# THE RULES COMMITTEE

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**Wellington**


22 March 2001

Minutes/2/2001

**CIRCULAR NO 23 OF 2001**

**Minutes of the Meeting held on Monday 12 March 2001**

The meeting called by Agenda/2A/01 was held in the Chief Justice's chambers, High Court, Wellington on Monday, 12 March 2001, commencing at 9.30am.

## 1. Preliminary

### 1.1 *In attendance*

The Chief Justice (the Rt Hon Dame Sian Elias, GNZM)
The Hon Justice Fisher (in the Chair)
The Hon Justice Chambers
The Hon Justice Wild
Master G J Venning
Chief District Court Judge Young
The Solicitor-General (Mr T Arnold, QC)
Mr K McCarron (for the Chief Executive, Department for Courts)
Mr T C Weston QC
Mr G E Tanner (Chief Parliamentary Counsel)
Mr B Stewart (Clerk to the Rules Committee)
Miss M A Soper (Secretary)

### 1.2 *Apologies*

Judge J P Doogue
Judge C J Doherty
The Attorney-General (the Hon Margaret Wilson MP)
Mr C F Finlayson

1.3 *Confirmation of minutes*

The minutes of the meeting held on Monday 19 February 2001 were taken as an accurate record and were confirmed, subject to the word "appealed" in the last paragraph of Item 12 on page 7, reading "repealed".

## 2. Papers Tabled at the Meeting

*2.1 By Justice Wild*

Memorandum from Justice Wild to the Rules Committee dated 12 March 2001 re power of officer to seize title deeds.

*2.2 By Mr Stewart*

Standard pre-trial directions and agreements (from the High Court at Auckland).

## 3. District Courts – costs and small claims

***Discussion***

3.1 The Committee noted that District Courts have concurrent jurisdiction with the High Court in respect of claims between $50,000 and $200,000. The Committee agreed that the costs regime should be the same in each Court so that there is no incentive to file in one Court or the other by reason only of the cost that might be recovered.

3.2 The Committee also noted that claims for less than $10,000 are rare in the District Court and would commonly be heard before the Disputes Tribunal.

3.3 The big issue arises as to how to fix costs for claims that range in value from $10,000 to $50,000.

3.4 For small claims, the Committee agreed that the issue of costs cannot be sensibly considered until the procedure is settled. If, for example, amendments are promulgated so that interlocutory applications are not available for small claims, this will be relevant to the issue of costs.

3.5 The Committee was also mindful that there are a huge number of cases in the District Court and there may be a significant economic effect from relatively small changes to the costs rules.

3.6 The Chief District Court Judge advised that the District Courts Civil Litigation and Case Processing Committee is working on an analysis of 50 current cases involving between $10,000 and $50,000. The need is to construct a regime with a reasonable procedural framework that is in keeping with the amount at stake.

3.7 The Committee noted that what is effectively a "default procedure" is actually arising in the context of a statement of claim; where the defence takes no steps

the plaintiff can then seek judgment under Rule 463 of the District Courts Rules.

3.8 The Committee noted that there is a tendency for cases in the District Courts to be run along similar lines to cases in the High Court and agreed that costs can provide a significant incentive to dispose of proceedings quickly.

*Decisions*

3.9 Chief District Court Judge Young agreed to ask the District Courts Civil Litigation and Case Processing Committee to assess the impact that a revised costs regime would have, as part of its current exercise in selecting 50 actual files and assessing the impact that streamlined procedures would have on them.

3.10 Mr Finlayson is to consult with the New Zealand Law Society, not on the basis of the three presumptions identified at the last meeting, but instead on the basis that costs should be the same where the jurisdictions are concurrent, and that costs for small claims will not be addressed until the procedure for small claims is addressed.

## 4. Uniform rules

4.1 The Committee noted that a move to uniform rules would see a regime with five levels of litigation, as is the case in the United Kingdom and Australia.

## 5. Electronic transactions

5.1 The Committee noted that Mr Finlayson is discussing this matter with the New Zealand Law Society.

## 6. Appeals from the District Court and the High Court

*Discussion*

6.1 The Committee agreed that, as much as possible, rules regulating appeals from the District Courts to the High Court should be in rules and not in the Act. Something that will need to be decided is whether to insert a new part in the High Court Rules, or whether the existing Part X can be amended.

6.2 The Committee agreed that the appeal time from a decision from a District Court should be 28 days, the same as from the High Court. The Committee agreed that leave should be reserved to appeal out of time.

6.3 The Committee agreed that many of the practice notes about appeals from the District Courts to the High Court should be included in the Rules. Overall, unless there is good reason to the contrary, the Committee agreed to adopt the appeals regime that applies from the High Court to the Court of Appeal for appeals from the District Courts to the High Court.

6.4 The Committee expressed the view that time should run from when the judgment is given and not from when it is sealed. The Committee also noted

that the Court of Appeal Rules make a distinction in this regard, depending on the outcome of the case.

