



THE RULES COMMITTEE

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9 December 2010

Minutes/05/10

Circular No. 82 of 2010

Minutes of meeting held on 29 November 2010

The meeting called by Agenda/05/10 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 29 November 2010, at 9:45 am.

1. Preliminary

In Attendance

Hon Justice Fogarty (in the Chair)
Hon Justice Chambers
Judge Joyce QC
Judge Doherty
Ms Cheryl Gwyn, Crown Law Office
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
Dr Caroline Anderson, Incoming 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 Asher
Hon Christopher Finlayson, Attorney-General
Mr Brendan Brown QC, New Zealand Law Society representative

Confirmation of minutes

The minutes of the meeting of Monday 4 October 2010 were confirmed.

Matters arising

The Chair introduced Dr Caroline Anderson to the Committee. She will be the new Clerk to the Rules Committee from January 2011.

The Chair also thanked Justice Stevens for his work on the Committee before he moved up to the Court of Appeal. He had been particularly involved in class actions and was a valued member of the Committee.

2. Input methodology appeals from the Commerce Commission – entry on the commercial list

The Committee considered amendments proposed by the Attorney-General to rule 29.5. The Chair introduced the item and stated that currently any party to appeals from the Commerce Commission can require under r 29.5 that the proceeding be entered on the commercial list. The commercial list is currently only based in Auckland. Appeals against input methodology determinations are likely to require the attendance of specialised staff who would therefore need to be based in Auckland during the hearing process. Fixtures are also more readily available outside Auckland. The Attorney's suggestion was that instead of a party being able to require the proceeding to go on the commercial list, this should be amended so that entry onto the list is discretionary and a party has to make an application.

The Chair reported that he had discussed the issue with the Chief Justice, the Chief High Court Judge, and Justices Miller and Clifford. The Chief Justice and the Chief High Court Judge were concerned not to change the rule to favour one party, and considered that the venue should be an open question to be argued on its merits.

The Chair commented that there were several issues: whether a proceeding goes on the commercial list, and where the hearing should be held.

The Chair proposed that an additional list judge be appointed from Wellington, and that parties could require the applications to go on the commercial list and the issue would be whether they would be heard in Auckland or Wellington. The other option was to create a commercial list in Wellington.

Justice Chambers did not favour this solution. He pointed out that it would leave the commercial list in Auckland so that at the very least there would have to be hearings in Auckland on the issue of the venue for the appeal itself. He suggested the option of creating a commercial list in Wellington (and perhaps Christchurch) and he was in favour of this possibility being explored. The Committee noted that there was a review of the Judicature Act currently being undertaken by the Law Commission that would look at the commercial list.

It was decided that the Chair would discuss the prospect of establishing the commercial list in Wellington with the Chief Justice. The Clerk will circulate a memorandum to the Committee to update them on this. Mr Hampton will obtain information on the logistics of setting up a commercial list in other centres and the impact this would have on registries, and will send this information to the Chair.

3. Discovery and electronic discovery

The Chair reported from the sub-committee on discovery. The Committee discussed the proposed draft rules on discovery and the draft consultation paper. The Chair noted that the proposed regime had two key aspects: first introducing an adverse documents test for standard discovery, and secondly incorporating electronic discovery as the default position. The intention is to put the paper out for consultation in December and have a period for submissions until March 2011.

Justice Chambers considered that the consultation paper needed to be expanded to explain further the rationales behind the electronic discovery regime. He also considered that the Rules Committee should conduct meetings in Auckland, Wellington and Christchurch, including if possible some members of the sub-group, to explain to practitioners the proposed scheme. There should also be included with the consultation paper and draft rules an example of a draft affidavit of documents.

The Chair identified that funding would need to be obtained for airfares and venues for holding meetings in the main centres.

The Chair will also contact *NZ Lawyer* magazine to arrange articles to promote the upcoming consultation.

The Committee thanked Dr Mathieson QC for his work in drafting the proposed rules. The Chair, Justices Chambers and Asher and Dr Mathieson will finalise the rules and consultation paper with a view to releasing them before the end of 2011.

The Chair also noted the Australian Law Reform Commission was conducting a review of discovery in Federal Courts with a report due out in March 2011.

