the behaviour of both the judiciary and the profession in relation to the pre-trial phase. As such a presentation could be used to gather the profession's views in relation to the proposed reforms, it could replace or supplement the usual consultation process.

The Chair supported Justice Winkelmann's proposals and discussed his paper of 7 June which provides a commentary on, and suggestions for the new rules that would be necessary to implement the reforms. The idea behind the proposed rules is to simplify the case management regime according to outcomes rather than checklists, as well as build on the dynamic of the discovery reforms. The general tenor of them has been borrowed from the Victorian system of case management.

Both the Chair and Justice Winkelmann sought feedback from the Committee as to concept of the draft rules and whether changes should be made to JSCs. Plus if the Committee was agreed that changes should be made to JSCs, whether this should be done formally or is best left to the Court's discretion.

Stephen Mills QC believed that the best aspect of the reforms was the shift away from the routine "tick-box" manner in which conferences are conducted by instead ensuring that the focus was on issue identification. Brendan Brown QC also firmly supported the idea of "Issues Conferences". Some concerns were expressed as to changing JSCs and also the

difficulty of interpreting any statistics pertaining to them. Asher J cautioned against being too quick in dispensing with them as they provided an important mechanism for the resolution of issues and some Associate Judges were superb at them. Judge Joyce noted that the success of JSCs was largely dependent on the ability of the individual judge in running them. Mr Brown also expressed the view that he would be disappointed if JSCs lose traction as he found them to be an undervalued resource, particularly in that they allowed parties to hear the case according to each other and not lawyers. He viewed that JSCs often resulted in settlements that were not picked up on by statistics. Andrew Beck similarly found JSCs as an important tool and useful meeting point in resolving cases. Cheryl Gwyn strongly endorsed the case management reforms in regards to early identification of issues and believed it would be useful to take draft rules to the profession for feedback. She too though was ambivalent about changing JSCs but believed that some change to them may naturally evolve as a consequential result of other changes. Winkelmann J pointed out that there was no intention to abolish JSCs, but rather limit them. She also highlighted that the predominant view was that Associate Judges stay with them.

Dr Mathieson raised some points regarding the refinement of issues in writing, which the Committee agreed would have to be looked at later on in the process. Namely, what does Victoria do in terms of the refinements of issues in writing and what is their relationship with pleadings: do they supersede or complement each other?

The Committee agreed that a closer look at the case management material was needed but that presenting it to the profession would be beneficial. It was decided that Messrs Beck, Brown and Mills would work with the Chair, Asher J, Ms Gwyn and Justices Venning, Miller and Winkelmann on the issues. The Clerk is to organise and book venues for the presentations, and work with Paula Tesoriero on a budget for them.

6. Company representation

Justice Chambers spoke to his memorandum on company representation and whether it was time to revisit the rule in *Re G J Mannix Limited* [1984] 1 NZLR 309 (CA) by providing for rules relating to the representation of companies in court proceedings. If the Committee believed that it was appropriate to have it governed by legislation, the question is then what direction we should take as to the issue: whether to liberalise it or further restrict it. Chambers J noted that we are one of the few Common Law jurisdictions which does not have legislation on the issue and that at the moment it was very vague and judge-dependent as to whether non-lawyers were given a right of audience.

Justice Asher observed that raising this issue was an example of how much the Committee will miss Justice Chamber's lateral thinking and energy. Asher J remarked that this issue arises often, especially in an interlocutory context where a judge will have to make a decision on it in minutes. He believed that having it regularised would be sensible. However, he raised concerns as to Dr Mathieson's drafting of Chamber J's proposed rules. His Honour believed any rule as to whether a judge should grant leave for a company to represent itself should be discretionary to allow for flexibility according to the circumstances.

The Chair also raised concerns over having a mandatory rule of permitting representation. Although in favour of reform and codification of the rule, he was hesitant about the lack of ethical duties that lay litigants had to the Court and in particular, the absence of any duty to not mislead it. Judge Joyce and Mr Beck agreed that this issue raises wider philosophical issues, while Dr Mathieson noted that the underlying rationale of the decision in *Re Mannix* was to generally restrict representation to lawyers given that they were officers of the Court. Mr Beck brought up the issue of access to justice and whether it was appropriate for a company to be treated as different to an individual. The question of whether a company should be eligible for legal aid was also raised.

