# THE RULES COMMITTEE

**P.O. Box 180**
**Wellington**
**Telephone 64-4-4949 794**
**Facsimile 64-4-4949 701**
**Email: rulescommittee@justice.govt.nz**


6 April 2009

Minutes/02/09

**Circular No. 42 of 2009**

## Minutes of meeting held on 30 March 2009

The meeting called by Agenda/02/09 was held in the Chief Justice's Boardroom, High Court, Wellington, on Monday 30 March 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
Hon Justice Stevens
Ms Rebecca Ellis, Crown Law
Mr Hugo Hoffmann, Parliamentary Counsel Office
Dr Don Mathieson QC, Special Parliamentary Counsel, Parliamentary Counsel Office
Mr Andrew Beck, New Zealand Law Society representative
Mr Jeff Orr, Ministry of Justice
Mr Andrew Hampton, Ministry of Justice
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 Christopher Finlayson, Attorney-General
Judge Joyce QC
Judge Doherty
Mr Brendan Brown QC

*Confirmation of minutes*
The minutes of the meeting of Monday 9 February 2009 were confirmed.

## 2. Supreme Court Amendment Rules

Concurrence for these has been completed. The Chair thanked all involved in completing these Rules.

## 3. Place of filing notice of appeals, amendments to rule 12.2(1), and amendments to form G39

These were small amendments to the High Court Rules that were made quickly to deal with specific problems. Concurrence has been completed. Form G39 related to search orders; a change was needed to fix the disjunction between rule 33.2 and the form. Rule 12.2(1) involved a change to the summary judgment rules.

## 4. Access to Court Documents Rules

The Chief High Court Judge reported on the progress on these amendments. It is hoped they will commence on 12 June 2009. Justice Randerson has produced a summary explaining the Rules, which can be distributed to Registry staff, the Law Society and Bar Association, and other relevant parties.

Mr Hoffman stated that he had had no indication the Rules would have difficulty being passed. Mr Hampton commented that the Ministers had not yet formally been briefed on the area, but the Rules had been mentioned in informal briefings. Justice Chambers noted that rules on access to court records were still needed for the Court of Appeal and Supreme Courts.

## 5. Class actions

Justice Stevens spoke on the progress made by the sub-committee. The papers for this item included a memorandum from him as Chair of the sub-committee, a draft letter to Ministers from the Chair of the Rules Committee, and the latest version of the Class Action Bill and Rules.

The legislation and Rules had had a lengthy history, starting with the previous Committee Chair, Justice Baragwanath. There had also been two rounds of consultation on the Rules so far. There is anecdotal evidence, from the experience of judges and others, which demonstrates that there is a clear and established need for these reforms. This point is mentioned in the draft letter to the Ministers.

The most recent round of consultation took place in late 2008. A number of very useful submissions were received, in particular that of the Bar Association. The Bar Association submissions were prepared by Mr Philip Skelton and Ms Mary Peters. They have liaised with Australian practitioners.

Since the last round of consultation, the sub-committee has met twice. They have made progress in finalising the changes to the proposed Bill and Rules. The basic approach of the scheme has not changed since the first round of consultation. However, since the consultation the sub-committee has been making refinements. For example, the Bar Association indicated that litigation funders would require certainty about funding agreements up front. The rules have been altered to allow review of funding agreements to take place up front so that there is certainty. There is also the ability to review again later if funding arrangements turn out to be oppressive.

The class actions Bill and Rules do not alter the substantive law; they are a procedural mechanism making procedural changes in areas such as limitations and res judicata.

The Chief Justice raised a query regarding public law litigation and instances such as Treaty litigation. She noted that the focus of the class actions scheme had been commercial rather than public law. Justice Stevens commented that the purpose of the class actions legislation is to facilitate social justice claims. The Chief Justice stated that often the crucial point about public law claims is when to bring them, and there was a concern that individuals could be forced into acting prematurely. There was also a concern that in an opt-out class action an individual could be bound by a class action if they did not opt out, and so be prevented from bringing their own claim in the future. There could be situations where the lead plaintiff taking the class action does not have the mandate to do so. Justice Stevens noted that the question of public law class actions had not been raised in either round of consultation.

Dr Mathieson QC noted that it was in the discretion of the Judge to order a class action be either opt-in or opt-out, depending on what is appropriate in the particular case. There are notice provisions in an opt-out situation; the notice process enables the notice to be tailored to the particular case. However, there were concerns that not all class members would receive the notice and take the step of opting out.

It was noted that opt-out schemes were useful in situations where there were large members of a class who may not all opt in, for example in a claim regarding excess credit card charges, where many plaintiffs may have a small claim.

Class actions would not always be the appropriate vehicle for a claim, and the Judge had the important discretion to make the order converting an ordinary action into a class action. Therefore there is judicial control over whether the class actions process is appropriate and should be used. It was also for the Judge to determine whether the opt-in or opt-out process should be used.

It was decided to consult Justice Joe Williams and Professor Phillip Joseph about the public law aspect of class actions in relation to the proposed scheme. Justice Stevens is to prepare a brief for the enquiry in conjunction with the Chief Justice and the sub-committee.

