THE RULES COMMITTEE

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23 June 2009

Minutes/03/09

Circular No. 56 of 2009

Minutes of meeting held on 8 June 2009

The meeting called by Agenda/03/09 was held in the Chief Justice's Boardroom, High Court, Wellington, on Monday 8 June 2009, at 10:00am.

1. Preliminary

In Attendance

Hon Justice Randerson, Chief High Court Judge (in the Chair)
Rt. Hon Dame Sian Elias GNZM, Chief Justice of New Zealand
Hon Justice Chambers
Hon Justice Asher
Hon Justice Stevens
Judge Joyce QC
Judge Doherty
Hon Christopher Finlayson, Attorney-General
Dr David Collins QC, Solicitor-General
Dr Don Mathieson QC, Special Parliamentary Counsel, Parliamentary Counsel Office
Mr Jeff Orr, Ministry of Justice
Mr Ian Jamieson, Parliamentary Counsel Office
Mr K McCarron, Judicial Administrator to the Chief Justice
Ms Anthea Williams, Private Secretary to the Attorney-General

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

Apologies

Hon Justice Fogarty
Ms Rebecca Ellis, Crown Law
Ms Liz Sinclair, Ministry of Justice
Mr Andrew Hampton, Ministry of Justice

Mr Brendan Brown QC
Mr Andrew Beck, New Zealand Law Society representative

Confirmation of minutes
The minutes of the meeting of Monday 30 March 2009 were confirmed, subject to amendments to the discussion on class actions. The Chief Justice commented that the minutes do not fully record her concerns about class actions. These concerns are set out more fully in the minutes of this meeting.

2. Obligations on counsel to co-operate

The Attorney-General spoke on this item. He noted that the duty on counsel to co-operate comes to the fore especially in discovery. A sub-rule could be inserted into the discovery rules; however, there needs to be a broader obligation also. The obligation involved co-operation between counsel, without limiting adversarial responsibilities. There was a concern that if the duty is spelled out, this could give rise to satellite litigation and additional complaints to judges. The Chief Justice commented that the duty could be expressed as co-operation to achieve the objectives of the Act. It would need to be general and non-justiciable. The United States discovery rule was discussed. There was also a concern that it could be used as a tool against the profession, and that there was a danger of manipulation by counsel.

The Chief Justice suggested that it could be expressed not as a duty or rule but as a subsidiary rule: that a judge is entitled to expect counsel will co-operate to achieve efficient resolution of disputes. In this way the Judge would have something to enforce, and also there is an educative function. The Attorney-General proposed that it could first be introduced first as an expectation, so that it has an educative function, and then in three years begin to enforce it. Justice Chambers considered it was a duty.

Justice Randerson commented that this issue needs a thorough examination because of the interface with counsel's duty to clients, regulation by the profession, and what is appropriate for sanction by judges as opposed to the professional regulatory body.

The issue of costs against lawyers was also discussed.

Dr Mathieson QC will draft a rule that reflects the Committee's discussions; this will be circulated for comment. The rule will be phrased as an expectation rather than a duty, to raise awareness, with a view to making it a duty in several years' time. It can be developed in relation to discovery and then extended to case management and other areas in the future. There is an advantage to having a general statement along with a specific statement for discovery.

3. Discovery

Justice Asher reported on the sub-committee's progress. He spoke to his paper and explained the background to the Committee's work in this area. There had been a strong expression of concern regarding the cost and delay in litigation. Criticism of the existing regime, of the *Peruvian Guano* test of 'train of enquiry' has arisen in all common law jurisdictions. There has been reform in most jurisdictions, but not all: some Australian states and Hong Kong have not yet carried out reform. The majority of Australian states, the United Kingdom, and Canada have adopted a narrow test, that of documents adverse to a party's case, rather than 'may be relevant'. The outcome in the United Kingdom has been that the process had not changed a great deal, and it was still very expensive. Another influence has been the joint NZBA/NZLS conference in Auckland in 2008, where the need for reform of discovery was targeted.

