THE RULES COMMITTEE
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5 December 2007

Minutes/07/07

Circular No. 164 of 2007

Minutes of meeting held on Monday 3 December 2007

The meeting called by Agenda/7/07 was held in the Chief Justice's Boardroom, High Court, Wellington, on Monday 3 December 2007 at 10am.

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 Joyce QC
Judge Doherty
Ms Cheryl Gwyn, Deputy Solicitor-General
Mr Hugo Hoffmann, Parliamentary Counsel Office
Ms Liz Sinclair, Deputy Secretary, Ministry of Justice
Mr Brendan Brown QC
Mr Andrew Beck, New Zealand Law Society representative
Mr Jeff Orr, Chief Legal Counsel, Ministry of Justice
Dr Don Mathieson QC, Special Parliamentary Counsel, Parliamentary Counsel Office
Mr K McCarron, Judicial Administrator to the Chief Justice

Dr George Barton QC, Counsel for the NZICA
Mr Craig McAllister, NZICA representative
Mr Aylton Jamieson, NZICA representative
Ms Tracey Davies, IRD observer

Ms Dolon Sarkar, Secretary to the Rules Committee
Dr Heather McKenzie, Clerk to the Rules Committee

Apologies

Mr Charles Chauvel MP

1. Preliminary

Confirmation of minutes
The minutes of the meeting of Monday 1 October 2007 were confirmed with one alteration. The amended paragraph, under item 13, 'Access to Court Records, amendment to rules 66 – 68' has been amended to read:

> Reform of the rules assumes urgency in light of *Mafart v TVNZ Ltd* [2006] NZSC 78 where the Supreme Court essentially merged application of the civil and criminal rules. The sub-committee including representatives of the legal profession has met several times and received feedback.

Other matters arising
There were no other matters arising.

2. Tax litigation and extension of the right to non-disclosure to the discovery phase

Dr Barton QC and Messrs Jamieson and McAllister presented the views of the New Zealand Institute of Chartered Accounts, and tabled a summary document. The Institute seeks an amendment to the legislation to extend the right of non-disclosure to the discovery process.

Informing discussion is the consequence that the protection currently afforded by the regime under ss 20B – 20G of the Tax Administration Act 1994 becomes valueless if the particular information must be disclosed on discovery should litigation commence. Furthermore, litigation may be undertaken in order to obtain discovery of documents formerly protected.

Notions of 'privilege' are somewhat misleading and complicate analysis. It may be more useful to conceptualise the task as involving perfection of an exception to the mandatory disclosure regime.

The issue was narrowed down to whether the current combination of ss 20B – 20G of the Tax Administration Act and s 69 of the Evidence Act 2006, 'Overriding discretion as to confidential information,' is adequate to protect legitimate interests. It was agreed that while these provisions should provide protection, the uncertainty resulting from the wide discretion afforded by s 69 is inconsistent with the certainty of ss 20B – 20G.

The consensus was that Parliament's policy is to safeguard the position of those who seek advice from a tax advisor rather than a lawyer. While this protection is expressly provided for until the pre-litigation phase of discovery by virtue of s 20B, the unique protection ought to continue beyond that stage. This might be achieved by a narrow extension of the right where the subject matter of the proceedings concerns a claim by the Commissioner for the recovery of tax.

Any change is best made through the Tax Administration Act.

Any consequential changes to the High Court Rules can be dealt with by the Committee.

The Committee, playing as it does an ancillary role here, will await the result of the policy decision.

3. Court of Appeal (Civil) Amendment Rules 2007

The Committee discussed issues relating to the possible costs increases and their impact on access to justice if litigants are dissuaded from pursuing an appeal. This assumes particular importance where it is in the public interest for an appeal to proceed, the litigant has acted reasonably, and ought to have pursued their litigation.

Costs rules are vulnerable to being used as a tool of attrition and courts are already spending considerable time debating costs. It is important the possible effects of any costs regime are fully considered and, in particular, it be kept in mind that clarification of the law can concern issues of wide public interest as well as commercial interests.

On the other hand, under the proposed rules successful litigants stand to recover significantly more of their costs than they may currently; and appeals usually represent a small proportion of litigation costs and vulnerability to costs at the appeal stage is unlikely, therefore, to have a stultifying effect.

The Chief Judge and Chair will establish a sub-committee to work on aspects of costs including:

> Determining the rates and time allocations
> A change to the High Court Rules and Court of Appeal (Civil) Rules to give judges more discretion in instances where an appeal has public interest aspects and/or where a party loses but it was reasonable for them to pursue the litigation to, for example, vindicate rights or obtain interpretation of legislation.

One solution may be to insert another stand-alone criterion in rule 53F, 'Refusal of, or reduction in, costs' (as '(a)'). This would permit a reduction where the appeal was important in the public interest and the party acted reasonably.

In the interim, the Committee approved the Court of Appeal (Civil) Amendment Rules 2007 excepting rule 9 concerning costs, and subject to addition of a rule providing for paragraph spacing to be at 1.5 point under r 40, 'Filing and form of case on appeal.'

The Court of Appeal would be keen to introduce e-filing if supported by the appropriate rules and technology.

