



THE RULES COMMITTEE

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8 December 2009

Minutes/06/09

Circular No. 128 of 2009

Minutes of meeting held on 30 November 2009

The meeting called by Agenda/07/09 was held in the Chief Justice's Boardroom, High Court, Wellington, on Monday 30 November 2009, at 09:45 am.

1. Preliminary

In Attendance

Hon Justice Fogarty (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 Stevens
Judge Doherty
Hon Christopher Finlayson, Attorney-General
Dr David Collins QC, Solicitor-General
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 John Marshall QC, New Zealand Law Society
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 Roger Howard, Ministry of Justice

Ms Sarah Ellis, Secretary to the Rules Committee
Ms Sophie Klinger, Clerk to the Rules Committee

Apologies

Hon Justice Asher
Judge Joyce QC
Mr Andrew Hampton, Ministry of Justice
Mr Jeff Orr, Ministry of Justice

Confirmation of minutes

The minutes of the meeting of Monday 5 October 2009 were confirmed.

Matters arising

Mr Brown enquired as to whether comments in the previous minutes meant that the Law Society representatives should arrange a substitute when they were both unable to attend a meeting, or when only one of them was unable to attend. The Chair clarified that it was not intended to change the Law Society members' usual practice of arranging a substitute only when both were unable to attend.

The Committee discussed the option of co-opting a third member of the profession. It may be appropriate to have a representative from Auckland. The Chief Justice and Mr Marshall will liaise over this.

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

The Committee discussed whether this rule should be amended in light of the issues canvassed in *R v E* [2009] NZCA 554. The Court of Appeal had stated that because of the Evidence Act a defendant cannot be forced to waive privilege through rule 12A of the Court of Appeal (Criminal) Rules 2001, as such an interpretation would render the rule ultra vires. The Court read down the rule to require the giving of a written waiver in circumstances where the allegation made amounts to a waiver in terms of s 65 or it is intended that a waiver be given.

The Chief Justice favoured removal of the rule. Justice Chambers considered that the rule would require a small adjustment. The difficulty was that appellants would not have a good chance of winning their appeal if they did not waive privilege. It was necessary to convey to appellants that there may be adverse consequences if they chose not to waive privilege. Justice Stevens commented that there was a parallel with *Scott v Scott* which also involved refusal to waive privilege.

Justice Chambers will consult with the Court of Appeal over the nature of desired amendments. The Chief Justice, Justice Chambers and Dr Mathieson QC will liaise and report back to the Committee at the next meeting.

Mr Brown QC stated that there had been developments in the United Kingdom Court of Appeal about waiving privilege when seeking to amend a patent, which may be relevant to the discussion on r 12A. He will send references to the above Committee members.

3. Cultural Property (Protection in Armed Conflict) Bill

At the meeting on 5 October 2009 the Committee approved the consequential rules amendments set out in the letter from the Ministry of Culture and Heritage. Mr Hoffman reported on behalf of the Parliamentary Counsel Office that it was not possible to draft the amendments yet because the Bill was still awaiting the Committee of the whole House stage.

The required rules amendments are very minor, so once the Committee has notification regarding the commencement date of the Bill, the rules amendments can be circulated for concurrence at the appropriate time.

4. Daily recovery rates review

The Parliamentary Counsel Office drafted the changes to the daily recovery rates for the High Court and District Courts Rules, as approved at the last meeting.

The Committee agreed that some transitional provisions were necessary, in the same form as the previous amendment rules. The Parliamentary Counsel Office is to insert a provision stating that any step taken in a proceeding before the commencement of the new rates is to be dealt with under the prior rates, along with a deeming provision, so that the new rates apply only in respect of steps taken after their commencement. This will be inserted into the amendments for the High Court and District Courts Rules. The changes will be circulated to the Chair, Justice Chambers, and Mr Brown for approval.

The commencement date for the new rates is not yet confirmed but 1 February 2010 may be possible.

