THE RULES COMMITTEE

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1st July 2002

Minutes/5/02

CIRCULAR NO 54 OF 2002

Minutes of the Meeting held on Monday, 1st July 2002

The meeting called by Agenda/5/02 was held in the Chief Justice's Chambers, High Court, Wellington, on Monday, 1st July 2002, commencing at 10.00am.

1. Preliminary

1.1 *In attendance*

The Hon Justice Chambers (in the Chair)
The Hon Justice Wild
The Hon Justice William Young (until 2:15pm)
Master Venning
Judge Doherty
Chief Parliamentary Counsel (Mr. G E Tanner QC)
Mr. T C Weston QC (from 10:15am)
Mr. C Finlayson (until 2:50pm)
Mr. H Hoffmann (for item 2.2 in the minutes)
Mr. R Gill
Mr. K McCarron (for the Chief Justice)
Mr. J Drake (Clerk to the Rules Committee)

1.2 *Apologies*

The Chief Justice (the Rt. Hon Dame Sian Elias GNZM)

The Solicitor General (Mr. T Arnold QC)
Judge J P Doogue

1.3 *Confirmation of Minutes*

The minutes of the meeting held on Wednesday, 5 June 2002 were taken as an accurate record and were confirmed.

1.4 *Matters Arising*

The Committee noted that the Governor-General had assented to the Revocation of Judicature (Interest on Debts and Damages) Order 2002 which set the maximum interest rate that courts could award for the recovery of debts or damages at 7.5% per annum (Payment into Court/3/02). The new rate is scheduled to take effect from 1 August 2002.

Justice Chambers reported that he had received a letter from the Chief Justice informing him that work was continuing on reviewing the criminal law practice notes. When the review had been finalised, it would be referred to the Rules Committee to see what should be incorporated into the rules.

Justice Chambers agreed to report back at the Committee's next meeting on his discussions with media representatives on the In-Court Media Coverage Committee and/or the Commonwealth Press Association regarding the proposed deletions of HCR 285 and DCR 307 (which purport to prohibit the plaintiff from delivering interrogatories in defamation cases as to the defendant's sources of information).

2. Matters referred to Parliamentary Counsel for drafting

2.1 High Court Amendment Rules (No 2) 2002 and District Courts Amendment Rules (No 3) 2002 – Omnibus 2

Judge Doherty reported that Judge Perkins thought that the District Courts needed admiralty rules for its in personam admiralty jurisdiction. He had prepared a report which was supposed to be referred to the Admiralty Rules Subcommittee. Mr. Finlayson reported that the subcommittee had not sighted the report.

The Committee directed Mr. Drake to note in the consultation paper for Omnibus 2 that the Committee was looking at the topic of admiralty rules for the District Courts as a separate exercise. It also directed him to obtain a draft of Judge Perkins's report and to distribute it to the subcommittee.

The Admiralty Rules Subcommittee is to consider the report and Mr. Finlayson undertook to report back to the Committee at its next meeting on the subcommittee's views.

The Committee also directed the Chief Parliamentary Counsel to prepare a final version of Omnibus 2 which would be released for consultation to the public on Monday, 8 July 2002. Mr. Drake was to make final amendments to the consultation paper which would be released with Omnibus 2 and would be available from the Committee's website.

The Committee directed the Secretary to the Rules Committee to distribute consultation paper and Omnibus 2 specifically to: The New Zealand Law Society, the Bar Association, Raynor Asher QC, the Insurance Council, Justice Williams, Tom Broadmore, Judge Perkins, Judge McElrea, Judge Willy, the Corporate Lawyers' Association of the NZLS, and insurers who had asked for a copy.

The Committee also directed Mr. Drake to write an article for inclusion in LawTalk magazine notifying people of the release of the consultation paper. Mr. Drake also was to write brief articles for inclusion in the Chief Justice's newsletter and the Chief District Court Judge's newsletter.

2.2 High Court Amendment Rules (No 3) 2002 and District Courts Amendment Rules (No 4) 2002 – Omnibus 3

The Committee decided that after any proposed amendments were made at this meeting, the resulting draft would be circulated to the National Caseflow Management Committee (NCMC), all the current Masters of the High Court, Mr. Tomas Kennedy-Grant, Justice Fisher, the Court Registrars, and Mr. Andrew Beck for comment. This would be an initial consultation phase. A formal, public consultation phase would come later.

