

**FAXED****FAX**

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TO:	Gordon Thatcher, Registrar The Supreme Court of New Zealand	FROM:	Kimberly Birkenfeld
FAX:	+64 4 914 3560	DATE:	May 10, 2010 EST
		PAGES:	26
RE:	SC 17/2010		

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Dear Mr. Thatcher,

- 1 Under the Supreme Court Act 2003, Rule 4 Interpretation provides: *Interlocutory application - includes an application for a new trial.*
- 2 The attached document is sent for filing via fax given the 3-day delay in using international courier service from Miami, Florida USA to Wellington, New Zealand:
  - **May 10, 2010 Interlocutory Application**  
Application for Order for Reconsideration on the Merits for Reason of Miscarriage of Justice that Justifies Reconsideration
- 3 The Supreme Court Fees Regulations 2003 ("SCFR") r 4 provide that the fees specified in the Schedule are payable. No fee is specified as payable for interlocutory applications in the SCFR Schedule.
- 4 In the international circumstances of this proceeding, notice is necessary forthwith of whether this application is accepted or not accepted for filing (via fax to +1 305 854-5906).

Sincerely,



Kimberly Birkenfeld

IN THE SUPREME COURT OF NEW ZEALAND

SC 17/2010

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BETWEEN            **KIMBERLY BIRKENFELD**

Applicant

AND                 **ANTHONY BRUCE KENDALL**

First Respondent

AND                 **YACHTING NEW ZEALAND INCORPORATED**

Second Respondent

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**Interlocutory Application**

Application for Order for Reconsideration on the Merits  
for Reason of Miscarriage of Justice that Justifies Reconsideration

May 10, 2010

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Kimberly Birkenfeld  
Applicant  
2475 Brickell Avenue  
Miami, Florida 33129  
United States of America  
+1 305 924-1614 voicemail  
+1 305 854-5906 fax

Nathan Gedye  
Counsel for First Respondent  
Beca and Co., Level 4  
1 Vulcan Lane, Shortland Street  
Auckland, New Zealand  
+64 9 358 3848 telephone  
+64 9 358 3626 fax

Neil Beadle  
Counsel for Second Respondent  
Phillips Fox  
22<sup>nd</sup> Floor, 209 Queen Street  
Auckland, New Zealand  
+64 9 303 2019 telephone  
+64 9 303 2311 fax

**To Registrar of the Supreme Court of New Zealand**

**This document notifies you that –**

- 1 The Applicant, Kimberly Birkenfeld, will on \_\_\_\_\_ 2010 apply to the Court for an order for reconsideration on the merits of SC 17/2010 *Application for Leave to Bring Appeal*.
- 2 This application is made on the grounds that there are circumstances which, in their totality, amount to a miscarriage of justice that justifies reconsideration on the merits.

**In Total, Circumstances amount to the Appearance of Pre-determination and Impartiality**

Circumstance 1:

The Proposed Appeal is supported by Documented Concerns of New Zealand's Assimilation of International Legal Obligations into Domestic Law

- 2.1 It is documented that the United Nations Human Rights Committee stated that provisions of the International Covenant on Civil and Political Rights ("ICCPR") have not been fully incorporated into the domestic law of New Zealand.<sup>1</sup>
- 2.2 The proposed appeal is on a question of public law interpreting New Zealand's legal obligations under the International Covenant on Civil and Political Rights Article 14(1) "Right to a Fair and Public Hearing":

*The International Covenant of Civil and Political Rights ("ICCPR") Article 14(1) provides right to a fair and public hearing. Having ratified the ICCPR, New Zealand has obligation to provide right to a fair and public hearing. The question of law on the proposed appeal is whether the regulations made in High Court (Access to Court Documents) Amendment Rules 2009 and Court of Appeal (Access to Court Documents) Rules 2009 (both which provide no right to general public access to documents on a court file in a pending proceeding even upon*

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<sup>1</sup> *Democracy in New Zealand*, John Henderson and Paul Bellamy, Macmillan Brown Centre for Pacific Studies and International Institute for Democracy and Electoral Assistance, 2002 p 117.

