THE RULES COMMITTEE

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27 February 2009

Minutes/01/09

Circular No. 15 of 2009

Minutes of meeting held on 9 February 2009

The meeting called by Agenda/01/09 was held in the Chief Justice's Boardroom, High Court, Wellington, on Monday 9 February 2009, at 10:00am.

1. Preliminary

In Attendance

Hon Justice Fogarty (in the Chair)
Rt. Hon Dame Sian Elias GNZM, Chief Justice of New Zealand
Hon Justice Chambers
Hon Justice Randerson, Chief High Court Judge
Hon Justice Asher
Judge Joyce QC
Judge Doherty
Ms Rebecca Ellis, Crown Law
Mr Hugo Hoffmann, Parliamentary Counsel Office
Dr Don Mathieson QC, Special Parliamentary Counsel, Parliamentary Counsel Office
Mr Brendan Brown QC
Mr Andrew Beck, New Zealand Law Society representative
Mr K McCarron, Judicial Administrator to the Chief Justice
Mr Andrew Hampton, Ministry of Justice
Ms Anthea Williams, Private Secretary to the Attorney-General
Mr Roger Howard, Ministry of Justice

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

Apologies

Hon Christopher Finlayson, Attorney-General

Confirmation of minutes

The minutes of the meeting of Monday 1 December 2008 were confirmed with one alteration to the list of attendees: Ms Rebecca Ellis from Crown Law was in attendance, rather than Ms Cheryl Gwyn.

Other matters arising

The Chair introduced the new Secretary to the Committee, Ms Sarah Ellis.

2. Supreme Court Amendment Rules 2008

The Chief Justice reported on this item. The proposed Order in Council has been circulated to the Committee. The Secretary will send out the concurrence version as soon as it is prepared. Mr Hampton stated that the new Rules may be able to take effect on 1 May 2009. The Chief Justice indicated the Rules should come into effect as soon as possible.

3. Discovery

The sub-committee is to meet on Monday 9 February at 2.00pm. The sub-committee members include the Chair, the Chief High Court Judge, Asher J, Associate Judge Faire (to be linked by telephone), Judge Joyce, the Attorney-General or nominee, Mr Brendan Brown QC, Mr Andrew Beck, and Mr David Williams QC. Associate Judge Faire and Mr Williams QC have agreed to be part of the Sub-Committee. Associate Judge Faire favours immediate disclosure by the plaintiff of the documents on which they rely, at time of filing the statement of claim.

The Discovery sub-committee will report back to the Committee on progress at the next meeting.

4. Report on Australian conference on procedural issues

Justice Asher reported on a recent Australian conference on a number of procedural issues, where he had presented a paper on litigation funding. Many of the issues in Australia are similar to those experienced in New Zealand. For example, the "vanishing civil trial" is a common concern: civil trials are becoming unmanageably expensive and time-consuming. In Australia they are developing a number of strategies to deal with those problems. Several matters were of key interest from the conference.

Litigation funding: this was seen as an Australian-driven event and there are many substantial companies providing this service. In the last ten years, some companies have been looking at New Zealand, and in the *Feltex* decision the issue of litigation funding came before the court. In Australia the clear indication from the courts has been that litigation funding is lawful. The courts have abolished the torts of maintenance and champerty in Victoria, New South Wales, Tasmania, and South Australia. The only issue is what level of judicial control there should be over litigation funding.

Fast Track Procedure/'Rocket Docket': this is to be implemented in the next few months in New Zealand.

Focusing on trial issues using pre-trial case management: this required judicial supervision and sequential judicial input to solve issues before the start of the trial. Those involved in Queensland did not consider this level of judicial input helpful, but generally the consensus in Victoria and New South Wales is that judges should be closely involved.

Written briefs: Australian does not have rules on this. Instead they tend to tailor the evidence to particular issues, using a combination of written and oral evidence in trial.

'Hot-tubbing' experts to save time: New Zealand is ahead on this, in that it has occurred in a number of major trials here, and is just being developed in Australia.

Timetabling of evidence in submissions in major trials: it was considered that imposing rigid deadlines on counsel in relation to evidence could be problematic, but getting counsel to agree on a timetable for the trial and ensuring the schedule was followed was a useful way of making trials progress more effectively.

