THE RULES COMMITTEE
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Wellington

28 February 2001

Minutes/1/2001

CIRCULAR NO 11 OF 2001

Minutes of the Meeting held on Monday 19 February 2001

The meeting called by Agenda/1/01 was held in the Chief Justice's chambers, High Court, Wellington on Monday, 19 February 2001, commencing at 9.30am.

1. Preliminary

In attendance

The Hon Justice Fisher (in the Chair)
The Hon Justice Chambers
The Hon Justice Wild
Master G J Venning
Judge J P Doogue
Mr K McCarron (for the Chief Executive, Department for Courts)
Mr T C Weston QC
Mr C F Finlayson
Mr G E Tanner (Chief Parliamentary Counsel)
Mr B Stewart (Clerk to the Rules Committee)
Miss M A Soper (Secretary)

(a) *Apologies*

The Chief Justice (the Rt Hon Dame Sian Elias, GNZM)
Chief District Court Judge Young
Judge C J Doherty
The Attorney-General (the Hon Margaret Wilson MP)
The Solicitor-General (Mr T Arnold, QC)

(b) *Confirmation of minutes*

The minutes of the meeting held on Friday 10 November 2000 were taken as an accurate record and were confirmed.

2. Papers Tabled at the Meeting

By Justice Fisher

Memorandum from the Chief Justice to Justice Fisher dated 16 January 2001, "Expert Witnesses".

Draft page for Rules Committee manual, "Information Technology"

By Master Venning

Memorandum dated 16 February 2001 on Agenda item 8 (Practice notes)

By Mr Finlayson

Electronic filing of documents

By the secretary

E-mail from Val Sim at the Ministry of Justice, dated 16 February 2001 on the background to the District Courts Amendment Act (No 3) 1995

3. Appeals

Discussion

The Committee noted that the reason why s 73 of the District Courts Act 1947 was amended in 1995 to provide that time for appeal should run from the date on which the order is sealed is addressed in the e-mail from Val Sim from the Ministry of Justice (tabled at the meeting). The problems at the time actually related to the distinction between final and interlocutory orders and it seemed to the Committee that there would be no constraints on it making provision for time to appeal to run from the time that judgment is given (as opposed to when it is sealed or when it is sealed and served).

The Committee noted that the date on which judgment is given can be difficult to ascertain if an oral ruling is followed by a written judgment. Any injustice that might result from relying on the later date can be remedied in the High Court because there is provision for leave to appeal out of time from the High Court to the Court of Appeal; there is no equivalent provision in the District Courts Act.

The Committee agreed that the appellate structure should be the same from District Court to High Court and the Court of Appeal. In that context, the Committee noted that Rule 6 of the Court of Appeal (Civil) Rules 1997 makes the distinction between the time when judgement is given and the time when the judgment is sealed, depending on whether the appellant is successful.

Decisions

The Committee agreed in principle that there should be one right of appeal in the District Courts Act, and that the existing provisions should be repealed. The Committee also agreed that the procedural matters should be in rules.

Judge Doogue agreed to draft a paper suitable to go onto the website, be referred to judges, and be published in Lawtalk, with a view to inviting comments on what is proposed.

Mr Stewart agreed to prepare a preliminary draft of any legislative amendment and rules.

4. Costs in the District Courts

Discussion

The District Courts Sub-committee of the Rules Committee has discussed the extent to which the costs regime in the High Court Rules should be applied to the District Courts. One option is to apply category one, two and three proceedings from the second schedule to the High Court Rules and time allocations A, B, and C from the third schedule to the High Court Rules with appropriate adjustments to the dollar amounts and the times respectively. There is an issue about whether category three and time allocation C will ever be applicable in the District Courts context; on rare occasions however senior counsel would appear in the District Courts, such as for example an appeal by a medical practitioner who has been struck off by the Medical Practitioners' Disciplinary Tribunal under the Medical Practitioners' Act 1995.

The Committee noted that to some degree the jurisdictions of the High Court and the District Courts overlap and there should not be any disincentive to bring proceedings in the District Courts because of any lower award of costs. The Committee noted that the great mass of claims in the District Courts will be category two and time allocation B.

The Committee noted that the case management regime to come into force in the District Courts on 1 March 2001 makes its own provision for swift cases by avoiding interlocutory procedures. Once the costs provisions are translated through to the District Courts, an option is for category one time allocation A proceedings to not allow costs on interlocutory matters.

The Committee noted that it is possible in the District Courts to use the summary judgment procedure to get judgment by default for liquidated sums. The Committee noted also that the third schedule of the High Court Rules makes provision for obtaining judgment without appearance.

The Committee noted also that not all of small claims will be category one and time allocation A; motor vehicle accidents, for example, may be category one but time allocation B.