*payment of a prescribed fee) are in violation of the right to a fair and public hearing provision of the ICCPR given effect in New Zealand by the New Zealand Bill of Rights Act 1990 ("NZBORA").<sup>2</sup>*

Circumstance 2:

The 21 April Judgment refers to Argument which the Applicant's Submissions do not Contain

- 2.3 *Nor are we persuaded that it is arguable that they had a prejudicial effect on the preparation of the applicant's case in any event: 21 April SC 17/2010 [2010] NZSC 42 judgment at [5] (emphasis added).*
- 2.4 The Applicant's submissions dated April 14, 2010 do not contain this argument.

Circumstance 3:

Reasons Given for Dismissal Fail to Refer to Issues of Fact or Law to Establish that the Court Considered the Applicant's Submissions

- 2.5 *We are not persuaded that it is arguable that the regulations concerned are invalid for the reasons advanced: 21 April SC 17/2010 [2010] NZSC 42 judgment at [5].*
- 2.6 Although brevity is allowed by statute, the dismissal of application for leave to appeal is without reference to submissions of fact or law made by the Applicant. In the circumstances, the judgment does not establish that reasons given in the Applicant's submissions are not arguable.
- 2.7 *Nor are we persuaded that it is arguable that they had a prejudicial effect on the preparation of the applicant's case in any event: Refer to circumstance 1 above.*

Circumstance 4:

By Law, it is not Open to Address Matters which do not Form Part of the Case Stated, but the 21 April judgment does so at [3]

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<sup>2</sup> April 14, 2010 Written Submissions in Support of Application for Leave to Bring Appeal at [1].

- 2.8 *Bicknell v Tauranga District Court and Coverhill* [2006] NZSC 106 held that the appellate court's consideration is confined to the question of law stated.
- 2.9 The 21 April judgment at [3] states: *The Court of Appeal pointed out that the judgment of 7 December 2009 is simply consequential on the 27 September 2007 judgment in respect of which rights of appeal have been exhausted (other than in relation to terms on which the Public Trustee holds the limitation fund...)*
- 2.10 This does not form part of the case stated in the Applicant's Written Submissions, but is in fact a ground of appeal in the Court of Appeal. The Supreme Court's statement at [3] prejudices this ground of appeal in the Court of Appeal.

Circumstance 5:

The Court Prejudices the Applicant's Grounds of Appeal in the Court of Appeal by  
by Omission of Grounds in the Applicant's Court of Appeal *Memorandum: Amendment of  
Grounds of Appeal* dated December 21, 2009

- 2.11 BATES 1-7: The Applicant's December 21, 2009 *Memorandum: Amendment of Grounds of Appeal* (at previous BATES 4-6) was included in documents filed in the Supreme Court under Supreme Court Act 2003 s 15(1)(a).<sup>3</sup>
- 2.12 The 21 April judgment at [2] omits these grounds.

Circumstance 6:

Appearance of Impartiality

- 2.13 BATES 8: The Chief Justice of the Supreme Court, the Right Honourable Dame Sian Elias GNZM is a member of the Rules Committee.

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<sup>3</sup> *Written Material Relevant to Application for Leave to Bring Appeal to the Supreme Court of New Zealand*  
SCA 2003 s 15(1)(a) April 9, 2010

- 2.14 She was a present member of the Rules Committee at meetings which oversaw making of the High Court (Access to Court Documents) Amendment Rules 2009 and Court of Appeal (Access to Court Documents) Rules 2009, including meetings on 11 February 2008, 9 June 2008 and 27 February 2009: BATES 10 – 19.
- 2.15 Elias CJ did not recuse herself from determining this application for leave on the question of law of whether the regulations made in High Court (Access to Court Documents) Amendment Rules 2009 and Court of Appeal (Access to Court Documents) Rules 2009 are in violation of the right to a fair and public hearing provision of the ICCPR given effect in New Zealand by the New Zealand Bill of Rights Act 1990.
- 3 The application is made in reliance on the Supreme Court Act 2003 s 3(2) and s 4, the Judicature Act 1908 rr 494-495, the New Zealand Bill of Rights Act 1990 s 25(a) the *International Covenant on Civil and Political Rights* Article 14(1), and attached Relevant Documents BATES 1-19.