Level of judicial control over litigation: some consider that there should be a great deal of judicial control. Also relevant is counsel's duty to the court to ensure that the court's processes are properly followed. This can be compared with a laissez-faire approach. New Zealand seems to be moving in the first direction with increased judicial control.

The Chair thanked Justice Asher for his discussion of the issues arising from the conference.

5. Access to Court Records

In the meeting of 1 December the issue was raised of whether the Rules Committee had jurisdiction to make rules on access to court records. The Chief High Court Judge's memorandum of 3 February 2009 set out the sources of the Committee's jurisdiction for civil and criminal rules: for civil rules, s 51C Judicature Act 1908; for criminal rules, s 51C Judicature Act, s 409 Crimes Act 1961, s 211 Summary Proceedings Act 1957 and s 122 District Courts Act 1947.

Mr Hoffman suggested that an explanatory note would be needed for staff and the profession. Another issue was that of charges for certain types of records, such as when a transcript of an audio recording is required. The Ministry of Justice is to examine the charges set out in the Fees Regulations to see what changes need to be made.

Justice Chambers raised four points in relation to the High Court (Access to Court Documents) Amendment Rules and the Criminal Proceedings (Access to Court Documents) Rules. First, in the Criminal Rules on page 4, in the definition of "formal court record", it was decided to amend (f)(i) adding the phrase "other than these rules" after "under any enactment". Secondly, in rule 6(1) it was decided to remove the phrase removing the phrase "at any time". This will also be amended in the Civil Rules equivalent.

Another concern was that rule 13(5) of the Criminal Rules currently requires the Registrar to give notice of any application to any person affected by it, which could lead to large numbers of people needing to be notified. Many of these applications come from reporters and litigants in person. It is possible the words of the rule are too wide and should be curtailed more closely than the "impracticable" requirement in rule 13(6). There was also the related issue of the rights of an affected person, i.e. what such a person can do and how the matter is to be resolved, which are not provided for in the rules. A regime of notice presupposes that the notified person has a right to do something.

A specific problem was identified when someone requests a transcript which has not yet been produced from the digital record: in this situation a person does not have a right to a transcript, but can apply under rule 13, and the request may be granted by a judge, subject to payment of fees. Transcription costs can be very expensive.

The section should be changed to make it clear that the process is controlled by the judge. This section could state that if objection is received by the parties affected, the process is entirely at the discretion of the judge and the registrar and there is no right to an oral hearing.

There was also a concern that there was a gap in the Court of Appeal and Supreme Court rules which have no such rules regarding access to court records. As a matter of urgency, Mr Hoffman should look into organising matching rules for the Court of Appeal and Supreme Court. The District Court is also affected by requests for records; in particular a fee needs to be worked out for transcription requests. Mr Hoffman is to talk to Mr Ian Jamieson regarding incorporating the District Courts into the scheme generally.

Justice Randerson and Mr Hoffman are to make the above changes to the rules in light of Justice Chambers' suggestions; the amendments can then be circulated for approval by the Committee; otherwise the issue must be deferred until the March meeting. In order for the changes to come into force on 1 May, it would be necessary for the text to be finalised by 27 February for concurrence by 6 March. Justice Randerson will write to Sir Geoffrey Palmer at the Law Commission explaining the Committee's responses to the issues raised.

The Chair thanked the Chief High Court Judge and Hugo Hoffman for their work in developing the rules. The Chief High Court Judge thanked Kieron McCarron, Andrew Beck, Bruce Gray, Hugo Hoffman, and Cheryl Gwyn for their contributions also.

6. Commerce Amendment Act 2008 and appeals on input methodologies

Letters have been sent to Mr Simon Power MP and Mr Mike Lear, indicating that the Committee did not see any need for changes to the rules in this area. The Committee noted the reply from Mr Power MP to the Committee's response.

7. Proposals for amendments to the High Court Rules (written briefs)

The most recent version of the consultation paper was discussed: the paper needed to be rephrased to make it clear that the Committee was not proposing a specific reform but inviting comment on a number of possibilities, one of which was that the existing written briefs scheme be retained; the paper has been redrafted on that basis. A diagram has been added at the end setting out the existing and alternative procedures. Justice Asher distributed the final version of the paper, which has now been circulated to the profession for consultation. The paper is to be circulated to all High Court judges.

