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24 April 2008

Minutes/02/08

Circular No. 42 of 2008

Minutes of meeting held on Monday 31 March 2008

The meeting called by Agenda/02/08 was held in the Chief Justice's Boardroom, High Court, Wellington, on Monday 31 March 2008 at 10am.

1. Preliminary

In Attendance

Hon Justice Fogarty (in the Chair)
Hon Justice Chambers
Hon Justice Randerson, Chief High Court Judge
Hon Justice Asher
Hon Justice Stevens
Judge Joyce QC
Ms Rebecca Ellis, for Crown Law
Mr Hugo Hoffmann, Parliamentary Counsel Office
Mr Brendan Brown QC
Mr Jeff Orr, Chief Legal Counsel, Ministry of Justice
Dr Don Mathieson QC, Special Parliamentary Counsel, Parliamentary Counsel Office
Mr Kieron McCarron, Judicial Administrator to the Chief Justice

Mr Andrew Hampton, Ministry of Justice
Ms Sarah Lynn, Ministry of Justice
Ms Catherine Yates, Parliamentary Counsel Office

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

Apologies

Mr Charles Chauvel MP
Rt. Hon Dame Sian Elias GNZM, Chief Justice of New Zealand
Dr David Collins QC, Solicitor-General
Judge Doherty
Ms Liz Sinclair, Deputy Secretary, Ministry of Justice
Mr A Beck, New Zealand Law Society

Confirmation of minutes

The minutes of the meeting of Monday 12 February 2008 were confirmed with one alteration to Item 5, 'E-lodgment of Court Documents and on-line courts.' The following paragraph has been amended as indicated in bold:

> It would be difficult to implement and test all five simultaneously. On the one hand, the more extensive and expansive the trial the better, yet on the other attempting too large a test scheme risks the project becoming unmanageable. Any pilot scheme will achieve optimum success where it is both practically useful for the jurisdiction and educational with respect to its application to other areas. The Ministry is seeking to identify two pilot areas. **While there is general agreement, including from the Ministry, that the District Court criminal summary jurisdiction should be one pilot, there remains debate on what the second, more civil focused, pilot should be**.

Other matters arising

New Committee members

The Chair welcomed Justices Asher and Stevens to the Committee.

2. Supreme Court Amendment Rules 2008

The Committee discussed the draft Rules and agreed they should be issued for consultation. It considered three issues in particular should be signalled in the consultation document:

a) Whether the various time limits should run backwards from the date of hearing or forwards from when leave to appeal is granted. The proposed rules envisage the second approach. The rationale is to bring forward the time when submissions must be filed in order to help mitigate against parties not filing submissions on time and the resulting adjournments. Alongside this however, too short a time to file submissions may invite problems associated with junior Counsel preparing submissions; an increasing reliance on written – rather than oral – argument; and Counsel seeking to revisit and revise submissions nearer to the time of the hearing.

b) The desirability of consistency of time limits in rule 7, 'Written submissions on appeal,' for a respondent to file submissions and for a respondent to a cross-appeal to file submissions. As currently drafted, the Rules provide 5 working days less to a respondent to a cross-appeal to file submissions than for a respondent at first instance to file their submissions. This appears to proceed on the assumption that cross appeals will be minor or less complex than appeals and the Committee suggests the time limits for respondents mirror each other here.

c) Whether there should be provision for filing a skeleton argument. These can be exceptionally useful and recognition may prevent Counsel from being 'ambushed' at the hearing

A consultation paper will be prepared by the Chief Justice, Justice Asher, and Mr Brown QC. The Clerk will prepare a brief memorandum outlining the issues raised at the meeting to help prepare the document. Any paper needs to give reasons for the policy decisions behind the draft Rules.

3. Is there a crisis in civil litigation?

Justice Randerson lodged a paper and spoke to the issues raised in it. Though there are benefits of a wide brief given the interrelating issues, it was decided it is important to be results-driven and focussed on developing initiatives that can be implemented without undue delay. The sub-committee's brief is thus initially limited to the following areas arising from Justice Randerson's paper:

a) Issues surrounding discovery, and in particular making better use of existing rules to limit the scope of discovery where appropriate; consideration of appointing Special Masters to deal with discovery issues in major commercial litigation or where there is likely to be a substantial number of documents; and making provision for costs shifting and/or costs limiting orders in suitable cases.

b) Pre-commencement protocols to guide litigants through certain requirements prior to filing. These have been adopted in England through the Woolf reforms and trialled in some Australian jurisdictions. They can be particularly effective when tied to a costs regime. There are some similarities with the proposed information capsule regime in the draft District Courts Rules 2007, but the protocols would not be as formal and would aim to retain flexibility.

c) Consideration of the 'rocket docket' fast track system being trialled in the Federal Court of Australia. This interrelates with the status of the Commercial List, which is widely considered unnecessary. (As an aside here, provisions regarding the Commercial List were retained in the High Court Rules. Dr Mathieson indicated he is prepared to delete them, but does not support replacement until an alternative has been fully considered.