Signature:

  
Kimberly Birkenfeld, Applicant

**Relevant Documents**

**BATES 1-19**

**May 10, 2010**

IN THE SUPREME COURT OF NEW ZEALAND

SC 17/2010

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**BETWEEN                    KIMBERLY BIRKENFELD**

Applicant

**AND                            ANTHONY BRUCE KENDALL**

First Respondent

**AND                            YACHTING NEW ZEALAND INCORPORATED**

Second Respondent

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Written Material Relevant to Application for Leave to Bring Appeal to  
the Supreme Court of New Zealand

SCA 2003 s 15(1)(a)

April 9, 2010

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Kimberly Birkenfeld  
Applicant  
2475 Brickell Avenue  
Miami, Florida 33129  
United States of America  
+1 305 924-1614 voicemail  
+1 305 854-5906 fax

Nathan Gedye  
Counsel for First Respondent  
Beca and Co., Level 4  
1 Vulcan Lane, Shortland Street  
Auckland, New Zealand  
+64 9 358 3848 telephone  
+64 9 358 3626 fax

Neil Beadle  
Counsel for Second Respondent  
Phillips Fox  
22<sup>nd</sup> Floor, 209 Queen Street  
Auckland, New Zealand  
+64 9 303 2019 telephone  
+64 9 303 2311 fax



## SCA 2003 s15 (1)(a) Table of Contents

\**Kimberly Birkenfeld v Anthony Bruce Kendall and Yachting New Zealand Inc. CIV 2004 485 1657*

(\* unless otherwise noted by related document)

	Date	Proceeding	Document	Bates
1	22 Dec 04	CIV 2004 485 1657	<i>Kimberly Birkenfeld v Anthony Bruce Kendall; Yachting New Zealand and International Sailing Federation (ISAF) High Court Wellington Statement of Claim</i>	91a - 104a
2	3 Mar 06	CIV 2005 085 596	<i>Johnston Lawrence v Kimberly Birkenfeld District Court Oral Judgment of Judge C N Tuohy</i>	1-6
3	13 Mar 07	CIV 2005 085 596	<i>Birkenfeld v Roger Chapman and Johnston Lawrence District Court Reserved Judgment of Judge John Walker</i>	7-16
4	22 Sep 08	CIV 2005 085 596	Fax to District Court Registrar and Johnston Lawrence from Birkenfeld	17-18
5	19 Oct 08	CIV 2005 085 596	Birkenfeld Memorandum to District Court	19-21
6	23 Oct 08	CIV 2005 085 596	District Court Order made 23rd October 2008	22-24
7	25 Oct 08	CIV 2005 085 596	Birkenfeld letter to Johnston Lawrence	25
8	27 Oct 08	CIV 2005 085 596	Affidavit of Birkenfeld in support of application for stay in District Court CIV 2005 085 596	26-29
9	11/19/08; 12/3/08; 12/10/08	CIV 2005 085 596	Birkenfeld fax to District Court	30-33
10	3 Jul 09	CIV 2005 085 596	Johnston Lawrence fax to Birkenfeld	34-43
11	16 Dec 09	CA 793/2009	Court of Appeal: Birkenfeld <i>Notice of Appeal</i> of CIV 2004 485 1657 High Court judgments	44
12	16 Dec 09	CA 793/2009	Court of Appeal: Birkenfeld <i>Interlocutory Application on Notice for Order for Stay of Execution of the Decision of the High Court to Pay Fund into Trust and Permanently Stay Proceedings</i>	45-46
13	16 Dec 09	CA 793/2009	Birkenfeld fax to Court of Appeal: Birkenfeld confirms fax number for service and delivery of documents is Duxton Hotel in Wellington, NZ	47-48
14	18 Dec 09	CA 793/2009	Birkenfeld fax to Court of Appeal	49
15	18 Dec 09	CA 793/2009	Yachting New Zealand Notice of Opposition to Application for order for stay of execution of the decision of the High Court	50-55

## SCA 2003 s15 (1)(a) Table of Contents

\*Kimberly Birkenfeld v Anthony Bruce Kendall and Yachting New Zealand Inc. CIV 2004 485 1657

(\* unless otherwise noted by related document)

