THE RULES COMMITTEE
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9 August 2010

Minutes/03/10

Circular No. 46 of 2010

Minutes of meeting held on 2 August 2010

The meeting called by Agenda/03/10 was held in the Chief Justice's Boardroom, High Court, Wellington, on Monday 2 August 2010, at 9:45 am.

1. Preliminary

In Attendance

Hon Justice Fogarty (in the Chair)
Hon Justice Chambers
Hon Justice Asher
Judge Joyce QC
Judge Doherty
Ms Cheryl Gwyn, Crown Law Office
Mr Brendan Brown QC, New Zealand Law Society representative
Mr Andrew Beck, New Zealand Law Society representative
Mr Andrew Hampton, Ministry of Justice
Mr Roger Howard, Ministry of Justice
Dr Don Mathieson QC, Special Parliamentary Counsel, Parliamentary Counsel Office
Mr Ian Jamieson, Parliamentary Counsel Office
Mr Kieron McCarron, Judicial Administrator to the Chief Justice
Ms Briar Charmley, Private Secretary to the Attorney-General

Mr Patrick Davis, Secretary to the Rules Committee
Ms Sophie Klinger, Clerk to the Rules Committee

Apologies

Rt. Hon Dame Sian Elias GNZM, Chief Justice of New Zealand
Hon Justice Winkelmann, Chief High Court Judge
Hon Justice Stevens
Hon Christopher Finlayson, Attorney-General
Mr Hugo Hoffman

Confirmation of minutes

The minutes of the meeting of Monday 31 May 2010 were confirmed with one amendment:

> Under item 8 on page 8, after "between", "Tauranga" deleted and "Hamilton" inserted.

2. Duty of parties to meet purposes of the Rules and counsel to assist

The closing date for submissions to this consultation was 7 May 2010. The Chair invited comment on the submissions received.

Ms Charmley reported on behalf of the Attorney-General that he had been persuaded by the submissions from the profession, and in particular those of the New Zealand Law Society and the New Zealand Bar Association; he considered it was necessary to tread carefully on this issue.

The Chair observed that this topic was going to be discussed at the upcoming New Zealand Bar Association annual conference where the Attorney-General was speaking, and it would be useful to defer decision-making until after the conference. The Chair considered that a possible solution may be partial reform of a more limited nature than contemplated in the consultation paper, which may satisfy the concerns of the Law Society and the Bar Association (and preserved the right of parties to go to trial). A further issue was that reform of parties' and lawyers' duties were going ahead in Australia and it was worth considering whether it was appropriate to have different sets of responsibilities across the two jurisdictions.

Judge Joyce noted the point in Dr Zondag's submission that part of the problem is that judges need to take a more determined and rigorous approach (which was a common theme of the submissions). It was also difficult to get parties who have come to court to cooperate, and what was required was management, including enforcing compliance with pre-trial orders.

The Committee concluded that it was appropriate that the topic be retained on the agenda, but that further discussion and action should be deferred until the Attorney-General, the Chief Justice, Justice Winkelmann, and Justice Stevens were available.

3. Electronic discovery

Justice Asher reported from the sub-committee on electronic discovery. The external parties brought in to assist include Ms Laura O'Gorman (partner at Buddle Findlay), Ms Lynn Holtz (project service manager at Chapman Tripp), and Mr Andrew King (litigation support manager at Bell Gully); Justice Chambers is also involved. The basic view of the external parties is that all discovery should be done electronically, since virtually all communications between lawyers and parties will have been electronic in the first place.

The group has met three times and is preparing an additional draft rule on cooperation in discovery. The key would be for the parties to achieve reciprocity in the nature and format of information to be exchanged. There are also two protocols (or checklists) being developed, one that will have general application, and then a further advanced protocol for electronic discovery. Those unable to participate in electronic discovery will also be provided for. It was important not to add to costs in this process.

Ms Gwyn observed that at Crown Law, despite initial resistance, moving to an electronic system for discovery had ended up cheaper than using a paper system. An electronic court environment had been used twice in the High Court and a number of times in the Human Rights Review Tribunal. Therefore, having electronic documents was useful beyond the discovery process.

