THE RULES COMMITTEE
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6 October 2011

Minutes/05/11

Circular No. 71 of 2011

Minutes of meeting held on 3 October 2011

The meeting called by Agenda/04/11 was held in the Chief Justice's Boardroom, Supreme Court, Wellington, on Monday 3 October 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
Judge Jan-Marie Doogue, Chief District Court Judge
Judge Joyce QC
Judge Doherty
Judge Susan Thomas
Mr Andrew Beck, New Zealand Law Society representative
Mr Brendan Brown QC
Ms Briar Charmley, Private Secretary to the Attorney-General
Ms Cheryl Gwyn, Crown Law Office
Dr Don Mathieson QC, Special Parliamentary Counsel, Parliamentary Counsel Office
Mr Kieron McCarron, Judicial Administrator to the Chief Justice

Ms Paula Tesoriero, Ministry of Justice

Ms Rita Lowe, Secretary to the Rules Committee
Ms Patricia Ieong, Acting Clerk to the Rules Committee

Apologies

Hon Chris Finlayson, Attorney General
Mr Stephen Mills QC, New Zealand Bar Association Representative

Confirmation of minutes

The minutes of the meeting of Monday 22 August 2011 were confirmed with two corrections: Mr Brendan Brown and Ms Pam Southey had been incorrectly listed as "In Attendance".

Matters arising

The Chair opened the meeting by welcoming the Chief District Court Judge and Judge Susan Thomas to the Committee.

The Chair also noted that this was the last meeting of Judge Joyce QC. Judge Joyce had been a member of the Committee for many years and the Chair expressed his thanks and appreciation for all the work that the Judge had contributed to the Committee.

2. Case Management and Consequential Rule Changes including Witness Briefs

Justice Winkelmann reported on the case management forums that had taken place in Dunedin, Christchurch, Hamilton, Auckland and Wellington. The forums were well-attended and generated a great deal of engagement and interest. There was general support for the more tailored system of case management, subject to a minority view that case management itself was undesirable because it adds costs to the litigation process.

One issue was the proposal to move the date of the first conference back to a later date of 10–12 weeks from the date of filing, to enable the parties to make more meaningful progress beforehand and to comply with discovery obligations. There was support for this proposal but some suggestions that it should be earlier to avoid a period of inactivity and to minimise time engaged in litigation. The counter view was that if the date was too early, a second conference would more likely be needed. In summary, her Honour thought that moving the time back to 9 weeks instead would be enough time.

Another proposal discussed was having a second issues conference in complex litigation. There was general support for this, again subject to the minority view that all case management was undesirable.

The Chair then opened up discussion of the proposed changes to the rules to align with the new case management policy. The policy is reflected in draft r 7.1(2), which distinguishes between defended hearings requiring one case management conference (expected to be the bulk of cases), defended hearings requiring more than one case management

conference, insolvencies and liquidations (where there are no case management conferences), and appeals and applications for leave to appeal (where there is the routine case management conference). The draft Schedule 5 lists only 8 matters for consideration, compared to the current Schedule listing 20 matters. Items 1 and 2 anticipate that the parties will have communicated and sorted out the case as much as possible before the conference, so that only one conference is needed. Item 7 indicates that a judge will be reluctant to allow a party to raise a pre-trial issue for the first time at the first case management conference. Item 8 provides an abbreviated checklist of routine matters that may need to be considered at the conference. The Chair stated that the intention of these rules was to put more responsibility for case management back on the parties. His Honour explained that the rules are a signal that behaviour and attitudes should change, but that much of the reforms could be done without rule changes, though would likely take a long time to embed.

The Chief Justice questioned the value that judges bring under this new system, especially as the first conference takes place at a very early stage. The Chair explained that judges will assist in issue identification, and noted that studies showed parties were more likely to settle after issues became clear, though clarified that the purpose of the rules was not to force people to settle. His Honour also said that if there was poor issue identification at the time of trial, this could cause injustice. Justice Winkelmann explained that in simple cases, the judge would be less involved but that in complex cases, a more interrogatory approach would be expected. Justice Asher also pointed out that the judge may also have to get involved at the discovery stage. The Chief Justice agreed with the overall scope of the changes, but noted that even setting down for discovery depends on identification of issues and occurs at a very early stage and it may be optimistic to think judges could do much at this stage. The Chair also pointed out that serious decisions about the level of discovery required could not be made until judges had an idea of the relevant issues.