The Committee approved rules 3 and 4 of HCAR (No 3) 2002, noting that they were the result of previous discussions that the Committee had had.

The Committee then considered rule 5 which revokes HCR 234 to 269 and substitutes new rules in their place.

The Committee approved proposed rules 234 and 235. It directed that proposed rule 236 be redrafted along the following lines: "The Court may make the order conditional on any of the following…" It also approved proposed rule 237. The Committee approved proposed rule 238 and noted that proposed rule 238(2)(b) had been simplified to take advantage of the definition of "enactment" in the Interpretation Act 1999. Mr. Hoffmann confirmed that consequential amendments also were proposed for forms 19 and 20.

The Committee noted proposed rule 240(1) was merely declaratory and did not purport to grant any new powers or jurisdiction on the Court. It deleted the words "detrimentally affected" in proposed rule 240(2) and directed that they be replaced with "adversely affected".

The Committee approved proposed rule 241 and noted that the proposed rule made it clear exactly about what the solicitor or counsel was personally satisfying himself or herself.

The Committee approved proposed rule 242.

Mr. Hoffmann reported that a recent amendment defined "Judge" as including "Master". In light of that, the Committee deleted "or Master" and "his or her" from proposed rule 243(2).

The Committee approved proposed rule 244.

The Committee directed that proposed rule 245(1) be amended by replacing "the applicant and on all other parties affected by the application" with "every other party". The purpose of this was so that everyone involved in a proceeding would be kept informed of any developments. The Committee also deleted the "2 weeks" in proposed rule 245(1)(a) and replaced it with "10 working days". It noted that these rules provided a default regime with which parties had to comply unless the Court ordered otherwise.

The Committee noted that proposed rule 246 dealt with predominantly the same subject matter as proposed rule 242 yet was drafted differently. It directed Mr. Hoffmann to bring them into line, preferably in the style of proposed rule 246.

The Committee deleted proposed rule 247(2) as it noted that HCR 510(1)(d) dealt with this issue of restricting affidavits in reply to relevant matters. It directed that words to the effect of "the notice of opposition or to" be inserted into proposed rule 247(1) after the word "to" and before the word "an". It replaced the words "1 week" in proposed rule 247(1)(a) with "5 working days".

It approved proposed rules 248, 269, 250, and 251. It noted that proposed rule 250(2) did not change the existing rule.

The Committee kept the reference to "Judge or Master" in proposed rule 252(3) as it was referring to a physical place rather than a Judge's jurisdiction. It decided that the proposed rule should reflect the following principles:

- If you make an interlocutory application, it will be heard in chambers.
- That hearing may take the form of a case management conference.
- A Registrar may allocate a hearing to a case management conference (as per proposed rule 243).

As a matter of principle, the Committee decided that a party should be able to do anything at a case management conference it could do at a hearing in chambers and vice versa. To that end, it agreed with Mr. Hoffmann's suggestion that a "hearing in chambers" be defined as "a hearing in chambers includes a case management conference

conducted in accordance with (proposed) HCR 435". It also directed that "case management conference" be defined as "a conference conducted in accordance with (proposed) HCR 435".

The Committee considered proposed rule 253. It noted that the proposed rule, as currently drafted, adequately dealt with the situation where either party made an application for a chambers hearing by telephone or video conference but not where the Court, on its own initiative, ordered the hearing. The Committee considered that, as a matter of policy, the plaintiff should pay the costs in such a case. It directed Mr. Hoffmann to draft something along those lines to be included as proposed rule 435(3). It also directed Mr. Hoffmann to clarify in proposed rule 435(4) that a case management conference could be held by telephone and/or video conference.

It approved proposed rule 254. It substituted the word "prejudice" for "other serious detriment" in proposed rule 254(1)(a).

The Committee deleted the phrase "party served with the application" in proposed rule 255(3) and replaced it with "respondent". It also deleted the phrase "to some other time or to some other time and to some other place" in the same subclause. The Committee noted that HCR 509 adequately dealt with the situation where a person refused to swear an affidavit. Rather than explicitly refer to it, the Committee decided that it was happy to rely on the writers of texts on the HCR to make a cross-reference to HCR 509.