The sub-committee has developed three core options:

1. Retention of the status quo, the 'train of enquiry' test from *Peruvian Guano*.

2. Reform using the 'adverse documents' test as seen in the UK and the majority of Australian states.

3. Initial disclosure of documents by a party on filing, where each party files the documents on which they rely, then specific discovery on application. This application would occur at a second case management conference.

This third option is set out in the draft Rules. It involves a targeted approach as in judicial review cases. This is one of the options favoured by Lord Justice Jackson's committee on civil costs in the UK. This is put forward as a general approach, but one way to limit it would be to confine it to specific types of cases. The conservative approach from the profession is that they will point to cases won by discovering the "smoking gun" and say that the administration of justice will be damaged by a reform like this. Mr Beck has expressed that view in the sub-committee. However, even with *Peruvian Guano* you do not get perfect justice on discovery; the current approach is not working, and other options need to be examined. There is a difference between achieving perfect justice and achieving the best result for a client.

Justice Asher invited comment on the options, and enquired whether the options were adequately covered and could go out to the profession for consultation.

The Solicitor-General commented that he considered retention of the status quo was not an option. He wanted options two and three to go to the profession. The Chief Justice considered that there needs to be more explicit acknowledgement in the paper of different categories of cases, particularly tort cases. Option two could be the default position, but counsel could apply for a more restrictive regime. The paper should be amended to reflect this option. There was also a concern about judges being drawn into prematurely judging what is in issue beforehand.

The Chief Justice queried whether arbitration should be the paradigm. Justice Asher commented that the Australian Federal Court Practice Note of Chief Justice Black may be a useful model.

Justice Stevens commented that it would be beneficial to see more exposure to the discovery regime for judicial review, because there are some useful lessons to be learnt from that context.

It was noted that the current New Zealand regime does include the option for restricted discovery, but it is hardly ever used, and orders are not narrowed down.

Justice Asher will revise his consultation paper, and put forward a revised paper at the next meeting, with a view to it going out for consultation after that.

4. Appeals from Associate Judges

Justice Chambers reported on this item. The issue is that a single decision of an Associate Judge leads to a bifurcated appeal process, whereby some parts are appealed to the High Court, and some parts to the Court of Appeal. This leads to confusion and appeals filed in the wrong court. The Court of Appeal judges are unanimously of the view that Associate Judge decisions should be treated like any other coming out of the High Court. This would solve the problem of the bifurcated appeal process and gives Associate Judges a proper status in the High Court. It also removes the anomaly that often it is random whether an Associate Judge or a Judge is allocated; a litigant's appeal rights should not depend on this allocation.

To resolve the problem, repeal of s 26P of the Judicature Act is required, along with minor amendments to rules 7.49-7.50 to remove references to Associate Judges.

The Committee supported this reform. There is a Judicial Matters Bill currently before Parliament into which this amendment might be inserted.

5. Class actions

Justice Stevens spoke to his memorandum and the draft Class Actions Bill. He stated it was intended to send out the current Bill with the Rules as a schedule, plus a letter that is in the course of preparation.

The sub-committee consulted with Professor Joseph, and items have been introduced into rule 34.8(4). There is a requirement that applicants make enquiries as to the degree of support: rule 34.7(3)(j) requires those who come before to Court to include information regarding any opposition and any persons who may become qualified persons but who have different interests or hold different views as to the wisdom of the proposed action. The limitation suspension provision has been clarified. There are also restrictions on the use of class action orders including fairness to class members and proposed defendants in 34.8(3)(f). There is provision for appointment of independent counsel in 34.8(6). There are restrictions on opt-out class actions in 34.8(4). Paragraphs 17-26 of Justice Stevens' memorandum set out criteria for deciding whether to make an opt-in or opt-out order, which are for guidance only and would not be in the Act or Rules.

The section on fees agreements has been recast to make it clear that agreements are reviewable at the outset, and also at a later point if their operation is oppressive or disproportionate, and there is a material change of circumstances. It is accepted that litigation funders will prefer the agreements not to be reviewed. However, the sub-committee considers it is best to let the proposal go forward in this form so that debate over the involvement of litigation funders and the review process regarding fees agreements can be dealt with at the select committee stage.