The Committee considered it was generally desirable to follow Australia where appropriate as this is consistent with harmonisation, facilitates Trans-Tasman proceedings, and aids comity. Alongside these factors, it is useful to keep in mind that Australia operates in a different context due to its varying jurisdictions which can delay progress as the states and territories align themselves. Harmonisation with Australia should not come at the expense of practical developments in New Zealand.

The Committee supports developing a species of fast track system. Overseas models such as Melbourne's could be a starting point with any eventual system being tailored to a New Zealand setting. This should not be conceptually tied to commercial cases as it is potentially appropriate for a much wider range of cases. A major benefit might be restoring public confidence in the Court's ability to dispose of cases in a timely manner. It was noted that the profession too bears some responsibility for slow case progression, and that any fast track regime needs the support of Counsel to be successful. Lastly, the Committee needs to be wary of creating rules which over-complicate matters.

The sub-committee's work will not compromise the High Court Rules revision. Innovations would largely be practical in nature and could be given effect to via practice notes. The Rules could be amended as necessary.

Any proposed changes would need to be considered by the Ministry of Justice with respect to operational impacts including, in particular, on Ministry resources and on the case management system.

A sub-committee was formed which will comprise: Justices Randerson and Asher (from the

Judiciary), the Solicitor-General or nominee (for the Crown), Messrs Brown QC and Beck (for the profession), and Ms Sinclair or nominee (for the Ministry of Justice). Parliamentary Counsel can be consulted later as ideas develop.

Given the sub-committee's brief extends to discovery in civil litigation, this agenda item (Item 4) was discussed with the present item rather than separately.

4. Disbursements

The Committee discussed draft High Court Rule 14.12 which expressly introduced the concept of proportionality into the disbursements rule.

Various consequences of proposed rule 14.12 include that an overly detailed approach might invite argument as to the general interpretation of proportionality or regarding the technical interpretation of the elements listed; considerations of proportionality are often inherent in enquiries into necessity and reasonableness (conversely, these two factors may go to whether something is proportionate); and proportionality will not be a relevant consideration in the majority of claims for disbursements: it will generally only arise where a party asserts a disbursement claimed is disproportionate.

Alongside these factors however, reference to proportionality in (and confined to) this rule received support. A definition could be useful as it is not necessarily a self-evident concept, and might promote consistency between cases.

Dr Mathieson will recast the rule by removing the definition of proportionality in 14.12(3) and the reference to it in the current 14.12(2)(d). That rule will stop at '… amount.' Then, a new 14.12(3) will be inserted which will read: 'Despite subclause(2), a disbursement which is disproportionate in the circumstances of the proceedings may be reduced to the extent the Judge thinks fit' (or similar). Rules 14.12(4) and (5) will remain.

Only a Judge, not a Registrar, should be able to order a report or assessment from a professional organisation under rule 14.12(5).

The definition of disbursement in r 14.12(1)(a) will be amended to read ' …. an expense paid or incurred for the purposes of the proceeding that would ordinarily be charged for separately from **legal** professional services in a solicitor's bill of costs; and …' (addition in bold). This is to exclude, for example, accountant's fees.

5. District Courts Rules 2007

Judge Joyce reported back on the sub-committee's progress. A meeting was held on 17 and 18 March and was attended by Judges Joyce and Doherty, Mr McCabe (Principal Analyst, Ministry of Justice), Ms Hindle (Principal Analyst, District Courts Family and Civil Team, Ministry of Justice), Mr Jamieson (Parliamentary Counsel Office), and the Clerk.

At its meeting the sub-committee discussed submissions with respect to both the general policy issues illuminated and more specific points regarding individual rules. Submissions were actioned (i.e. rules changed) where necessary, or concerns answered in the report if no change was considered warranted.

The sub-committee was not persuaded to retreat from the substance of the rules, and most major policy areas arising in submissions had been responded to in previous consultation.

