THE RULES COMMITTEE

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17 June 2008

Minutes/03/08

Circular No. 79 of 2008

Minutes of meeting held on Monday 9 June 2008

The meeting called by Agenda/03/08 was held in the Chief Justice's Boardroom, High Court, Wellington, on Monday 9 June 2008 at 10am.

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
Chief Judge Johnson, Chief District Court Judge
Judge Joyce QC
Judge Doherty
Ms Rebecca Ellis, for the Solicitor-General
Mr Hugo Hoffmann, Parliamentary Counsel Office
Mr Ian Jamieson, 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 Roger Howard for the Chief Legal Counsel, Ministry of Justice
Mr K McCarron, Judicial Administrator to the Chief Justice
Mr Andrew Hampton, Ministry of Justice

Commander Chris Griggs, New Zealand Defence Force
Ms Suzanne Giacometti, Parliamentary Counsel Office

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

Apologies

Mr Charles Chauvel MP
Dr David Collins QC, Solicitor-General
Justice Asher
Justice Stevens
Ms Liz Sinclair, Deputy Secretary, Ministry of Justice

Confirmation of minutes
The minutes of the meeting of Monday 31 March 2008 were confirmed as a true and accurate record.

Other matters arising
The meeting of Monday 4 August is changed to Wednesday 6 August.

There will be an extra meeting on Monday 23 June to discuss enactment of the High Court Rules and District Courts Rules, and report on finalisation of the District Courts Rules.

2. Court Martial Appeal Court Rules 2008

Ms Giacometti and Commander Griggs (New Zealand Defence Force) spoke to the amended Rules.

In response to discussion at the 11 February meeting two rules have been created where there had been one. These are rules 43, 'Right to be present,' and 44, 'Right of audience.' Draft rule 43 enables a member of the Armed Forces to be present at the hearing of an appeal in which he or she is either an appellant or respondent. It includes provision for appearance by video-link for practical purposes, and the right to be present may be dispensed with in 'exceptional circumstances' (r 43(1)(b)). Rule 44(c) enables the appellant or respondent him or herself to address the Court if not represented.

It was pointed out that where the right to be present is dispensed with under r 43(1), the unqualified right of audience in r 44 could be compromised where the appellant is not represented. One solution could be to make rule 44(c) subject to rule 43(1) and express provision included in r 44 for an unrepresented person to make written submissions in the event that their right to be present is dispensed with.

The Rules will be amended to remedy this, and the relevant part re-circulated for the Committee's consideration.

Other changes include a new r 15, 'Deponent may be required to give evidence orally,' to provide for the same procedure as recently incorporated in the Court of Appeal (Criminal) Rules (see rule 12BA).

Ms Giacometti tabled an omitted form, 'Warrant for arrest for absconding, breaching bail condition, or failing to appear.'

3. District Courts Rules 2008

The Committee divided discussion into two areas: the substantive content of the Rules, and their enactment.

Content

Judges Joyce QC and Doherty spoke to the revised draft Rules, these being the District Courts Rules 2008 (PCO 6698/2.8).

There are few substantive changes from the previous drafts. Most alterations are technical and tidy up inconsistencies or unintended omissions. The Sub-Committee was generally not persuaded to change its approach on policy areas submitters attempted to re-litigate.

Where High Court Rules are imported into the District Court, the different operational contexts required close analysis of Registrars' functions and powers. Currently, Registrars in the District Court exercise broader powers and functions than their High Court counterparts due to the volume of cases in the former Court. A direct transferral might see Judges in the District Court doing tasks their Registrars currently do. After work by a Ministry team redrafting some rules, the status quo remains. Notwithstanding this, the Rules might not make it sufficiently clear that there has been no change to Registrars' powers. Mr Jamieson will clarify this in the Rules.

The Sub-Committee has not altered enforcement provisions. Ministry of Justice work is pending and it is undesirable to make ad hoc changes which might be inconsistent with its final findings and recommendations. Also, any approach needs to be consistent with the High Court.

Forms remain a work in progress.