8. Fast track procedure

The terminology change from 'pilot' to 'procedure' for this item was noted. The final draft of the procedure has been circulated to a number of parties including the Law Society and the Bar Association, and some feedback has been provided (although formal feedback has yet to come from the Law Society). Justice Asher is to go through the feedback with the Chief High Court Judge, and then if there is agreement they will circulate a practice note.

9. Place of filing of notice of appeal

There is agreement on this item and it is nearly concluded; Mr Hoffman will organise the concurrence version. Since there is no commencement date listed, it is likely to be 1 May 2009, but it is desirable to have minimum lead time. Mr Hampton and Mr Hoffman are to find out earliest date that can be achieved.

10. Class actions

Justice Stevens reported that the latest round of the consultation process was reaching its conclusion. The submissions thus far had generally been supportive and constructive. One submission had been anticipated from Russell McVeagh on behalf of a client but they eventually decided not to make a submission. The NZ Bar Association provided a very helpful submission, address on the litigation funding issue, and a number of technical points.

Dr Mathieson will prepare a paper summarising the submissions for the sub-committee to consider. A paper by the sub-committee on the main issues and any changes necessary will be circulated promptly, and the sub-committee would report back to the Committee at the 30 March meeting. The sub-committee's report to the Committee would be circulated at least a week prior to the meeting. It is intended to resolve the final stages of this scheme at the next meeting.

Dr Mathieson raised several points of information. First, there is an international website on class actions, listing the Class Actions statues and rules of all major Common Law jurisdictions, run by Christopher Hodges, from the Centre for Socio-Legal Studies, Oxford. Secondly, Christopher Hodges has written a very useful paper on the European scene: *From Class Actions to Collective Redress*: A Revolution in Approach to Compensation *Civil Justice Quarterly* (2009), 28(1): p.41-66. Thirdly, Professor Vince Morabito, a leading academic commentator on class actions in Australia, wished to make a submission on the proposed scheme, which Dr Mathieson agreed to accept. This submission has now been received, and will provide a perspective on the NZ scheme from an Australian point of view.

An Australian law firm had also wanted to make a submission to the consultation, but the closing date for the consultation period had passed in late 2008, and it was decided that it was not possible. Efforts to contact the law firm using the email address provided have so far been unsuccessful.

There was also a discussion on litigation funding and the torts of maintenance and champerty. There is clearly interest in this topic and the Committee could write a report giving its view on the matter. The Chair could liase with the Attorney-General and the Ministry of Justice as to whether the Committee should continue to deal with this issue or whether it will be handed over to the legislature.

11. Request from Sir Ian Barker

The Chair informed the Committee that he had received a request from Sir Ian Barker, who is working for Lord Justice Jackson, who is chairing a committee on reform of the civil jurisdiction in the UK. Sir Ian Barker wanted to know whether he could get confirmation from the Rules Committee that he is summarising the practice and issues in New Zealand accurately; the Chair has advised that the Committee will cooperate fully in this. The Committee agreed to providing cooperation. The Chair will circulate a memo informing the Committee about this point. Dr Mathieson will give a copy of a relevant report to the Chair and interested Committee members.

12. District Courts Rules 2008

Judges Joyce QC and Doherty updated the Committee on progress. The new rules are complete, subject to finalising the forms and any continuing review on issues such as access to court records. The forms are being revised by the Parliamentary Counsel Office in order to make them as close as possible to the High Court Rules forms. The Ministry of Justice has engaged consultants to draft the first four forms and they will be tested with lay litigants and the profession. Publishers Thompson Reuters and Lexis Nexis have indicated that in order to update their publications, they would need the final version of the Rules by April. Therefore, final approval will need to be given by the Committee at the meeting of 30 March. The forms will be circulated at least a week prior to the meeting.

Judge Doherty is co-ordinating with the New Zealand Law Society to produce a travelling road show for education about the new Rules.

Mr Hoffman indicated that there was a numbering issue with the Rules. Correspondence from Mr Ian Jamieson was circulated, which explained that the Rules will contain a different

numbering style than that in the original drafts. The publishers want to ensure consistency in numbering style and have requested this. The Committee agreed that the proposed numbering was satisfactory.

