THE RULES COMMITTEE

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Wednesday 8 August 2007

Circular No. 82 of 2007

Minutes of Rules Committee meeting held on Monday 6 August 2007

The meeting called by Agenda/4/07 was held in the Chief Justice's Boardroom, High Court, Wellington, on Monday 6 August 2007 at 10am.

1. Preliminary

In Attendance

Hon Justice Baragwanath (in the Chair)
Hon Justice Chambers
Hon Justice Randerson, Chief High Court Judge
Judge Joyce QC
Dr David Collins QC, Solicitor-General
Mr H Hoffmann, Parliamentary Counsel Office
Ms L Sinclair, Deputy Secretary, Ministry of Justice
Mr J Orr, Chief Legal Counsel, Ministry of Justice
Dr D Mathieson QC, Special Parliamentary Counsel, Parliamentary Counsel Office
Mr B Brown QC
Mr K McCarron, Judicial Administrator to the Chief Justice

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

Apologies

Rt. Hon Dame Sian Elias GNZM, Chief Justice of New Zealand
Mr Charles Chauvel MP
Hon Justice Fogarty
Judge Doherty
Mr A Beck

Confirmation of minutes

The minutes of the meeting held on Monday 11 June 2007 were confirmed.

Matters arising

i. New role of Committee member
Mr Hoffmann was welcomed to the Committee as the representative of the Parliamentary Counsel Office.

ii. Provision of authorities and trial directions in affidavit evidence cases
The Clerk will give the Chair a set of draft guidelines.

iii. Rule 66, 'Search of Court records generally'
The Chief Judge informed the Committee that work is continuing on revision of rule 66. It is expected that a report will be circulated to the Committee before the next meeting.

2. Rules reform

District Courts Rules 2007
The Chair expressed the Committee's thanks to Mr Jamieson, Chief Parliamentary Counsel, for his invaluable work on the Rules.

Ms Sinclair was thanked for her team's statistical analysis.

Judge Joyce and the Clerk will revise the first paragraph under 'Guiding Principles' to clarify the meaning. Once this has been done, the Rules and paper can go out for consultation.

High Court Amendment (Wills Act 2007) Rules 2007
The general consensus was that the former draft (PCO 8038/5) is preferable to its successor (PCO 8038w/1), though a wholesale return to the previous draft was not proposed.

Parliamentary Counsel Office will revise the earlier draft following identification of various areas for amendment, and this will be circulated to the Committee for discussion at the meeting of 1 October 2007.

With respect to melding the new provisions into the revised High Court Rules, Part 27 as drafted by Dr Mathieson will be used. Dr Mathieson will refer to the alternative Part 27 drafted by Ms Nixon and integrate any changes into his version he considers necessary.

High Court Amendment Rules (No 2) 2007 – rule 428, 'Case management and pre-trial conferences for proceedings on standard track'
The rationale behind the changes is that the administrative practice of the courts be formally supported by the Rules.

Several alterations will be made by Dr Mathieson:

> The requirement for counsel's memorandum addressing the points in the new Schedule 8 will be shifted to rule 428 due to the danger of it being overlooked if it remains at the end of the Schedule;
> In rule 428(7) 'trial Judge' will be changed to 'presiding Judge';
> In Schedule 8 at (f) the phrase 'Bundle of documents to include only those documents to be referred to by witnesses or counsel in submission' will be

shortened to 'Bundle of documents.' This follows discussion of the need for leave to introduce in cross examination documents not included in the bundle of documents; and
Schedule 8 may be re-numbered as Schedule 6.

High Court Amendment Rules (No 3) 2007 – insolvency rules
Dr Mathieson spoke to the draft rules and the Chair's paper, highlighting several points. The Court has a far-reaching back-up role with respect to voluntary administration; and the success of the regime rests on an appreciation that time is of the essence and on Judges and Associate Judges making appropriate decisions not confined to fine matters of process. Voluntary administration is so distinct from liquidation as to warrant its own part of the rules. Reference to the commercial list has been removed.

Changes to Form 101, 'Originating application to cancel irregular transaction under section 206 of the Insolvency Act 2006,' will be made:

Identification of all orders sought will be required at the beginning of the Form, in one place;
There will be express notification to the person served of what to do if they object; and
A time will accompany [*date*] at '1.'

Rule 458D, 'Application of Part 4A,' will be amended to provide for irregular transactions. The Ministry of Justice has some further technical issues.

There will need to be separate start dates for parts of the Amendment Rules due to the different timing of the Companies Amendment Act 2006 (coming into force in October 2007) and the Insolvency Act 2006 (expected early December 2007).

The wording of the phrase 'This document notifies you that – ' was queried, and it was explained that the Form reflects the new drafting style of the revised High Court Rules.

Dr Mathieson will make the changes, and the Clerk will circulate a revised set of Rules. Committee members will have the opportunity to request a telephone conference if they wish to discuss issues. Absent such a request, the Committee can approve the Rules on the papers.