Mr Patrick McCabe has consulted with the Ministry of Economic Development which has consulted with the Commerce Commission, the Securities Commission and the Ministry of Consumer Affairs. All of those are supportive of the proposals and consider that the proposals will facilitate redress in appropriate cases where mass wrongs have been committed and breaches of either the Commerce Act or the Securities Act.

A number of issues were discussed:

- Securities Commission
    - Clause 20 of the Bill clarifies that the Securities Commission has the same powers in bringing a class action as it does under the Securities Act, and is in the same position as other lead plaintiffs in respect of costs. They are in a different position in that they are not making a claim on their own behalf.
    - If the Commission is a lead plaintiff in an opt-out class action, that will affect a class member's right to bring an action if they do not opt out. The question is what is appropriate as a control.
- There was also discussion on whether the Rules Committee would be recommending this form of legislation. The Rules Committee is assisting the government of the day to produce a Bill with associated Rules. This would first require the government to decide whether it wanted to introduce the Bill and secondly, the form of any Bill; thirdly, it would go to select committee and Parliament for debate. The Rules Committee is assisting because of its particular expertise with Rules. Justice Stevens is preparing a letter to accompany the Bill that will identify policy issues in several areas.
- The Rules are now in a schedule to the Bill so that the Rules can be the subject of submissions together with the Bill.

The Chief Justice highlighted several policy areas:

- Litigation funding
    - The Chief Justice enquired as to what the principled basis was for making litigation funding available to class actions but not to impecunious litigants generally. Dr Mathieson QC stated that this was based on experience of class actions in the Federal Court of Australia. For economic reasons, only a small proportion of class actions would be taken without litigation funding. The sub-committee had considered that the question was what degree of control there should be over litigation funding agreements. Litigation funding needed to be dealt with in the case of class actions because it was considered unavoidable. Litigation funders are already operating in New Zealand.
    - The Chief Justice considered that litigation funding could be addressed in a litigation funding Act. The issue should be addressed directly rather than indirectly through class actions legislation. Dr Mathieson commented that Australian states do not address litigation funding in a separate Act. Justice Asher commented that reform in the area had been judge-driven; the consensus in Australia seemed to be that litigation funding is appropriate as long as it is monitored and controlled. The diminishing relevance of the torts of maintenance and champerty has happened incrementally.
    - It was noted that litigation funders are careful about what actions they fund; most funding is not class actions but other types of litigation.
    - Justice Randerson considered that rather than taking litigation funding out of the Bill, it was preferable to address this issue in a covering letter flagging it as an issue. It was useful to suggest some control of litigation funding, and highlight whether maintenance and champerty need to be abolished altogether; this would enable Parliament to deal with this important social issue.
- Opt-out class actions
    - There was a concern that parties cannot opt out later in the process if litigation is being conducted in a way that that they do not agree with.
- Privileges for class actions legislation
    - The Chief Justice also enquired as to the reason that certain privileges were being afforded to class actions which are not more generally available, for example limitation suspension, and restriction on interlocutory applications. There was a question as to why these features should apply to this class of litigation only. Dr Mathieson commented that the Australian experience has shown that defendants' strategy in class actions is to delay the proceedings and attempt to reduce the class. Therefore it is necessary to put controls on interlocutory proceedings. The Chief Justice commented that this could be considered hostile to defendants.
    - The Chief Justice enquired about the definition of excess costs in rule 34.24(5). These are expenses and disbursements. The lead plaintiff can get an order for costs unique to the lead plaintiff because of extra costs they incurred; this would come out of damages, not from the defendant. This protects the lead plaintiff against the other class members.
    - In class actions legislation in other jurisdictions, limitation periods are suspended. This is because during the period that a class action is

commenced, the action could stop for some reason, or be struck out. A person must be able to sue in their own capacity. The Chief Justice considered this could be a problem in opt-out. There is still a limitation period suspension in opt-out situations. Most class actions are likely to be opt-out.