Significant changes in the new draft include:

- 20 working days is changed to 30 working days. No unintended consequences flow and, amongst other things, this will help practitioners and lay litigants adjust to the new regime. There remains the power to extend time under r 1.19.
- Time limits in short and simplified trials have been changed from per witness to per party. While the total time is calculated according to the number of witnesses, counsel are free to divide it as they wish.
- A transitional provision has been added (r 16.2). Proceedings which are pending or in progress immediately before commencement of the new rules will be continued, completed, and enforced under the 1992 Rules. The Court can make any order for this purpose in the interests of justice.
- 'Summary trial' has been changed to 'short trial' to avoid confusion with 'summary judgment.'

Several areas were discussed in more detail:

- The threshold of 'exceptional circumstances' might be too onerous in some instances. Recent appeal decisions indicate it is difficult to satisfy (it was noted however that some caution is necessary given the different contexts), and this may prove more problematic given practitioners will be adjusting to a new regime. Furthermore, lay litigants, who might increase in number, might have difficulty meeting the threshold. Lastly, Judges may be restrained in effective case management if they can only deviate from the norm in 'exceptional circumstances.'

Submitters to the 2007 consultation contended that a high threshold may result in litigants feeling they have not had a fair trial if denied, for example, more time under r 2.43, and that clear guidance is required on what constitutes 'exceptional circumstances.'

A lower threshold is desirable. One suggested reformulation is 'for good reason consistent with the objectives of these Rules.' This would provide more flexibility while retaining the policy of the reform. Another option is defining 'exceptional circumstances' which may provide clarity for litigants and Judges alike.

The Sub-Committee will review usage of 'exceptional circumstances' and modify to a lower threshold if appropriate.

- Rule 1.5, 'Duties of parties' reads: 'The parties to a proceeding must help the Court to act in accordance with the objective of these rules.' The rule may not be appropriate, and its scope and the consequences of non-compliance are not clear. The rule is contained in the English Rules of Civil Procedure, r 1.3 which reads: 'The parties are required to help the court to further the overriding objective.' Its inclusion in the proposed District Courts Rules was designed to reflect the fundamental drivers and objectives of the reform including proportionality and its flow-on benefits such as speedier and cheaper proceedings. Some kind of duty is useful given the new rules might increase the number of lay litigants.

  The Sub-Committee will investigate amplifying the rule to clarify how parties must help the Court by reference to the objectives. It will consider the obligation in High Court rule 1.20, though that rule concerns the duties of lawyers, and the views expressed in the Victorian Law Reform Commission's Civil Justice Review Report (147 ff).

- In providing for indemnity costs against unsuccessful plaintiffs in summary judgments, the proposed rules essentially reverse the current District Court and current (and proposed) High Court approaches to costs. This approach was designed to discourage unmeritorious and expensive summary judgment applications given their low success rate.

  This could be unfair however where a defendant only narrowly escapes summary judgment. The summary judgment procedure is useful and litigants should not be discouraged from using it. Judges currently tend to err on the side of caution and decline to award summary judgment in less clear cases. They might be dissuaded from doing so if indemnity costs will flow to the plaintiff. Moreover, the new processes may see many applications fall away or matters which summary judgment applications were in fact designed to illuminate, such as discovery, will have been resolved earlier.

  The Sub-Committee will amend the rules to reflect the current regime where costs generally follow the event.

- The proposed rules do not have provisions analogous to those in Part 17 of the High Court Rules, 'Arbitration Act 1996.' These rules may not be necessary in the District Court context as provisions relevant to the Arbitration Act might be contained elsewhere.

The Sub-Committee will investigate the jurisdiction of the Committee to make District Court rules under the Arbitration Act, the desirability of Rules (if within the jurisdiction), and what the rules would be. If rules for the Act are considered desirable, there will need to be a comparative analysis done as Part 17 cannot be directly transposed.

