THE RULES COMMITTEE
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23 August 2011

Minutes/04/11

Circular No. 57 of 2011

Minutes of meeting held on 22 August 2011

The meeting called by Agenda/03/11 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 23 August 2011 at 9:45 am.

1. Preliminary

In Attendance

Rt Hon Dame Sian Elias, GNZM, Chief Justice of New Zealand
Hon Justice Fogarty (in the Chair)
Hon Justice Winkelmann
Hon Justice Asher
Hon Judge Joyce QC
Hon Judge Doherty
Mr Andrew Beck, New Zealand Law Society representative
Mr Ross Carter, Parliamentary Counsel Office
Ms Briar Charmley, Private Secretary to the Attorney-General
Mr Tony Fisher, Ministry of Justice
Ms Cheryl Gwyn, Crown Law Office
Ms Angela Holmes, Ministry of Justice
Mr Roger Howard, Ministry of Justice
Mr Ian Jamieson, Parliamentary Counsel Office

Ms Anna Johnston, Ministry of Justice
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
Ms Pam Southey, Ministry of Justice
Ms Paula Tesoriero, Ministry of Justice

Dr Caroline Anderson, Clerk to the Rules Committee
Ms Rita Lowe, Secretary to the Rules Committee
Ms Patricia Ieong, Incoming replacement Clerk to the Rules Committee

Apologies

Hon Chris Finlayson, Attorney General
Judge John Walker, Acting Chief District Court Judge
Mr Brendan Brown QC

Confirmation of minutes

The minutes of the meeting of Monday 13 June 2011 were confirmed.

Matters arising

The Chair opened the meeting by welcoming Ms Julie Nind and Ms Anna Johnston from the Ministry of Justice and Mr Ross Carter from the Parliamentary Counsel Office who have all been working on the procedural regulations and rules necessary to effectively implement the Trans-Tasman Proceedings Act 2010. The Chair further welcomed Ms Angela Holmes from the Ministry to present on the issue of amending rules in respect of the Criminal Proceedings (Enforcement of Fines) Rules 1967. Because of these parties' attendance, the Chair noted that Agenda items six and four would be dealt with first. Lastly, Patricia Ieong was introduced to the Committee as the interim replacement Clerk for the last quarter of 2012.

2. Trans-Tasman Proceedings Act – Rules and Regulations (Agenda item no. 6)

Ms Cheryl Gwyn, who has chaired the sub-committee on this topic, spoke to the Committee about the work done by the group since the last meeting. She observed that the sub-committee had met in Wellington in July with the addition of David Goddard QC and examined the proposed rules and regulations carefully. Ms Gwyn noted that while the original intention of the parties was to have regulations rather than rules, the empowering provisions of the Trans-Tasman Proceedings Act 2010 are not sufficiently broad to allow for everything to be included by means of regulations. However, the resulting composite nature of the documents meant that they were both easier to understand and more accessible, whilst also meeting the goal of consistency with the Australian courts wherever possible. Ms Gwyn noted that the substantive changes that had been made to the draft rules and regulations since the June meeting were set out in the appendix of Ms Julie Nind's

letter of 15 August 2011. Ms Gwyn turned the floor over to Ms Anna Johnston to speak to these changes.

Ms Johnston stated that there were two main substantive points noted in the appendix. The first was to introduce by rule 16 of the Trans-Tasman Proceedings Regulations and Rules 2011 the power to review Registrar's decisions on an application to register an Australian judgment. The second is the newly proposed rule 7 (new HCR 5.36A). This rule would allow an Australian solicitor, if authorised by a defendant served in Australia, to file an appearance and response document or other specific document (e.g. an application for a stay or leave to appear remotely) if given leave to appear remotely under the TPPA. In regards to this latter rule, Ms Johnston stated that our Australian counterparts have advised that Australia may not be in a position to enact a reciprocal provision at this stage as it would involve legislative change at the Federal level (due to the particular definition of "lawyer" in the Federal rules), as well as changes to each individual Territory and State rules. Nonetheless, the sub-committee was of the view that New Zealand should progress this rule due to the real benefits it makes towards access to justice, as well as how it supports the overall policy behind the Trans-Tasman scheme.