13. Search orders

In a letter discussed at the 1 December meeting, Mr Katz QC had drawn to the attention of the Committee a possible disconnect between the rule 33.2, 'Search order,' and Form G39, 'Search order'.

It may be necessary to amend the order to make it clear that it still preserves the rights of the subject of the order to decline entry, and allow the matter to be sent back to court for further argument, and thus maintain the position at common law, that the order does not force entry. If entry is blocked then it might also be necessary to ensure there is an injunction to prevent the subject from destroying items at stake; there is a question about whether this injunction should be automatic. It may be useful to consult with the equivalent in the Australian jurisdiction since the form used is a comprehensive standard form which may address the matter of an injunction. Any changes made will also need to address the issue of adverse inferences.

The form can be changed easily but it is more difficult to change the legislation. Therefore, it is likely that the form will be changed to fit the rule. The Chair will consult with Dr Mathieson on this issue. The Chair, with the assistance of the Clerk, will prepare a report for the meeting of 30 March.

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

This item was carried over from the 1 December meeting. The issue was originally raised in letters by Mr Glenn Mason and the New Zealand Law Society to the Committee in 2008. Item 8 of Schedule 3 applies to preparation for the hearing if a case proceeds to hearing, and provides that preparation is double the time taken by the hearing. Item 7 provides a means of determining time allocations for preparation when a case does not proceed to a hearing. The result of the rules is that cases that are shorter or settle can receive more preparation time. The Chair proposed several solutions to the problem: making no changes; amending item 7 to include more situations; deciding that if a cases does not reach a hearing, preparation time is calculated against parties' estimations of how long the case was going to take.

Some members considered that the estimation of how long a trial was expected to take should not be a relevant consideration, for example because it could lead to a disproportionately generous time allocation if a case estimated to take a long time settled very early on. The difficulty with determining preparation time when a case settles before a hearing is that settlement may occur at different times, including the day before the hearing or just after the hearing date is set down. Therefore, it is appropriate to have several options of time depending on how much preparation has been completed, leaving scope for choosing what is correct for the particular case. It may be useful to have minimum time allocations.

Mr Beck and Mr Brown are to formulate a set of options for consideration, with a view to reporting back to the Committee in time for the next meeting. Justice Randerson is to be consulted once the options are drafted.

Mr Beck also raised an issue regarding preparation time for appeals which had previously been on the agenda. This issue will be put back on the agenda as a separate item for the next meeting.

15. The new High Court Rules and the effect on filing fees

Ms Hayley Rogers of Duncan Cotterill contacted the Committee enquiring about the High Court Fees Regulations, noting that they did not refer to the numbering in the new High Court Rules. In particular there was a concern about filing fees.

The Committee considered that the Interpretation Act 1999 would enable interpretation of the Fees Regulations as referring to the new High Court Rules, until such time as the Fees Regulations were updated. Mr Hampton will discuss updating the Fees Regulations with the Parliamentary Counsel Office and will report back to the Committee at the next meeting. The Clerk will write a letter to Ms Rogers about the Committee's view on the matter she raised and informing her that the Ministry of Justice is looking at updating the Fees Regulations eventually. This letter will be approved by Mr Hampton before being sent out.

16. Pre-action protocols

Justice Randerson spoke about the UK practice of pre-action protocols: processes written into rules that parties are required to go through before filing. Unless the matter is urgent, the parties have to satisfy the registrars that they have completed the pre-trial protocols. The protocols are designed to produce a balance between access to the courts and avoiding clogging the courts with cases. Examples of protocols include the plaintiff sending a letter setting out the basis of the claim, giving the defendant an opportunity to respond, or the parties being required to explore ADR before coming to court. These pre-trial processes could prove costly and there were concerns that this would lead to front-loading of costs.

There are also options worth exploring that involve showing the opposing party the key documents on which the statement of claim is based at the outset, rather than providing the documents later. It was noted that there is a need for a culture change in relation to discovery, involving both judges and lawyers. The issue of judges' involvement in case management was also discussed.

The Clerk will do some preliminary research on the topic, or the task may be given to Clive Lansink, the Clerk for special projects at the High Court in Auckland.

The meeting closed at 12.45 pm.