



THE RULES COMMITTEE

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10th April 2006

Minutes/2/06

Circular No. 43 of 2006

Minutes of Meeting held on Monday 3rd April 2006

The meeting called by Agenda/2/06 was held in the Chief Justice's Boardroom, High Court, Wellington, on Monday 3rd April 2006 at 10 am.

1. Preliminary

In Attendance

Hon Justice Baragwanath (in the Chair)
Rt. Hon Dame Sian Elias GNZM, Chief Justice of New Zealand
Hon Justice Chambers
Hon Justice Randerson, Chief High Court Judge
Hon Justice Fogarty
Judge Doherty
Judge Joyce QC
Ms K Clark, Deputy Solicitor-General
Mr G Tanner QC, Chief Parliamentary Counsel
Ms L Sinclair, Deputy Secretary, Ministry of Justice
Mr B Brown QC, New Zealand Law Society representative
Mr A Beck, NZ Law Society representative
Mr K McCarron, Judicial Administrator to the Chief Justice
Ms G Smith, Secretary to the Rules Committee
Ms Bernice Ng, Clerk to the Rules Committee

Apologies

Mr J Orr, Chief Legal Counsel, Ministry of Justice

Confirmation of minutes

The minutes of the meeting held on Monday 13th February 2006 were confirmed as an accurate record.

The Chair welcomed Ms Gina Smith as Secretary to the Rules Committee.

The Chair confirmed that Justices Heath and Winkelmann and Associate Judge Faire would act as delegates of the Rules Committee, in assisting in the drafting of the Insolvency Law Reform Bill.

2. Rules Reform

The note from the Clerk on the progress of the Rules Reform project was discussed and considered by the Committee.

The Clerk is to contact Dr Mathieson QC to arrange the next meeting of the Steering Committee.

Probate

The Committee discussed the memoranda from Justice Potter and agreed that her valuable recommendations form part of the reform of the Probate rules.

Order for Committal

The Committee considered the memorandum from Mr Nathan Gedye and his sub-committee on whether there should be formal rules, procedures and forms to enforce judgments and interlocutory applications.

It was agreed that the memorandum and Justice Randerson's judgment in *Waller and ors v Rea* Auckland, High Court, CIV 2003-404-4055, 3rd March 2005 should go to Dr Mathieson as part of the reform project.

Part 7 Extraordinary Remedies

Justice Fogarty addressed the Committee on a paper he wrote in response to proposed changes to Part 7 of the High Court Rules.

The Committee decided to refer the material to Dr Mathieson and his team with the request that the rules should be tidied up with reference to Justice Fogarty's paper but within the current statutory framework. Statutory change should not be contemplated.

3. District Court Rules Project

Judge Doherty tabled a memorandum on the progress of the District Court reform project.

It was agreed that the District Court Rules project and the High Court Rules Reform project should operate and progress in tandem. Both the District Court Rules and the High Court Rules should be presented to the Government as a single package. Mr George Tanner QC informed the Committee that both projects were in sync with each other. Redrafting of a couple of Parts and the forms to both sets of Rules had not started.

The District Court Rules sub-committee needed to be reconstituted. It was agreed that Catherine Ansley from the Ministry of Justice and Ian Jamieson from Parliamentary Counsel Office should be seconded to the sub-committee.

There is currently no practitioner on the sub-committee. The Committee decided that it was not efficient or effective to bring in a member of the profession, as the project is at an advanced stage. The best approach to getting practitioner feedback is to send the work in progress of the District Court Rules to the New Zealand Law Society and other professional bodies for their consideration and feedback. This will allow the profession to give objective feedback on the changes to the rules and procedure.

The redrafting of the District Court Rules should preserve parties' ability to make urgent applications to the court under certain circumstances.

Judge Doherty informed the Committee of the passing of one of its original sub-committee members, Mr Paul Thomas. The Rules Committee expressed its sympathies to his family. The Committee greatly appreciated Mr Thomas' invaluable assistance in the project. A note from the Rules Committee will be sent to Mr Thomas' family.

4. Harmonisation of Rules of Discovery

The Committee endorsed the Australian Freezing Order and Search Order Rules recently adopted by the Federal Court of Australia.

The Committee decided that the Australian Rules should go to George Tanner to draw up a New Zealand version of the Rules. The substance of the Practice Notes should become rules in the New Zealand version.

Justice Baragwanath will write to Justice Lindgren thanking him for inviting New Zealand to participate in this important exercise.

5. Misconduct of Trial Counsel

The Committee discussed a number of memoranda from Justice Chambers and Ms Karen Clark on proposed new r 12A.