There was discussion about whether issues could be raised after the first case management conference, or whether parties would be bound by the issues they had raised early on. It was clarified that parties could change and add to pleadings as litigation progresses. Dr Don Mathieson QC noted that the wording of r 7.4(1) "*will be* set" implies that new matters cannot be raised at later stages and suggested the wording be relaxed. The Chair pointed out that Item 7 of Schedule 5 allows parties to raise any issues provided they have discussed them with the other party at least 5 working days before the conference. The Chief Justice was concerned that this might be too prescriptive. Justice Winkelmann commented that judges retain a discretion also to raise issues that they view as pertinent, even if they were not discussed by the parties.

The next issue was whether the checklist in item 8 was helpful. Views were split on this point. Judge Joyce noted that a checklist was used in the District Court but often completed in a routine and uninstructive way. Mr Brendan Brown QC noted that a checklist would provide guidance to younger, inexperienced lawyers in large firms who did much of the discovery work. He expressed a concern that if a checklist was not provided in the rules, publishers would put out their own. The Chief Justice suggested using an explanatory or practice note setting out the matters that usually needed to be considered, without it being a prescriptive form. The Chair noted that it was common overseas to have a combination of

explanatory or practice notes with rules. Dr Mathieson pointed out that an explanatory note would be preferable to a practice note as it would contain the rules in a single document. The Committee supported having an explanatory note.

Justice Asher suggested that it would be better if r 7.3(1), which provides that the first case management conference will be held on the first available date 30 working days after the close of the pleadings were amended so that the time ran from the filing of proceedings instead. Dr Mathieson also supported changing the wording of "the close of the pleadings" as this might lead to arguments about when it closed.

The Chair suggested taking a tougher stance on statements of defence, requiring defendants to particularise the items in dispute and not allowing them simply to deny everything in the statement of claim. Judge Doherty pointed out that many judges do this already.

Dr Mathieson raised a concern over the dropping of r 7.8, which records that parties can exclude or limit any right of appeal. He queried whether without this, the statutory right to appeal could be excluded by agreement. The Chair stated that r 7.8 did not confer a statutory right as it was made as delegated legislation.

It was noted that the outstanding issues with the rules were in the details, but that there was general consensus as to the overall tenor of the changes. Ms Paula Tesoriero and Ms Cheryl Gwyn both expressed support for the draft rules. Justice Asher queried whether, after a draft was prepared, it would be put out for further consultation or whether subsequent changes would be in the nature of refinements for which consultation would not be needed. The Chair stated that further consultation was not envisaged as the issues had already been extensively consulted. The Committee agreed that the draft rules would be circulated to be discussed in detail at the December meeting, with the rules passed in March or April 2012. It was also agreed that the rules should be circulated to Associate Judge Doogue for comment.

The Chair then addressed the issue of written briefs last discussed at the May 2010 meeting. The Committee approved the draft rules retaining written briefs presented at the May meeting. The Committee decided to retain the position that the common bundle would not be received until after written briefs.

3. Review/Appeal from Associate Judge Decisions and Interlocutory Appeals to the Court of Appeal

The Chair re-activated this Agenda item, which comprises two distinct issues. First, the review of an Associate Judge's decision by a High Court Judge. The Chair commented that in light of the recent reforms on case management and discovery, it would be desirable if Associate Judges' decisions could be reviewed more quickly in the High Court by the same registry than if they were removed to the Court of Appeal. Second, whether appeals against non-dispositive interlocutory decisions should only be by way of leave. The Chair sought comment from the Committee on these issues.

Some Associate Judges' decisions fall to be reviewed in the High Court while others are appealed to the Court of Appeal. Justice Winkelmann expressed concern at the inconsistency that summary judgments by Associate Judges go to appeal whereas strike-out applications go to review. The Chief Justice pointed out that there are substantively different outcomes between summary judgment and strike-out, justifying two different procedures.

