THE RULES COMMITTEE

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29th July 2005

Minutes/4/05

Circular No. 68 of 2005

Minutes of meeting held on Monday 04 July 2005

The meeting called by Agenda/4/05 was held in the Chief Justice's Chambers, High Court, Wellington, on Monday 04 July 2005 at 10 am.

1. **Preliminary**

In Attendance

Hon Justice Baragwanath (in the Chair)
Hon Justice Chambers
Hon Justice Randerson, Chief High Court Judge
Hon Justice Fogarty
Judge Joyce QC
Mr T Weston QC, NZ Law Society representative
Mr C Finlayson, NZ Law Society representative
Ms K Clark, Deputy Solicitor-General
Mr G Tanner QC, Chief Parliamentary Counsel
Dr D Mathieson, QC, Special Parliamentary Counsel
Ms L Sinclair, Deputy Secretary, Ministry of Justice
Mr J Orr, Chief Legal Counsel, Ministry of Justice
Mr R Living, Secretary to the Rules Committee
Ms B Ng, Clerk to the Rules Committee

Apologies

Judge Johnson, Chief District Court Judge
Judge Doherty
Mr Russell Fairbrother, MP

Confirmation of minutes

The minutes of the meeting held on Monday 23rd May 2005 were confirmed as an accurate record.

Matters arising

Justice Chambers was Chair for the first half of the meeting while Justice Baragwanath was absent.

2. District Court Rules

Judge Joyce provided the Committee with a progress report on the District Court Rules.

Judge Joyce and Judge Doherty have had discussions with Mr Ian Jamieson at the Parliamentary Counsel Office. The Parliamentary Counsel Office is making good progress on the development of rules. Judge Joyce and Judge Doherty continue to work through the District Court Rules determining changes that need to be made to the rules. Once that process has finished, the Judges will pass that information on to Mr Jamieson, eventually developing a grand plan.

Criteria for full trial hearings would be developed once there had been more progress. There was a strong lean towards referring to the High Court Rules through the new District Court Rules: parties are able to refer to both the High Court Rules on full trial/hearing rules, and to the District Court Rules.

From the Ministry perspective, Ms Sinclair stated that the operational areas of the Ministry's District Courts Civil Team have looked at the proposed changes to the DCR and have identified some issues, which may be discussed with Judge Doherty. The policy team is considering whether legislative change is required.

The Chief Judge of the District Court is happy for time to be devoted to the development of the new rules. A tremendous start to changes thus far.

3. Omnibus 5

Rule 251A: Skeleton vs Synopsis

Justice Chambers referred the Committee to the Circulars outlining whether "skeleton" or "synopsis" should be used in HCR rule 251 A. It was noted that the use of the word "skeleton" came from the English Civil Procedure Rules. Adopting the word would mean buying into the jurisprudence that had developed in England on the definition of "skeleton". There were a number of rules in the HCR where the word "synopsis" was used. Use of the word synopsis would be consistent with the use of "synopsis" in other HCR rules.

The Committee voted on which word to use: synopsis won by majority.

Rule 251A (1)

The use of the term "defended interlocutory" was so that there was consistency with other HCR rules.

It was also decided that there was no need to expressly require the respondent to respond to each of the applicant's principal submissions.

The rule as it was currently worded was sufficient.

Rule 251A (2)

It was suggested that the current timetable for filing synopses was too tight (no later than two days before the hearing for applicants to file their synopsis, and no later than one day for respondents to file their synopsis). The Committee agreed that the timetable should be changed so that the applicant's synopsis has to be filed no later than three working days before the hearing and the respondent's synopsis not later than one working day before the hearing.

Rule 251A (3)(e)

The Committee agreed that the list of authorities was not to form part of the 10 page maximum set out in the subrule. It was suggested that to make clear that the list of authorities was not a part of the 10 pages, (e) and (f) would be switched around so that (e) would be at the end of the criteria. It was suggested that (c) should also be shifted.