The Chair expressed some concern that there needed to be true reciprocity with the Australians over this last rule, especially given its policy ramifications. Similarly the Chief Justice queried whether it was sensible to pass a rule before the Australians had joined in, particularly one that involved an important right of audience. Ms Nind noted that it was a very limited and narrow right, and that the same right for New Zealand lawyers to appear remotely will be enacted in Australia, albeit at a somewhat delayed date.

The Chief Justice believed that the rules should be passed but only come into effect in a staged and ready way when we were assured of full reciprocity. She asked whether we have seen what the draft documents that the Australians are working on. Ms Nind replied that the Federal Court has promulgated rules very recently. Ms Nind noted, however, that while the Australian draft regulations are very consistent, if not identical, with their New Zealand counterparts, there are differences in the rules. This difference though is largely a matter of authorial drafting and context as the content is essentially the same (for example, the New Zealand rules are much more detailed). Ms Nind remarked that in fact the Australians were likely to look towards our draft rules as a model, and that the core of reciprocity is found in the Acts. The primary point of the rules and regulations are to support the legislation already enacted. The Chief Justice then asked whether there had been any judicial exchange on this issue, perhaps by means of the Harmonization Committee. The Chair explained that most of the dialogue on this issue was with Ms Johnston and Mr Carter and their respective Australian counterparts, and that putting things through the Harmonization Committee is inevitably a lengthy procedure although potentially a good method in this case. Ms Gwyn questioned what the practical consequences of delay would be in respect to this issue. Ms Nind responded that everything would have to be deferred, which may result in pushing the timeframe out to March next year due to the forthcoming election. Eleven documents will need to be passed. Upon Asher J questioning whether it was realistic to expect that the Australians will be in a position to implement their own rules and regulations at this date, both Ms Nind and Ms Johnston stated their belief that it was.

It was decided that the Chief Justice was to speak with the Chief Justice of the Federal Court of Australia, Hon Justice Patrick Keane, on the issue, and that the result of their discussion could be reported to the sub-committee on this topic. The sub-committee is to then reconvene and consider the issues after receiving advice from the Chief Justice.

The Chair asked Ms Johnston whether there were other points which should be brought to the Committee's attention. She replied that the last point relates to the proposed Evidence (Trans-Tasman Service of, and Compliance with, New Zealand subpoenas and Australian subpoenas issued in Criminal Proceedings) Rules 2011, and specifically access to court files. The draft criminal proceedings rules can be contrasted to HCR 9.60, which provides that an application for leave to serve a subpoena in Australia is to be made by originating application, and that the file is to be kept separately from the file for the main proceeding. Under this rule the application for leave to file may not be searched by the other party to the main proceeding. The apparent rationale for this was the importance of preserving the possibility of producing a secret witness. Unlike HCR 9.60, the draft criminal proceedings rules mean that although applications must be made without notice, the other party/ parties involved could find out that a subpoena has been issued (and for whom it was issued) by searching the court file. Ms Johnston raised the issue that the Committee may want to reconsider whether the current provisions in HCR 9.60 are necessary in a civil context given the wider trend of increased disclosure obligations.

Mr Stephen Mills QC put forward a question about the consistency of the forms in the draft Trans-Tasman Proceedings Regulations and Rules 2011. Regulations 6, 14, and 19, and r 7 all use the word "must" suggesting that use of the specified forms is mandatory, whereas reg 9 merely prescribes that the corresponding form "may (but need not) be" used. Mr Carter explained that all the forms are caught by reg 4. This provision allows all the forms in the Schedule to be varied as the circumstances of a particular case require, and holds that only substantial compliance with the relevant form is required. However, reg 9 goes further in being a purely optional form, most analogous to the writ of habeas corpus in the Habeas Corpus Act 2001. The Chair suggested that perhaps the sub-committee could look at this point as well.

Lastly, the Chair expressed his thanks to the sub-committee, and particularly David Goddard QC for joining it, as well his gratitude to Ms Nind, Ms Johnston and Mr Carter for all their hard work.