Date	Proceeding	Document	Bates
16 18 Dec 09	CA 793/2009	Birkenfeld Memorandum to Court of Appeal	56-59
17 Dec 20, 09	CA 793/2009	Birkenfeld fax to Court of Appeal, High Court and Respondents: Birkenfeld confirms fax number for service and delivery of documents is +1 541 863-3315	60
18 21 Dec 09	CA 793/2009	Court of Appeal fax to Birkenfeld and Respondents	61
19 Dec 21, 09	CA 793/2009	Birkenfeld fax to Court of Appeal and Respondents	62-65
20 Dec 21, 09	CA 793/2009	Birkenfeld fax to Court of Appeal: Please fax the judgment to +1 541 863-3315	66
21 22 Dec 09	CA 793/2009	Court of Appeal fax to Birkenfeld and Respondents	67
22 Dec 21, 09	CA 793/2009	Birkenfeld Memorandum: CACR 205 r 34(1) <i>Amendment of Grounds of Appeal</i>	68-74
23 22 Dec 09	CA 793/2009	22 December 2009 10:30 AM Judgment of the Court of Appeal: The application for a stay pending disposition of the appeal is dismissed. Faxed to Birkenfeld at +1 305 854-5906	75-78
24 23 Dec 09	CA 793/2009	Yachting New Zealand sends notice of sealed order of the High Court. Faxed to Birkenfeld at +1 305 675-2947	79-83
25 Dec 23, 09	CA 793/2009	Birkenfeld fax to Court of Appeal	84-85
26 24 Dec 09	CA 793/2009	Court of Appeal faxes 22 December 2009 judgment to Birkenfeld at +1 541 863-3315	86-87
27 Jan 3, 10	CA 793/2009	Birkenfeld fax to Court of Appeal, High Court and Respondents: Birkenfeld confirms fax number for service and delivery of documents is +1 305 854-5906.	88-90
28 23 Feb 10	CIV 2005 085 596	Johnston Lawrence serves Birkenfeld and Public Trust with Garnishee Summons	91-96
29 2 Mar 10	CIV 2005 085 596	District Court fax to Birkenfeld	97
30 2009		Passport K. Birkenfeld Nationality United States of America	98

IN THE COURT OF APPEAL OF NEW ZEALAND

CA 793/2009

BETWEEN

**KIMBERLY BIRKENFELD**

Appellant

AND

**ANTHONY BRUCE KENDALL**

First Respondent

AND

**YACHTING NEW ZEALAND INCORPORATED**

Second Respondent

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**Court of Appeal (Civil) Rules 2005 r 34(1)**  
**Memorandum: Amendment of Grounds of Appeal**  
**December 21, 2009**

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Kimberly Birkenfeld  
Appellant  
2475 Brickell Avenue  
Miami, Florida 33129  
United States of America

Nathan Gedye  
Counsel for First Respondent  
Level 4, Vulcan Buildings  
1 Vulcan Lane, Shortland Street  
Auckland, New Zealand

Neil Beadle  
Counsel for Second Respondent  
Phillips Fox  
22<sup>nd</sup> Floor, 209 Queen Street  
Auckland, New Zealand

Memorandum: Amendment of Grounds of Appeal CACR 2005 r 34(1) December 21, 2009

I, Kimberly Birkenfeld, Appellant in the proceeding identified above, give notice that I am appealing to the Court of Appeal of New Zealand against the decisions dated 3, 7, 10, 14 and 17 December 2009 given by the Honourable Justice Randerson in CIV 2004-485-1657 High Court Wellington.

On 7 December 2009, Randerson J ruled that the Shipowners' Limitation of Liability Fund be paid into the Public Trust and the proceedings be permanently stayed. Ancillary decisions affected the right to a fair hearing in this matter.

1 The specific grounds of appeal are:

1.1 The High Court Rules were systematically ignored in determination of this matter. The Appellant filed lawful applications in effort to uphold application of the High Court Rules. Randerson J labeled the Appellant's filings as "abuse of process" and invoked inherent jurisdiction to block her right to be heard.

As her applications were based on procedural violations by the Court, was it an abuse of process for the Court to invoke inherent jurisdiction to block the Appellant's right to be heard on her applications for procedural violations?

1.2 No reasons were given for the decision of Randerson J that Birkenfeld's sole basis of appeal to the Court of Appeal could be on the terms of the fund.

Is this consistent with the right to a fair hearing under Art 14(1) of the International Covenant on Civil and Political Rights?

