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10 June 2010

Minutes/02/10

Circular No. 26 of 2010

Minutes of meeting held on 31 May 2010

The meeting called by Agenda/02/10 was held in the Chief Justice's Boardroom, High Court, Wellington, on Monday 31 May 2010, 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 Chambers
Hon Justice Winkelmann, Chief High Court Judge
Hon Justice Asher
Judge Joyce QC
Judge Doherty
Ms Cheryl Gwyn, Crown Law Office
Mr Brendan Brown QC, New Zealand Law Society representative
Mr Andrew Beck, New Zealand Law Society representative
Mr Andrew Hampton, Ministry of Justice
Mr Roger Howard, Ministry of Justice
Dr Don Mathieson QC, Special Parliamentary Counsel, Parliamentary Counsel Office
Mr Ian Jamieson, Parliamentary Counsel Office
Mr Kieron McCarron, Judicial Administrator to the Chief Justice
Ms Anthea Williams, Private Secretary to the Attorney-General

Mr Patrick Davis, Secretary to the Rules Committee
Ms Sophie Klinger, Clerk to the Rules Committee

Apologies

Hon Justice Stevens
Hon Christopher Finlayson, Attorney-General

Confirmation of minutes
The minutes of the meeting of Monday 22 February 2010 were confirmed.

2. Discovery reform and electronic discovery

Justice Asher reported from the sub-committee on discovery. At the last meeting the Committee had considered the submissions to the 2009 consultation. Many members of the profession had opposed the abolition of having a default position generally, and favoured retaining *Peruvian Guano*. The Committee had decided not to adopt Option 3 from its consultation. The draft rules reflected the decision that there would be a default rule but that would be changed from *Peruvian Guano* to adverse documents, bringing New Zealand in line with many Australian states and the United Kingdom.

Justice Asher referred to the draft rules prepared by the sub-committee. The core reform was about the test for discovery. The committee was moving towards two types of discovery, standard and non-standard. Rule 8.18(2) contained the adverse documents test for standard discovery. It was based on the wording from the Australian Federal Court. Rule 8.18A addressed non-standard discovery. The procedure for non-standard discovery was set out in rule 8.18B and was planned to be a simple procedure, aimed at requiring the parties to discuss discovery with each other and hopefully agree before the first case management conference.

Within the sub-committee there had been debate about the criteria for non-standard discovery. Andrew Beck had argued that there should be a requirement based on principle rather than particular criteria. The sub-committee had also considered putting certain types of cases in the non-standard discovery category, but had decided that apart from allegations of dishonesty category, they were too arbitrary and there were too many exceptions.

The Chief Justice observed that non-standard discovery was trying to cover cases where standard discovery was too onerous as well as those where standard disclosure was not sufficient. Justice Winkelmann considered that if the intention of rule 8.18A was to restrict discovery, not expand it, the rule did not appear to have that as its emphasis, as only (e) was about when discovery was disproportionate. The rule could instead just have as its criteria: (a) when the costs of standard discovery where disproportionate; (b) where standard discovery would not be in the interests of justice; and (c) where the parties agree that non-standard discovery should be used.

Justice Asher noted that the United Kingdom scheme had specifically included *Peruvian Guano*-type discovery as an option; the draft rules here instead include the option for a judge to make any other order the court considers appropriate, which could include orders along the lines of the *Peruvian Guano* test.

Justice Fogarty commented that the aim of discovery reform was to lower the cost and improve access to justice, especially for smaller litigants.

Justice Chambers expressed concern that the proposals put forward by the sub-committee did not address electronic discovery. He considered that the key problem with discovery was electronic documentation. He was concerned that the draft rules were designed for a paper-based system. He considered that it was necessary to move away from paper-based discovery. There was useful software available. In electronic discovery there was the

advantage that each party could decide for themselves which documents were relevant. He considered that the test for discovery was not as important as developing a way to deal with electronic discovery. He was concerned also that it may take longer for lawyers to work out whether documents are adverse than under the *Peruvian Guano* test.

The Chief Justice pointed out that there would still need to be some method of discovery for litigation that was not electronic or small litigation (for example involving notebooks).

Justice Asher reported that from his discussion with Andrew King, rule changes were not needed to address electronic discovery and a practice note would suffice. Judge Joyce agreed that practice notes could work well.