3. Criminal Proceedings (Enforcement of Fines) Rules 1967 (Agenda item no. 9)

Ms Angela Holmes from the Ministry talked to the letter circulated on this issue (C 54 of 2011). She explained that the Courts and Criminal Matters Bill, passed July 2011, amends the Crimes Act 1961 and the Misuse of Drugs Amendment Act 1978 to authorise High Court fines and reparation as primarily enforced under Part 3 Enforcement of Fines of the Summary Proceedings Act 1957. This will give the High Court access to the wider range of tools that the District Court currently has, while retaining the current orders it has. In addition, more power will be extended to registrars in respect to enforcing fines including,

for example, the ability to make a decision on the amount deducted from an offender's account as well as the timeframe of payment. The Ministry aims to implement its policy in late November 2011, which would require that the existing rules governing the criminal enforcement of fines in Criminal Proceedings (Enforcement of Fines) Rules 1967 are revoked as superfluous.

The Chief Justice wanted to gauge whether these rules would have any substantive impact, although the Chief High Court Judge was comfortable that the changes were largely procedural. The Chair explained that the Committee has a policy that even though the general content of proposed rules may be agreed upon, it must nonetheless take responsibility to consider each rule unless a sub-committee on the issue is personally satisfied as to the specific content and wording of each rule. As such, it was decided that a sub-committee on this issue was to be convened, consisting of Ms Holmes, a nominee from the NZBA, and, if agreeable, His Honour Justice Ronald Young. Given the timeframe for concurrence, it was decided that the sub-committee was to report to the Clerk, who in turn is to ensure that the Chief Justice is comfortable with the rules as drafted.

4. Discovery (Agenda item no. 2)

Justice Asher reported to the Committee that by Friday 19 August, the working group had concluded going through the final submissions received and made changes to the rules resulting in the draft version 1.20. He thanked Dr Mathieson QC for his hard work and dedication, especially in having to have made changes in such a short timeframe. Regarding the submissions received, he noted that nine had been received, with the comments from the NZBA and Bell Gully of particular help. Overall, the comments received were very constructive and positive, and as a result a dozen or so drafting changes had been made. In accordance with the tenor of the last meeting, Asher J requested that the Committee approve this version.

Dr Mathieson noted that the absolute deadline for finalising the documents and having them sent out for concurrence is Monday 29 August. He also remarked that the consultation process for these rules has been exhaustive.

Two rules were then discussed by Dr Mathieson.

The first was the continued inclusion of a preservation of documents rule (draft r 8.3). He stated that one of the drafting changes made to this rule reflects the change from a person to a (prospective) party to avoid the situation where an employee will be held personally liable for a company's breach. He noted that although r 8.3 was not accompanied by a parallel obligation on solicitors to ensure that the obligation is met, he believed that the imposition of such a duty would be appropriate. However, Dr Mathieson observed that the sub-committee viewed that imposing such an obligation was substantial enough to necessitate consultation with the profession before it could be included in the rules. Justice Winkelmann remarked that a lawyer's professional obligations would surely cover this situation anyway. There was some discussion as to whether such a rule corresponded with any existing common law duty. The general view was that it did not but regardless of this

fact, the HCR cannot be read as abrogating any other statutory duties or general duty of care.

The second discussed by Dr Mathieson was the rule governing initial disclosure (draft r 8.4). Dr Mathieson explained that the phrase "principal documents" had been settled upon after a long discussion, during which Chambers J had been very emphatic that there will invariably be a large variation in how lawyers interpret "principal" and how they approach their duties under this rule. Where there is any deficiency with initial disclosure, this deficiency will be rectified in the ordinary discovery that follows. As a result, the rules mean that when initial disclosure is done badly it will not be fatal. However, when done well, initial disclosure will be very valuable.

The Chair stated that it was important to workshop the rules, given that many practitioners did not fully appreciate the flexibility of the system, or that it was based on proportionality and appropriateness to each case. The Committee understand that the reforms are challenging and will take time to embed. Workshops were being organised by the NZLS, but the Chair felt that it was important to stress that the standard and principles inherent in these rules will be ultimately decided by judges.

Judge Doherty noted that as the District Court Rules will need to be amended to refer to the new HCR if passed, Mr Ian Jamieson had prepared draft amendment rules. On this point, Dr Mathieson also questioned whether the new discovery regime of these draft rules should be drawn to the attention of other courts and tribunals. The Chief Justice agreed that this should be done.

