THE RULES COMMITTEE

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4 March 2010

Minutes/01/10

Circular No. 13 of 2010

Minutes of meeting held on 22 February 2010

The meeting called by Agenda/01/10 was held in the Chief Justice's Boardroom, High Court, Wellington, on Monday 22 February 2010, at 10:00 am.

1. Preliminary

In Attendance

Hon Justice Fogarty (in the Chair)
Hon Justice Chambers
Hon Justice Winkelmann, Chief High Court Judge
Hon Justice Stevens
Hon Justice Asher
Judge Doherty
Hon Christopher Finlayson, Attorney-General
Ms Cheryl Gwyn, Crown Law Office
Dr Don Mathieson QC, Special Parliamentary Counsel, Parliamentary Counsel Office
Mr Brendan Brown QC, New Zealand Law Society representative
Mr Andrew Beck, New Zealand Law Society representative
Mr Kieron McCarron, Judicial Administrator to the Chief Justice
Ms Anthea Williams, Private Secretary to the Attorney-General
Mr Hugo Hoffman, Parliamentary Counsel Office
Mr Jeff Orr, Ministry of Justice
Ms Paula Tesoriero, Ministry of Justice
Ms Pam Southey, Ministry of Justice

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
Judge Joyce QC
Mr Andrew Hampton, Ministry of Justice

Confirmation of minutes

The minutes of the meeting of Monday 30 November 2009 were confirmed.

Matters arising

The Chair expressed thanks to Justice Randerson for his work at both Committee and sub-committee level. Justice Randerson will continue to be involved with the sub-committee for written briefs and discovery. The Chair also thanked the outgoing Secretary, Ms Sarah Ellis, for her work on the Committee in 2009.

The Chair welcomed Justice Winkelmann, Chief High Court Judge, to the Committee. He also welcomed the new Secretary, Mr Patrick Davis.

The Committee discussed start times for the next meeting. It was agreed that the next meeting would start at 9:45 am.

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

The Committee noted that the consultation paper on this topic was sent out to the profession and a range of other organisations. The closing date for submissions is 7 May 2010.

3. Discovery consultation

Justice Asher presented a report from the sub-committee in response to submissions to the discovery consultation held in late 2009. He also addressed Lord Justice Jackson's final report. Lord Justice Jackson has moved away from the option supported in the interim paper of a specific disclosure regime and towards favouring a "menu" option for substantial cases.

The report recommended the following:

a) Proceed with an initial disclosure requirement as provided for in the draft Rules attached to the Consultation Paper.

b) Proceed with an adapted Option 4 from the Consultation Paper, retaining a default disclosure requirement based on an adverse documents test rather than a Peruvian Guano test, and with specific tailored discovery in certain defined types of cases.

c) Proceed to draft new rules specifically tailored to electronic discovery.

A key question was whether to move from the test under *Peruvian Guano* to an adverse documents test. Experience in England had shown that moving to an adverse documents test had not resulted in changes in practice from *Peruvian Guano*. However in theory there is a real difference between the two tests. There was also the issue of electronic discovery. Bell Gully had offered to draft some specific rules in this area.

The questions to be decided were:

1. Whether to move forward on discovery at all;
2. Whether to conduct more research into the problem areas of discovery;
3. Whether to send the issue back to the sub-committee to prepare a set of draft rules.

There was a concern that under an adverse documents test the profession would default to discovering large numbers of documents regardless of the change of approach. There were difficulties in making any changes effective. Mr Brown also reiterated a point raised by Justice Randerson that changes requiring an application to the Court may increase the burden on Associate Judges. The Attorney-General favoured moving forward with the adverse documents approach.

Dr Mathieson expressed a number of concerns about the adverse documents test:

1. The change to this standard in England appeared to have made little practical difference;
2. The concept of "adverse documents" is itself very subjective and affected by the conflict between duties to the court and to the client;
3. In difficult cases there are often many amendments to the statement of claim and new issues introduced, which may mean there are new classes of adverse documents;
4. The adverse documents test may be more expensive.

He favoured a solution similar to the adverse documents test but without using that terminology.

The Committee agreed that a change in culture and behaviour in the profession was necessary around discovery.

Justice Chambers considered that the distinction drawn by Lord Justice Jackson between substantial cases and other cases was key. The menu option was clearly the preferred choice of Lord Justice Jackson for substantial cases, based on the definition in the draft rule. For regular cases, however, Justice Chambers considered the current regime of *Peruvian Guano* may be the cheapest. He pointed out that England has not really moved away from the *Peruvian Guano* test since the adverse documents test is de facto *Peruvian Guano.* This is because if the adverse documents approach is carried out properly it is more expensive. He also preferred a separate regime for discovery of electronic materials. Justice Chambers suggested that some of the providers of e-discovery products who presented to Lord Justice Jackson might have contacts in New Zealand. The Attorney-General commented that he has literature available on e-discovery.

Justice Winkelmann favoured the adverse documents test, regardless of whether it may be more expensive. The Attorney-General disagreed with Justice Chambers' comments and supported Justice Winkelmann's views.