Given that deciding on the appropriate approach was a difficult question of balance, the Committee agreed that informal submissions on the issue should be collected. The Clerk is to prepare some comments on the issue for Justice Chambers to approve, which alongside the draft rules can then be circulated by means of the NZBA and NZLS's weekly e-newsletter. Submissions will be gathered and the item put on the agenda at next month's meeting for the Committee to establish which approach to take. Mr Beck noted that the reference to a company's seal should first be removed from the draft rules.

7. Marine and Coastal Area (Takutai Moana) Act 2011

Dr Mathieson explained the amending rule for the HCR which would be necessary in relation to this Act. The rule removes the need to seek leave of Court to commence an action by originating application under Part 19 of the HCR for a recognition order (or to vary a recognition order) and ensures that this is the default position for such an application under the Act. The current procedural position allowing a notice of proceeding and a statement of claim is unsatisfactory as it is inconvenient and unworkable in some cases.

Mr Brown expressed some concern about leaving something as contentious as this to an originating application and wondered whether there had been any analysis of it. In particular, Mr Brown was concerned as to the implications of what follows as, for example, discovery and cross-examination are dictated by the process that instigates the issue. Dr Mathieson answered by explaining that in many cases a statement of claim was not appropriate as it would not be clear who the Defendant is, plus the Act itself sets out its own code of procedure. Briar Charmley voiced that the Attorney-General was convinced that the correct method for this issue is by originating application and not by statement of claim. The proposed amending rules were a matter of urgency as currently iwi were using an inconsistent approach.

The Chair agreed that the proposal should go forward.

8. Form C2 of the High Court Rules and applications under s 175 Companies Act (agenda item 9)

Dr Mathieson reported that the amending rules were complete and could go into force the 1st February 2012.

9. Daily recovery rates and time allocations consultation (agenda item 8)

Everyone was comfortable with the consultation paper as it stands.

Justice Chambers suggested adding a point to the paper. He believed that one of the fundamental defects of the current civil justice system is the complexity and costs involved in enforcing judgments. Improvements needed to be made to make it quicker and to get full reasonable costs back from an obstructive debtor. His Honour wondered if the costs rules could be changed so that there is a presumption of increased costs in enforcement proceedings: an uplift of 50% on standard costs against a debtor would allow a more reasonable total recovery.

The Committee agreed that this was an important point and should be added to the paper as per Chambers J's suggestions to gather feedback on the issue. The Clerk is to add it to the paper before issuing it to the profession.

10. Interlocutory appeals and review of strike out/ summary judgment

The Chair noted that the sub-committee is in the process of being set up.

11. Criminal Procedure (Reform and Modernisation) Bill – Criminal Rules Sub-Committee

The Committee approved the appointment of:

- Chief High Court Judge (Chair)
- Ronald Young J
- Simon France J
- Judge Harding
- Judge Davidson
- Mr Philip Morgan QC (NZLS)
- Mr Jonathan Krebs (NZLS)
- Ms Sandy Baigent (NZLS)
- Mr Ken Johnston (Bar Association)
- Mr Cameron Mander (Crown Law)
- Mr Andrew Hampton (Ministry of Justice)
- Mr Peter Batchelor (Ministry of Justice)

The appointments of Dr Heather McKenzie as an independent advisor and Mr Stuart McGilvray as providing secretarial support were also approved.

12. General Business

Dr Mathieson updated the Committee as to the progress on class actions: priority 5 has been given to the Class Actions Bill. Attention was also drawn to the latest issue of the New Zealand University Law Review which has an article on class actions, as well as a judgment by French J on the issue.

The Committee approved the Clerk's suggestions for archiving consultation papers on the website and also putting up future submissions received. The fact that submissions are to be publically posted will be added to any future consultation papers issued. The possibility of a Rules intranet site on which meeting materials could be posted is to investigated and priced up.

Finally, Justice Chambers reflected on his time spent on the Committee and thanked all the Committee.

The meeting closed at 1.15pm.