THE RULES COMMITTEE
P.O. Box 180
Wellington

Telephone 64-9-969 5149
Fax 64-4-494 9701
Email: rulescommittee@justice.govt.nz

3 April 2012
Minutes/02/12

Circular No. 38 of 2012

Minutes of meeting held on 2 April 2012

The meeting called by Agenda/08/12 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 2 April 2012 at 10:00 am.

1. Preliminary

In Attendance

Hon Justice Winkelmann (acting as Chair)
Hon Justice Asher
Judge Doogue, Chief District Court Judge
Judge S Thomas
Judge Doherty
Mr Andrew Beck, New Zealand Law Society representative
Mr Brendan Brown QC
Mr Rajesh Chhana, Ministry of Justice
Ms Phoebe Dengate-Thrush, Private Secretary to the Attorney-General
Mr Bruce Gray QC, New Zealand Law Society representative
Cheryl Gwyn, Crown Law
Ms Angela Holmes, Ministry of Justice
Dr Don Mathieson QC, Special Parliamentary Counsel, Parliamentary Counsel Office
Mr Stephen Mills QC, New Zealand Bar Association representative
Mr Kieron McCarron, Judicial Administrator to the Chief Justice

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

Apologies

Rt Hon Dame Sian Elias, GNZM, Chief Justice of New Zealand
Hon Justice Fogarty (in the Chair)
Hon Christopher Finlayson, Attorney-General

Matters arising

Justice Winkelmann opened the meeting noting the apologies from the Chief Justice, the Attorney-General and the Chair. Given Justice Fogarty's absence, she explained that she would chair the meeting today.

Confirmation of minutes

Judge Doherty queried the way the discussion on the District Court Rules was reported in the minutes of the February meeting. In particular, he questioned the sentiment expressed in the phrase "All were in agreement with the Attorney-General's view that this general review is urgent [...]" as he believed that there were opposing views in the Committee. Mr Mills QC recollected that there was a general consensus that a broad review of the new District Court Rules was necessary, and that this was to include the objectives of the reforms. Judge Doherty expressed his opposition to any review of the fundamental objectives of the DCR.

2. Revision of Default Judgment and Formal Proof Rules (Agenda item 3)

Asher J explained that the old rules governing default judgment were anachronistic and did not reflect current practice in the High Court. The proposed regime was developed to bring the rules in line with practice, cure deficiencies in the current rules, and streamline the processes surrounding default judgment.

His Honour noted that the draft rules had been further considered at a sub-committee meeting on 12 March and that several minor amendments had been agreed. The sub-committee decided to retain the current definition of "liquidated demand", reinstate the rule whereby judgment for the recovery of land and chattels is treated the same way as claims for liquidated sums, and adjust the wording of r 15.9(3). Rule 15.9(5) was changed to allow a Judge at formal proof hearing to direct that a deponent give evidence and adjourn the hearing for that purpose (rather than automatically requiring deponents to attend). He also noted that Mr Brown QC had written an email outlining several good points that should also be incorporated.

The Judge noted that the resulting version of the draft rules (v 1.13) was circulated to all of the original submitters for comments on drafting. None offered further feedback and all appeared to indicate approval of the changes. Justice Asher believed that the draft rules were well thought through and should be approved by the Committee, subject to incorporating some of the suggestions made in Mr Brown's email. Justice Winkelmann stated her opinion that the draft rules were well-designed and internally coherent. The Committee was happy with the draft rules and approved them, subject to any minor amendments made by Justice Asher.

3. Case Management Reforms (Agenda item 2)

Dr Mathieson QC distributed the latest version of the draft rules (v 1.15) and explained that the main changes were to Schedule 5 and the definitions of "ordinary defended proceedings" and "complex defended proceedings" in r 7(1)(4). A revised Form G2 drafted by Mr Gray QC was also distributed to Committee members.

In regards to the definitions offered in r 7(1)(4), Justices Winkelmann and Asher also explained that the Auckland Pilot was up and running and that so far around 9 proceedings had been defined as "ordinary" and 2 as "complex". Those designated as complex will be managed under the draft rules by High Court Judges involved in the pilot scheme. The Judges and Dr Mathieson agreed that a more precise definition of proceedings type for case management purposes was not possible.

Dr Mathieson noted that although the changes to Schedule 5 appeared significant, the revised version in fact incorporated the substance of current Schedule but in more concise language. Dr Mathieson is to correct several typographical errors in the draft Schedule.