Further action:

- Mr Jeff Orr commented that the first step in the process going forward is a Cabinet Policy Paper. Any letter from the Rules Committee highlighting key policy issues would be of assistance to whomever drafts that paper.

- The letter from the Chair of the Committee could indicate that the Chief Justice has some concerns about the wider policy issues. The Chief Justice could if necessary provide a covering letter setting out her concerns, to accompany any letter from the Chair of the Committee, or her concerns could be flagged in a letter from the Committee.

The Chief Justice also queried some technical issues:

- The Chief Justice enquired as to whether "each individual claim" in paragraph 23 of Justice Stevens' memorandum referred to each member's claim. This section was prepared by Dr Mathieson from overseas literature and experience as to what drove whether claims went into opt-in and opt-out orders. There was also concern with the term "gatekeeper" in describing the judge's role in making the class action order; the term "management" was preferred. The Committee had reservations about this part. Reasons whether to make an opt-in or opt-out order should be developed in the case law.

- There was discussion of the problem that members cannot opt out once the notice period has expired, for example if they do not like the way in which the litigation is being run. This is a protection for the defendant, because it is important to know how many claimants there are, what their exposure is, because this affects litigation tactics and insurance. This is only an issue in opt-out class actions.

- The Committee decided that, when the Bill is handed over, it should be acknowledged clearly in the covering letter that it contains a new model that no jurisdiction has yet adopted. New Zealand will have the only opt-in or opt-out model.

- There was a query about why consent is required before certain parties are a class member, including the Crown. This is contained in clause 7 of the Bill. Many of the economic arguments do not apply to the Crown.

- There was also discussion of cl 15(2), which limits specified kinds of interlocutory applications by a defendant. This is to prevent gaming by a defendant. However, there was the question of why, if this is an issue, this restriction should only apply to class actions and not be brought in across the board. Dr Mathieson suggested that experience suggested that this is a particular problem in class actions. However, that still left a lack of symmetry in class actions having this provision. This should be flagged as an issue for consideration. The Chief Justice noted that the potential for the section was broad and covers all interlocutory applications; it may be preferable for this to be specifically directed at the interlocutories around management.

- The Chief Justice queried the section in cl 17 and cl 20 where the Commerce Commission or Securities Commission may apply to be a lead plaintiff when acting on behalf of persons who "apprehend that they will suffer loss or damage". Dr Mathieson gave the example of a misleading prospectus, where the loss is apprehended but has not crystallised yet. The Chief Justice considered that a loss on the part of individual members would be necessary first. There did not seem to be an underlying claim for the

Commission as opposed to using their other powers such as enforcement. Dr Mathieson will query this point with the Commerce Commission and the Securities Commission.

- The Chief Justice queried whether if a person gets proceedings wrong, it should be "void", as stated in rule 34.5(1). There may be Limitation Act issues. This should be changed to "voidable". Alternatively, it could be changed so that the person who files cannot proceed without the judge's permission, but may still continue as an individual. The cross-reference to 34.14(6) will be changed to 34.15(6).

- The Chief Justice queried why "must" is used in rule 34.8(2) rather than giving a discretion. It was decided to change "must" to "may" in 34.8(2) and (3).

- The Chief Justice queried the meaning of the phrase "as far as practicable" in 34.8(4)(a); this phrase may not add anything to the section. The wording had come from consultation with Professor Joseph, and contemplated widely dispersed class members. The Committee also discussed whether to insert "and" rather than "or" in that section. There was the view that if (a) and (b) are made cumulative by using "and", opt-out class actions will never be used. It was suggested to leave "or" and remove "as far as practicable" in (a). It was also suggested to remove (b) altogether. It was decided to flag this section for the attention of the Ministry.

- The rule on appointment of independent counsel in 34.8(6) was discussed. The impetus for inserting this section had come from discussions around effective notice for Maori groups. The sub-committee had considered that this rule should not be constrained to Maori issues. The Court already has the power to appoint independent counsel but the sub-committee had kept the section in to remind of this. The Committee decided to remove this sub-rule.