5. Rule 7.39 of the High Court Rules

At the July 2009 meeting the Committee discussed Mr Beck's proposals to dispense with the requirement in rule 7.39 for synopses of argument in respect of all defended interlocutory applications, and the bundle of documents to accompany each application. Justice Randerson had reported back that most of the Judges consulted found the rule very helpful in most cases and considered that it should not be changed.

Mr Beck accepted that the rule was useful in some applications but considered that the automatic application of the rule in all application caused problems. He considered that providing the bundle and synopsis should not be the default option.

Justice Randerson commented the Judge can make directions that the parties do not need to comply with the rule in appropriate cases. If counsel consider that the matter is such that the rule should not apply then they can convey this to the Judge. He considered that it was not practical to reverse the rule so that the Judge had to order a synopsis and bundle. It was decided to retain the rule as it stands.

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

Justice Stevens reported on progress on this item from the sub-committee. The Committee discussed the sub-committee's paper on the duty of parties to meet the purposes of the Rules and the duty of lawyers to assist. The focus has moved from duties on counsel to cooperate to obligations on the parties. The proposals contained in the paper are based on the Bill before the Australian Federal Parliament. The paper contained proposed amendments to the High Court Rules as well as the Judicature Act, developed with the assistance of the Parliamentary Counsel Office. The planned changes were to introduce a new requirement for parties, buttressed by the duties of lawyers, and complemented by changes to the Client Care Rules (RCCC).

There was an interface with the Lawyers and Conveyancers Act and the RCCC. The sub-committee had been working with the Law Society, Mr Ian Haynes and Justice White. Preliminary work had been done by the Law Society and they provided a

draft RCCC rule 13.1A (Duty to facilitate the administration of justice). This is intended to cover not only the High Court Rules but also the rules of other courts and probably tribunals.

In the draft amendments to the High Court Rules, subsection (6) was particularly important.

The Committee agreed that the wording would be finalised and then the paper and draft amendments would go out for consultation of the profession and other organisations including business groups early in 2010. This will include contacting those who made submissions in the past.

Certain issues will be flagged in the consultation paper and comment invited, including the issue of costs against lawyers; this also brought with it questions of privilege. It should be noted in the paper that costs against lawyers personally would be a special exception rather than being routine. Foreign jurisdictions may have some useful ideas in this area but this can be addressed after consultation. There may also be issues to do with the Legal Services Act.

The Committee also agreed to remove 1.2A(2), on settlement, from the draft rule, and make a consequential adjustment to (3). The qualification in the draft High Court Rule 1.2A(7) will be changed so that it is consistent with the qualification in the RCCC rule. The intituling on the draft rules will also be changed so that they are an initiative from the Rules Committee.

Justice Stevens will amend the paper to convert it into a consultation paper, which with draft rules will be circulated to the Chair, Mr Marshall, the Chief Justice, and the Attorney-General before being sent out for consultation.

7. Consultations on discovery and written briefs

The period for submissions to these two consultations closed on 20 November 2009. The Chair expressed his appreciation for the high quality of the submissions received from professional organisations, individual practitioners and law firms. The Chair thanked the Clerk for her summaries of the submissions.

The submissions will be considered by the sub-committees along with options for action during December to February. The sub-committees will report back to the Committee at the next meeting. The submissions will be circulated to the full Committee. If non sub-committee members have comments on the submissions they can direct them to the Chair, the Clerk, Justices Stevens and Asher.

The Committee discussed the proposed rules on written briefs. Justice Chambers expressed concerns that the proposed rules would give an open-ended discretion to the individual judge about orders regarding oral evidence and written briefs. Some members considered that it would be desirable to have some principles or criteria to guide the making of orders under the rules. The written briefs sub-committee will consider these issues.

Dr Mathieson considered that it would be helpful for the profession representatives to assist with the question of cost under the proposed rules, and whether it would be more costly to have written briefs followed by oral evidence than the present regime.

