**THE RULES COMMITTEE**
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**Wellington**

11 May 2001

Minutes/3/01

**CIRCULAR NO. 41 OF 2001**

**Minutes of the Meeting held on Monday 30 April 2001**

The meeting called by Agenda/3/01 was held in the Chief Justice's chambers, High Court, Wellington on Monday, 30 April 2001, commencing at 9.30am.

## 1. Preliminary

1.1 *In attendance*

The Hon Justice Fisher (in the Chair)
The Hon Justice Chambers
The Hon Justice Wild
Master G J Venning
Chief District Court Judge Young
Judge J P Doogue
Judge C J Doherty
The Solicitor-General (Mr T Arnold, QC)
Mr K McCarron (for the Chief Executive, Department for Courts)
Mr T C Weston Queen's Counsel
Mr C F Finlayson
Mr G E Tanner (Chief Parliamentary Counsel)
Mr I Jamieson (Parliamentary Counsel)
Mr B Stewart (Clerk to the Rules Committee)
Miss M A Soper (Secretary)

1.2 *Apologies*

The Chief Justice (the Rt Hon Dame Sian Elias, GNZM)
The Attorney-General (the Hon Margaret Wilson MP)

1.3 *Confirmation of minutes*

The minutes of the meeting held on Monday 12 March 2001 were taken as an accurate record and were confirmed, subject to the reference to Rule 426 in the last sentence of paragraph 15.1 on page 7, reading "Rule 426A".

## 2. Papers Tabled at the Meeting

*2.1 By Justice Chambers and Mr Stewart*

Memorandum dated 26 April 2001 re Part 10 of the High Court Rules: issues for discussion.

Draft revised Part 10 of the High Court Rules

Draft District Courts Amendment Bill

*2.2 By Mr Tanner*

Crimes (Criminal Appeals) Amendment Bill

Court of Appeal (Criminal) Rules 2001 (PCO3940/1)

High Court Amendment Rules 2001 (PCO3980/1)

*2.3 By Mr Stewart*

Memorandum dated 26 April 2001 re Regulations Review Committee: Part 2.

## 3. Costs against barristers and solicitors

***Discussion***

3.1 The Committee recalled that Justice Baragwanath had suggested to the Committee that the High Court should have power to order costs personally against barristers and solicitors if they had wasted the time of the court. Consideration of that suggestion was deferred until the Privy Council's decision in *Harley v McDonald* (9 and 50 of 2000, 10 April 2001) had been given.

3.2 That decision was now to hand. The Committee noted that the Privy Council had acknowledged a limited jurisdiction where the omission is demonstrable, and the Committee noted also the natural justice issues if the court were to go so far as to try a professional negligence case.

3.3 The Committee noted that the United Kingdom has enabling legislation and specific rules, and that New South Wales has rules based on the inherent jurisdiction of the court.

3.4 Justice Hammond, in his judgment in *Hughes v Ratcliffe* AP40/00, High Court, Hamilton Registry, 21 July 2000, noted that there is no jurisdiction to award costs against barristers and solicitors in the District Courts.

***Decisions***

3.5 Justice Wild agreed to prepare a paper for the Committee that reviews the materials and makes recommendations.

3.6 Mr Finlayson, (who appeared before the Privy Council in *Harley v McDonald),* agreed to refer his materials to Justice Wild.

## 4. Costs and small claims

***Discussion***

4.1 The Committee noted that District Courts Civil Litigation and Case Processing Committee has asked the Department for Courts' policy and research section to do the analysis of 50 current cases involving between $10,000 and $50,000.

4.2 The Committee noted that one option was to initiate claims without resort to the courts by giving notice of a claim. This option was explored in the early 1990s and may be worthwhile exploring again.

4.3 The Committee was advised that the current practice in the District Court in Auckland is to award costs on a similar basis to the old approach in the High Court i.e. two-thirds of actual.

4.4 The Committee noted that the District Courts are particularly vulnerable to downstream consequences from a change to the costs regime in that, by setting a costs scale too high or too low, it is possible significantly to encourage or discourage litigation. It is much more difficult to fix a scale even vaguely approximating two-thirds of what are likely to be the reasonable actual costs.

4.5 The Committee noted also that the High Court is operating just in the main cities while the District Courts operate in small provincial centres. Regional differences may mean that the outcome of a change to the costs regime is difficult to predict andit may be that a scale is totally inappropriate for the District Courts.

***Decision***

4.6 The Committee agreed to put two separate items on the agenda for the meeting to be held on Monday 30 July:

4.6.1 Party and party costs in the District Courts;

4.6.2 Procedure for small claims in the District Courts.

## 5. Form for summary judgment by defendant

***Discussion***

5.1 The Committee noted that the District Courts Subcommittee had considered this issue and decided that it was inappropriate for there to be a form for the defendant to make an application for summary judgment because proceedings have already been commenced and the application can be made by way of interlocutory application. The Committee noted also that the District Courts Rules Subcommittee had considered that High Court Form 13A was similarly neither necessary nor appropriate.