- The Chief Justice queried the meaning of 34.9(1). That rule is there because an application under 34.7 is a pre-action procedure. It was suggested this rule should apply for all applications. It was said that an application under 34.7 is unusual because it is a pre-commencement procedure.

- There was a query about rule 34.12(3), that the written notice for opt-out must be in form G 40. It was suggested there should be more detail, as there is in 34.14. It was noted that unlike opt-in, in opt-out there is no necessity to show why the party is entitled to take that option. Justice Randerson noted that there was a power for a judge to specify the form of the notice; this could say something like 'or as modified by order of the court'. Dr Mathieson will look at 34.12(3) and 34.11(2)(c) to address this.

- The Chief Justice commented on 34.12(6)(b), which states that a member of the class is not a party to the class action. They are not technically a party but are bound as if they were.

- The Chief Justice queried why notice to the class members is required before approval of a settlement, under 34.14(3). This rule is there so that if a member had concerns about the proposed settlement, they would not be bound to accept the offer if they have not been heard first.

- There was also an issue about whether the defendant is present at the hearing where a judge approves the settlement. A section will be inserted to indicate that the defendant is not entitled to take part in the approval process, unless given permission.

- Rule 34.16 - Conversion to an ordinary proceeding

    - There was a query about the meaning of 34.16(1)(a). The class action may be converted to an ordinary proceeding if the court is satisfied that the cost to the defendant of distributing amounts payable to class members would be disproportionately onerous. It was decided to remove (a), since it is

inappropriate to convert at an early stage because of anticipation of the situation at the end of the action.

- Justice Chambers commented that the defendant may be able to try to re-litigate using 34.16(1)(c).

- The Chief Justice considered that (b) should be relevant at the outset in making the class action, but should not be relevant later on.

- Class actions should only be converted into ordinary actions because of some supervening event or change of circumstances. The most likely change of circumstances would be that the defendant has settled with substantial numbers of class members.

- The Chief Justice enquired in respect of 34.17(1), whether all the issues of the class members have to be the same. The class members must have at least one common issue, as per cl 6 of the Bill. Class members may have different quantifications of damages.

- There was also a question about 34.17(4) regarding a class member's liability for costs. This section may have come from the Federal Court of Australia. This could be changed to include a discretion, so that the member "may be liable" for costs, rather than "is liable". The change would read "The Court may order that a member, who is not the lead plaintiff, is liable…".

- Another issue was whether a lead plaintiff will take appeals on behalf of an individual member. This was covered by cl 13(2).

- There was an issue of whether the lead plaintiff needed to show specific loss for particular members. In many cases it will be obvious. There is a requirement in 34.7(3)(e) that the pre-commencement application has to contain information on the nature of the claims made on behalf of a proposed class, and the relief sought in respect of those claims. Statements of claim are referred to in 34.9(2).

- A question arose from rule 34.19: it was unclear when class members have standing to make an application. Class members have restricted standing to make certain applications, including in respect of settlement, the fees agreement, and removing the lead plaintiff.

- Rule 34.20 was discussed. This addressed the basis for the court approving settlement and discontinuance. There was a concern that the merits of the case was not listed as a relevant factor. The merits of the case will be inserted as a factor to consider under the section.

- Rule 34.23

  - The wording in 34.23(2)(c) was queried: the section refers to it being not "cost effective" to identify some class members. One option was to change to "disproportionately expensive". "Cost effective" is a more balanced term. The sub-committee will consider this.

  - Rule 34.23(5) was also discussed. It was clarified that this rule is relevant to the excess unclaimed funds.

- Costs

  - There was a question of whether costs should be awarded against a lead plaintiff only, as per 34.24(2), including in an opt-in action. There was a concern about security for costs. The Chief Justice proposed that the discretion should be somewhat wider and not restricted only to the lead

plaintiff. In Australia the ordinary rules apply. It is part of the obligation of the lead plaintiff. The practice is that the lead plaintiff carries the risk of costs. It is part of risk management.