- The Committee discussed the initial disclosure procedure in information capsules where parties are not required to disclose documents injurious to their case. The rationale is a desire to keep this stage of the process simple and only truncates discovery at an early point (fuller discovery can occur later). The only exception is in short trials where there are no interlocutory procedures. However, here parties can apply to change track and this would in turn trigger different discovery obligations.

  The Committee does not resile from its position, driven as it is by the overriding objectives of the reform. Proper discovery will still occur at the appropriate point, and very rarely is an outcome determined by injurious documents which were not discovered.

The Sub-Committee will circulate a memorandum to the Rules Committee to enable members to discuss its proposed resolution of these issues at the extra meeting on Monday 23 June.

The enactment of the District Courts Rules and High Court Rules

If the High Court Rules are passed as a schedule to a Judicature Amendment Bill, it is unlikely they will come into effect before 2010. This delays the District Courts Rules which are parasitic on the High Court Rules. It would be undesirable to lose momentum on either set of Rules, and in particular there are serious access to justice issues with a substantial delay in the District Courts Rules given the pressures the Court and litigants labour under. In this vein, the District Courts Rules reform should not be seen as consequential to the High Court Rules.

The Committee discussed the implications of one or both sets of Rules being passed by Order in Council. For the District Courts Rules, this does not appear to present major problems because the High Court Rules imported do not present any *ultra vires* issues. Aspects of the High Court Rules which may be *ultra vires* (see below) are not problematic for the District Court because they either already exist or are neither sought nor necessary.

For the High Court Rules, however, there are some areas where rules might be *ultra vires* and hence legislation is required. Three areas need to be considered:

- Content of rules where this extends beyond regulating the practice and procedure of the High Court by, for example, imposing substantive obligations on third parties – '*ultra vires* proper';
- Proposing that certain statutes be amended incidentally; and
- Postponing the commencement of parts of the Rules (e.g. the e-filing provisions)

Dr Mathieson QC identified eight areas where the content might present *ultra vires* issues. The list is not exhaustive:

- Attachment orders: these impose onerous obligations on non-parties (new in the revised High Court Rules, but existing in the District Court). This could be considered an economic adjustment by transferring part of the judgment debtor's obligation onto employers. While most attachment orders would be issued in the District Court, they are a useful tool for the High Court.

- E-filing: this is new and arguably imposes duties on solicitors. The rules require solicitors to register as users before e-filing, and registration requires certain standards and practices. This might impose restrictions on solicitors' practice.
- Discovery against non-parties: this can impose duties on non-parties, in some cases where proceedings do not proceed. It is in the existing rules, but these were passed as a Schedule to the Judicature Amendment Act (No 2) 1985.
- Freezing orders: would-be third party transferees of assets may miss out. The orders are new.
- Search orders: there is an obligation to allow the search, and provisions are new. The proposed power to control execution applies even where proceedings remain anticipated and never eventuate
- Rule 10.23, 'Counsel assisting': this imposes an obligation on the Solicitor-General in certain cases, typically public interest cases, to appoint counsel to assist the Court. This imposes costs on the Crown which is not a party.
- Service outside the jurisdiction: some obligations are imposed on the Secretary of Justice and Secretary of Foreign Affairs and Trade in relation to service and transfer of international documents. This is not new.
- Rule 14.12(5)(a), 'Disbursements': the Judge can now call on professionals to assist the Court with advice in relation to quantum of disbursements. There is an implied obligation on those persons to assist the Court.

Turning to the second limb of *ultra vires* issues, making incidental amendments to specific acts does not present any difficulty if the Rules are passed by statute. In particular, under the Judicature Act Amendment Bill as drafted there are amendments to the Summary Offences Act 1981 in relation to an employer's non-compliance with an attachment order, and to s 26I of the Judicature Act 1908 extending the jurisdiction of Associate Judges in relation to attachment orders.

Regarding postponing the commencement of parts of the High Court Rules, an Order in Council cannot provide that certain rules come into effect later, this must be authorised by Parliament. Parts such as the e-filing section have been included from the outset for educational purposes and to streamline the process at a later date.