It was agreed that the list of authorities should not be included as part of the 10 pages: (a), (b) and (d) should not exceed 10 pages, and (c) and (e) will be attached.

Rule 251A: handing up further written material at hearing.

Mr Finlayson suggested that the new rule should prohibit counsel from being able to hand up at the hearing any further written submissions or other written material. After discussion, the Committee did not adopt that suggestion.

R 512 (r 9)

The Committee considered whether this rule should be re-written to reflect current practice, to file two affidavits; one affidavit is the foreign language affidavit and the second the interpreter's affidavit having as an exhibit a copy of the foreign language affidavit.

It was agreed that Mr Tanner is to change the wording of the rule so that it reflects current practise.

S 299A

Simplification of wording?

It was put forward that the old rule was much simpler. If there was a document that was referred to in pleadings and it was not there, one could just go and ask for it. The new rule creates the possibility that even if you ask for the documents, privilege may be claimed on it. The old rule also did not have so many qualifications.

It was agreed that Mr Tanner is to simplify section 299A.

The use of "person" or "party"

It was agreed that Mr Tanner would adopt the term that was consistent with the HCR.

Notice to speak Maori

It was argued that the current 15 working days notice period would create huge delays for hearings and that there was no incentive for the Registry to have trained Maori interpreters on hand. A shorter period of notice would encourage the Ministry to resolve difficulties with finding an interpreter. It was put that a notice period of 5 working days was more appropriate.

Ms Sinclair stated that the Registry would prefer 21 working days, as there were real practical difficulties with finding an interpreter. A shorter notice period will create difficulties for Registry staff.

The idea of two sets of working days was floated: 15 working days for trials and 5 working days for interlocutories and conferences. However, it was noted that it would be difficult to manage two sets of working days.

It was agreed that notice of an intention to speak Maori will change to 10 working days.

Rule 900

Three issues were raised concerning the present drafting of the revised rule 900.

First, a concern was expressed that "taking no steps" in subclause (1) is ambiguous. It was agreed that the rule should be amended so as to make it clear that the step which must be taken within the period of ten working days is the filing and service of an application under rule 901.

Secondly, rule 900 was considered somewhat ambiguous as to when time starts running. The Committee agreed that the rules should be amended so as to achieve the following result:

> (a) In the absence of an order abridging time, the defendant has ten working days from service of the plaintiff's rule 900 application to file and serve a rule 901 application. If the defendant has not filed and served such an application within that time, the registrar must promptly enter the award as a judgment.
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> (b) If an order is made providing for a shorter period in which the defendant must act, if he or she wishes to oppose the plaintiff's rule 900 application, then time starts running from the date of service of the order abridging time. That is to say, if an order were made abridging time to five working days, then the defendant would have five working days from the date of service of the order abridging time in which to file and serve his or her rule 901 application, if the defendant wishes to oppose the plaintiff's rule 900 application.

The third concern related to whether the Registrar had power to award costs to the plaintiff on an application under rule 900(1). The Committee considered that a plaintiff's costs on a rule 900(1) application would generally be minor, given that such application may be made informally:

see rule 900(2). The Committee considered, however, that the Clerk should talk to the Auckland High Court Registrar, Mr Tony Mortimer, and Mr David Williams QC to get their views on this topic. The Committee asked the Clerk to report back on this matter at the next meeting. It was agreed that the rules would not be held up pending elucidation on this matter.

Other matters

Two points were raised in a memorandum from Associate Judge Faire.

The first point is *HCR r 15 (1)*. It was noted that the changes were only mere changes of the headings and did not do away with having memoranda.

The second point relates to costs schedules. In the bankruptcy and winding up cases there appears to be a duplication of applications for costs under High Court Civil Proceedings rules and the bankruptcy and winding up rules. "Additional" could be removed from the third schedule. Without it, it is sufficiently clear that the schedule covers bankruptcy cases.