Decisions

Mr Finlayson agreed to do the first draft of a paper that can go onto the website for consultation. The paper is to be prepared on the basis of three presumptions: cases

involving less than $10,000 will be category one and time allocation A; cases involving less than $50,000 will be category one; in cases where the amount claimed is less than $50,000 costs on interlocutory proceedings will be allowed only with special leave.

The Committee agreed to refer the matter to the Chief District Court Judge, and with his approval, to publish also in Lawtalk and on the judicial intranet.

Mr Finlayson and Mr Tanner agreed to prepare a first draft of the amendments. The Committee noted that Rule 47 may need to be amended in order to guide the District Courts on how those presumptions ought to be applied.

5. Small claims in the District Courts

Discussion

The Committee noted that the issue of small claims in the District Courts is also being considered by a civil litigation committee comprising the Chief District Court Judge, Judge Joyce and Judge Doherty.

Decision

The Committee agreed to seek advice from Judge Doherty on whether the default procedure is working in the District Courts.

6. Uniform rules

Decision

The Committee agreed that Mr Stewart would attempt the exercise of combining the High and District Courts Rules into one set to see whether it should be pursued further or whether it will be too difficult to do. Assuming the exercise is practicable, comments can be sought later from the Rules Committee website, Lawtalk, and the judicial intranet.

7. Review of the Rules Committee

Decision

Mr McCarron agreed to mention to the sub-committee of the Criminal Practice Committee the need to look at the Court of Appeal (Criminal) Rules 1997 in the light of allegations of denials of natural justice.

8. Rules Committee manual

Decision

The Committee agreed to insert paragraphs 4.4 on information technology into the manual.

9. Electronic transactions

Discussion

The Committee noted that the courts' technology committee is currently addressing the issue and that Justices Hansen and Gault are members of it.

The Committee noted that the rules adopted by the Federal Court of Australia are the most appropriate for New Zealand conditions.

Decisions

The Committee agreed to write to the Chief Executive of the Department for Courts enclosing a copy of the paper prepared by Mr Finlayson (tabled at the meeting) together with draft rules and advising that the Rules Committee supports the introduction of rules for electronic filing. In this context, the Committee noted that practitioner members feel that the Committee is under increasing pressure to get such a system running in the interests of efficiency.

Mr Finlayson agreed to prepare the draft, adapting the Federal Court of Australia Rules.

10. Summary judgment for the defendant on a particular cause of action

Discussion

The Committee noted that the ability of a defendant to get summary judgment on a particular cause of action can operate to eliminate causes of action in the statement of claim that cannot be successful, often when strikeout is not available. The Committee noted also that summary judgment can operate to bring out the other side's case at the outset.

The Committee noted also that different provisions for appeal to the Court of Appeal may apply, given that most summary judgment applications are heard by Masters.

Decision

Mr Finlayson agreed to update his paper in the light of the decision of the Court of Appeal in *ANZ Banking Group (NZ) Ltd v M M Kembler NZ Ltd* (CA 51/00, 9 November 2000).

11. Expert Witnesses

Discussion

The Committee considered the paper revised by Mr Weston.

The Committee noted that one of the assumptions on which the draft rules proceed is that unless evidence is presented in a particular way it cannot be adduced. That raises the issue about whether the rules purport to change the substantive law on the admissibility of evidence.

The Committee discussed the difficulties about determining the status of a report prepared by experts and referred to the decision in *Westgate v Methanex* (2000) 14 PRNZ 81. The issue is whether the agreement between the experts was without prejudice or whether the agreement was that the report be before the court.

The Committee also noted the American procedure whereby the judges rule in advance on minimum validity and, in that context, noted the decision of *Daubert v Merrell Dow Pharmaceuticals Inc* 509 US 579 (1993). The proposed rules would be more moderate than any of the recent overseas equivalents.

The Committee noted that it would be undesirable for experts who have reached agreement to resile from that by reinstating the evidence in their original brief. At the same time, the Committee recognised that experts must still be able to give other evidence.

The Committee agreed that it will usually be before a trial that a conference is directed. The judge needs to know something about the evidence in order to decide whether a conference is necessary and whether the lawyers should be present. An issue is whether it is actually necessary for the judge to see the briefs of evidence, and the Committee noted that in most cases the initiative for exchanging briefs of evidence would come from counsel.

In respect of the "hot tub" rules, the Committee noted that the relevance of the evidence should relate to the proceedings and that the rules should refer to "relevant matters within the expert's area of expertise".

The Committee noted that Rules 5 and 6 should refer to "his or her evidence" instead of "witness statement".

The Committee noted that there is no reason why a similar amendment should not be incorporated into the District Courts Rules. The Environment Court has its own practice note on expert witnesses. The Committee noted also that some District Courts Rules apply in the Family Court's jurisdiction and it will need to be alert to other possible default implications.