Mr Gray QC wondered whether if the distinction between ordinary and complex proceedings works in the Auckland pilot, there would be a separate commercial list. Justice Winkelmann agreed that the proposed regime could be understood as effectively commercial list management for all proceedings, but Asher J noted that the case management process will have less flexibility than the commercial list given that there is a weekly court for the commercial list and there will be no case management equivalent to this. Mr Gray also noted that with the commercial list, a party elects whether or not to put its proceeding on it whereas case management is mandatory.

The draft rules were then considered in some detail.

Judge Doherty questioned the current format of r 7.3(1) as well as the proposed new r 5.73, which would require the plaintiff to notify the Court when the statement of claim is served. His view that it was odd to not have the filing of the statement of defence as the trigger for activating the case management processes was shared by several Committee members. It was noted that the aim of inserting a time period ("not less than 45 working days") was educative and aimed at ensuring the prompt filing and service of statements of claim and defence. By listing "45 working days", the subclause sought to encompass the totality of the period within which statements of claim and defence must be filed. However, most agreed

that Judge Doherty's point was a good one and that for policy reasons the case management regime should be linked to a defended claim. The Committee then discussed ways of rewriting this rule to ensure that an appropriate timeframe is specified with the statement of defence listed as the trigger for case management. The sub-committee was to meet to discuss the best way to do this in a manner which ensures that a very prompt first defendant does not shorten another defendant's timeframe for filing. Justice Winkelmann noted that as a matter of practice the conference will not be scheduled until everyone has been served.

The Committee agreed that subclause (4) of r 7.3 should be changed to allow parties to file in a different order if they agree by adding the phrase "or in such other order as the parties agree".

Mr Brown QC raised his concern that a pedantic reading of Form G2 as currently drafted may be confusing in cases where there are multiple defendants. It was suggested that the phrase "If you file a Statement of your Defence [...]" could be reworded as a passive sentence along the lines of "Once any Statement of Defence is filed in the Registry you will be notified of the date and time of the first case management conference." Several other drafting points were noted in respect of the Form: the second line is to be changed to "you must file in this Registry of the Court" and on the fifth line the word "hearing" is to be deleted.

Regarding r 7.13A, Mr Beck queried how it is to be decided that an appeal is subject to the case management regime under the draft rules as well as how to reconcile r 7.13A with r 7(1)(8). Mr Brown also noted that r 7.13A refers to Schedule 6, which is unnecessary given the nature of appeals. He questioned whether linking appeals to case management as formulated in proposed rr 7.1 – 7.13 is appropriate. Justice Winkelmann agreed that the case management sub-committee needs to rethink r 7.13A. Justice Asher concurred and highlighted that the sub-committee will also need to work through Mr Brown's email and the points he raises, including whether r 9.8 should deal with rebuttal evidence before addressing non-responsive supplementary briefs.

Lastly, Dr Mathieson raised the issue of when the draft rules could come into force if approved. The Secretary stated that for the rules to commence on 1 August 2012, they would need to be approved within two weeks. Justice Winkelmann believed that the sub-committee will be able to resolve the issues discussed as none of them are policy decisions, and it is important to progress the draft rules given their long gestation. The Committee agreed that the sub-committee is to revisit the draft rules in light of the comments made at the meeting, with a view to circulating an amended version for the Committee's approval at the end of next week.

4. District Court Rules 2009 Reform (Agenda item 4)

Judge Susan Thomas introduced this topic by noting that the Chief District Court Judge's letter to the Chair (C 16 of 2012), written after a meeting with Justices Fogarty and Winkelmann, Judge Doherty and the Chief District Court Judge, proposes a framework and timetable for review. The letter outlines the possibility that the Legal Issues Centre at Otago

University help the District Court gather qualitative data from which the performance of the reforms could be assessed, including the canvassing of various stakeholders (such as self-represented litigants). It also suggests that the District Court Civil Committee immediately begins a review of the forms as well as undertakes a general consultation with the profession and interested parties on the Rules. This consultation process would last six months and allow for the impact of the recent amendments to be assessed. The results of the consultation would then be reported back to the Rules Committee along with proposals for a further review (if necessary). Judge Thomas will Chair this process.