Presently, after an Associate Judge's decision has been reviewed, there is still a further right of appeal to the Court of Appeal. Justice Asher suggested that to remove the right of review of Associate Judge's decisions by High Court Judges also removes the hierarchical distinction between the judges and would be a significant policy-level change which must be addressed. Mr Beck opined that the distinction between Associate Judges and Judges was unacceptable as chance often dictates which judge hears a case. The Chief Justice was reluctant to remove a right of appeal simply to remove hierarchy, and expressed the view that there was a place for hierarchy. The Chief Justice favoured retaining the current position on reviews. The Committee moved to discuss the second issue of appeals against non-dispositive interlocutory decisions.

There is always a right of appeal from the High Court to the Court of Appeal in dispositive cases (for example, summary judgment or strike out decisions). The proposal to require leave for appeals against interlocutory decisions is for non-dispositive cases only. The Chair pointed to the *Feltex* case as an example of a case that was still in the interlocutory stage after three and a half years. Justice Winkelmann added that the rationale behind requiring leave to appeal interlocutory decisions was to reduce costs and delays and prevent tactical use of these appeals. Mr Beck and Mr Brown were concerned that the leave requirement itself added costs with very little benefit. Justice Winkelmann acknowledged this concern, and the concern that fewer cases may reach the Court of Appeal, but said that this would be mitigated if judges properly decided leave applications. The Chair agreed that a judge at first instance can often tell immediately whether a case is clear or not, and could therefore decide leave applications swiftly, even by telephone if the required judge was on circuit. Mr Beck referred to Justice Chambers' memorandum which had found that there were only eight appeals in the Court of Appeal from High Court interlocutory decisions in 2009. The Chief Justice agreed that the number of appeals in the Court of Appeal did not indicate this was a pressing issue. Her Honour further noted that any changes to this would have to be dealt with by statute.

The Chair noted that in other jurisdictions, appeal by leave against interlocutory decisions was common, and that New Zealand was virtually alone allowing appeal by right. In the United Kingdom, all appeals (not just for interlocutory decisions) are by leave. The Chief Justice pointed out that the culture in the United Kingdom is quite different.

Mr Brown queried whether there would be different rules for cases on the commercial list to those not on the commercial list. The Chair commented that it would be desirable to have consistent rules regardless of whether or not a case was a list proceeding.

The Chief Justice pointed out that the Law Commission had looked at this issue earlier. The Chief Justice suggested asking the profession whether they thought there were problems in

this area. The Committee agreed this was a good idea, as the impetus for the proposed changes came from judges. Mr Beck and Mr Brown agreed to sound out sentiments amongst the profession and put together a draft paper on leave. The Clerk is to assist by researching leave requirements in comparative jurisdictions. Justice Winkelmann is to prepare a paper on the separate issue of review.

4. Company Representation (Agenda item no. 6)

This item was moved up in the Agenda as the Chief Justice needed to leave at noon. Justice Asher introduced by explaining that the issue of company representation had been brought up by Justice Chambers, who had noted that New Zealand was in the anomalous position of not having an enacted rule on this point. The case *Re Mannix* sets out the position, which is that companies must be represented in court by lawyers, but that courts have a discretion to allow others to represent companies in exceptional circumstances. Justice Chambers' Clerk, Anthony Wicks, prepared a memorandum comparing the positions in different jurisdictions and found that some had absolute prohibitions on representation by directors, others required leave, and some had a more relaxed regime where representation was generally allowed.

Justice Asher reported that the sub-committee had looked at the issue, bearing in mind that in the District Court, there is a rule permitting laypersons to represent companies. There was a debate on this issue at the High Court Judges' conference in the previous week. The issue arises often for High Court Judges and Associate Judges, and they tended to allow laypersons to appear at first call-overs and lists if nothing final was decided or the hearing was not defended. There was clear unanimous consensus amongst the judges that *Re Mannix* worked well and that no change was required. Mr Beck also pointed to the New Zealand Law Society's submission strongly expressing that there should be no change.