The Chief Justice suggested an opt-in system for litigants who would prefer to use systems for electronic discovery as an intermediate measure, until electronic records become entirely ubiquitous. Then the test would not be important and one could just require all documents. However Justice Winkelmann noted that it would still be necessary to define the database and what documents were contained in it, using some sort of test.

The Committee also considered the issue of privilege. It was still necessary to look at the documents and assess whether they are privileged. Cheryl Gwyn commented that Crown Law had moved to a standard system of electronic discovery for virtually all litigation. The application of a test (e.g. relevance) and analysis of the electronic documents was still necessary.

Justice Fogarty proposed taking back the question of electronic discovery to the sub-committee. He considered that the present proposal can accommodate electronic discovery.

Justice Chambers considered that the sub-committee needed technical advice from the suppliers of software packages.

Justice Asher drew attention to the informal use in big litigation of electronic discovery, using protocol agreed between the parties. He proposed that the sub-committee discuss the issue of electronic discovery and bring in people to provide more expertise, for example Laura O'Gorman and the person at Crown Law managing electronic discovery. There was the view that electronic discovery is a practice issue not a rules issue. Lord Justice Jackson's committee had considered that electronic discovery can develop separately from rule changes.

Referring again to the draft rules, Justice Asher described the process whereby if a party believes that the proceeding should be treated as non-standard, they can put that to the judicial officer, but until then it is temporarily treated as non-standard.

On initial discovery, Justice Asher noted that there had been vigorous debate in the sub-committee about whether this should involve "principal" documents or all documents. The sub-committee had decided to retain "principal". The process of initial discovery, it was hoped, would force parties to work out what documents support their case, and promote settlement. The disadvantage is that it is another step in the process. Justice Asher acknowledged that having initial discovery would be significant reform. Justice Fogarty commented that the idea for this rule had come from Associate Judge Faire and the IBA practice for commercial arbitrations.

The Chief Justice commented that perhaps there was no need to go to this position immediately, and having initial discovery of only documents referred to in the pleadings would be a useful initial reform. Justice Fogarty said that initial discovery was designed to

prevent trial by ambush and reveal your case as early as possible. Justice Chambers opposed the idea of initial discovery as it could add to cost and may not promote settlement more quickly. Justice Winkelmann was also concerned that the rules could add complexity and increase costs. However other members considered that initial discovery would not necessarily add significantly to costs.

There was also the issue of the timing of settlement conferences which may be changed. The High Court is currently capturing data about what promotes settlement and when settlement occurs. So far the data had shown that 20 percent settle after the issue of proceedings and 30 percent settle after discovery. The Chief Justice considered that this reform should be deferred until the next meeting so that this data can be taken into account. Justice Fogarty stated that he would go back to Judge Faire to get more detailed information about his reasons about initial discovery. Justice Chambers stated that it would be useful to get the views of other Associate Judges as well as Judge Faire, as others may have different views.

Brendan Brown stated that it seemed to be unclear where the Committee's views lay about discovery of adverse documents and *Peruvian Guano*. The most important issue was the cost of discovery and the problem of creating additional costs. Even in electronic discovery, someone still has to go through the documents and find those that are adverse. The current discovery reform, electronic discovery, and the Chief High Court Judge's consideration of case management procedures were all tied together.

The Chief Justice commented that the Committee had agreed to move to an adverse documents test. The Committee ought to now consider where electronic discovery fits in. Electronic discovery should at least be an option for those that want to use it. On the issue of moving costs of discovery forward (e.g. in initial discovery), the timing of case management procedures was crucial. If settlement conferences are earlier than discovery then that is a reason for moving costs to the front, but if settlement conferences are not before discovery, then there was no reason to front-load these costs.

Justice Chambers proposed that a technical group be established, consisting of lawyers who have expertise in electronic discovery and people from the industry, to consider the question of what an electronic discovery regime (if not exclusively but as the predominant method) should look like and what technology is currently available.

Justice Winkelmann expressed some concern that the electronic discovery proposal would take the focus away from the original problem with discovery that was being examined, being the need to try to refine the focus of discovery and narrow down the documents presented to the court. Even in electronic discovery, at some point a test is needed to select documents. Justice Chambers disagreed that the particular test was important.