It was concluded that the issue of waiver in criminal appeals should be addressed in the Evidence Bill.

6. Appeals against Interlocutory Orders

The Committee again considered whether a leave provision was necessary to appeal against interlocutory orders from the High Court to the Court of Appeal. It was agreed that statutory change might be necessary if a requirement to seek leave to appeal interlocutory orders were introduced.

A consultation paper considered at the last meeting of the Committee will be amended as discussed by the Committee and published for consultation with the profession.

7. Costs on Multiple Issues

The Committee agreed that the paper should be tidied as discussed and sent out for consultation.

The Committee agreed that the issue of preparation costs on appeal still needed to be addressed. The Clerk will present a paper at the next meeting.

8. Evidence Bill

It was agreed that the Committee's submissions to the Select Committee should be limited to technical matters in the Evidence Bill that impinge on matters to do with Rules. George

Tanner offered to go to the Select Committee to clarify the scope of the Committee's submissions.

The Committee agreed to form a sub-committee to prepare the submissions for the Select Committee. The submissions would be made on behalf of the practitioner and judicial members of the Committee. The sub-committee will liaise with Ministry of Justice on its submissions.

The members of the sub-committee are:

- Justice Baragwanath (Chair);
- Justice Randerson, Chief High Court Judge;
- Justice Fogarty;
- Judge Joyce QC;
- Karen Clark, Deputy Solicitor General, Crown Law;
- George Tanner QC, Chief Parliamentary Counsel (or nominee); and
- Brendan Brown QC.

The sub-committee will confer before the next Committee meeting.

9. Judicature Amendment Bill (No. 3)

George Tanner highlighted two important features of this Bill, which are currently in a Supplementary Order Paper. The first is that Associate Judges are able to deal with certain proceedings through video conferencing. This will require the promulgation of rules. There is a deferred enforcement date to allow the Committee to make those rules.

The second is the mode in which the Court of Appeal can give its judgments. This will also require the promulgation of Rules.

The Committee agreed that rules should be drafted for each of the two highlighted issues. The rules relating to the mode in which the Court of Appeal can give their judgments must come into force with the Bill.

It is important that both sets of rules be drafted and circulated for members' consideration before the Bill's commencement. Minor issues can be discussed in a telephone conference with relevant members of the Committee.

10. High Court Rules r 82

The Committee met with Dr David Chaplow, Chief Advisor Mental Health and Dr Jeremy Skipworth, Deputy Director of Mental Health and Senior Advisor from the Ministry of Health to discuss their submission on behalf of the Ministry of Health on proposed draft of new r 82.

The Committee explained that it was necessary to have some kind of test dealing with people under the new Criminal Procedure (Mentally Impaired Persons) Act 2003 and Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003. Firstly, it was important to fairly work out those who need help. Secondly, the District Court and the High Court have neither the competence nor the resources to establish whether a person under the new mental health legislation is in fact incapacitated.

The Doctors agreed that those were important objectives but a "test" if such a test was possible needed to be formulated so that the civil and human rights of persons under the new mental health legislation were preserved.

It was agreed that r 82 should be amended to include two new separate considerations:

- (e) a person who is:

- (i) subject to the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003; and
- (ii) determined by the Court to be lacking legal capacity.

(f) any other person whom the court determines to be lacking legal capacity.

It was agreed that there should be consideration of whether there are other provisions dealing with incapacitated persons which for consistency should be included.

11. Form of Documents

The Committee discussed the concerns raised about the numbering of pages on court documents.

The Committee agreed that the first page did not need to be numbered or initialled.

Rule 30 will be sent to George Tanner and Dr Mathieson to be tidied up.

12. Group Litigation/Class Action Rules

The Committee welcomed the suggestion that there should be rules to allow and regulate class actions in New Zealand. Class actions are well developed in Australia and United Kingdom.

The Committee asked the Clerk to prepare a memorandum on class actions in Australia and the United Kingdom particularly looking at:

- How the class of plaintiffs should be determined?
- Whether a trust structure should be established? How should that be provided for in the rules; and
- What procedural rules need to be in place for example discovery and the evidentiary burden of proof? For example, is it necessary for each plaintiff to prove his or her case, or is a sample sufficient?

The Clerk should also look to whether Australia and the United Kingdom rules of procedure for class actions are backed by legislation.

13. Court Ordered mediation

The Committee noted that there was a paper prepared some years ago by a committee chaired by Justice Doogue for the Department for Courts. The Clerk will investigate.

The meeting concluded at 2.15pm.