It was agreed that there would be a further meeting of the sub-committee, to pursue the points made in this meeting, to the point where it formed a view as to the appropriate rule changes. The sub-committee would then involve Dr Mathieson to prepare some draft rules to bring back to the full Committee at the next meeting. The draft rules will contain criteria as to when the menu option is

to be applied as opposed to the default position. E-discovery will be looked into further and Bell Gully may be approached.

4. Written briefs consultation

The Chair presented a report from the sub-committee in response to submissions to the second written briefs consultation in late 2009. The report noted that there was little opposition to the revised policy put forward in the second consultation, which was itself a response to the submissions received in the first round of consultation. The report went on to consider a submission from the New Zealand Bar Association that trial judges were tolerating inadmissible evidence in written briefs in contravention of s 83(2)(b) of the Evidence Act. In answer to that criticism, the report outlined a three-part proposal involving challenges to admissibility of a brief needing to be notified within 20 working days; notice given to the Court if the issue is not resolved between counsel in a further 10 working days; the Court having the power to exclude passages from the brief that are inadmissible (in part or in its totality) and require the witness to give evidence orally at the trial.

The Committee discussed briefs of expert witnesses and whether a similar regime should apply to them. Some considered expert briefs should be treated as a separate issue. Some considered that the proposed regime should also apply to expert briefs, as the remedy of requiring evidence to be led orally would be rare in those cases.

Justice Stevens commented that there was merit in introducing changes to discovery, written briefs and other areas as a package at the same time. The Committee agreed that this was desirable.

The sub-committee will continue work on these issues and prepare some draft rules. It will report back to the Committee at the next meeting.

5. Preparation of common bundle and integration of chronologies

The Chair and Mr Beck outlined proposals for bringing forward the preparation of the common bundle of documents, so that the compilation of the index to the common bundle would begin from the time the pleadings are filed. The Committee agreed in principle with this change to rule 9.12.

The Chair also proposed that the preparation of the chronology be integrated with the preparation of the index to the bundle, and for this to be prepared in collaboration between the parties. This did not meet with general approval. However, there was significant approval of a suggestion from Mr Brown QC that the obligation to prepare chronology should be brought forward to the completion of written briefs.

6. Appeals from Associate Judges

The changes agreed at previous meetings have been drafted by Parliamentary Counsel Office. However there will be some delay before they are passed as there is no suitable legislative vehicle for the changes at present.

7. High Court Rules issues raised by registries and the profession

The Chair, Dr Mathieson QC and John Earles will meet on the afternoon of 22 February 2010 to discuss the changes proposed and Parliamentary Counsel Office's draft amendments.

8. Daily recovery rates review

The draft rules had been updated to include transitional provisions for the new daily recovery rates for the High Court and District Courts Rules, as agreed at the last meeting. They had been approved by the Chair, Justice Chambers, Judge Doherty and Mr Brown. The Secretary will circulate forms for concurrence. It is anticipated that the commencement date will be 3 May 2010.

9. Court of Appeal (Criminal) Rules 2001, Rule 12A (Complaint against trial counsel)

This item related to comments made in *R v E* [2009] NZCA 554. Parliamentary Counsel Office presented a proposed substitute rule 12A on complaints against trial counsel. The proposed rule was satisfactory to the Court of Appeal judges. The rule provides that if an appellant does not waive privilege, then they are on notice that their evidence might not be accepted if they have not given an opportunity for trial counsel to give evidence explaining the conduct referred to in their evidence.

The Chief Justice had expressed the view that any changes should be set out in a practice note rather than in a rule. Justice Chambers disagreed with this view.

The Committee suggested some amendments including moving subsection (4) to before subsection (3), then making the next step if that the appellant cannot waive and does not get a direction approving this from the Court, then they are on notice of the risk that the Court may not accept their evidence. Justice Asher recommended that the phrase "or any part thereof" be inserted after "any affidavit evidence" in subsection (3).

The Chief Justice, Justice Chambers and Dr Mathieson will liaise further over the draft rule. It will be considered again by the Committee at the next meeting.

10. Discontinuance reform

In *Agrotain International LLC v Fertiliser Quality Council Inc* (HC Wn, CIV 2009-485-1855, 17 December 2009) Justice Miller expressed concern about the scope of a plaintiff's right to discontinue a proceeding in the High Court Rules. The view of the Parliamentary Counsel Office was that a rule change was unnecessary. The Committee agreed with this view. The Chair will contact Justice Miller and update him on the Committee's decision.

11. General business

Dr Mathieson raised the issue of Form C 2 of the High Court Rules that had been brought to the Committee by Justice French. The issue was whether applications under s 174 Companies Act should be properly be located under Part 31 as is the case currently, or under Part 18 (so that a full statement of claim is required). It was agreed that Dr Mathieson would set out the issue in a memorandum and send it to the Chair and Justice Winkelmann. Justice Winkelmann will then seek feedback from the Associate Judges. The Committee can then proceed to concurrence to remove the rule from Part 31.

The meeting closed at 12:45 pm.