5.2 The Committee discussed whether the notice of proceeding in the District Courts Rules should contain advice to the defendant because of the number of litigants appearing in person. The Committee decided, however, that if the defendant makes a positive response (whether by way of counter-claim or application for summary judgment), the plaintiff will need to refer to the District Courts Rules anyway and the advice contained in any notice of proceeding filed by the defendant would be of limited value.

***Decisions***

5.3 The Committee agreed that the secretary should write to Judge McElrea.

5.4 The Committee agreed that High Court Rules 132 to 141 and Form 13A need to be amended such that an application by a defendant for summary judgment is made by interlocutory application.

## 6. Mentally disordered persons

***Discussion***

6.1 The Committee noted that the Rules currently provide that a person who is mentally disordered will be served through a next friend or guardian *ad litem.* Not every person who is mentally disordered will, however, be the subject of an order under the Mental Health (Compulsory Assessment and Treatment) Act 1992. The practice under that Act is for the court first to decide if a person is mentally disordered and then to decide whether or not to make an order for compulsory treatment.

6.2 The Committee considered that, when the court is dealing with mentally disordered persons as litigants, the court will need it make its own decision on whether or not the person is mentally disordered, and the position will not be defined by the presence or absence of an order under the Mental Health (Compulsory Assessment and Treatment) Act 1992.

***Decision***

6.3 The Committee agreed that the secretary should write to Judge McElrea in consultation with Judge Doogue.

## 7. Affidavit proving service of document

*Discussion*

7.1 The Committee noted that Rule 196 provides that service must be proved by affidavit in Form 16, but that Form 16 does not specify how the deponent identified the person served.

7.2 The Committee noted that Form 14 in the District Courts Rules (as amended by the District Courts Amendment Rules (No. 2) 2000 addresses the issue specifically.

*Decision*

7.3 The Committee agreed that Form 16 of the High Court Rules should be amended to bring it into line with Form 14 of the District Courts Rules.

## 8. Criminal appeals to the Court of Appeal

*Crimes (Criminal Appeals) Amendment Bill*

8.1 The Committee agreed that it is desirable to incorporate Forms 1 and 3 under the Crimes Act 1961 in the Crimes (Criminal Appeals) Amendment Bill, in order to ensure as a minimum that a procedure is in place to lodge an appeal once the bill is passed.

8.2 The Committee noted that Form 3 deals with appeals against conviction and sentence. The Crimes Act does, however, make provision for appeals on interlocutory matters with the leave of the court (s 379A), and for appeals against orders in respect of costs (s 379CA). Section 66 of the Bail Act 2000 makes provision for appeals relating to bail. The Committee considered that these matters can, if need be, be addressed by practice note.

*Forms 1 and 3 of the Court of Appeal (Criminal) Rules 2001*

8.3 The Committee noted the concern of the Criminal Bar Association about advice to the appellant on legal aid for preparing the notice of appeal. The Committee noted that the purpose of the Legal Services Act 2000 is to remove decisions about legal aid from the Court of Appeal. The Committee considered that publicity about the availability of legal aid should properly be a matter for the Legal Services Agency.

8.4 The Committee agreed that Forms 1 and 3 of the Court of Appeal (Criminal) Rules, with changes as suggested by Justice Blanchard (relating to clarity of expression), should be included in the Bill.

8.5 The Committee noted that in due course Forms 1 and 3 will be repeated in the Rules for ease of location.

***The text of the Court of Appeal (Criminal) Rules 2001***

8.6 The Committee agreed that because of the need to have rules in place as soon as possible after the passage of the Act, the Rules should come into force the day after their notification in the Gazette.

*Rule 5 – form of notice of appeal and notice of application for leave to appeal*

8.7 The Committee agreed to delete the words "notice of appeal or" and the comma after the word "appeal" because applications under ss 379A and 383(2) of the Crimes Act are always by leave.

*Method, timing and service of appeals*

8.8 The Committee noted the need for a new Rule to appear after Rule 8 to clearly define three matters: how an appeal is brought, when an appeal is brought and the service of the notice of appeal. The Rule should therefore provide that an appeal is brought by notice, that the appeal is brought once the notice of appeal is filed with the Registrar of the Court of Appeal, and that the Registrar of the Court of Appeal will attend to service.

*Rule 9 – Registrar to obtain certain documents*

8.9 The Committee compared Rule 9 with clause 5 of the Bill, which amends s 392 of the Crimes Act, and noted that Rule 9 requires the Registrar to obtain the file and exhibits from the trial court, while clause 5 requires the Registrar to prepare a preliminary case on appeal. The Committee noted also that the Rules contain no provision for appeals on interlocutory matters under s 379A of the Crimes Act.