8. Appeals from Associate Judge decisions

The Chair reported on this item. The Committee agreed that any appeals from the Associate Judges should go to the Court of Appeal, the provision for review by High Court Judges should be abandoned, and Associate Judges be given the same power to review their own interlocutory decisions as High Court Judges have. This will be implemented at the next opportunity in 2010.

9. Appeals against decisions refusing summary judgment or strikeout and other interlocutory decisions

These items will be discussed further in 2010. The Law Society representatives expressed concern over the idea of limiting appeals of interlocutory decisions. In a number of cases strikeout has been refused in lower courts but given on appeal. The Chair and Judge Faire strongly supported requiring leave to appeal summary judgment and strikeout decisions. Justice Fogarty commented that research clerk Clive Lansink was looking at appeals of interlocutory decisions in Victoria, New South Wales and Queensland. The Chair will report at the next meeting.

10. Court of Appeal (Access to Court Documents) Rules 2009

These were circulated for concurrence on 16 November 2009. The Secretary reported that the necessary concurrence had been received. The commencement date is 1 February 2010.

The updated Fees Regulations will commence on the same date. Justice Randerson enquired whether the new Fees Regulations included the amendment in line with the Ministry of Justice position that the first copy of a file is without charge. It was established that this point was not included in the new Fees Regulations and should be included as soon as possible. This point should be considered for all three jurisdictions. Mr McCarron will supply Mr Hoffman with the relevant correspondence from Mr Hampton.

11. District Courts Rules reform

Judge Doherty reported on this item. The new District Courts Rules came into force on 1 November 2009.

In November 2008 there had been 2014 statements of claim filed in the District Courts throughout the country; as of 3 pm 26 November 2009 there had been 552. In October 2009 there were 2900 filed, which was about 10% more than usual.

The Chair recommended that the District Court Judges continue to follow the statistics and report back to the Rules Committee at a later date. Judge Doherty agreed.

12. Freezing and search orders

The Chair reported on developments in Australia. The Chair of the Rules Committee sits on the Harmonisation Committee chaired by Justice Lingren. Australian courts are currently discussing the qualification to the right against self-incrimination regarding giving up documents, and the interaction with freezing and search orders. There is a process to test the merit of a claim that documents cannot be provided because it would breach the right to self-incrimination. It may be necessary for New Zealand rules to harmonise with Australia by following their approach both in statute and in rules.

The Chair will raise this issue again in 2010. He will pass on the correspondence from Justice Lingren to the Attorney-General and Dr Mathieson.

13. Trans-Tasman Proceedings Bill

The Trans-Tasman Proceedings Bill was introduced on 24 November 2009. There have been some difficulties in establishing common terminologies between New Zealand and Australia. The differences are in language rather than substance.

Beyond regulatory proceedings, a number of areas needed to be addressed including disputes about property or companies where there are interests in both jurisdictions. A range of disputes would benefit from harmonised rules.

Justice Randerson raised the topic of whether there should be rules addressing cross-jurisdiction discussion between judges. The Chair advised that he had intended to raise this first with the Chief Justice, noting that it would only work if the Australian judiciary agreed. There was some general discussion as to international practice: international family disputes; in the United States; and a recent (2008) preparation of a draft "General Principles for Judicial Communications within the context of the international Hague Network of Judges".

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

Parliamentary Counsel Office reported on the schedule of the changes proposed by registrars. Registrar Tony Mortimer had submitted a lengthy list of suggested changes to the High Court Rules, most of them to the forms. Dr Mathieson proposed that in early 2010 he, Mr Mortimer and one other member should meet to discuss the list of suggestions and Dr Mathieson's responses. The Chair agreed to participate in this meeting.

One further point was raised: Justice French had queried the necessity of Form C2 and whether it should be under Part 31. Dr Mathieson, Mr Beck and the Clerk will liaise over this issue. This will be discussed as a separate agenda item at the next meeting.

The meeting closed at 12.30 pm.