Mr Hampton commented that from a systems perspective there were three broad approaches: the parties develop a shared database through cooperation; using a database system from a third party provider; having a system administered entirely by the court. The last approach was unlikely to be adopted as it would be very expensive.

The group will present the draft rule on cooperation in discovery, along with the two protocols, at the next meeting on 4 October. The Chair also made reference to the civil litigation system in Singapore; the Clerk will made enquiries about discovery processes in that jurisdiction. Contact will be made with the Singapore registry through Mr Hampton.

4. Court of Appeal (Criminal) Amendment Rules 2010: Rule 12A (Complaint against trial counsel)

The Secretary reported that concurrence had been received for the amendment to this rule. Further, the amendment was approved by the Cabinet Legislative Committee on 22 July 2010 and will come into force on 1 September. Dr Mathieson commented that the final version on which the Committee gave concurrence reflected the Chief Justice's views.

5. Form C 2 of the High Court Rules and applications under section 174 Companies Act

Dr Mathieson reported on discussions with Associate Judge Faire. A new Form C2, reflecting agreement between Dr Mathieson and Associate Judge Faire, is included in the High Court Amendment Rules (No 2) 2010. This redrafted form introduces a requirement for particulars; applications under s 174 of the Companies Act 1993 are retained in Part 31 of the High Court Rules.

The Committee discussed the draft Form C2 along with Mr Beck's memorandum, which argued that it remained necessary to move s 174 Companies Act applications from Part 31 to Part 18 of the High Court Rules. Mr Beck considered that s 174 applications clearly did not belong in Part 31 and should properly be located in Part 18.

The Committee agreed that Justice Asher will liaise with Associate Judge Faire to try to obtain a consensus on the applications being moved out of Part 31, based on Mr Beck's arguments. It may be useful to find out whether Associate Judge Faire's view is shared by the other associate judges. Justice Asher will notify Dr Mathieson of the outcome of his discussion and any drafting that is required. Any draft rules will be sent to Mr Beck for review. The matter will be brought back to the Committee at the next meeting unless a clear consensus emerges. Dr Mathieson noted that if Form C2 is retained in Part 31, then further consideration of changes to the form would be needed.

6. Tauranga/Rotorua registries issue

Changes to High Court Rule 10.1 were approved by the Committee at the last meeting, to resolve the problem of the imbalance of work between Rotorua and Hamilton; the new rule provides that cases can be heard at either registry. The Committee approved the form of the amendment, which will be included in the High Court Amendment Rules (No 2) 2010.

7. High Court costs allocations

Mr Beck and Mr Brown reported on proposed restructuring of costs allocations in the High Court Rules. They provided a draft revised Schedule 3. This included fixed periods of preparation regardless of whether the hearing went ahead. Another feature was that they had specified for bands A, B, and C, a particular duration of trial (1-2 days, 3-5 days, and 6+ days).

Justice Chambers suggested that the lengths of time should not be listed behind the bands as they apply only for specific items on the schedule. He also proposed that wording along the lines of "… fixture *of the hearing being prepared for*" needed to be added to the statement explaining the different categories of hearing/trial duration, as the length of time relates to, for example in item 22, the interlocutory hearing, not the length of the substantive hearing. Finally, he enquired about the items involving second counsel, where a 50% figure was listed, whether the 50% figure referred to 50% of the figure for appearance for first counsel. Dr Mathieson confirmed that item 4.16 provided that the figure related to appearance for principal counsel; this wording would be retained.

The Clerk will draft a consultation paper outlining the changes to the schedule and providing background on the reasons for the review and problems that have been experienced with the current schedule. The draft consultation paper will first be sent to Mr Beck and Mr Brown for their comments before going out to the profession. The Committee considered combining this consultation with review of the daily recovery rates. The Clerk will liaise with Ms Margaret Bryson from the Law Society over the desired timing of the next review of the rates. The Chair thanked Mr Beck and Mr Brown for their work on this topic.