The Chief Justice suggested that it was a question of who does the assessment, and that if parties are allowed to decide for themselves what is relevant, that is a way of keeping costs down. Justice Winkelmann pointed out that there still needed to be a test for inclusion in that electronic set of documents. The Chief Justice suggested that it would be useful to hear from the sub-committee or those with technical expertise whether it would be better to keep *Peruvian Guano* for electronic discovery.

Justice Asher agreed with the proposal to contact lawyers with expertise in discovery rules and electronic processes. The group could consider see if there is a way of shaping the current proposals (adverse documents and an option of non-standard discovery) to include electronic discovery, and whether a change to the rules is required or a practice note.

Justice Fogarty proposed that this discussion be taken on board by the sub-committee and the sub-committee would bring in input from outside, and come back at the next meeting with a response. The Chief Justice suggested that the sub-committee separate into two to deal with the rules and electronic discovery.

The Committee had a further discussion about the objectives that were sought with reform of discovery. The Chair considered that the Committee had a consensus that they were trying to achieve the just and efficient disposal of cases. He presented several propositions: the first, that the best and fastest way to bring litigation to an end is to get the parties to focus on the issues. The second was taking into account electronic discovery. A third point was to make the High Court accessible, with some sense of proportionality. The Chair offered to circulate a document identifying the Committee's goals in order to have some criteria against which to test proposals.

The Chief Justice commented that it was necessary to bear in mind that discovery was not just about identifying the issues, but was also about evidence.

3. Written briefs, common bundle and chronology reform

The Chair reported from the sub-committee on written briefs. He noted that the when consulted, the profession had been in favour of retaining written briefs. He presented some draft rules which provided for this. There were also proposals in the draft rules for changes to common bundles and chronology rules. The current issues were, as with discovery, what steps should be moved forward, for example compiling a chronology. He noted the desirability of rules that can be tailored to fit the case. He noted that many of the draft rules were in the nature of guidelines and possibilities for the parties to consider and agree or have resolved by an Associate Judge.

Justice Fogarty also drew attention to the procedures developed in the Commercial Court in Victoria which were referred to in his paper, including the testing of all actions against the objective of a just, speedy and inexpensive determination of the dispute (which he proposed as draft rule 9.1.

The draft rules proposed the option to bring forward the timing of the common bundle. The timing of exchange of written briefs was also left open by the rules, to be decided by the court. The rules also proposed to bring forward the timing of the chronology to after the exchange of either the common bundle or the written briefs (instead of three days before trial). The rules proposed that the plaintiff set out the key facts, cross referencing to documents or written briefs, and then the parties highlight where they differ in terms of the facts. This will rapidly identify before the trial what the disputed facts are, and what is agreed between the parties.

Rule 9.1H addressed directions about oral evidence. The rule proposed that a court be able to direct that evidence be given orally where there are disputed facts, by reason of conflicts of recall and the absence of contemporaneous written records e.g. meetings where there were no written minutes and the parties are at odds about what was said. Otherwise one would expect the evidence would mainly be given in written form.

Rule 9.1I dealt with the problem of judges admitting the contents of inadmissible written briefs at trial in breach of the Evidence Act provision (which was not being fully observed by the judges). The rule included an obligation to notify of any challenge to the admissibility of any content of a written statement, which can then be dealt with either before or at trial. The rule was not aimed at expert briefs. Justice Asher considered that these issues can be resolved very quickly by a trial judge on the day, and to put in more pre-trial procedures was to add to costs. The Chief Justice observed that perhaps judges need to more

rigorously enforce the Evidence Act and not admit the briefs, and more time should be given to allow for this.

Justice Winkelmann suggested that in order to balance the competing concerns, this rule could be amended so that there is an explicit provision saying the issue does not get resolved until trial (to avoid more interlocutory applications). Therefore she proposed a simplified rule, involving parties notifying the other side if there is a problem with a written brief, then if it is not resolved between the parties, coming to the court to decide, with some sort of sanctions to encourage compliance with the rules of admissibility for written briefs. The Chief Justice observed that if there is notification before trial, then there will be applications. Justice Winkelmann considered that these could be avoided by a provision stating that the issue would only be resolved at trial except in exceptional circumstances (e.g. where it will substantially enlarge the scope of the hearing). Justice Chambers observed that a great deal of inadmissible evidence comes in at trial by consent.