4. Court of Appeal (Criminal) Amendment Rules 2007

The Committee endorsed the proposal to require an oral evidence notice where a party requires that a witness give evidence orally.

5. High Court Rules and service outside the jurisdiction

General

The High Court Rules and service outside the jurisdiction were discussed together.

Dr Mathieson signalled differences in the near final draft from earlier versions, particularly with respect to areas commented on by Mr Goddard QC. These included electronic service and service of foreign process. Provisions in the Electronic Transactions Act 2002 were not adopted wholesale, though the concept of service being effected when the file is received/ enters the information system is carried over.

Service outside the jurisdiction

The Chair noted the seamless approach of rules 6.27 and 6.28 governing service outside the jurisdiction and expressed his confidence in the rules alongside their English counterparts. It

is desirable that there be consistency with Australia and Dr Mathieson has forwarded his rules to Australia and awaits any comments.

Dr Mathieson noted that 6.27(d)(ii) refers for the first time to interim injunctions in support of judicial or arbitral proceedings outside New Zealand and the defendant or the property that is the subject-matter of the claim is in New Zealand. While its status is uncertain given currently it would not be possible and hence is of no practical application, reform has been suggested in Australia. An analogy was drawn with the cooperative approach with respect to arbitration where the Courts will act in aid of arbitrators. The category will be retained in the meantime and the Committee can respond to developments as these occur.

There will be another category added to rule 6.29, 'The Court's discretion whether to assume jurisdiction.' Category 6.29(1)(c) will function as a standalone ground for not dismissing the proceeding and will read: '… that leave would have been given under rule 6.28 and that the Court is satisfied it is in the interests of justice that the failure to apply for leave be excused.'

Mr Beck suggested that rule 6.29 substantively changes the law and, in particular, essentially places a reverse onus on the plaintiff to defend their case on the merits. It was submitted the onus should be on the defendant to show there is no serious issue to be tried, as in a strike out application, and that the proposed rule runs contrary to case law. In response, it was noted that 6.29(1)(b) provides an important safeguard against a defendant outside the jurisdiction being required to come to New Zealand.

Mr Beck is invited to prepare a submission to the Committee identifying the case law which goes against proposed rule 6.29.

Forms
Dr Mathieson has received comments on the forms from Mr Earles. The inconsistent use of 'office of the Court' and 'Registry' will be amended by changing reference to 'office' in the body of the Rules to 'Registry.' Dr Mathieson will tidy up the forms considering Mr Earles' comments and they will be circulated to the Committee for approval.

Resolution passed
The Committee passed a resolution to approve the rules subject to Dr Mathieson's work on the forms and any live issues arising out of Mr Beck's submissions. There may be further minor editorial amendments made by Parliamentary Counsel Office's editorial service. The resolution was moved by Justice Chambers, and seconded by the Chair.

Record of thanks
The Chair expressed grateful thanks to Dr Mathieson and congratulated him on an enormous achievement. Dr Mathieson's five decades of experience coupled with the care and professionalism he extended to the consultation process contributed towards this significant achievement.

6. Revised High Court rule 14.12, 'Disbursements'
Discussion was carried over to the 11 February meeting.

7. E-lodgement of court documents
Discussion was carried over to the 11 February meeting.

8. Class Actions
Substantive discussion was carried over until the 11 February meeting, though class actions were mentioned in passing during discussion of the definition of 'litigation funder.'

9. Litigation funding

The Committee was invited to give comments to the Chair who is attending a meeting of the Litigation Funding and Insurance Harmonisation Committee on 4 December. While there was some debate regarding the Committee's role in this arena, the Harmonisation Committee sought feedback from the New Zealand Rules Committee and the Australian jurisdictions.

Discussion centred around two areas of concern: orders for costs and security for costs, and the potential for a funder to control litigation in a manner which may be an abuse of the court's process. An analogy was drawn with a party being on legal aid as both types of arrangements can have a fundamental effect on exercise of the court's discretion regarding (amongst other things) costs and the approach of other parties. A comprehensive disclosure regime is therefore very important.

The definition of 'litigation funder' in the Australian draft is considered too narrow. A principled approach here is required which identifies the mischief rules aim to remedy and the differences in principle between a business-related funder and other funders. A distinction was drawn between insurers and litigation funders because the former are involved before proceedings are contemplated, whereas a litigation funder emerges once proceedings are afoot and as a result of them. Furthermore, an insurer's business is much broader than a litigation funder's.

Mr Orr will report back from a meeting of the Standing Committee of the Attorneys-General held in Adelaide from 27 – 28 March 2008.

10. Habeas Corpus

The Chief Justice will write to the Law Commission expressing that, assisted by discussion with the Rules Committee, she does not consider necessary the Commission's proposed amendments to the Habeas Corpus Act 2001.

11. Constituency Election Petition Rules 2008

Discussion was carried over to the meeting of 11 February.

12. Discovery in civil litigation

Discussion was carried over to the meeting of 11 February.

13. District Courts Rules 2007

Discussion was carried over to the meeting of 11 February.

14. Guidelines for provision of authorities

Discussion was carried over to the meeting of 11 February.