The primary objection to allowing laypersons to represent companies is the danger that a class of persons that may represent companies but are ill-equipped to do so will emerge, hampering the efficiency of court processes. The Committee agreed that there was no real need for change and that the position could remain as it stands in *Re Mannix*.

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

The Chair explained that at the last meeting, it had been decided a sub-committee would be convened to examine the rules, but that this had been postponed until the Chief District Court Judge was appointed. The sub-committee members were confirmed as being: the Chief District Court Judge (as Chair), Judge Doherty, Judge Susan Thomas, the Chair, Andrew Beck, with Mr Ian Jamieson involved at the drafting stage. The sub-committee will convene by mid-November in time to report at the December meeting.

The Chair also noted that at the last meeting, Judge Joyce and Judge Doherty had produced a number of proposed changes. It was agreed that the sub-committee would look at the summary judgment proposals in more detail, as well as conduct an ongoing long-term review of the rules. Ms Tesoriero stated the Ministry was happy to support the changes

generally outside of the main proposal to reinsert summary judgment for all cases, but was concerned about timing.

Ms Tesoriero explained that the Cabinet can start to consider proposals around February or March if the sub-committee has considered the changes before the next meeting. Ms Lowe then explained that after the proposal has been approved by Cabinet, a 28-day period is needed before an Order-in-Council will come into effect. The Committee agreed that the sub-committee can consider the timing issue alongside the other issues afresh and report back at the December meeting. It was agreed at the previous meeting that Justice Winkelmann, Ms Tesoriero, and Ms Briar Charmley would be copied in to sub-committee correspondence to help with timing. The Chief District Court Judge will also discuss with the Chief Justice any ongoing issues with the rules and will report back in December.

6. Consultation on Time Allocations and Daily Recovery Rates (Agenda item no. 5)

Mr Brown reported that the sub-committee had received four responses from the New Zealand Law Society, the New Zealand Bar Association, Mr Robert Gapes, and Grimshaw & Co.

Mr Brown raised a number of specific issues:

- Whether there should be a costs item at the beginning of proceedings for preparation of the bundle for discovery. Mr Brown noted there was a danger this would be doubling up for discovery, but overall viewed it as desirable as it focuses on the obligation to provide initial discovery and is then contestable if not done properly. He suggested that a principled view was needed on this.
- Item 3 — whether the category C figure was too high. The NZBA suggested it should be reduced to 1.2 from 2.4. Mr Brown agreed with this.
- Item 8 — whether the category C figure was not high enough for a large case. Mr Brown was not convinced about this, as the real work was in preparing the submissions for the hearing.
- Item 9 — the NZBA suggested the category C figure was too high and suggested it should be 1.6 instead.
- Item 17 — the NZBA suggested that the category B figure of 1.5 should be increased. Mr Brown said there was merit to this, but believed it did not need changing if an item for initial discovery was introduced.
- The limitation of 50% of the allowance for appearance of principal counsel for second and subsequent counsel — neither Mr Brown nor Mr Beck thought this needed further investigation currently.

Mr Beck spoke to the wider issue of whether there should be an item for oral preparation for appeal, bringing in a regime similar to the Court of Appeal's into the High Court. The sub-committee did not see a need for a further item as written submissions already came under a general and rather substantial allocation for preparation. The Chair noted that in many jurisdictions the written submissions are the governing submissions and oral submissions are truncated, whereas in New Zealand, we still allocate time as if both are

heard in full. His Honour believed that if the allocations for written and oral submissions were separated, this would further compound the problem.

Mr Beck also raised the suggestion of adding an extra costs categorisation. He stated that this would be a move away from the simple category 1, 2, 3 and band A, B, C structure which was familiar and well-understood. Mr Beck also believed that the NZBA's concern that category 2 costs were applied as a default for expediency was misguided, as that had been the intent of the costs structure. He also expressed that having separate categorisations for parts of a proceeding would also bring unneeded complexity and many arguments about separate items. The Committee agreed with this view.