There may be occasions where there is a class, for example wholesalers and retailers, that would be better suited to an opt-in system, and then another class, such as large numbers of purchasers, that is better served by an out-out system; different systems can be applied according to the needs of the different classes. It was noted that New Zealand will be the only country with both opt-in and opt-out options. This is in recognition of the huge variety of class actions that we can expect in New Zealand. The 'classic' class action situation involves hundreds of plaintiffs, each with a small uneconomic claim. The 'non-classic' situation involves a much smaller number of plaintiffs, each of whom has a more substantial claim. So, there are several distinctive types of claimants, and the proper approach is to look at the needs of the classes separately. A Judge will have a great deal of information available to him or her to decide whether to use opt-in or opt-out.

Another issue was whether the Rules or Bill should contain criteria for a Judge to use when deciding to make the action opt-in or opt-out. There may need to be judicial education on this point or a practice note issued, especially if there are no criteria in the legislation. One important factor would be the size of the class. It is difficult to design criteria in advance. One option could be to have a restriction on the types of situation where op-out could be used, unless certain safeguards were satisfied, for instance to prevent people from being unfairly bound in the future. It was decided to insert a section similar to: "A Judge shall not make an opt-out order unless: …", with some relevant criteria inserted, for example regarding plaintiffs being unfairly bound, or notice not being received.

Limitation periods were discussed. Clause 14 of the Bill provides that the limitation period is suspended from running during a class action. The policy reason is fairness: there may be a person who does not opt out; then if the class action subsequently collapses because of settlement or another reason, that person must not be prejudiced in commencing their own claim subsequently, since the class action member may have had little control or information during the class action proceedings. If a person were time-barred before the class action started, that person would not be

eligible to be part of the class. There was a concern that the date when the running of the limitation period recommenced was not clear. The section will be amended to make this date explicit.

It was noted that the structure of the Rules and Bill may develop before the legislation is finalised, and some sections that are substantive may be more appropriately located in the Bill than in the Rules.

The Committee also noted that the sub-committee had discussed the torts of maintenance and champerty. The sub-committee had concluded that it was not appropriate at this time, in the context of the class actions legislation, to review the status of the torts generally. The explanatory note for the legislation could state that nothing in the Bill or Rules should be construed as endorsing the torts generally.

Any further drafting points should be directed by email to Justice Stevens and Dr Mathieson QC. Justice Randerson thanked Justice Stevens and Dr Mathieson QC for their work on developing the class actions legislation.

## 6. Case management / written briefs consultation

Justice Asher spoke to the recent consultation on written briefs. The consultation concerned how evidence should be presented generally, whether written briefs should remain the default position, and whether the case management and pre-trial conference process could be improved. The consultation paper proposed that evidence directions be made at a pre-trial conference, after setting-down, without the presumption that written briefs apply as the mode of evidence, while still recognising that in many cases there would be written briefs, particularly in the area of expert evidence.

The consultation period expired on 16 March 2009, and nine submissions were received. The submissions generally support reform. The ADLS submission was supportive, with the exception of will-say statements. The NZBA submission indicated that there were differences of opinion. The submission was generally supportive, but was cautious about will-say briefs. The submission contained a useful discussion of pros and cons of written briefs and the proposed change. The NZLS submission was not supportive of the proposed change. Submissions received from a range of individual parties were supportive of change.

Will-say statements were discussed. There were questions regarding whether costs would be reduced significantly by using will-say statements as opposed to written briefs. The Committee also noted that issues around written briefs were closely related to those about discovery.

The sub-committee on written briefs will meet to discuss the submissions further; there will be a report circulated for the next meeting.

## 7. Fast track procedure

Justice Randerson reported that the Practice Note on this topic has been refined, and has been circulated to all High Court judges for comment. It has been made clear that the process will apply at all registries, in cases where there is a five to seven day time period. It is available only with the consent of the parties. Justice Asher commented that the procedure requires parties and counsel to accept urgency to receive a fixture more quickly.

There was discussion over whether the note should include a 'best endeavours' undertaking from the Judge regarding when judgement will be given. The Chief Justice commented that Judges should accept the obligation to act with speed in all cases. She suggested that if parties had waited longer for a judgment then they should not get lower priority.

## 8. District Courts Rules reform

The memorandum from Judge Joyce QC was discussed. Progress was being made on the forms for the new District Courts Rules. Mr Hampton indicated that it was the intention of the Ministry of Justice to go to the Ministers with the new Rules in April/May. Although the start date for the Rules was not until later in the year, it was desirable to have a long lead-in period to get the Rules through Cabinet and enable training to take place.

The final Rules and forms will be sent round to members to comment on the forms. Judges Doherty and Joyce QC and Mr Ian Jamieson will prepare a commentary on the Rules for members to consider.

## 9. Discovery

The Chair spoke to his memorandum informing the Committee of the work of the sub-committee. He noted that discovery is the key costs centre of civil litigation. The sub-committee is proposing three steps:

1. When filing a statement of claim, the party should file and serve a bundle of the principal documents that are relied upon. It is hoped that the concept of filing bundles of documents at the outset will focus the parties on the areas where further discovery is needed.