The sub-committee envisages circulating a revised draft set of rules and accompanying report to the Committee by 12 May 2008 for consideration at its meeting of 9 June. Expert assistance is required to draft the six forms specific to the District Courts Rules. In the meantime, Dr Mathieson will forward Judge Joyce a document compiled by PCO regarding protocols for developing forms.

6. Lawyers Admission Rules 2008

The Committee discussed the draft Lawyers Admission Rules 2008 at length aided by a memorandum prepared by Mr White QC for the New Zealand Law Society. Several relatively straightforward points were resolved, and the Committee will present two issues to High Court Judges for consideration and comment at the upcoming judicial conference.

The Ministry hopes to finalise the Rules by 28 April in order for them to proceed to Cabinet. It is highly desirable they are in force by 1 July 2008 when the Lawyers and Conveyancers Act 2006 ('LCA') comes into force.

Factors underlying consideration of the Rules

Any consideration of the Rules is underpinned by three broad factors: the purpose and scheme of the LCA; the importance of the admission process; and the respective roles of the High Court, Law Society, and Registrars in the admission process.

The LCA's purposes include maintaining public confidence in the provision of legal services and recognising the status of the legal profession (s 3).

The right to be a barrister and solicitor of the High Court is stringently regulated because Judges depend significantly on the integrity and learning of the profession (in that order). The admission process is a prerequisite for gaining a practicing certificate which then authorises a person to exercise and enjoy all the privileges of the profession, including appearing as Counsel before courts and tribunals. This necessitates careful monitoring of the process for admission, and recognition that something which appears a formality or tradition can in substance import significant implications.

The scheme of the LCA suggests the High Court, Law Society, and Registrars each occupy a distinct role in the admission process. The High Court is the body effecting admission and must ultimately be satisfied the candidate is qualified (both with respect to educational qualifications and to character as a fit and proper person): ss 52(2)(a) and 49. The role of the Law Society is also central to the admissions process. Firstly, this is because admissions are a subset of the Society's wider regulatory functions as enshrined in s 65. Second, while ultimately the High Court must determine whether a candidate is a fit and proper person to be admitted, in the absence of proof to the contrary, a certificate issued by the Society qualifies as sufficient evidence of this: s 51. The Society may oppose any application for admission: s 67(2)(d). Lastly, the admission fees it may fix under s 62 reflect its various responsibilities. In comparison, the statutory role of Registrars in the process is limited. Upon admission and payment of fees, the Registrar must place the person's name on the roll and keep the roll: ss 57 and 56. Sections 58 to 61 further prescribe functions of the Registrar relating to keeping the roll up to date and furnishing the Society with information it requires for the purpose of issuing practicing certificates: ss 58 – 61. The role of Registrars goes more to the machinery of admissions and maintenance of records than it does to their substance. The latter lies in the domain of the Court and Society.

Issues that were resolved

i. Certificate of character from the New Zealand Law Society

The Committee debated whether there should be an express requirement in the Rules for a candidate to seek a certificate of character from the Law Society. The rules as drafted do not require a candidate to apply to the Law Society for a certificate of character (see r 5(4)). This is because s 51 of the LCA does not mandate this and a candidate may apply directly to the High Court.

The Committee considered a directive rule should be introduced requiring a candidate to seek a certificate of character from the Law Society. While in the majority of cases candidates will proceed via the Society, the lack of an express provision requiring candidates to seek a certificate of character provides an opportunity to by-pass the Law Society. Though the Law Society must be notified if an applicant applies directly to the Court (r 5(4)(a)), and may

oppose such an application (r 5(4)(b)), removing its initial enquiries as to character arguably erodes a significant facet of its role in the admissions process. The fact that a certificate from the Law Society is not mandatory in the LCA does not mean it is ultra vires section 54 to require all candidates to seek a certificate.

ii. Signing of the roll
It was decided applicants should not be required in the Rules to sign the roll as this would be inconsistent with the LCA where it is not mandatory. In practice most applicants sign the roll.

iii. Requirement for application to be moved by another practitioner
It was considered that the rules should require another practitioner to move a candidate's admission rather than a candidate being able to move his or her own admission. This is desirable because it reflects the importance and solemnity of an admission by having another practitioner involved; a candidate moving their own admission may sit uncomfortably with the fact they are not at that time an officer of the Court (though this does not pose any statutory difficulties as he or she would occupy a position analogous to a lay litigant); and in the event that a candidate did not know a practitioner to move their admission, the Bar Association is likely to be able to provide assistance.