8. High Court Rules amendments raised by registries and others

Dr Mathieson reported on the amendments set out in the High Court Amendment Rules (No 2) 2010, which have been completely agreed between Dr Mathieson and John Earles, but are still subject to John Earles' final checking. They mainly concern small changes to the forms that are needed by the registry for practical purposes. The Chair congratulated Dr Mathieson for his work in preparing the amendments.

These amendment rules may be combined with changes the Rules Committee is planning in other areas in early 2011, or may proceed earlier if the other reforms are not finalised in time. The Committee will attempt to finalise the other reforms by late 2010 or early 2011 (including consultation as necessary).

The Committee noted that the amendment rules contain a form of a general court order using conventional wording; removing or updating some of the content was considered, but the Committee decided to retain the standard wording.

Mr McCarron proposed that the Rules Committee could consider adopting a procedure similar to a statutes amendment bill, that is, an annual set of changes, to occur at a specified time each year, that the profession would expect and could be encouraged to contribute to. This may help with communication with the profession and would address some concerns about "tinkering" with the Rules.

9. Applications for pecuniary penalty orders

The Committee considered the letter received from the Law Commission on applications for pecuniary penalty orders, which invited the Committee to consider whether it was necessary to develop specialised rules for such applications.

The Committee considered that specialised rules were not necessary and it was not appropriate to move these applications into Part 18; indeed the procedure for ordinary proceedings was usually desirable for these applications. However, there were concerns about the references to the rules in the proposed wording of clause 42(6) of the Securities Trustees and Statutory Supervisors Bill. In particular, the reference to "usual" in "usual rules of court" should be removed; also, the statement about the standard of proof should be set out in a separate sub-section.

The Committee decided that, rather than making a submission to the Select Committee or writing to the sponsoring department, Mr Brown QC will contact Mr George Tanner QC directly as a representative of the Committee, to inform him of the discussions on his letter and raise the concerns identified over the form of clause 42(6).

10. Progress of the Class Actions Bill

Justice Chambers requested an update from the Ministry of Justice regarding the progress of the Class Actions Bill. The Secretary will make enquiries with Mr Patrick McCabe and report back to the Committee.

11. New Zealand Bar Association seminar on best practices in litigation

The Chair reported that he had been part of a panel at a NZBA/IPSANZ seminar on best practices in litigation on 30 July 2010. There had been a number of straw polls conducted by the moderator. One of interest demonstrated that all but one of the practitioners present were in favour of leading evidence orally in circumstances where there is no contemporaneous record (while written briefs would still be exchanged). The sole dissenter had commented that this could lead to management problems for the trial judge.

The moderator of the discussion was Justice Annabelle Bennett of the Federal Court of Australia, who commented on the difficulties and delays resulting when directions made at directions hearings are not complied with by the parties. Other topics discussed at the seminar included the docket system and specialisation of the Bench and the Bar.

12. Commercial list

Dr Mathieson queried whether the Committee wanted to address the continued utility and relevance of the commercial list. The Chair commented that this topic was included as part of the Chief High Court Judge's review of case management processes, so it was not necessary for the Committee to deal with it at this point.

13. District Court Rules

Justice Asher commented that it would be useful to have some feedback about the District Court Rules in a few months' time. Judge Joyce stated that the District Court judges would report at the end of the year once there was more information available about how the new rules were working. From the observations of the court staff, litigants in person seem to be finding the new process user-friendly. Justice Chambers enquired about transfers from the District Court to the High Court. The Clerk and the Secretary will obtain information about this for the meeting on 29 November.

14. Sub-group on rules regarding applications under the new foreshore and seabed legislation

Ms Charmley proposed on behalf of the Attorney-General that the Committee establish a sub-group to address changes to the High Court Rules to cater for applications under the new foreshore and seabed legislation, as applications will be made to the High Court. The Bill will be introduced in August. The Chair will liaise with the Chief High Court Judge over setting up the sub-group and if necessary this will be convened before the next Rules Committee meeting on 4 October.

The meeting closed at 12.45 pm.