The Chief Justice believed that the Committee should approve these rules and observed that they represent a brave and challenging plan, and one necessary to break the current Peruvian Guano test for discovery. She also acknowledged the tremendous work that has been done by the Chair, Asher J, Dr Mathieson, and the profession towards reforming discovery.

Justice Fogarty remarked that in fact the reform has involved a cast of thousands and has certainly been the most intensive process the Committee has faced during his tenure as Chair. He hoped that at the next meeting he would be able to put on record his thanks to all who had been involved in the process.

As there was consensus, the Chair stated that this set of rules was to move forward to concurrence. However, discovery is to remain an item on the agenda until the next meeting and the working group is to continue monitoring the rules and looking towards their implementation through workshops.

5. Case Management (Agenda item no. 3)

Justice Winkelmann remarked that the first case management forum was to take place the next day in Christchurch (23 August) and that four more have been planned for Dunedin, Hamilton, Wellington and Auckland in that order. The forums are being chaired by herself,

with Justice Miller, other High Court judges, and the Committee's representatives from the profession also presenting.

The forums will discuss the possibility of a more tailored form of case management, which will have a later first conference. Case management will act in a triage-like way whereby short causes are more lightly managed but complex causes will have more intensive management involving an issues conference.

Her Honour noted that the response of the profession has been very encouraging, and that hopefully the forums would generate an instructive and useful discussion.

This item is to continue to appear on the agenda.

6. District Court Rules 2009 Reform (Agenda item no. 4)

Judge Joyce QC referred to his memorandum on this topic circulated the preceding Friday. Alongside Judge Doherty, Ian Jamieson, and the Chair, the Judge has worked on amending the District Court Rules and drafted a set of amendment rules that has been circulated to the Committee (v 2.16). His Honour summarised the proposed changes as:

- Reducing the time period from thirty to twenty days for rr 2.12, 2.14, 2.15, 2.22, 2.27, and 2.30. It has emerged from practice that the profession would prefer a shorter period for these rules.
- Amending pleadings by relaxing the current restrictions on them in the pre-pursuit process through the addition of two new rules. These proposed rules would allow the pleading to be amended in cases where a plaintiff has either miscalculated the sum for which she/he wants judgment or where judgment for a different amount is later sought.
- Extending the existing rules to make the procedure easier for a plaintiff seeking judgment in case of admission of facts, or lack of defence.
- Relaxing the existing restrictions on the availability of summary judgment by providing a new procedure for any proceedings under the principal rules (excepting appeals), as well as for the enforcement an agreed debt under r 1.7 and the recovery of a debt under ss 23 or 24 of the Construction Contracts Act 2002. The Judge noted that one feature of the changes would be that a party who seeks but does not receive summary judgment will be prima facie liable for indemnity costs.
- Providing a form for freezing orders that is based on form G 38 of the HCR. His Honour noted that the current DCR inadvertently excluded such a form.
- Providing new forms as a necessary consequence of the changes made in the proposed rules, as well as correcting several practical issues that have arisen through experience with them.
- Providing for other matters, such as bringing back cover sheets to all pleadings, and the specific requirement that principal documents must be provided upon request to the other party/ parties.

Ms Paula Tesoriero stated that although she had read through the drafts and memoranda circulated before the meeting, she would like to examine in some detail the changes on a policy and operational level, plus have the ability to assess how any changes would best be passed through parliamentary processes. The fact that the sub-committee proposed at the last meeting had yet to be activated was noted. There was then some discussion as to how urgent it was to pass through the reforms, particularly those relating to the amendment of pleadings and the ability to enforce a Construction Contracts Act remedy. The Chair believed that a sub-committee should be convened and could prioritise from the proposed rules those that were urgent and stand-alone to ensure they were passed separately and speedily. However, he believed that certain changes (for example, the issue of indemnity costs) should be more considered and perhaps consulted on. The Chief Justice argued that any sub-committee on this topic needed to be engaged in reviewing the rules in their totality as well as in an in-depth manner. She thought that it was better to have a smaller sub-committee to do this which could then report back to the Committee. Asher J agreed that a smaller sub-committee would be preferable, and that it was a sensible to have it prepare a consultation paper to go out to the profession on the issues. Winkelmann J expressed some disquiet that such a consultation paper should not necessarily be limited to what we consider are the issues, and that it may be appropriate to have a more formal and effective consultation.