2. Each party should file and serve a list of documents including other documents they intend to rely on (not in the bundle) and documents adverse to that party's case.

3. Any further discovery should be by way of an order of the court, made on the application of any party. It is likely to be specific discovery. In exceptional cases it may be general.

There were a number of areas where further work was required by the sub-committee:

1. The definition of 'adverse documents', including the extent of diligence required to look for such documents;

2. Minimising applications to the Court;

3. A process of requests between parties for discovery;

4. The practice note from the Federal Court of Australia of Chief Justice Black;

5. A system of special masters, members of the Bar appointed by the Court to assist in discovery; and

6. Professional obligations on counsel. It was noted on this point that caution was needed over requiring certificates of solicitors in counsel as to lists of documents. It was important to avoid the situation where solicitors felt obliged to give over too many documents.

The sub-committee has determined that it requires the assistance of Parliamentary Counsel Office in both drafting and research. Justice Fogarty will confer with Mr Hoffman and Dr Mathieson QC.

The sub-committee will continue its work and will report to the Committee at the next meeting.

## 10. New High Court Rules and the effect on filing fees

Mr Andrew Hampton reported on the response of the Ministry of Justice on whether the Fees Regulations 2001 needed to be updated to reflect the new High Court Rules numbering system. The Interpretation Act can be relied on to provide the correct interpretation until the Regulations are changed. The Ministry's preliminary view was that the Regulations did not need to be changed in response to the new High Court Rules at this time.

The issue of charging for copies of the Court file had also been resolved: there is no charge for the first copy. Mr Hampton will work with registrars and with Parliamentary Counsel office to ensure that practice reflects the new Rules.

The Clerk has sent Ms Rogers a reply advising her of the Committee's answer to her query: that the Ministry of Justice is considering updating the Fees Regulations, and that the Interpretation Act will ensure the Fees Regulations are interpreted correctly in the meantime.

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

This item was carried over until the meeting of 8 June 2009.

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

The Chair stated that problems arising from the High Court Rules were being directed via the Clerk to the Parliamentary Counsel Office. The Parliamentary Counsel Office will analyse the issues and make recommendations to the Rules Committee on resolving them.

The Chair also noted that the changes to Rule 12.2(1) and Form G39 had been effected, and would come into force on 15 May. He thanked the Secretary, Mr Patrick McCabe, and the Parliamentary Counsel Office for their assistance in resolving the matters.

There was also an issue regarding repeat headings: the Rules had been interpreted by some registrars as requiring intituling to be inserted twice. Mr Hampton will get advice as to whether a change is needed and will pass the issue on to Parliamentary Counsel Office if necessary.

### 13. Sentence indications

The Committee discussed the request received from the Criminal Practice Committee for the Rules Committee to prepare rules on sentence indications. Justice Chambers stated that the Court of Appeal had a preliminary meeting to discuss this proposal, where concerns were raised; Justice Chambers will report back to the Rules Committee at the next meeting on the views of the Court of Appeal.

There may also be issues over whether the Rules Committee has the jurisdiction to write rules on sentence indications. The skill set of the Committee may not be appropriate for such an area. Significant District Court input would be needed. It was possible that the area needed some statutory regulation.

It was also noted that the need for sentence indications would be reduced if there were guidelines of sentences available. However, sentence indications were useful because a view from a judge was perceived to be more authoritative to a defendant than that of counsel. It was considered that sentence indications were more important in the District Court because the sentence may or may not involve a term of imprisonment, whereas at the High Court the sentence is usually imprisonment. There was also a question as to the judicial time that ought to be spent deciding a sentence indication, and whether other considerations were required such as the impact on victims. Justice Chambers further noted that it was crucial for defence counsel to have greater certainty as to what manner of discount will be given for a guilty plea.

The Committee decided to await the results of discussion at the Court of Appeal and then contact the Criminal Practice Committee regarding the views of the Committee.

### 14. Originating applications

The Committee discussed the memorandum from Judge Osborne on service of originating applications. Judge Osborne has suggested having the address which a creditor has given on the statutory demand for payment, or to have the address which a caveator has given for land transfer

purposes, treated as an address for service. The Committee agreed with Judge Osborne's proposal. The proposed change will be sent to the Parliamentary Counsel Office for drafting.

## 15. Rule 7.39 of the High Court Rules

The Committee discussed the letter received from the New Zealand Law Society on rule 7.39. The rule currently requires a synopsis of argument to be filed and served in all defended interlocutory applications, and also for an indexed and paginated bundle of relevant documents to accompany every application. Mr Beck stated that these requirements add extra paper and expense to litigation, especially the requirement for pagination and indexing.

The Law Society proposed that the default position be that the bundle of documents was not required, and the Court could direct where it was required. It was decided that Mr Beck will draft an amendment to put to the Rules Committee. Justice Randerson will consult with Judges and Associate Judges to determine how useful the bundle of documents is currently. The Chief Justice noted that it should be considered carefully whether to put the burden on the applicants, where requirements are for the administrative convenience of the Judge.

The meeting closed at 12.55 pm.