4. District Courts Rules reform

The Committee considered the statistics received from the Ministry of Justice on the impact of the new District Courts Rules, a letter from the Courts Committee, Wellington branch, NZ Law Society, and a memorandum received from Faire AJ regarding transfer within the District Court jurisdiction.

Judge Doherty led discussion on the statistics from the Ministry of Justice. Filings were now almost up to the same level as they had been prior to the introduction of the new rules. There had been a significant drop-off in interlocutory applications which was a deliberate aim of the new rules. Judge Doherty observed that after adjustment there has been a decrease of about 80% in interlocutories, so the new rules have had quite a significant impact on judges' time in this respect.

There was also some indication that plaintiffs are either not progressing their claims or are settling, which was one of the drivers of reform for the new rules. The statistics indicated that more parties are commencing their own claims without the need for counsel.

The timeline data indicated that as at October 2010 the average age of cases when they receive judgment by default was 227 calendar days but this figure is impacted by the 30 period for filing/serving and the sample size is small. Likewise the figures for the time between filing notice of claim and filing pursuit of claim show that this period is increasing, but the number of claims is very low; this data will continue to be analysed and reported on. Further data is being collected on a number of time periods in the litigation process.

The data indicated that the number of summary judgment applications filed in the High Court has increased slightly following the introduction of the new District Courts Rules. Although the numbers involved are very small, there has been an increase in the number of summary judgment applications filed in the High Court for less than \$200,000. There has been an increase in the number of civil cases transferred to the High Court since the new rules (but again numbers are relatively low and do not bear out anecdotal reports of this occurring frequently).

Judge Joyce QC noted that under s 43 District Courts Act there was a provision for claims over \$50,000 to be transferred as of right when a defendant applies within 7 days giving notice of the wish to transfer. This must date back to the time when the District Court jurisdiction went from \$50,000 to \$200,000. The Committee will consider whether it is necessary to change this provision.

The Chair thanked the Ministry of Justice for compiling the data into a report. Judge Doherty will send his supplementary statistics to the Clerk who will circulate them to the Committee.

The letter received from the Courts Committee of the Wellington branch of the New Zealand Law Society was also discussed. The letter contained a number of objections to the new rules and the processes contained within them. In contrast Judge Joyce QC had received a letter via the Auckland registry indicating that the new rules were on the whole working well. The Courts Committee letter noted a number of difficulties with the forms including accessibility. PDF forms were available on the website and Word versions were available from registries upon request. It was noted that the new rules were written with the general court user in mind rather than members of the profession, and that self-represented litigants were finding them easier to use.

Judges Doherty and Joyce QC and Mr Ian Jamieson will meet in early 2011 to discuss the issues raised by the letter and other points that have been highlighted; Mr Andrew Hampton or a representative will also be involved. The Committee agreed that further consultation with the profession about their experience and views would be helpful. This could be in a meeting format or submissions could be requested to the Committee in writing.

Judge Joyce QC will draft a reply to the Courts Committee letter in the interim and send it to the Chair for approval.

5. Appeals against interlocutory decisions

The Committee decided to defer discussion of the memorandum and statistics received from Justice Chambers until the next meeting on 21 February 2011. The Clerk will enquire whether statistics have been requested from the High Court on appeals against interlocutory decisions, and will report to the Chief High Court Judge, Mr Hampton and Justice Chambers.

6. Trans-Tasman Proceedings Act

The Committee discussed the letter received from Ms Julie Nind at the Ministry of Justice on rules changes required for the Trans-Tasman Proceedings Act. Dr Mathieson QC tabled the High Court Amendment (No 2) Rules 2011 which were a draft of the rules changes required.

The Committee agreed that in the case of a time period for service on a party in Australia under the Trans-Tasman Proceedings Act, there would be an additional rule stating that the time period is extended by 10 working days.

The Committee also considered the issue of whether Form G2 (Notice of Proceeding) should be amended to allow 30 days (instead of 25) where the defendant is served under the Trans-Tasman Proceedings Act. This is because the statute refers to 30 days so perhaps the form should also refer to this amount. The Committee agreed that Dr Mathieson QC would consult further with Ms Nind on this point.

Dr Mathieson QC will aim to bring the final version of the amendment rules to the February 2011 meeting for approval by the Committee.