In the end a more pared down sub-committee was agreed upon, consisting of Judge Doherty, Judge Joyce QC and a nominee of the Chief District Court Judge, the Chair, Andrew Beck, a nominee from the NZBA, and perhaps Paul Michalik. Copied in to any of the sub-committee's correspondence are to be the Attorney-General, Briar Charmley, Winkelmann J, and Paula Tesoriero. Roger Howard raised the point that it may be helpful to include a District Court Registrar who will often be dealing with the practical enactments of the Rules.

7. CPRAM (Agenda item no. 5)

Justice Winkelmann reported back to the Committee that the CPRAM sub-committee had divided the Bill into the core provisions and the technical ones. She noted that developing specific rules out of the Bill was a huge and complex undertaking, and that the sub-committee was concerned to ensure that they stayed within the scope of the Bill. She also observed that the Bill does contain a provision regarding the issue of company representation which has as a default presumption that anyone can represent a company. Her Honour will report back to the Committee once the sub-committee has made more progress on its task.

8. Company Representation (Agenda item no. 7)

The Chair informed the Committee that the NZLS had submitted comments in regards to Chambers J's suggested amendment to the rules. The Society argued for retaining the rule in *Re Mannix* as the status quo. In particular, it also pointed out that the Lawyers and Conveyancers Act 2006 would need to be considered if any change was made. The Chair told the Committee that he had discussed the issue with Asher J and that Asher J was happy

to look more closely into Chambers J's proposal and its ramifications. Asher J stated that the Law Society's submission was very good but that he also believed it would be helpful to get views from High Court judges on the issue.

There was some discussion as to whether it was appropriate to have the issue governed by a rule, or whether it should continue to be left to judicial discretion. The Chief Justice wondered whether the issue was not better provided for in the Companies Act. The Committee decided that the best approach was to set-up a sub-committee with Asher J as Chair, and with Messrs Beck and Mills as members. Dr Mathieson is to be involved at the drafting level.

9. Freezing Orders (Agenda item no. 10)

As no one had any comments at this stage, this item was moved to the next meeting. The Chair and the Clerk are to prepare a memorandum on the issues in the meantime.

10. Court of Appeal (Civil) Rules (Agenda item no. 11)

In regards to the Court's desire to reduce the time between the filing of an appeal and its hearing in r 43 to three months, the Committee was happy that a reduction in time was appropriate. However, Mr Beck raised the concern that the reduction in time may result in prejudice to would-be applicants. He stated that he would personally like to canvas the issue further. The Chair held that the issue would be left until the next meeting to give Mr Beck the chance to do this and gather informally any more submissions from the NZLS.

The Chief Justice was concerned that the Court had other changes that it wanted made, and she was reluctant that any such reform should proceed in such a piecemeal fashion. She also stated that she did not concur with the proposal to make the use of the *New Zealand Law Style Guide* mandatory as it would generate unnecessary compliance costs.

11. Electronic Operating Model (EOM) Presentation (Agenda item no. 8)

Ms Tesoriero and Mr Tony Fisher (the General Manager District Courts) presented to the Committee the re-scoping of the proposed EOM. In particular, they raised the issue of including the Higher Courts (including the civil jurisdiction) within phase two of the model's implementation, which would significantly move forward the timeline for when e-filing could be realistically implemented. At this stage, phase two is expected to be deployed 2014/15.

The Chair observed that it was a comfort to know that there was political support for these initiatives and that they would bring New Zealand better in line with other jurisdictions. Mr Kieron McCarron stated that the IT Committee of the Courts will need to look at the technology as it is developing, from a constitutional and flexibilities perspective, while the Chief Justice also raised the issue of the appropriate functionality for other jurisdictions. Mr

Fisher noted that the late Chief District Court Judge had appointed a working group to look into these issues, chaired by Judge Christopher Harding.

The Chair thanked Ms Tesoriero and Mr Fisher.

The meeting closed at 1.25 pm.