Justice Chambers stated that he objected to introducing incremental requirements on lawyers. He was concerned they would be time-consuming and lawyers would not agree. Every extra step added the possibility of a dispute about compliance. He acknowledged that from a judge's perspective all of the proposed changes were highly desirable.

Justice Fogarty invited comment on rules other than 9.1I. Justice Asher observed there was an original decision of the Committee to issue a consultation paper in relation to written briefs. Following that consultation and feedback from the profession, the Committee decided to abandon the root and branch reform of written briefs and to make more modest reform whereby where there were issues of disputed fact, the judge could direct that evidence be given orally. This had come from the strong perception of trial judges that written brief evidence on issues of disputed fact was unsatisfactory. The Committee had decided that that was the way forward and it was just a question of drafting the rules, which could then be put on hold until the completion of the Chief High Court Judge's review of case management. He was concerned that the proposals seemed to have broadened. He also considered that the present rules for the common bundle and chronology are effective and do not need reform.

Justice Fogarty commented in respect of rule 9.1H (oral evidence directions) that this had been expanded as Justice Chambers had considered there needed to be criteria for when a judge should order that evidence be given orally. Justice Asher considered that consensus on this area had been limited to issues of credibility and reliability and the other elements in the draft rule went further than what had been agreed. Justice Fogarty considered that the rule had previously only referred to credibility and reliability and the expanded draft rule was an effort to identify when situations with those at issue would arise, but accepted that these additions could be taken out. He recalled that Justice Hansen in Victoria had observed that in the common law division there were very few written briefs and most evidence was given orally. It was agreed that the draft rule would be reduced to specifying a credibility/reliability standard and subsection (1) removed.

The Chief Justice observed that improvement in this area may be better effected by judges invoking the powers available, rather than by adding a rule. Any rule would have to allow them substantial discretion, but there was then the problem of consistency. Justice Winkelmann considered that an advantage of having the rule was that counsel will know to be prepared to lead oral evidence in certain situations. Judges also needed to be educated about the availability of directing oral evidence to be given. It was necessary to try to change the culture.

Andrew Beck noted that changes would need to be made to the wording of subsection (2) including deleting "such". Brendan Brown considered it was important for a witness to be given warning if they are going to have to give evidence orally. Justice Asher and Brendan Brown both considered that the rule should include a notice provision. If the lawyers know that the witness may have to give evidence orally, then it is more likely the written brief will not be "wordsmithed".

There was a concern that since witnesses can be cross-examined on their written brief as a prior statement, the combination may lengthen the trial.

Judge Doherty suggested that this issue could be settled by referring to credibility/reliability and using the other points as examples. Justice Fogarty was satisfied with this option.

Justice Fogarty considered that the matter should be taken back to the sub-committee to redraft the rules in light of the responses of the Committee. The matter can be addressed again in August. Justice Winkelmann commented that a preliminary paper on her review of case management should be available by August.

Brendan Brown noted that there were a number of points in the draft rules where judges have to direct something. He observed that in Victoria, judges have Fridays set down for directions. There were concerns that these proposals would add to the judicial workload.

Justice Fogarty highlighted the issue of the timing of the common bundle (before or after written briefs). He had drafted the rule so that the timing was flexible. Justice Asher had considered that there was no disadvantage getting the bundle after the written briefs. Andrew Beck considered that it was more useful to have the documents in the bundle before written briefs, as then the briefs could refer to the documents. Justice Chambers considered that it would be useful to move to electronic bundles as these were more flexible and easier to prepare in advance. There was the problem, if common bundles were earlier, that lawyers would put in all of the documents that they might possibly want to refer to, and the bundle could end up being very large. The profession had not been consulted on this question of the moving the timing of the bundle. Justice Fogarty assessed the mood of the Committee as not favouring doing the common bundle before written briefs (aside from Andrew Beck and Justice Fogarty).

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

The closing date for submissions to this consultation was 7 May 2010. The Chair reported on submissions received. Most of the submissions had been directed against the power to order costs against lawyers. He proposed that the sub-committee consider the submissions in more detail and report back at the August meeting.