1.3 In her November 23, 2009 *Application for Compliance with the UN Convention on the Rights of Persons with Disabilities*, the Appellant sought reasonable modification that a certified transcript be provided. Randerson J failed to give reasons (in accordance with the HCR 2008 provision that reasons for oral decisions be given in a written report of the reasons) as to why a certified transcript would not be provided.

Is this consistent with the right to a fair hearing under Art 14(1) of the International Covenant on Civil and Political Rights?

1.4 Randerson J failed to establish that he addressed the facts from the Appellant's application for recusal. Is this consistent with the right to a fair hearing under Art 14(1) of the International Covenant on Civil and Political Rights?

1.5 Randerson J failed to establish that he addressed relevant facts in his determination that Birkenfeld's appeal had reached lawful final disposition in accordance with provisions of the Supreme Court Act 2003 and the Supreme Court Rules 2004.

2 The judgment I seek from the Court of Appeal is


The High Court decision to permanently stay CIV 2004-485-1657 is in error. The matter is remitted back to High Court for a new hearing in accordance with the High Court Rules. Randerson J is recused from the matter. A certified transcript will be delivered forthwith to the parties.

Costs and disbursements in the Court of Appeal will be born by Respondents.

I am not legally aided.

Dated this 21<sup>st</sup> day of December 2009

Signature:

  
\_\_\_\_\_  
Kimberly Birkenfeld, Appellant

**SENDING REPORT**

Dec. 21 2009 01:15PM

YOUR LOGO : BIRKENFELD  
YOUR FAX NO. : 541 863 3315

NO.	OTHER FACSIMILE	START TIME	USAGE TIME	MODE	PAGES	RESULT
21	0116449143170	Dec. 21 01:13PM	02'10	SND	04	OK

TO TURN OFF REPORT, PRESS MENU #04 SET.  
THEN SELECT OFF BY USING JOG-DIAL.

FOR FAX ADVANTAGE ASSISTANCE, PLEASE CALL 1-800-HELP-FAX (435-7329).

## Membership

The Rules Committee is required by s 51B of the Judicature Act to have 11 mandatory members: the Chief Justice; the Chief High Court Judge and two other judges of the High Court appointed by the Chief Justice; the Chief District Court Judge; one other district court judge appointed by the Chief Justice on the recommendation of the Chief District Court Judge; the Attorney-General; the Solicitor-General; the Chief Executive of the Ministry of Justice; and two barristers and solicitors nominated by the Council of the New Zealand Law Society and approved by the Chief Justice (s 51B(1)).

The Chief Justice may appoint any other person to be a member for a special purpose. That person holds office during the pleasure of the Chief Justice (s 51B(2)).

The Chief Justice and Chief High Court Judge attend all or part of most meetings. Other members may have a permanent nominee who attends meetings whether or not the principal member is present. Nominees are full members of the committee for all purposes other than the formal execution of concurrences. Concurrences are signed by a nominee only where the nominee has been appointed by the Chief Justice pursuant to s 51B(2).

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## Members of the Rules Committee

( Constituted under the Judicature Act 1908 )

### Ex Officio

The Chief Justice, the Rt Hon Dame Sian Elias GNZM  
 The Chief High Court Judge, Hon Justice Winkelmann  
 The Chief District Court Judge, Judge R J Johnson  
 The Attorney-General, Hon Christopher Finlayson  
 The Solicitor-General, Dr David Collins QC  
 Chief Executive, Ministry of Justice, Ms Belinda Clark

Appointed Members	Appointment Details	Expiry Date
Hon Justice Chambers, (appointed by the Chief Justice)	3 years commencing 11 October 2007	10 October 2010
Hon Justice Fogarty, Chairperson (appointed by the Chief Justice)	3 years commencing 1 March 2008	not more than 3 years (1 March 2011)
Judge Joyce QC (appointed by the Chief Justice on the recommendation of the Chief District Court Judge)	3 years commencing 18 November 2008	17 November 2011

# The Role and Powers of the Rules Committee

Introduction  
Rule-making for the High Court  
Rule-making for the Supreme Court  
Rule-making for the Court of Appeal  
Rule-making for the District Court

## Introduction

The Rules Committee is a statutory body established by section 51B of the Judicature Act 1908. It has responsibility for procedural rules in the Supreme Court, the Court of Appeal, the High Court and district courts.