Returning to the broader issues of how the Rules should proceed, the orthodox position has been that legislation will be required. Deviating from this incurs various considerations:

- Passing the District Courts Rules by Order in Council requires confirmation that no imported High Court Rules present *ultra vires* issues. There will also need to be consideration of whether the imported High Court Rules remain as cross references or are written-in as District Courts Rules. The former approach is preferred because later amendments to the High Court Rules would flow automatically, and the work in writing-in the imported rules would be considerable.

- Passing the High Court Rules by Order in Council requires careful consideration of the possible *ultra vires* issues. Some or all of the problematic rules could be omitted for the time being (probably attachment orders and e-filing), their numbering taken into account, and later introduced into the Rules after having been effected by legislation. The other areas could remain and would most likely survive an (unlikely) *ultra vires* challenge. Omitting them would preclude revocation of a few parts of the current High Court Rules, which could be very confusing for lawyers or lay litigants having to refer to a largely obsolete document.

From an administrative perspective, both sets of rules will require significant resources for Registries to implement. There are technological changes (e.g. to case management software) and changes to Court skills and general training material. The committee discussed the interaction between the manner of enacting the Rules and the processes for seeking funds to put the rules into effect.

There will be a 5 or 6 month implementation period for both sets of rules while the profession adjusts. While the numbering and formatting changes in the High Court Rules are significant, the substantive changes are not numerous and those which do exist are relatively easy to grasp.

Dr Mathieson QC will produce a paper on the issues from the perspective of the High Court Rules for discussion at the 23 June meeting.

Mr Hampton will report to the Committee on the various implications of implementation. He will advise the Minister that the Committee seeks a deferral of two weeks for presenting its paper seeking approval for a Judicature Amendment Bill. He will lastly advise on how the 1985 High Court Rules were introduced so that an undesirable or inconsistent precedent is not created.

Record of thanks
The Chair thanked the Sub-Committee for its work.

Judge Doherty thanked the Clerk; and Mr Jamieson for his contribution, noting his drafting and technical expertise.

4. Appeals in Wellington
This item was carried over until the meeting of 6 August 2008.

A more radical solution than the proposed amendment to HCR 708, 'Filing of notice of appeal,' was suggested. This is to remove rules regarding which Registry in which documents must be filed and allow plaintiffs to choose, and widen the ability to change the Registry.

5. Access to Court records
The Chief Judge summarised issues arising from submissions received to the proposed rules and from his discussions with Auckland High Court judges. Submissions are pending from the New Zealand Law Society and Auckland District Law Society.

It is desirable that Judges retain their supervisory role. Judges must ensure that the cover of privilege is not abused or eroded by, for example, access to documents containing allegations which do not proceed to trial.

Mr Beck noted that the Law Society considers it undesirable that counsel's submissions be subject to release. This is because they should generally be confidential and could be copied by other counsel as a shortcut for their own work.

Outstanding issues include:

- Should a presumption of openness apply?
- If there is to be a presumption of openness, what are the implications for the law of privilege as it bears upon defamation? In particular, would it be necessary to remove the defence of absolute privilege in relation to pleadings and evidence?

- Should access during the depositions and trial phases be open to all parties unless a Judge rules otherwise (rather than restricted to media and law reporting purposes)?
- Should access be more liberal beyond the period of 20 working days after the trial phase?
- Should Registrars' powers be more confined and applications determined by a Judge except for routine matters?
- Is the listing of relevant considerations in 68G (civil) and 14 (criminal) *ultra vires* the Rules Committee?
- Should applicants for access be required to give reasons so that the bona fides of an applicant may be assessed?
- Should the existence of a genuine or proper interest be added to the list of relevant considerations or be reinstated as a requirement an applicant must demonstrate?
- Should any objections to access to documents or evidence produced or given in Court be dealt with as they are produced rather than through the process proposed of application to the Registrar and referral to counsel?
- Should the criminal rules list statutes which restrict rights of access?
- Should there be time limits for responses to applications and a requirement for reasons to be given when decisions are made?
- Is legislation a better solution?