The Committee noted that what it is proposing is moderate by comparison with the rules relating to expert evidence in the United Kingdom, Australia and the United States. The problems in the United States are greater but nevertheless the same as those in New Zealand, namely, relevance, qualifications, and lack of objectivity. The Committee noted also that in the United States expert evidence would be adduced mainly in personal injury and medical malpractice cases, which we do not have in New Zealand.

Decision

Mr Weston agreed to revise his paper in time for the next meeting on 12 March 2001, and to prepare a short article for Lawtalk, the judicial intranet and the website.

12. Practice Notes

Discussion

The Committee referred to Master Venning's draft rules (tabled at the meeting).

The Committee queried whether the provisions relating to applications for appeal deal with substantive issues of law and agreed to refer to issue to the Chief Justice for comment.

In draft Rule 441M, the Committee agreed that there should be "exhibits" rather than "documents".

The Committee discussed whether the Rule should provide that the bundle of documents should include only those documents referred to in opening by counsel. The Committee noted, however, that the course of a trial cannot always be anticipated and other documents may be referred to.

The Committee discussed whether a statement of issues should be provided for in a practice note, and while, depending on the pleadings, it may not be necessary, it can be subject to a direction from the judge.

The Committee noted that Rule 438 has largely now been overtaken by case management.

In the context of the common bundle of authorities, the judicial members expressed preference to see the legal issues at the outset.

In the context of the record of notes of evidence, the Committee noted that digital recording is being trialed in Auckland and needs to be accommodated in the description of the record. In that context, the Committee noted that the Rules will need to comply with any legislative provisions that enable notes of evidence to be adduced as evidence in other proceedings.

The Committee noted that provisions relating to cross-examination, hypothetical questions and reminders about the content of briefs of evidence should remain in practice notes rather than be incorporated into the Rules. In due course, the Chief Justice and the executive judges need to address, on a national basis, which practice notes still apply.

Decisions

Justice Chambers agreed to send a copy of the standard directions used in Auckland to Master Venning and Mr Tanner. In respect of bundles of documents, these directions provide that affidavits be inserted minus exhibits and for a synopsis of counsel for the plaintiff.

Master Venning agreed to revise his draft, after consultation with Mr Tanner, for the next meeting.

Master Venning agreed to prepare a list of practice notes to identify those which are appealed and those which should remain, for the Chief Justice to approve.

13. Criminal appeals to the Court of Appeal

Discussion

The Committee noted that the Crimes (Criminal Appeals) Amendment Bill 2000 is currently before a Parliamentary Select Committee. The Committee will need to be

in a position to make rules as soon as the Bill is passed, in consultation with the Criminal Practice Committee and the Judges of the Court of Appeal.

Decision

In the first instance, the Committee agreed that the secretary should write to the Court of Appeal, mindful of the fact that the procedure in the Court of Appeal is primarily a matter for the Court of Appeal Judges, mentioning that the initiative has in the past come from the Court of Appeal Judges in matters relating to that Court's rules, and asking them whether they would want to provide a first draft.

14. Admiralty rules

The Committee noted that Mr Finlayson had spoken to Justice Williams, Mr Broadmore and Judge Perkins, and hopes to come back to the next meeting with a set of proposed amendments.

15. Write of sale

Justice Wild agreed to report on this issue.

16. Interlocutory matters

Master Venning agreed to liase with Mr Finlayson on this issue.

17. Interrogatories

Discussion

The Committee noted that Rule 285 refers to the defence of fair comment in defamation cases and now needs to be amended.

Decision

Mr Weston undertook to consult with Julian Miles QC.

18. Masters

Discussion

The Committee referred to Mr McCarron's paper distributed (not as a circular) as Masters/2/2001 — Masters' jurisdiction.

The Committee noted that, while no amendment to the Rules is strictly necessary, they need a liberal interpretation to make it clear that the references in the High Court Rules do include judgments by Masters.

Decision

The Committee agreed that the definition of "Court" should include a Judge and a Master of the High Court when acting in the Master's jurisdiction so as to put the matter beyond doubt. The matter was referred to Mr Tanner for drafting.

19. Pleadings

Amended pleadings

The Committee discussed whether amendments to pleadings should be shown in a different colour or typeface and considered that the amendments were of more interest to the parties before the trial than they are to the judge. The Committee saw no need to highlight any amendments once they have been effected.

Certificate by lawyer responsible for document and earlier disclosure of essential evidence — oral and documentary

The Committee noted that these two topics are related.

Master Venning agreed to ask Justice Doogue for further background information and any statistics, and to liase with Mr Weston.

20. Summary judgment — service of notice overseas

Discussion

The Committee noted the paper prepared by Elizabeth Tobeck (Summary Judgment 1/01), and noted that Master Faire agreed with her wording of the proposed amendment.

Decision

Master Venning agreed to discuss the issue with Master Faire and come back to a subsequent meeting.

The meeting closed at 3.10 p.m.

The next meeting will be held on Monday, 12 March 2001.

Secretary