It was agreed that Mr Tanner is to make changes to the rule in accordance with Associate Judge Faire's suggestions.

Justice Chambers suggested that because of the number of changes, Mr Tanner should circulate another set of finalised rules to members before concurrence.

Omnibus 5: District Court Rules

Changes to the HCR common to the DCR will be made.

There were no major issues or problems.

Mr Tanner to also circulate another set of re-drafted rules.

4. Rules Revision

NSW project

Dr Mathieson thought that it was best to go through some of the principal things that he learnt on his trip without going into too much detail.

Dr Mathieson covered in brief detail the Civil Procedure Bill, which was passed when Dr Mathieson was in Sydney. Dr Mathieson will circulate the relevant portions of the NSW Civil Procedure Rules that were recently enacted to the working committees.

One interesting aspect of the Act was Part 6. In Part 6, section 56 sets out the overriding purpose and section 57 sets out the objects of the Civil Procedure Bill. The origin of the project was to rationalise procedure among the different courts because of the imminent introduction of Courtlink. Courtlink is a computerised procedure linking the courts with one another. It will eventually include aspects such as electronic filing. The focus of a number of sections in the Civil Procedure Act is to ensure that there is ultimately no undue delay of proceedings for example through express sections stating the requirement to not cause undue delay.

The effect of the rules is to have a wider view as to what amounts to "dictates of justice", and the delivery of justice. Dr Mathieson noted that there was a clear issue in NSW as to whether that view should be expressed in legislation or through the Court rules, which would probably involve issues of vires. Under modern case management systems, justice means not only justice between the parties, but also justice in terms of the public interest.

Dr Mathieson offered to send out copies of the Civil Procedure Act and the second reading speech to members of the Committee who were interested.

Working Committees

Dr Mathieson to report back to the Committee on the 17th October on the work of the working committees.

5. High Court Criminal Practice Committee

Mr Tanner said that there was a meeting of the High Court Criminal Practice Committee, chaired by Justice Panckhurst and attended by Justice Williams, Mr Robert Lithgow and Mr Ross Carter (from the Parliamentary Counsel Office). The working committee initially tended towards not having formal rules. Mr Tanner has since seen the minutes of that meeting, and the working committee seems to favour producing a manual relating to jury trials and appeals. That exercise would identify what aspects of criminal procedure and appeal procedure might require legislation, what might go into the rules, and what should remain in the practise manual.

The Clerk to contact Justice Panckhurst and inquire about the progress of the working committee work.

6. Harmonisation of Rules of Discovery: Self-incrimination and Anton Piller orders

Ms Sinclair stated that Justice Baragwanath and Ms Julie Nind (who is currently dealing with harmonisation of the HCR rules and the Evidence Bill) met to discuss the potential different treatment of the privilege against self-incrimination by the Australian Harmonisation Committee. The main difference between the Evidence Bill and the Australian rule is that the Evidence Bill requires an ad hoc judicial order to provide the shield against admissions being used against the admitter. The Australian rule is that the order applies as a matter of course.

At the meeting between Ms Nind and Justice Baragwanath, a number of actions are going to take place. Justice Baragwanath has written a letter to Justice Lindgren suggesting that the matter be considered by the Federal Attorney General in Australia. It was agreed that Ms Julie Nind should come to a meeting of the Committee and discuss the issue.

Justice Baragwanath wants the Committee to decide what the best approach to harmonisation is. The Committee should deal with it because it is quicker on its feet. It is hoped that the actions of the Committee would influence the direction of the Lindgren committee and the Parliamentary Select Committee.

Justice Baragwanath proposes first to invite the Committee to decide what the best option is (Evidence Bill; or broad Lindgren model; or narrow Lindgren model). Once the Committee decides which option to pursue, the option can be promoted in one of three ways: the first is to go through the Australian committee via Ms Julie Nind; or through submissions on the Evidence Bill; or deal with the issue through the rules.