8.10 The Committee agreed that Rule 9 should provide that for appeals, including appeals by the Solicitor-General, the Registrar must comply with s 392 of the Crimes Act, and then go on to spell out the procedure for interlocutory appeals under
s 379A of the Crimes Act.

8.11 The Committee noted the reference in clause 5 of the Bill to a "preliminary case on appeal" and noted that in practice a further case on appeal would not be prepared but that any additional material would just be made available to the court and the parties.

8.12 The Committee agreed that Rule 9 should expressly provide that the preliminary case on appeal under s 392 of the Crimes Act shall be the case on appeal for the full oral or papers hearing subject to the addition of any supplementary documents necessary for the determination of a substantive hearing. The Committee agreed that Rule 9(2) should provide that, on receiving notice of an application for leave to appeal against anything other than a conviction or sentence, the Registrar must obtain for the use of the court the material relevant to the decision or ruling under appeal.

8.13 The Committee agreed to consequentially delete Rule 9(3).

8.14 The Committee agreed to look separately at rules relating to appeals on bail, costs and questions of law.

8.15 The Committee noted that clause 5 of the Bill, which amends s 392(6) of the Crimes Act, requires the Registrar to advise the parties about the procedure and timeframe relating to written submissions on the mode of hearing.

*Rule 10 – trial court may direct delivery of documents, etc*

8.16 The Committee queried the need for this Rule but agreed that it should be revisited when the Rules are reviewed once they have been in force for long enough to see how they will work in practice.

*Rule 12 – Register to be kept*

8.17 The Committee agreed that this Rule should be located with the Rules following Rule 8 relating to filing of the notice of appeal.

*Rule 13 - Court of Appeal may require trial court to provide report*

8.18 The Committee noted that the word "require" in the heading should read "request".

8.19 The Committee referred to Rule 13(2) and noted that the appellant would have an automatic right to the report. The Committee agreed that Rule 13(2) should be redrafted along the lines that the report must be disclosed to the parties except where the Court of Appeal directs to the contrary.

*Rule 14 – Registrar to give parties notice of fixture for hearing involving oral submissions*

8.20 The Committee agreed that Rule 14 should be combined with Rule 11 so that the Registrar makes a fixture and gives notice of it. The Committee agreed that Rule 11 should become Rule 14(2) and Rule 14(2) become Rule 14(3).

*Rule 15 – court to appoint period allowed for making written submissions if hearing is on papers*

8.21 The Committee agreed in Rule 15(2) to substitute the Registrar for a judge or the court because in practice the Deputy-Registrar is the person who sets fixtures and associated timelines.

8.22 The Committee noted that the effect of clause 6 of the Bill which amends s 392A of the Act is to give two opportunities to revisit whether the hearing be on the papers or oral.

8.23 The Committee agreed that the Rules should create a framework that once the mode of hearing is decided there is an opportunity to make further submissions within a time limit. That will result in a second decision on the mode of hearing. The Committee agreed that Rule 15 should include, as well as written submissions on the merits of the case, provision to revisit the mode of hearing.

8.24 In the course of discussion on *Rule 26 - application for determination by court*, the Committee agreed to insert a new Rule 15(2) to the effect that in addition to making submissions on the merits of the appeal or application for leave to appeal, the appellant can make submissions on the mode of hearing.

8.25 The Committee addressed Sub-Rule (6) and referred to the principle that if the notice is received then time starts running. If the notice is sent to the last postal address it is deemed to have been received three days later. The Committee noted that Sub-Rule (6) needs to relate to Sub-Rules (2) and (3).

8.26 The Committee noted that Sub-Rule (2) gives the court the power to appoint a period of not less than 28 days in which to make written submissions in support, and that Sub-Rules (3) and (4) are predicated on a 28-day period. The Committee agreed that Sub-Rules (3) and (4) should therefore use the term "the appointed period" rather than "the appointed 28-day period". The Committee agreed that Rule 15 should contain a general provision for the enlargement of time in a new Sub-Rule at the end.

8.27 The Committee referred to clause 5 of the Bill, which amends s 392(6) of the Act, and noted that the Act contemplates rules about written submissions and written material for the court. The Committee referred to the Criminal Practice Note [1997] 3 NZLR 513 and noted that provisions relating to written submissions and a bundle of authorities and legislation are addressed in the practice note.

8.28 The Committee agreed that the provisions in the Practice Note relating to written submissions, bundles of authorities, and legislation, be incorporated into the new Rules.