6.5 The Committee noted the problem of not being able to identify the date a judgment is given when District Court judges giving a decision which is later followed by reasons, and noted that an amendment to the Rules about the mode of giving judgment should assist with this issue. The Committee also noted the undesirability of this course in the absence of compelling reasons for it given the prejudice to potential appellants who would wish to take into account the reasons for a decision. If it were a widespread practice the Heads of Bench might be invited to speak to their judges about it.

***Decision***

6.6 Subject to further discussion at the next meeting Justice Fisher agreed to address with the President of the Court of Appeal the issue about the point from which time to appeal runs. The Committee noted that there may need to be a statutory amendment as well.

## 7. Interest on judgment in the District Court

7.1 In the situation where judgment is given, money is paid, there is a successful appeal and money is returned, the issue is whether interest should be paid. The Committee noted that any change will require an amendment to the District Courts Act 1947.

## 8. Long vacation

8.1 The Committee agreed that, for all purposes, time ought not to run from 20 December to 10 January. At present that rule applies to some things and not others.

8.2 The Committee noted that the Court should have a discretion to override should that be necessary in a particular case.

8.3 Mr McCarron agreed to check with the Registry Advisory Group to make sure there would be no difficulties with what is proposed.

## 9. Criminal appeals to the Court of Appeal

9.1 The Committee noted that the Crimes (Criminal Appeals) Amendment Bill 2000 has been reported back to Parliament and is relatively high on the order paper. The government will be moving some additional amendments to accommodate the Legal Services Act 2000. Once the Bill is enacted, the existing rules will apply, subject to any practice directions until new rules are in place.

9.2 The Chairman agreed to write to the President of the Court of Appeal, thanking him for the Court's assistance in preparing a first draft and advising that, in accordance with a standard consultative process, the Rules Committee will be seeking the assistance of the Criminal Practice Committee (which advises the

Minister of Justice) and seeking comment through the website, the judicial intranet and "Lawtalk".

## 10. Criminal appeals to the High Court

10.1 The Committee noted that there are a number of practice notes which would be easier to find if they were made as rules.

10.2 The Committee agreed to invite the Criminal Practice Committee to make suggestions governing criminal appeals from the District Courts to the High Court.

10.3 Mr McCarron agreed to liase with the Committee, and to refer to it a copy of Elizabeth Tobeck's paper, where she compiled a list of the criminal practice notes.

## 11. Evidence – expert witnesses

***Discussion***

11.1 The Committee noted that the consultative process had so far elicited responses mainly from experts. By and large the experts agree that cross-examination is a powerful tool for exposing any partiality. The experts also agreed that the Code of Conduct is a good idea; issues of partiality arise more often before tribunals where both experts and counsel are less experienced. The experts also noted that a Code of Conduct would be helpful in the event that they came under pressure from the party calling them to state a particular opinion. The Code would also be useful for experts from the United States where it is usual for the expert to have an advocacy role. The experts also considered that it is important to clarify the status of the document that results from a conference of experts.

11.2 The Committee noted that some of the issues that have prompted overseas jurisdictions to regulate the calling of experts arise in the context of competition law cases. Concern was expressed that general rules about expert evidence may have significant flow on effects in the Family Court (child psychological reports) and in civil cases involving the police (estimates of speed, evidence about handwriting and identification are all expressions of opinion, for example, although not necessarily the result of an academic qualification). The Committee noted that proceeds of crime is another area that is replete with opinion evidence.

11.3 Concern was also expressed that prescriptive rules about expert evidence may deflect judges from focusing on the issues that are for the court to determine.

***Decisions***

11.4 The Committee agreed to write to the police and specifically seek their views.

11.5 The Committee also agreed to address the issues more specifically with the judges.

11.6 The Committee would revisit the topic after responses to the latest consultation paper and draft rules

## 12. Practice notes

*Discussion*

12.1 The Committee noted that the case management practice note is in conflict with a number of the rules. In particular, the filing of a praecipe has become obsolete and there is no longer any basis for distinction between Rules 437 and 438. Rule 436 needs to be amended.

12.2 The Committee noted that a number of directions follow from a point where the proceedings have been set down for trial and the Committee agreed, as part of the standard directions, judges should turn their minds to a finality date.

12.3 The Committee noted that in the United Kingdom practice notes are actually contemplated by the rules and both are accessed from the website for the Lord Chancellor's department.

12.4 The Committee identified discovery as being a particularly problematic interlocutory procedure because it is expensive and burdensome. An option is to require the party seeking discovery to fund it in the first instance, subject to any discretion in individual cases.

*Decisions*

12.5 The Committee agreed to prepare a schedule to the rules, which sets out the standard pre-trial directions.

12.6 The Committee agreed to advise the Chief Justice as to which practice notes, in its view, should go into the rules, which should remain as practice notes, and which should be obsolete.