Justice Baragwanath hopes to get the Trans-Tasman proposals into a shape that the Committee is happy with and is willing to support. The Committee will then make further submissions on the Evidence Bill based on the shape of those proposals.

The Ministry of Justice is to consider the policy rationale underlying the New Zealand position, and examine whether there is divergent policy rationales. If there is, it will be taken up with the Harmonisation Working Committee.

Justice Fogarty offered to look at the issue, and possibly draft a report on the issue. The report should come back to the Committee for consideration.

7. Interlocutory Orders

The Committee considered the memorandum from Associate Judge Faire on a particular interlocutory problem. He raised the question of what should happen where a chambers order is made in the absence of a party, who then turns up late and has a valid excuse for earlier non-attendance. Can the order be recalled? Is the non-attendee's only remedy one of review to a High Court judge?

The Committee considered that this was a tricky problem, in particular because of certain restraints imposed by s 26P of the Judicature Act 1908. The Committee asked the Clerk to prepare a paper on the problem raised.

8. Appeals to the Court of Appeal from Interlocutory Orders

The Committee discussed the question whether appeals to the Court of Appeal from interlocutory orders in the High Court should be only by leave.

Justice Chambers reported that this matter had been discussed by the Court of Appeal judges and that their view was that no change to the current law was required.

Notwithstanding that, the Committee considered that this was a matter which should be the subject of consultation. The Committee requested the Clerk to prepare a draft consultation paper, setting out the pros and cons of introducing a leave requirement.

9. Protective Costs Orders

The Committee considered the Clerk's paper on protective costs orders.

It was acknowledged that current rules on costs do not properly deal with costs in public interest cases, and that possibly a new set of rules dealing with costs in public interest litigation should be introduced.

A consultation paper may be issued along with discussion on interlocutory appeals. The paper will invite the public to submit their views on the policy issues to do with public interests costs.

The only matter over which the Committee has jurisdiction is costs orders and security for costs. The Committee cannot look at the matter too broadly. This is a major public policy issue, closely linked with applications to intervene. There are major implications for legal aid, applications for security, public funds, and other government initiatives.

The Clerk is to reformulate the paper into a possible consultation paper focussing on costs orders and security for costs in public interest cases.

10. Electronic Filing

The Committee considered the Clerk's paper on electronic filing.

The Committee should look into the American Law Institute's guidelines on electronic filing, and the United States experience. It was agreed that the Committee should not have to look at the technical aspects of implementing and operating electronic filing. The focus of the Committee needs to be on determining rules that address the issues about electronic filing.

The Committee felt that it was best to consider the Ministry of Justice's position on electronic filing before the Committee starts creating rules.

It was agreed that Ms Sinclair should find out what whether the Ministry has any problem with the Committee coming up with some rules on electronic filing. Ms Sinclair also to provide more information about the Ministry of Justice's position.

The Clerk will also investigate the latest development in Australia and the United Kingdom on specific rules to do with electronic filing.

11. Trial Counsel Incompetence

The Committee considered the memorandum from the Deputy Solicitor General.

The Committee agreed that Justices Baragwanath, Randerson, Chambers, and Simon France would discuss this matter further and would bring to the Committee a redrafted rule on trial counsel incompetence for discussion the next meeting. Following that, there would be consultation with the profession.

12. Solicitor Costs Awards

The Committee considered the letter from Mr Bryce Williams, and decided that there was a misunderstanding of the rules by collections officers in the Registry of the relevant rule.

It was agreed that Ms Sinclair would address the issue with the collections officers, via the minutes of the Committee.

The Committee thanked Mr Tom Weston QC for his outstanding contribution to the work of the Rules Committee over many years. The Chairman outlined Mr Weston's invaluable service to the profession and the community through his perceptive and principled analysis of issues and wise guidance.

Meeting ended 1.35pm.