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

Mr Beck reported on his discussions with Associate Judge Faire on this issue. The Chair stated that he had discussed the issue with the Associate Judges at their recent meeting. There had been no consensus but a slight majority may favour Judge Faire's approach of the status quo of retaining s 174 application in Part 31. Mr Beck noted that Associate Judges did not have jurisdiction to hear such applications. He stated that the crux of the issue was that in the majority of cases such applications are defended, so a procedure is needed to treat the applications like ordinary company applications.

Mr Beck will prepare a memorandum setting out the concerns of those who have been involved in this debate and outlining possible solutions.

Dr Mathieson QC noted that this issue had originally come before the Committee from Justice French's concerns about particulars in Form C 2.

8. Marine and Coastal Area (Takutai Moana) Bill

The Committee noted the memorandum from the Chief High Court Judge, which stated that it had been ascertained that no changes would be needed to the High Court Rules to cater for the passage of the Marine and Coastal Area Bill. Therefore the sub-committee established for this purpose would not be required to take any action and the item can be removed from the agenda. If the position changes the Chief High Court Judge will advise the Committee.

9. Recent rules amendments

The Secretary provided an update on recent rules amendments. The Court of Appeal (Civil) Amendment Rules 2010, the High Court Amendment Rules (No 2) 2010 and the District Courts (Limitation Act 2010) Amendment Rules 2010 (except Parts 5 and 6) will come into force on 1 January 2011.

The Court of Appeal (List Election Petitions) Amendment Rules 2010 and Part 6 of the High Court Amendment Rules (No 2) 2010 will come into force on 2 December 2010.

10. Correspondence regarding interim orders in burial dispute cases

The Committee discussed the letter received from Ministry of Justice proposing an amendment to the High Court Rules on court orders in applications for interim injunctive relief in burial dispute cases, giving registrars the power to make such orders.

The Chair reported that he had discussed the issue with the Chief Justice and had entered into further correspondence with Mr Beresford who had written the letter to the Committee, along with Ms Paula Tesoriero and Mr Hampton. The concerns of the Chair and the Chief Justice had been:

1. Whether injunctive powers (albeit interim) should be given to registrars when registry staff are readily able to contact a duty judge;
2. A concern regarding a perception by registry staff that applications had to be in writing and in the correct form (which was not always the case in instances of urgency);
3. A reluctance to consider changing the rules on an ad hoc basis arising from particular disputes.

Mr Hampton responded that he understood that the perception was that obtaining orders from a judge was a process that was slower than was necessary in some cases, and there had been some urgent matters where it had been difficult to locate a judge. He further noted that the powers proposed to be given to registrars were limited and on an interim basis only. He also observed that currently applications for interim injunctions needed to be filed in the High Court and in smaller centres this could be done in the District Court on behalf of the High Court.

Justice Chambers and Judge Joyce QC expressed concerns about the burden that the proposed changes would place on registrars who may be relatively junior court officials, as burial disputes are inevitably emotionally charged situations.

The Chair requested that Mr Hampton obtain further information for the Committee from the relevant Ministry of Justice team as to the reasons driving the recommended reform. Mr Hampton agreed that he would report back the consensus of the Committee to the team and obtain further information on the drivers of the reform.

11. Meeting of Judge Doherty with Singapore Rules Committee

Judge Doherty reported on his recent meeting with members of the Singapore Rules of Court Working Party. They conducted most of their meetings electronically. They were interested in having a connection with the New Zealand Rules Committee. Judge Doherty recommended that the Clerk liaise with Ms Denise Wong of the Supreme Court of Singapore. Judge Doherty advised that there is a conference in May 2011 in Singapore on electronic discovery and suggested it would be appropriate for a representative of the New Zealand Rules Committee to attend.

12. Change of Clerk to the Rules Committee

The Chair noted that this was the last official meeting of Ms Sophie Klinger as Clerk to the Rules Committee, and thanked her for her outstanding work over the last two years. Ms Klinger will be succeeded from January 2011 by Dr Caroline Anderson.

13. Criminal Procedure (Reform and Modification) Bill

Mr Hampton updated the Committee on the implications for the Committee stemming from the Criminal Procedure (Reform and Modification) Bill. Rules will be required and a sub-committee of the Rules Committee will be established for this purpose. There is discussion ongoing as to the composition of the sub-committee. There is a generous timeline, as full implementation of the legislation is not expected for 18 months, but some work may be needed in the very short term. Mr Hampton is liaising with heads of bench over the issue.

The meeting closed at 12.30 pm.