Mr Beck then raised the NZLS's concern that costs were supposed to be tax-neutral, but because parties who are registered for GST can claim back GST paid to their lawyers whereas parties who are not registered cannot, the effect is that the costs of litigation are higher for parties not registered for GST (typically individuals). This problem is not just limited to costs but exists across the board such as with filing fees. It was suggested that a judge might use his or her discretion to increase costs awarded to an unregistered litigant by an amount to reflect the GST input, but this would add complexity. The Committee recognised that there was a measure of unfairness but did not see a viable solution presently.

Justice Winkelmann queried whether item 10 should be more nuanced, and should recognise the difference between the first case management conference and an issues conference. The Chair suggested changing item 10 so that there could be separate items for consultation with other counsel and preparation. There was concern that this would be too generous, especially for appeals. The Chair suggested two different allocations: one for appeals, one for other cases. Mr Brown suggested that item 52 could be changed to reflect this, as opposed to item 37 for ordinary proceedings.

The Chair asked whether there should be a separate item for initial disclosure. Justice Asher stated that the current position could stand, as the idea is that initial disclosure should not take much time and does not involve filing or fees.

Mr Beck also raised the practice of increasing recovery rates every 6 months or 1 year to reflect inflation. Ms Tesoriero noted the difficulty of getting through small incremental increases and queried whether there was a more accurate measure of increased costs to the profession than the Producers' Price Index. An alternative suggestion was to use the PPI but wait until a certain percentage was reached before prompting change. There was concern that if this latter course were adopted, it would be harder to justify a large increase to Treasury and that costs may become very far out of sync with reality in the interim. The Committee generally agreed that incremental increases were simpler.

The Committee agreed that Mr Beck and Mr Brown would take the discussion on the other issues back to the profession and review the issue again at the December meeting.

7. Freezing Orders

The Chair discussed the memorandum prepared by himself with the Clerk, Dr Caroline Anderson, comparing New Zealand's rules with Australia. Freezing orders are always made ex parte initially and are always under the control of the judge. The Chair expressed that there was no real problem with the current rules. Justice Winkelmann agreed that her recent experience with the freezing orders rules had not revealed any issues with them. The Committee agreed that the rules should not be changed.

8. CPRAM

Justice Winkelmann reported that the CPRAM sub-committee agreed to keep the main descriptions of the rules required and requested that the Ministry prepare a draft provision with the minutes from the sub-committee meeting and assistance from PCO.

9. General Business

The Chair opined that earlier circulation of papers was desirable and suggested a goal of circulating all papers at least a fortnight before the meeting. The Committee agreed.

Ms Rita Lowe reported that the rule changes for applications under s 174 of the Companies Act, and for recognition orders under the Marine and Coastal Area (Takutai Moana) Act 2011 were being considered by Cabinet that day. Ms Lowe reported also that concurrence for the Trans-Tasman proceedings rules was needed by the end of the year if the changes were to go to Cabinet early next year. Ms Gwyn stated that Ms Julie Nind had said that the Australian processes for reciprocity would be in place in November.

The Chair noted also that Cabinet was considering the discovery reforms that day and that the rules were proceeding to Order-in-Council. Ms Lowe added that the rules would be Gazetted on Thursday. The Chair thanked everyone who had been on the discovery sub-committee and otherwise involved in the discovery reforms: the Chief Justice, the Attorney-General, Chambers J, Randerson J, Stevens J, Winkelmann J, Asher J, Ellis J, Faire AJ, Judge Joyce QC, Dr Mathieson QC, Mr Brown, David Williams QC, Caroline Anderson, Andrew Beck, Briar Charmley, Cheryl Gwyn, Hugo Hoffman, Lynn Holtz, Andrew King, Sophie Klinger, Heather McKenzie, Laura O'Gorman, and Anthea Williams. The Chair specifically thanked the final sub-committee especially Justice Asher for bringing together the whole project and stated that it had been an extremely ambitious endeavour attempted twice previously. The Chair also made special mention of Andrew King, Laura O'Gorman, Faire AJ and David Williams for their contributions. The Chair also thanked the numerous other people who were consulted during the project.

Lastly, the Chair said goodbye to Judge Joyce and thanked him for his many years of service on the Committee and especially for the instrumental role he played in developing the District Court Rules.

The meeting closed at 1.00 pm.