8.29 The Committee referred to s 392(6)(d) of the Bill and agreed to insert a provision along the lines that in an oral hearing the right of reply must be oral. The intention is that the appellant not be expected to give a written reply at an oral hearing.

*Rule 16 – court not to proceed to hear appeal on papers until relevant period allowed for submissions has expired.*

8.30 The Committee identified the reason for the Rule as being to make it clear that the court can have a hearing even if no submissions are received.

8.31 The Committee agreed to delete the words "because the appellant or respondent has not made submissions and the period for making those submissions has expired" because those words add nothing and have the potential to confuse.

8.32 The Committee agreed to insert in Sub-Rule (1) after the word "periods" the words "prescribed or directed".

*Rule 17 – hearing on papers to be conducted by three judges*

8.33 The Committee identified that there are three stages which need to be provided for in the Rules: the hearing, the decision and the delivery of the decision.

8.34 Rule 17 needs to address the hearing and the decision. The Rule needs to make it clear that a hearing on the papers under s 392A(1)(a) of the Act must be considered by three judges and may take the form of each judge separately considering the relevant materials (including any written submissions) before the three judges arrive at their decision. The Committee agreed that the Rule should be redrafted to that effect.

*Rule 18 – decision to be delivered in open court*

8.35 The Committee considered s 398 of the Crimes Act (as proposed to be amended by clause 8 of the Bill) and s 58 of the Judicature Act 1908. The Committee agreed to word Rule 18 in the passive to remove any inference that might otherwise be made that the judgment needs to be delivered by the same three judges who conducted the hearing on the papers and reached a decision.

*Rule 19 – Registrar to notify appellant or respondent of court's determination*

8.36 The Committee agreed that the heading should read that the Registrar must notify the appellant and the respondent of the court's decision.

8.37 The Committee noted the need to check that the term "Public Prison Service" is a proper reference for the Department of Corrections, and that private prisons will be included.

*Rule 26 – application for determination by court*

8.38 The Committee noted that this Rule potentially also goes to the mode of hearing and, after discussion, agreed to include in Rule 15 a new Sub-Rule (2) to the effect that in addition to making submissions on the merits of an appeal, the appellant can make submissions on the mode of hearing.

*Rule 33 – mode of giving notice to Court*

8.39 The Committee agreed to delete "or any other means" from Rule 33 to avoid ambiguity and ensure certainty as to whether a notice was received.

*Rule 34 – postal address of appellant*

8.40 The Committee agreed to expand the term "postal" to include mail, fax, or any other means; this would enable to continue its existing practice of sending notices by fax to prisons.

***Decisions***

8.41 The Committee agreed that Mr Jamieson would do another draft of the Rules.

8.42 The Committee established a sub-committee comprising Justice Fisher, Justice Chambers, and the Solicitor-General.

8.43 The Committee agreed to circulate the revised draft to all members, who would forward any comments to Justice Fisher. Once the sub-committee have checked the draft, the Committee agreed that they would forward it to the Court of Appeal.

8.44 The Committee noted that in due course the rules will need to be revisited to ensure that they are functioning in practice.

## 9. Costs – Regulations Review Committee

9.1 The Committee reconsidered the use of the term "daily recovery rate" and, after discussion, was unanimously of the view that the term "day" where it is

used in the High Court Rules does not conflict with the Interpretation Act 1999.

9.2 The Committee reconsidered the definition of "disbursements" and noted that, as a result of the decision of Justice Fisher in *J G Russell v Commissioner of Inland Revenue* (High Court, Auckland, CP526/SD99, 19 December 2000), what disbursements are generally recoverable is now reasonably well defined. The Committee considered it inappropriate to descend to too great a level of detail in the Rules because of the extent to which the appropriateness of disbursements will depend on the context in which they are incurred. The Committee was unanimously of the view that no amendment to the Rules was immediately required. The issue of disbursements is, however, a matter currently being considered by the Costs Sub-Committee.

9.3 The Committee considered whether it might be helpful to meet informally with the Regulations Review Committee to discuss these matters. Justice Fisher agreed to draft a further letter to the Regulations Review Committee setting out the Committee's view and putting forward the possibility of a meeting..

9.4 The Committee noted that an extension of time had been sought until Friday 11 May 2001.

## 10. Rules Committee manual

10.1 The Committee agreed to amend the manual at paragraph 4.3.3 to provide that circulars should be routed through the secretary up until the Friday before the meeting. On the Friday before the meeting any circulars, whether by e-mail or hard copy, should be sent to members direct and the papers will be given a number at the following meeting.

## 11. Appeals

11.1 The Committee agreed that any comments on Mr Stewart's redraft of Part X of the High Court Rules should be forwarded in time to be incorporated before the next meeting.

The meeting closed at 3.20 p.m.

The next meeting will be held on Monday, 11 June 2001.

Secretary