- Opt-in Form G 41

    - There is no acknowledgment in the form that by joining the action, a plaintiff is losing their own cause of action. There was a question whether the form was sufficiently explicit in regard to the consequences of opting in. including *res judicata*, and lack of control over litigation, and only three areas in which they can intervene.

    - Usually the litigation funder or lead plaintiff will send out a notice explaining this issue. However the form should draw attention to this also. The judge gives directions under 34.8(3)(g) about the wording of notification to qualified persons as to their rights. The form will be amended to include the statement "I have read the notice setting out my rights and obligations in signing this form" or similar.

Justice Randerson thanked Justice Stevens, Dr Mathieson, the Clerk, Sophie Klinger, and the previous Clerk, Heather McKenzie for their work on the class actions legislation. Justice Stevens acknowledged the contributions of Professor Phillip Joseph and Justice Joe Williams. The Chair will send them a letter to thank them for their work. Mr Patrick McCabe and Ms Lisa Hansen will also be sent letters thanking them for their work on the sub-committee. Justice Stevens thanked Dr Mathieson and acknowledged his assistance in drafting.

Justice Stevens, Dr Mathieson and sub-committee will prepare amendments for the Committee to view. They will consult with the Chief Justice before sending it to the full committee for comment before the next Rules Committee meeting. Once the Committee is satisfied, the Bill can then be forwarded to the Secretary for Justice, to decide whether the Ministry wants to proceed with it and present it to the Minister. A letter will accompany the Bill, flagging relevant policy issues that require attention. This letter will also be circulated to the full Committee for comment. The letter will draw attention to the need to have provision for class actions legislation. It will indicate that there are two options (opt-in and opt-out) and the Committee worked on using both. The letter will also indicate a number of significant policy issues needing to be addressed, which are outside the remit of the Committee. The issues will be listed. The letter will be from the Chair of the Rules Committee to the Secretary for Justice.

6. District Court Rules reform

There are new forms for the claims procedure for approval by the Committee. There was a note from the Ministry of Justice describing the process the forms have been through. The District Courts Rules have also had some minor amendments as set out in Mr Ian Jamieson's memorandum. The Rules and forms are currently being checked by the Parliamentary Counsel Office. The Law Society is set to run seminars on the new Rules in August.

The Committee approved the forms. The Rules are scheduled to come into force on 1 November. Judges Doherty and Joyce QC will finalise the date.

7. Case management/written briefs

Justice Asher reported on the sub-committee's progress. A consultation paper was sent out in December 2008, proposing to remove the presumption in favour of written briefs and proposing a conference before setting down, in substitution for the third pre-trial conference, where evidence direction would be made. With the exception of the New Zealand Law Society, submissions supported some kind of change.

There were two main concerns expressed in submissions. The first was that the presumption in favour of written briefs would be abolished. There was a concern that oral evidence would be extended beyond situations where credibility was in issue. That was a particular feature of the Law Society submission. The sub-committee has prepared a draft for another round of consultation which will provide for no presumption either way as to how evidence should be presented in court. The draft Rules, at 9.2, set out guidance as to how evidence should be given. They indicate that where evidence is on disputed matters of fact, or credibility is in issue, evidence should be given orally. For expert evidence, background evidence and other similar evidence, written briefs should continue to be used.

Will-say statements were the second area of concern. The submissions expressed concern that will-say statements were an unknown area. They are covered in 9.3 to 9.5 of the draft Rules. There is a short definition of will-say statements. It is also noted that they will not be admissible, so as to avoid the danger that will-say statements will just become another form of written briefs. However they may be admissible for the purposes of seeking to persuade a judge to make orders, if a party is claiming some unfairness arising from inadequate will-say statements.

The other substantive change, which did not elicit any adverse comment during consultation, was the proposal to change the pre-trial conference to a third conference, before setting down, but after the settlement conference stage has been completed. At this conference the normal pre-trial issues would be considered, but the Judge would also consider the issues and make directions on the evidence.