12.7 Master Venning and Mr Weston agreed to address matters further at the next meeting on the assumption that, in principle, pre-trial directions should include the fixing of a "finality date" which would approximate to the present setting down date.

## 13. Execution: charging orders- writs of sale

*Discussion*

13.1 The problem is that Rule 601, which provides for the seizure of any title deeds, does not cover the situation where the title is out of possession of the party named in the writ.

13.2 On a related point the Committee noted the inability to enforce a charging order in the District Court; there is a cumbersome procedure to transfer the charging order to the High Court for the writ of sale process. The Committee noted the difficulty of executing judgments in general, particularly in the District Courts.

*Decisions*

13.3 The Committee agreed to refer the matter to Mr Tanner to draft a suitable amendment in relation to the seizure of title deeds.

13.4 Justice Wild and Mr Stewart agreed to address the issue of execution in general for the next meeting.

13.5 The secretary undertook to send the papers on execution to the Chief District Court Judge so that he could allocate a Wellington judge to look at the issue.

## 14. Execution: fine for contempt and warning about contempt

*Discussion*

14.1 The Committee noted that the Rules do not provide for the imposition of a fine in the event that a party is in contempt.

14.2 On a related point, the Committee referred to Rule 628 of the District Courts Rules and noted the concern that had been expressed that before an injunction could be enforced the notice should contain a warning about contempt. The concern was that that warning was being missed.

*Decision*

14.3 Mr Stewart agreed to look at where the warning should appear, and to compare with the comparable High Court Rules, which provides for a writ of attachment.

## 15. Interlocutory matters – general review

15.1 The Committee noted that recent Court of Appeal decisions on Rules 186 and 477 had deflected some of the concern about needing a general review of the Rules on interlocutory matters. Similarly, Rules 426 and 478 have been eclipsed by case management.

15.2 The Committee agreed to remove this matter from the agenda in the short term, but to monitor the position for the future.

## 16. Interlocutory matters – Defamation Act 1992

16.1 The Committee noted that Rule 285 needs a consequential amendment following on from the enactment of the Defamation Act 1992.

16.2 Mr Weston agreed to prepare a paper for the next meeting.

## 17. Masters

17.1 The issue is whether rules referring to Judges include Masters and the Committee agreed it was advisable for the avoidance of doubt to refer the matter to Mr Tanner for drafting an amendment.

## 18. Pleadings – certificate by lawyer and earlier disclosure of evidence

*Discussion*

18.1 The Committee noted that the issue about a certificate by the lawyer responsible for the documents and the issue about the earlier disclosure of essential oral and documentary evidence overlap if the plaintiff is required to file an affidavit verifying the factual basis for the proceedings. At that point it is a small step to requiring preliminary briefs and core documents.

18.2 The Committee noted that the chances of the proceedings being settled increase the earlier the core issues are identified. The Committee noted, however, that just filing a certificate, or disclosing the essential evidence early on is not sufficient because the matter needs to go at least before a Master.

18.3 The Committee noted that requiring written evidence in advance frontloads the cases in terms of cost and that it would be a significant burden on solicitors and counsel to certify proceedings and also burdensome on Masters. It would be particularly burdensome to calculate the damages, for example, and the Committee did not identify any evidence that irresponsible filing is presently a problem in New Zealand.

18.4 The Committee noted that in the United States, where parties do not face the risk of having costs awarded against them, there can be irresponsibly prepared documents and the procedural rules do require lawyers to certify.

18.5 The Committee noted that in New Zealand the award of costs can significantly address these issues and there are strong obligations on lawyers now under the code of ethics.

18.6 The Committee explored the possibility of all proceedings being filed by summary judgment. The Committee noted that the summary judgment process identifies the issues much more quickly and then there needs to be a trial only for those cases where the facts are disputed. The summary judgment procedure is, of itself, a type of case flow management. The Committee was not aware of any reluctance to issue proceedings by way of summary judgment now (approximately 40% of civil proceedings in Christchurch, for example).

*Decisions*

18.7 The Committee decided that requiring a certificate by the lawyer responsible for the documents and requiring earlier disclosure of essential oral and documentary evidence would be unduly burdensome for plaintiffs, defendants and Masters. The Committee also considered that the important issue of the parties disclosing the case early on in order to facilitate settlement or at least narrow the trial issues, can be addressed through case management and also the summary judgment procedure.

## 19. Summary judgment – service of notice overseas

19.1 The Committee agreed to refer this matter to Mr Tanner to draft an amendment along the lines of the paper prepared by Elizabeth Tobeck.

## 20. General business

20.1 The Committee referred to a letter received from Marian Hinde. The point is that Rule 121(2) refers to Form 5 which makes provision for costs, but there is then no provision for that in the schedules. The Committee agreed that the sentence in the form could be deleted and the matter was referred to Mr Tanner to draft an amendment accordingly.

The meeting closed at 2.00 p.m.

The next meeting will be held on Monday, 30 April 2001.

Secretary