It might be desirable that access during the depositions and trial phases be widened from to the media to all parties unless a Judge rules otherwise. This removes any questions of *vires*.

Turning to the possibility that the criteria on which to assess applications in rr 68G (civil) and 14 (criminal) is *ultra vires*, the Rules Committee frequently 'codifies' the common law in its rules. See for example the Court of Appeal (Criminal) Amendment Rules 2008 which contain the Court of Appeal's approach to determining whether leave applications will be heard separately or together with the substantive appeal as set out in *R v Leonard* [2007] NZCA 452.

It is desirable to continue work on the rules, even if a revised set is ultimately an interim measure in the event legislation is passed. This is important in light of *Mafart and Anor v Television New Zealand* [2006] 3 NZLR 18 (including in particular its dicta that an application to access to records on the criminal file is a civil application), and media criticism of the somewhat inconsistent practices between Registries.

Legislation might be appropriate given the significant gaps in the Rules Committee's jurisdiction over matters relating to records.

6. Official Information Act and Rules Committee documents

This item was carried over until the meeting of 6 August 2008.

7. Supreme Court Amendment Rules 2008

The Clerk will draft a consultation paper and forward to the Chief Justice and Mr Brown QC for approval. It will highlight the issues discussed at the meeting of 31 March 2008.

8. Is there a crisis in civil litigation? – Fast Track Pilot Practice Note

The Chief Judge introduced the proposed Fast Track Pilot Practice Note. While new rules are not required because the Note goes no further than existing rules, the Committee's general feedback

was sought. The Note would formalise procedures which are currently available and be an educative tool for Judges and counsel.

The Note would apply to all classes of civil proceedings with an estimated duration of no more than 7 days. It is designed to enable cases which could be ready for hearing comparatively soon not to have to wait until an allocated hearing time, which is usually more than 12 months away. Currently, both or all parties must consent to the proceedings being on the track and this could be signalled at the time of initial filing.

If the pilot is successful, the Committee might investigate making provisions in the High Court Rules to enable, for example, a Judge to order a case proceed on the Fast Track even if all parties do not consent.

There are issues yet to be resolved. For example, a panel of three Judges and two Associate Judges is envisaged to manage the Fast Track List. It might be more desirable for Fast Track matters to simply be part of Judges' usual work.

There will be further consultation.

9. Class actions

The Chair updated progress of the Class Actions Sub-Committee in the absence of its Chair, Stevens J.

The Sub-Committee is working on several issues including:

- Definition of litigation funder
    - This will need to be worked into the High Court Rules
    - The Chair has been in contact with Lindgren J regarding Australia's work in this area, and will forward information to the Sub-Committee;
- The number to constitute a class being set at 7;
- Whether the regime should apply only to future actions; and
- Provisions for converting existing actions into class actions.

Chapter Eight of the Victorian Law Reform Commission's Civil Justice Report, 'Improving Remedies in Class Actions,' is a useful resource.

The Sub-Committee will continue its work and report to the Rules Committee. It is authorised to consult with relevant external organisations.

10. Rules of Court (Hague Service Convention) 2008

The Chair reported on his attendance at the telephone conference on 19 May 2008. At this point New Zealand is only observing because the Government has not acceded to the Convention. It appears that once the Government accedes, New Zealand will be well-placed to follow the Australian approach.

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

This item was carried over until the meeting of 6 August 2008.

12. High Court Fees Regulations 2001 and non-payment of hearing fees in advance

A practitioner raised the issue of absence of provisions for non-compliance with the requirement that hearing fees be paid in advance.

The Rules Committee does not have jurisdiction to amend the Regulations, and discussion was not pursued.

13. Lawyers and Conveyancers (Lawyers: Admission) Rules 2008

The Committee worked closely with representatives from the Council of Legal Education, the Ministry of Justice, and Parliamentary Counsel Office to finalise the Rules.

The Rules will come into effect on 1 August 2008.

14. Court of Appeal (Civil) Amendment Rules (No 2) 2008

The rules will come into effect on 1 July 2008.