Judge Thomas stressed that it was important to assess the impact of the recent amendments, which, in addition with revising the forms, may significantly solve many of the concerns previously raised. She also emphasized that undertaking qualitative research is necessary to understand how the Rules function in practice and that data on the Rules is currently lacking. Given these points, she believed that any review should be a more gradual process, initiated by letting people know that complaints have been noted whilst gathering feedback and monitoring the impact of the amendments. Judge Thomas then noted that the upcoming Triennial District Court Judges' Conference will additionally provide a valuable opportunity to gather feedback from the Bench on the Rules.

The Judge then asked for comments in respect of the letter's proposals, as well as people's thoughts on the scope of a review and whether the objectives of the Rules themselves are in question.

Asher J noted that the concern of the review would be to establish whether the original objectives and drivers of the reform have been met. Justice Asher believed that there needs to be a general review of the Rules including the drivers and objectives of them, in line with the comments received from the profession and particularly the NZLS, and one that is started without undue delay. However, he stated that while the profession was just one of many interested parties, it had nonetheless expressed strong dissatisfaction with the Rules and that it was appropriate to have a full consultation round. He believed that this process could be initiated by sending out a paper asking for submissions. The paper would set out the original changes made by the reform and explain their context through background information. The sub-committee could then consider the submissions and come back to the Committee to discuss the next steps. Mr Beck agreed with His Honour that a comprehensive review of the Rules is necessary.

Judge Doherty disputed that there was strong dissatisfaction with the Rules and that, excepting the NZLS submission, little complaint had been formally submitted. In regards to the motivation behind the reform, he stated that two of the fundamental aims of the reform were proportionality (given that the average civil claim in the District Court concerns less than $30,000) and access to justice. The latter was particularly relevant as approximately 50% of claims involve a self-represented litigant, at least in the initial stages of the claim. He believed that is as yet unclear that these reforms have not been met, and that any problems with the Rules will be rectified by the recent amendments along with a rethink of the forms. Judges Doogue and Thomas agreed with this analysis. The Chief District Court Judge stated that anecdotally self-represented litigants liked the new Rules,

although Judge Thomas conceded that it could be questioned whether the Rules catered too much to self-represented litigants.

Justice Winkelmann commented that the sub-committee may have to construct a more interactive consultation process than usual, particularly if self-represented litigants are to be engaged. She also warned that care must be taken to ensure that any consultation is properly contextualised and information such as the average amount of claims and the number of self-represented litigants is set out. Her Honour advised that it will take some time to construct a consultation paper and genuinely identify the issues that need to be addressed. Judge Thomas agreed that the process should be interactive and that the recent case management fora could be used as a model from which a formal consultation paper is devised. In summing up, Justice Winkelmann stated that there should be a first principles review and that the sub-committee is to construct a discussion paper and report back to the Committee at the June meeting.

5. Developing a Protocol for Electronic Files (Agenda item 6)

Justice Winkelmann welcomed Justice Clifford and asked that he speak to the Committee on his memorandum suggesting that a protocol for "electronic case files" is developed.

Clifford J noted that he came to the Committee as Chair of the Inter-Bench IT Committee ("IBIT") with a modest proposal. As parties are already furnishing the Court with i-Pads in civil cases to act as "electronic case files" (and as Judges are also privately acquiring them to facilitate their workload), he believed it was timely to think about issuing a protocol that provides a commonly understood way and manner in which electronic files can be used in civil trials and appeals. Given that the Court retains a Court paper-based file where documents are stamped to prove registration and authenticity, he stated that such a protocol could be developed relatively autonomously by a suitable working party. He proposed that the Rules Committee take on such a project as in many respects it follows on from the work the Committee has already done with the new discovery rules, particularly its creation of an electronic listing and exchange protocol. Justice Clifford considered that such a protocol does not need to be promulgated as a rule; it could simply be issued by means of a letter from the Chief High Court Judge to the profession. This would allow it to be easily amended and updated as technology progresses. He suggested that Laura O'Gorman and David Goddard QC be included in the project.

The Committee agreed that it was a good idea and were happy for such a protocol to be developed under its auspices.

Justice Winkelmann noted that while such a protocol was already in existence in Australia, our new listing and exchange protocol provides an excellent benchmark from which the Committee can draw on. Existing web-based programs, like those used by Crown Law, were also discussed. Mr Gray remarked that further work needs to be done to develop management software capable of allowing electronic libraries to be shared in Court and annotated on by parties. This type of software would need appropriate firewalls to be built

in to ensure that certain documents could remain inaccessible as necessary (i.e. where there is a party in breach) and annotations stay private. Clifford J agreed that such technology needed to be developed but he reiterated that his proposal was much more modest.