To discharge its rule-making functions, the committee may undertake ancillary activities such as consultation, promoting statutory change where it is needed to co-ordinate with procedural rules, annually reviewing cost levels to update cost schedules, publicising proposed and enacted rule changes, and assisting with seminars about new rules.

The committee relies heavily on input from judges, practitioners, and other interested people.

Comments and suggestions about the rules and the Committee's work are welcomed.

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## Rule-making for the High Court

The source of the power to make rules in the High Court is s 51C(1) of the Judicature Act 1908. It provides that the Governor-General, with the concurrence of the Chief Justice and two or more members of the Rules Committee (of whom at least one shall be a High Court judge) may make rules regulating the practice and procedure of the court. Neither the Rules Committee nor the Government has the power to make rules unilaterally. Past experience has been that rules proposed by the committee have been endorsed by Cabinet and made by the Executive Council.

As well as making rules in general under s 51C, the Judicature Act provides for the Rules Committee to make specific rules relating to the nature and extent of reviews of the decisions of associate judges (s 6P (1A)); appeals to the High Court (s 51C(1)); costs (s 51C(2)(g)); form and manner of applications (s 51E); and the powers of registrars (51F). There are other statutes to similar effect, such as the Arbitration Act 1996, No 99, s 16; Administration Act 1969, No 52, s 50. See also List Election Petitions Rules S.R. 1998/326.

The rule-making power conferred by s 51C is not confined to civil proceedings. The committee's responsibility extends to criminal proceedings in the High Court and Court of Appeal.

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## THE RULES COMMITTEE

P.O. Box 180  
Wellington

Telephone 64-4-4949 794

Facsimile 64-4-4949 701

Email: [rulescommittee@justice.govt.nz](mailto:rulescommittee@justice.govt.nz)

[www.justice.govt.nz/rulescommittee](http://www.justice.govt.nz/rulescommittee)

14 February 2008

Minutes/01/08

### **Circular No. 15 of 2008**

#### **Minutes of meeting held on Monday 11 February 2008**

The meeting called by Agenda/01/08 was held in the Chief Justice's Boardroom, High Court, Wellington, on Monday 11 February 2008 at 10am.

### **1. Preliminary**

#### **In Attendance**

Hon Justice Baragwanath (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 Fogarty  
Judge Doherty  
Ms Cheryl Gwyn, Deputy Solicitor-General  
Mr Hugo Hoffmann, Parliamentary Counsel Office  
Mr Brendan Brown QC  
Mr Andrew Beck, New Zealand Law Society representative  
Mr Jeff Orr, Chief Legal Counsel, Ministry of Justice  
Dr Don Mathieson QC, Special Parliamentary Counsel, Parliamentary Counsel Office  
Mr K McCarron, Judicial Administrator to the Chief Justice

Commander Chris Griggs, New Zealand Defence Force  
Mr Andrew Hampton, Ministry of Justice  
Ms Suzanne Giacometti, Parliamentary Counsel Office

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

While various issues surrounding the role of the Executive and principles of international comity arise as to whether the High Court should have a discretion to permit a Judge from another jurisdiction to take evidence for foreign proceedings, it was agreed that the Committee has only been requested to nominate an option rather than to advise on this issue.

Secondly, the Committee agreed to make a declaration under Article 18. This Article concerns a diplomatic officer, consular agent or commissioner authorised to take evidence under articles 15, 16, or 17 applying for assistance to obtain evidence by compulsion. The Article does not guarantee such an application will be granted.

## **6. Class Actions and litigation funding**

These items were discussed together.

Given the postponement of the proposed telephone conference, there was no progress to report. A face-to-face meeting is preferable over a telephone conference, and this will be arranged when the sub-committee is reconstituted which is required because the Chair is leaving the Rules Committee.

The sub-committee will also advance aspects of litigation funding because any class actions regime may be compromised if litigation funding is not worked through.

## **7. Court of Appeal (Criminal) Amendment Rules 2008**

These Rules contain rules previously approved by the Committee and also provide for the new Court of Appeal 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.