Justice Chambers considered that waiver presented a very significant problem for these proposals. It was clear that the issue of privilege needed to be addressed more thoroughly than had been the case in draft rule 14.24. The sub-committee should consider this carefully.

Justice Asher stated that he had a concern about the draft 51CA(1) of the Judicature Amendment Bill. He was concerned that it was a function of litigation to allowing venting of differences and giving a forum to air disputes, and the proposed changes could push parties into mediation or settlement unduly. It was also not necessarily fair to put this on counsel.

Justice Winkelmann had some reservations about the proposals and considered that they may cut across various principles of the civil litigation system.

Justice Chambers considered that Tony Ellis's submissions had merit in his point about interfering with the fundamental independence of lawyers. The cost rules would lead to many disputes about whether the lawyer or client should pay.

Anthea Williams reported on behalf of the Attorney General that he shared many of the concerns already mentioned, particularly about the independence of lawyers. He considered that more thinking was required about structuring the obligation as a duty aimed at procedural cooperation rather than affecting anything substantive. More consideration was also needed about the balance between the duty on counsel and the duty on parties.

Justice Fogarty considered that there was a consensus that the Committee needs to re-think the proposals. The item will be placed high on the agenda for the August meeting. There were questions about how best to address the concern that the stronger party to the litigation may try to take every interlocutory step to wear down the other side before trial. The clerk will circulate all of the submissions to the Committee.

6. Court of Appeal (Criminal) Amendment Rules 2010: Rule 12A (Complaint against trial counsel)

Parliamentary Counsel reported on the amendment rules. The proposed substitute rule 12A had been redrafted since the last meeting. The Court of Appeal judges have indicated their agreement with the rule.

The rule enables appellants to apply to get a non-binding indication from the court if the case is capable of resolution without a waiver. It also gives them warning that unless a waiver is given the court may not be able to deal adequately with the appeal. The rule complies with the Evidence Act 2006 and improves the appellant's position. The rule is now completely neutral as to whether the appellant gives a waiver.

The Committee approved the rule and directed that it proceed to concurrence. It was anticipated that the rule could come into force in August 2010. The Chief Justice considered that Justice Tipping should review the proposed rule before it is changed; she will seek feedback from him and raise any further issues before concurrence.

7. Form C 2 of the High Court Rules and applications under section 174 Companies Act

This issue concerned the proposal to shift these proceedings from Part 31 of the High Court Rules to Part 18, originally raised by Justice French. The Committee discussed the memoranda from Dr Mathieson QC and Associate Judge Faire. Associate Judge Faire was unclear about the reasons behind the proposal to shift s 174 applications to Part 18. The Committee decided that Associate Judge Faire should be sent Dr Mathieson's memorandum to obtain his comments. Dr Mathieson will liaise with Associate Judge Faire to discuss the issue.

Dr Mathieson commented that once the applications are located in Part 18, the Judge will direct service on the affected creditors. The requirement for directions as to service, and the advertisement provision, should together ensure public notification and notification of the creditors.

8. Tauranga/Rotorua registries issue

The Chief High Court Judge reported on the issue of the imbalance of work between Hamilton and Rotorua (as Rotorua is the registry at which Tauranga's work is heard).

The Committee approved an amendment to High Court Rule 10.1, so that the place of hearing can be either location, as directed. This addressed the problem in respect of civil cases. Once drafted by Parliamentary Counsel, this rule can proceed to concurrence.

The Chief Justice noted that caution should be exercised in changing locations of criminal proceedings. No action will be taken at this point in respect of criminal proceedings.

9. Daily recovery rates review

The Committee noted that the new rates for the District Court and High Court have been approved by Cabinet and came into force on 24 May 2010. A notice was sent to the New Zealand Law Society, Auckland District Law Society, New Zealand Bar Association, and placed on the Rules Committee website.

The Clerk reported that she had had an enquiry from Ms Margaret Bryson of the New Zealand Law Society about when the Rules Committee would next be reviewing the daily recovery rates (in light of the proposed GST increase in October). The Clerk will remind the Committee to review the rates after October.

The meeting closed at 1.00 pm.