Winkelmann J directed that Laura O'Gorman and David Goddard QC were to be invited to join part of a working group to develop facilitative guidelines for managing documents electronically in civil cases. Justice Asher is to Chair the group with Ms Gwyn and Mr Gray to also be members. Justice Clifford will be called on as needed.

6. Proposed Amendments to High Court Rules and the District Court Rules 2009 (Agenda item 7)

The acting Chair then welcomed Ms Angela Holmes to speak on her letter to the Committee of 23 March 2012. The letter outlined several changes proposed by the Ministry of Justice resulting from the passing of the Courts and Criminal Matters Bill in 2011. These changes are intended to clarify the inter-relationship between the seizure and sale of secured property by the courts as well as security interests registered against this property on the PPSR.

Before turning the floor over, Justice Winkelmann questioned whether the Ministry's proposed changes can be provided for in rules rather than regulations. Ms Holmes stated that the Parliamentary Counsel Office and Mr Tony Mortimer had been consulted and that both had advised that the content can be provided for in rules. Nonetheless, there was some discussion about whether the rules might be ultra vires, with Dr Mathieson expressing concern that they may be changing property law rules with rules of procedure. Several members also conveyed unease with how Ms Holme's letter proposed defining some of the DCR forms as approved rather than prescribed forms.

The general consensus was that the Committee needs to investigate these proposals further given that they involve policy changes. The District Court Civil Committee is to consider the changes in relation to the DCR, while the Chair, Mr Brown, Justice Winkelmann, Tony Mortimer and Dr Mathieson are to look at them in respect to the HCR. Ms Holmes is to provide background information and assistance to the respective groups, which are to be interlinked to each other before reporting back to the Committee at its June meeting.

7. Wills Act Amendments (Agenda item 5)

Dr Mathieson raised this issue by stating that he had read through the proposed amendments and believed them to be uncontroversial and necessary. He confirmed that Registrar Earles had checked and approved the changes in his capacity of technical adviser. It was decided that the rules would be approved subject to any issue being raised for circulation by 20 April 2012. Mr Chhana requested that the draft rules be incorporated with the bundle of HCR reforms when they are ready for Cabinet approval.

8. Law Commission Review of the Judicature Act (Agenda item 8)

Justice Winkelmann drew the Committee's attention to the Law Commission's Review of the Judicature Act 1908 and in particular Chapter 8 of the Review, which lists different options as to how to deal with the High Court Rules. She noted that submissions on the issue are due on 27 April and asked whether the Committee wishes to make submissions.

Dr Mathieson stated that the Review raised very important and difficult constitutional issues and that it was undesirable to reach a quick view on them. He proposed writing a discussion paper that lays out the implications of the different options suggested in Chapter 8. However, he believed that any submission should also examine other subjects that potentially involved the Committee's work (e.g. specialisation of judges, contempt of court, McKenzie Friends, self-represented litigants, commercial list).

It was agreed that Dr Mathieson is to draft a discussion paper within the next week or so and limit it to Chapter 8 issues of the Commission's Review. This paper could then be used as the basis for himself and Justice Fogarty to draft submissions to circulate to the Committee. The view was that it was very important for the Committee to engage in these issues and Justice WInkelmann also asked Mr Mills to raise the matter with the NZBA. If individual Committee members have any comments or views they are to send them to Dr Mathieson and the Chair by 20 April.

9. Other matters

Ms Dengate-Thrush raised a point for the Attorney-General in regards to HCR r 5.1(5) ("Identification of proper registry"). The Attorney-General would like this rule to be amended so that the interests of justice and administrative reasons can be taken into account in deciding whether a case should be transferred to a different registry. Mr Chhana observed that such a change would allow the Court to move a case to another registry even if it was against the wishes of the parties. Dr Mathieson and Justice Winkelmann both saw this as a significant change, which should be tabled for discussion when Justice Fogarty and the Chief Justice were present. The Clerk is to review other jurisdiction's rules on this matter.

Lastly, Dr Mathieson noted that the Class Actions Bill had been moved up to a Legislative category 4 and, while this category was low priority, the Bill should progress to a select committee sometime in 2012.

Meeting finished at 1 pm.