It is anticipated there would be a short consultation paper and draft Rules circulated to the profession for consultation.

Justice Chambers considered the issue could go to consultation but had several concerns about the proposals. He considered there would be more disputes and more time expended. There may be disputes about whether points were properly signalled in will-say statements and departures from will-say statements. He considered they will not resolve the fundamental problem with written briefs, which is that they are written in the lawyer's words. However, he considered that this may be an overstated concern, since cross-examination will expose where a witness has had words placed in their mouth.

Justice Randerson commented that there are two main concerns with written briefs. The first was the upfront costs involved, where such costs are wasted if there is settlement (except to the extent the briefs may have contributed to settlement). The other problem was carefully manicured statements. The proposal was to move the time when the brief was required, until after the settlement conference. At that point the Judge could tailor the form of evidence to the case. At draft rule 9.12, a range of options is available.

There is a need to prevent ambush; this was a factor in introducing written briefs in the first place. One suggestion was that the evidence could take the form of a counsel summary of evidence. It does not need to come from the witness necessarily.

There was also a concern that in increasing the flexibility, there was a risk that the conduct of the trial would depend on the preference of a particular judge who prefers a certain type of evidence. There is guidance in draft rule 9.2. The Chief Justice commented that these may be factors but they are not principles.

The Chief Justice suggested that the Profession may have become accustomed to written briefs, would not be able to adjust to the new practice, and would be concerned about the possibility of ambush. An approach where evidence is matched to the case may be difficult to manage.

It was important that will-say statements not become just like written briefs. On the other hand, there was the view that if will-say statements are to be useful, they will need to contain about as much detail as written briefs.

An option for consultation was to permit briefs to be prepared including disputed oral parts, but for the disputed part to be given orally. This would give advice to the other side, avoid the trouble of will-say statements, and enable the judge to direct the witness to give evidence orally at the trial at certain points.

There was a great deal of judicial support for a trial directions conference before a judge, just before setting down.

The Committee will seek comment from the professional members, Mr Brendan Brown QC and Mr Andrew Beck. The option will be raised of having evidence all in a brief but an order for some to be given orally. Justice Randerson will seek more input from judges. The item will be placed on the agenda for the next meeting.

8. Daily recovery rates

Justice Chambers raised the issue that daily recovery rates have not been updated since 2006. The Clerk will prepare a paper for consultation of the profession. It will be useful to point out the percentage changes, in a manner showing what the proposed rates would be if they were adopted. The Clerk will send the draft paper to Justices Chambers and Randerson and Judge Doherty.

9. Rule change – address for service

This issue was raised by Justice Hugh Williams. There is a proposal regarding the rules on changing representation or address for service. This is currently done in the form of an interlocutory application, requiring a $600 filing fee. The rule needs urgent amendment so that there is an exception to the fee for this issue or an interlocutory application is not required. Dr Mathieson QC will draft a rule to address this issue.

10. Access to court records

These have now been approved by Cabinet and came into force on 12 June 2009. The Committee will need to consider similar rules for the District Court (summary criminal) and the appellate courts. The proposed civil rules in the District Court incorporate the rules for the High Court with minor modifications. This item was carried over until the meeting of 6 July 2009.

11. Schedule 3 of the High Court Rules and time allocations

This item was carried over until the meeting of 6 July 2009.

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

This item was carried over until the meeting of 6 July 2009.

13. Sentence indications

This item was carried over until the meeting of 6 July 2009.

14. Originating applications

This item was carried over until the meeting of 6 July 2009.

15. Rule 7.39 of the High Court Rules

This item was carried over until the meeting of 6 July 2009.

16. Construction Contracts Act 2002 and Rules of Court

This item was carried over until the meeting of 6 July 2009.

17. Court-ordered mediations

This item was carried over until the meeting of 6 July 2009.

18. Trans-Tasman Proceedings Bill

This item was carried over until the meeting of 6 July 2009.

The meeting closed at 3.15 pm.