Issues for comment
High Court Judges will be invited to comments on two points:

a) Does proposed rule 9 reconcile relevant provisions in the Trans-Tasman Mutual Recognition Act 1997 ('TTMRA') and LCA?

b) Should the Registrar be required to formally notify the Law Society upon placing a person's name on the roll to enable the Society to proceed with a subsequent application for a Practicing Certificate? Or, should the Order for Admission suffice as proof of admission in this context?

i. Rule 9 and reconciling provisions in the TTMRA and Lawyers and Conveyancers Act 2006
Difficulty is encountered reconciling the provisions of the LCA and the TTMRA. This is with respect to both the principle of mutual recognition of qualifications between Australia and New Zealand (s 15(1) TTMRA) and more specific provisions. Rule 9 has been drafted to attempt to reconcile the provisions of the two Acts to enable TTMRA candidates to be admitted in a fashion consistent with the mutual recognition principle. It is important to note that candidates under the TTMRA are treated differently from other overseas candidates.

At the outset, the specific provisions in the TTMRA prevail over the more general ones in the LCA as a principle of statutory interpretation (see too s 52(5) of the LCA).

To outline the difficulties, under s 49(4) of the LCA a candidate is qualified for admission if he or she has been issued with a certificate by a Registrar stating they have given notice under s 19 of the TTMRA to the Registrar acting as a local registration authority. Under s 52(4) of the LCA, the High Court must make an order admitting the candidate if it is satisfied he or she is qualified for admission under s 49(4).

The difficulty essentially arises because if a candidate is entitled to be registered in New Zealand by virtue of the TTMRA, an order for admission to complete registration must follow: there is no discretion to refuse such an order. That is, any person who merely gives a notice under s 19 of the TTMRA and receives a certificate from the Registrar that he or she has done so must be admitted according to the TTMRA. The schemes of the Acts do not appear to provide for the situation where registration under the TTMRA does not proceed. Moreover, under the TTMRA the Registrar and Deputy Registrar are the local registration authority and have power to register a candidate. In New Zealand, an order for admission must be made

by the High Court, and it is undesirable that Registrar's should be able to exercise this function.

ii. Notification of Law Society of admission
There are competing arguments for whether a Registrar should be required to formally notify the Law Society of an admission to later facilitate issuing a Practicing Certificate, or whether the Order for Admission should suffice. On the one hand, many individuals are admitted but never practice. Giving their information to the Law Society irrespective of this might be considered a breach of their privacy. A straightforward way around this is for the Order to suffice. On the other hand, there is the possibility of fraudulent Orders and so a procedure with greater integrity might be for the Registrar to formally notify the Law Society of each admission.

7. Lawyers and Conveyancers Act 2006
The Committee approved the proposed Rules.

8. Appeals in Wellington
Substantive discussion was carried over to the 9 June meeting.

9. Class actions
Justice Stevens was appointed as Chair of the sub-committee. The sub-committee will have a face-to-face meeting as soon as is practicable.

While the groundwork of developing a policy position and translating this into a draft bill is largely complete, there remain four major issues for consideration:

a) The threshold for lowering the number in a class to less than 7 (see clause 11 of the draft Bill): some cases appropriate for class action litigation may not have 7 members yet would not satisfy a threshold of 'exceptional circumstances' or similar justifying an exemption from this requirement. The draft clause 11 is silent on the threshold.

b) The extent of control the Court should exercise over litigation funding agreements: given their attractiveness in this context, it is vital to fully consider and regulate such agreements.

c) Whether the Act will apply to all proceedings or only those arising after it comes into effect.

d) The role of the Rules Committee once a policy position has been finalised in relation to the Executive Government and Law Commission.

10. Access to Court records
The Committee discussed the proposed High Court (Access to Court Documents) Amendment Rules 2008 and Criminal Proceedings (Access to Court Documents) Rules 2008. The rules require action for three main reasons:

a) There has been on-going criticism from the media and others regarding the complexities and difficulties of obtaining access to court records.

b) The result in *Mafart and Anor v Television New Zealand* [2006] 3 NZLR 18 signalled a need for the rules to expressly identify, amongst other things, criteria for access and provision for notice to parties affected.

c) Concern amongst the legal profession and judiciary stemming from the Law Commission's presumptive approach to access recalling an Official Information Act regime.