The Rules detail the new procedures and do not include, for example, the criteria in [13] to [14] of *Leonard* (factors pointing towards and against granting leave). The Court had considered referring to the principles in *Leonard* to amplify the Rules, but it was concluded that the criteria will evolve and *Leonard* will not be the final word.

For the avoidance of doubt, it was clarified that the procedure in *Leonard* applies to all appeals including, in particular, s 381 appeals where the Court refuses to reserve the question.

The Committee approved the Rules, with the suggestion that 'lengthier' in rule 5G(3) be changed to 'longer.'

Rather than direct practitioners to follow *Leonard*, it is envisaged the Rules will come into force soon enough for these to guide practitioners. The expected date is 17 April 2008.

## **8. Access to Court records**

The Committee discussed the proposed High Court (Access to Court Documents) Amendment Rules 2008 and Criminal Proceedings (Access to Court Documents) Rules 2008. Each contains two options for access by non-parties: Option One with a general presumption of availability of listed documents (the Judge can still order that the document or part of the document relating to the proceeding not be accessed without permission of a Judge), and Option Two requiring the permission of the Judge for all access.

Option 1 may be attractive to groups such as the media; and lessens the risk that Judges face the prospect of frequently ruling on questions of access to documents and especially if issues are trivial but procedurally must be traversed. Such issues may be especially marked in the District Court. On the other hand, a more open access regime potentially erodes privacy and a Judge is a more subtle arbitrator of questions of access than a rule presuming access. Moreover, people may attempt to pry into material not reported by virtue of the requirement that the media only provide a 'fair and accurate' report of proceedings.

The definitions of 'court file' (civil) and 'court record' (criminal) imply that any notes made for the Judge's personal use would be included in the file or record but for their express exclusion. The rules will be amended to remove this incorrect inference given the Judge's personal notes would never be discoverable.

It is desirable that there be one set of rules governing the civil and criminal systems respectively, rather than different rules for each court. Two single instruments may achieve this.

Dr Mathieson will re-insert provisions in the current High Court Rules into their revised counterparts given finalisation of the access rules may post-date the new High Court Rules. These new Rules can later be amended to update access provisions.

It was agreed that the draft Rules will be circulated for consultation with both options and an explanation of the arguments.

## **9. Costs in the Court of Appeal**

Court of Appeal judges have produced a Practice Note essentially replicating their proposed costs regime. The Note was prepared as a holding arrangement. It was driven by the prospect of a possible delay incurred by working through a sub-committee coupled with a concern to help mitigate current practices regarding costs and the typically low recovery rates.

While the regime the Note prescribes was twice consulted on, it met some opposition from the Rules Committee given the potential sharp increase in costs. Consequently, specific costs examples were calculated and circulated, and a sub-committee had been formed to advance the issue. The increase is a particularly acute consideration in non-commercial cases where a greater discretion to depart from the 'costs follow the event' model may be desirable.

The Note has yet to be issued, and it was noted that it may be ultra vires. The Chief Justice will discuss the matter with Justice Young, President of the Court of Appeal.

Costs issues exist in the High Court too and will ultimately need to be addressed.

## **10. Constituency Election Petition Rules 2008**

The draft Rules have been slightly altered by a re-ordering of the rules in s 5(1), 'Application of High Court Rules and practice of Court.'

With reference to the interaction between s 234 of the Electoral Act 1993, 'Rules of Court,' and s 51C of the Judicature Act 1908, 'Power to make rules,' there was discussion regarding whether the rules are made by the Governor-General in Council on the recommendation of the Minister of Justice or by the Rules Committee. The matter will be referred to the Solicitor-General through Ms Gwyn for advice.

In the interim, the Committee endorsed the form of the Rules.



## THE RULES COMMITTEE

P.O. Box 180  
Wellington

Telephone 64-4-4949 794

Facsimile 64-4-4949 701

Email: [rulescommittee@justice.govt.nz](mailto:rulescommittee@justice.govt.nz)

[www.justice.govt.nz/rulescommittee](http://www.justice.govt.nz/rulescommittee)

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

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



**THE RULES COMMITTEE**  
**P.O. Box 180**  
**Wellington**

**Telephone 64-4-4949 794**

**Facsimile 64-4-4949 701**

**Email: rulescommittee@justice.govt.nz**

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.