Amendment of High Court Rule 708, 'Filing of notice of appeal'
The issue is whether notices of statutory appeal should be filed in the nearest Court to where the hearing took place rather than in Wellington or the place of the office of the respondent. This is an access to justice issue and there is no reason in practice why the rule cannot be changed. Alongside this however, amendment would involve significant ramifications and there is a need to proceed with caution. While the court can direct that the notice of appeal be filed in another office under rule 708(3), the power to do so is somewhat reluctantly exercised.

The Committee will reconsider the issue in light of research the Clerk will do on the practice in other jurisdictions.

3. Litigation funding and class actions

These two agenda items were discussed together as issues overlap, especially concerning access to justice, funding, and control over proceedings. The Chief Judge spoke about his attendance at a telephone conference on 27 June 2007, and outlined the main issues raised with particular reference to the Supreme Court of Victoria's submission to the Victorian Law Reform Commission's review of civil procedure.

Provision for class actions would require legislative change, a process the Rules Committee can help initiate. New Zealand is behind other jurisdictions such as Canada, Australia, the USA, and England which provide for class actions, and it is timely that the Committee seize upon the issue.

While submissions to the consultation paper generally revealed enthusiasm for an 'opt out' class action arrangement, the benefits of an 'opt in' procedure were also discussed. The latter include the desirability of potential litigants making a clear, voluntary, and informed decision as to whether to engage in litigation instead of being a party by default; and the dangers should publicity regarding opting out of litigation not reach a potential class member. Benefits of an 'opt out' approach include the gains litigants may see from proceedings into which they may not actively opt due to reasons including insufficient funds, uncertainty, or simple inertia; and a defendant being accountable for their wrongdoing which may add up considerably across a class of plaintiffs who may not have sufficient interest to instigate proceedings individually.

Litigation funding is already being seen in New Zealand, and is an important avenue for access to justice for individuals who may not be able to fund their own litigation. Issues surrounding litigation funding extend to defendants as well as to plaintiffs, and in particular those pursuing cross-claims. While not yet posing significant problems, risks come into sharper focus where contingency funders are considered as compared to, for example, insurance companies. There is a risk of a conflict of duties owed by the solicitor to the court, to their client, and to the litigation funder, as well as that shortcuts will be taken to maximise profits. It was noted that the New Zealand Law Society researched contingency fees 2 or 3 years ago, and was suggested that the Committee refer to this.

The Chair will advise Lindgren J that the Rules Committee is examining litigation funding in the context of class actions, and that the Australian model will provide a starting point with which consistency is desirable, although the Committee will act independently.

Dr Mathieson will draft a set of rules concerning class actions working from the Australian Federal Court Rules model and making changes, or flagging issues for consultation, where desirable. Dr Mathieson will work on the premises that:

> Proceedings do not become a class action until the court approves of the approach and defines the class;
> The court will decide whether proceedings are to be 'opt in' or 'opt out' at this initial stage and the promoting solicitor must adhere closely to its directions; and
> There will be close judicial intervention from the outset.

It is crucial for the court to have significant case management control in areas including costs and securities, discovery, giving evidence, and defining the class.

4. Service outside the jurisdiction

The Chief Judge spoke to his memorandum regarding the telephone conference he attended on 27 June 2007 and to the Clerk's comparative research. Both indicated a significant level of consistency with respect to the circumstances in which legal processes can be served overseas, and requirements for leave.

There is a desire for consistency between Australian and New Zealand rules, and a sub-committee was formed to further investigate differences. The sub-committee will comprise the Chair, the Chief Judge, and a representative from the profession (Mr Brown and Mr Beck will liaise to decide who will join). New Zealand is in the process of adopting the Hague Service Convention and this will need to be factored in.

The Chair and Chief Judge will report to Lindgren J on the Committee's work and willingness to work towards harmonisation. The Committee will also inform Julie Nind as to its actions.

5. Electronic courts

The Committee will ascertain from Miller J his opinion on the success or otherwise of his nine week paperless trial (currently underway). Dr Collins tabled a report on the Crown's experience of the trial, indicating that since preliminary technological problems were resolved, about 2 weeks have been gained.

Providing guidelines for electronic courts would ultimately require direction on the two limbs of transcription of evidence and document management.

6. Discovery of documents in civil litigation – the *Peruvian Guano* test of discoverability

There was general discussion about discovery in light of upcoming attendance at a conference on issues relating to discovery of documents in civil litigation by the Chair, Chief Judge, and Judge Joyce in Melbourne on 24 August 2007.

Problems with the current regime include interpretation of 'necessary' with respect to documents, the high costs of discovery, and the lack of structure and/or assistance for those undertaking discovery. Various ideas were discussed including the benefits of discovery based on identification of the issues rather than on the pleadings which tend to be wider. Alongside this though, discovery dependant on definition of the issues may be in a constant state of change as issues evolved during a trial, or too narrow a framing of the issues could result in inadequate discovery.

It was ultimately agreed that the essence of the matter is illuminated where discovery leads to uncovering new issues. The question becomes whether discovery should be parasitic on the issues, or the issues parasitic on discovery.

The meeting closed at 1.05pm.