Both sets of Rules aim for consistency and clarity for access principles and procedures. The revised draft rules were outlined by the Chief Judge with emphasis on the following substantive points or amendments to the last draft:

a) In the civil context, the phrase '… for the purpose of reporting or commenting on the hearing in any news medium, law report, or law journal …' has been added to rule 68A(2). This was in response to a concern there may not be sufficient protection for a person despite Counsel and parties being asked by the Registrar their view regarding access.

b) The addition of being able to access to a series of files or 'class' of documents in rule 68F(3)

c) Turning to the criminal Rules, rule 11(4) resolves the procedural tension where an application under the criminal search Rules is treated as a civil application.

d) Rules rr 7(3) and 8(3) require news media and law reporters to gain the permission of the Judge before gaining access to videotaped records of interviews with a complainant or an accused, or images of a complainant or victim. This is an exception to the presumptive approach at this phase of proceedings.

e) The matters to be taken into account to determine whether to permit access (where required) outlined in rule 14 mirror their civil counterparts excepting the addition of 'the right of the defendant to a fair hearing' (rule 14(a)).

The Committee was invited to consider the draft rules and return comments to the Clerk by Monday 14 April. Members are asked to please notify the Clerk if more time is required. If the Rules are generally approved and do not require substantial amendment, they can go out for consultation. The consultation versions will no longer include the two options for general approach to access.

11. Amendments to the Court of Appeal (Civil) Rules 2005

The Committee discussed proposed amendments to three rules:

a) Rule 14, 'Time for making application for leave,'
b) Costs-related rules – rr 53F, 53C, and 53A, and
c) Rule 29A (new): 'Extension of time for appealing'

The Committee approved the proposed changes subject to some minor amendments to drafting and the approval of the Court of Appeal Judges on 2 April. The various rules will be re-circulated to the Committee when in their formal form.

Rule 14, Time for making application for leave

The redraft of rule 14 removes a lacuna in the Rules which do not provide for a third type of leave provision whereby an applicant may seek leave from either the Court of Appeal or High Court.

The Committee approved the redraft with some minor adjustments which will be effected by Messrs Brown QC and Hoffmann.

Costs-related rules – rr 53F, 53C, and 53A

There has been consultation on two previous occasions; and the Chief Justice, President of the Court of Appeal, and Chief Judge have agreed on the approach contained in the proposed rules. The rules essentially replicate the initial approach.

Justice Chambers highlighted three amendments however:

i. Rule 53F, 'Refusal of, or reduction in, costs'
This rule now makes explicit what had been an implicit ground for reducing or refusing costs. The ground is that the appeal concerned a matter of public interest and the party opposing costs acted reasonably in the conduct of the appeal (see rule 53F(e)). An undesirable consequence of this is that the absence of the provision in the High Court Rules may tempt parties to argue it does not apply in that Court. Dr Mathieson will amend the High Court Rules to include the ground and remove this possibility.

ii. Rule 53C, 'Appropriate daily recovery rates'
A standard appeal will be categorised as the same as a Category 2 proceeding in the High Court, and a complex appeal will be considered as a Category 3 proceeding together with, if certified for, an uplift of up to 50%.

iii. Rule 53A: 'Principles applying to determination of costs'
The rule had been reworded to make it appear more discretionary and less prescriptive (given it somewhat uncomfortably qualifies rule 53, 'Costs at the Discretion of the Court,' which grants the Court a broad discretion as to costs). The rules as revised do not read well however, and the final wording will be left to Mr Hoffmann.

For all the costs-related rules, Mr Hoffmann will consult with the Chief Justice, President of the Court of Appeal, and Chief High Court Judge where necessary.

Rule 29A, 'Extension of time for appealing'
Where an applicant is late filing an appeal under the current Rules he or she must apply for leave to appeal out of time and must go through the Part 2 procedures.

Rule 29A proposes to treat an application for leave to appeal out of time as an application for extension of time to which rule 5, 'Directions,' applies (rule 29A(1)). If the respondent endorses his or her consent to the application to extend time, the Court may grant an extension. It is only where the respondent does not consent that the application should proceed as an application for leave to appeal out of time under the Part 2 procedure. Advantages include that a single Judge can deal with such an application and it may be cheaper for parties.

The Committee agreed with the principle and general form of the proposed rule 29A. Mr Hoffmann will draft a rule.

12. Employment Court Rules
The Committee approved circulating agendas and minutes to Judge Colgan and enabling His Honour to be present on invitation at the discretion of the Chair. Mr McCarron will consult the Chief Justice.

13. Circulars
The Committee agreed to aim for a cut-off point for circulars of the Friday week before a meeting. This will give members one working week and two weekends to consider circulars.

The meeting closed at 3.05pm.