The Committee directed that the title of proposed rule 256 be changed to read "Oral evidence in special circumstances". It also deleted the words "if the interest of justice so require" in proposed rule 256(1).

It approved proposed rules 257 to 261.

The Committee deleted the words "136 or rule 137" in proposed rule 262(2)(a) and replaced them with "138". It also deleted proposed rule 262(2)(b). As one of the goals of the proposed rules was to encourage parties to agree, as much as possible, on interlocutory matters, the Committee felt that it might be counter-productive to prohibit a party, who had consented to an interlocutory order, from applying to vary or rescind it.

The Committee directed Mr. Drake to highlight this in the consultation paper on this topic.

The Committee considered proposed rule 262(6) which purported to prohibit a party from applying to vary or rescind an order or decision given by a Master in Chambers. The Committee noted that this area involved the interplay of sections 26I and 26P of the Judicature Act 1908, and HCR 61C. It considered that party should not be able to "appeal" a Master's decision twice. It considered that the appropriate principles in this area should be:

- A party affected by an interlocutory order, whether made by a judge or master, may appeal that order to the Court of Appeal; but instead of appeal, may apply to have it reviewed in the following circumstances:

    - Relevant facts not brought to the Court's attention; or

    - A change in circumstances which rendered the orders inappropriate; or

    - The issues were inadequately argued the first time that the Court considered the issue.

The Committee then considered the issue of whether, assuming the criteria were met, a master could review a decision of a judge. It noted that this would only apply in respect of interlocutory matters. As such, it considered that it may be appropriate if this proposal were specifically linked to the case management conference procedure by saying that a master could review a judge's decision in respect of matters covered in proposed rule 425(b) to 425(e).

Justice William Young undertook to write a paper reviewing this area of the interplay between HCR 61C and the Judicature Act provisions which governed masters.

In the meantime, for initial consultation purposes, the Committee directed Mr. Hoffmann to leave proposed rule 262 as is, except as already amended here. It directed him to amend the tile of the proposed rule to words similar to "Variation or recission of orders".

The Committee approved proposed rules 263 and 264.

The Committee then considered rule 6 which revoked HCR 425 to 438 and substituted new rules in their place.

The Committee approved proposed rule 425 and noted that it empowered the Court in respect of how hearings are to be conducted.

It approved proposed rules 426 to 432.

The Committee noted that the proposed rules made provision for two tracks (apart from the commercial list). These were the 'swift track' and the 'standard track'. It inserted the word "particular" before the word "Judge" on both occasions in proposed rule 433(4).

Mr. McCarron conveyed the Chief Justice's view that matters of internal procedure should be included in practice notes whereas only rules imposing obligations on parties and/or their counsel/solicitor should be included in the HCR.

The Committee agreed with this view and noted that the provisions dealing with which track a case was assigned to imposed obligations

on counsel. It also noted that the proposed rules in this area were phrased at their most general level.

It directed Mr. Hoffmann to insert a suitable definition of "Executive Judge" in the rules.

The Committee also considered whether the proposed rules were in the most appropriate order. It directed Mr. Hoffman to place proposed rule 433, with its own heading, before proposed rule 426. Justice Chambers and Mr. Hoffman undertook to look at whether the proposed rules ought to be re-ordered to reflect a more logical sequence.

It deleted the phrase "1 or more of the parties" in proposed rule 435(2) and replaced it with "a party". It noted that, earlier in the meeting, it had proposed other additions be made to proposed rule 435. These were that a case management conference could be held by video conference or telephone and clarifying who was responsible for paying disbursements when the Court initiated the case management conference.

The Committee replaced the word "may" in proposed rule 436(2)(b) with "will". It inserted the words "that stage in" after the words "relevant to" in proposed rules 436(3)(a) and 436(5). It replaced the words "the solicitors or counsel of the parties" in proposed rule 436(4) with "each party". The Committee also considered proposed schedule 4 and directed that the words "5 working days" replace "7 days" in item 14 of the schedule.

The Committee deleted the word "appeals" in proposed rule 437(4)(c) and replaced it with "the appeal". It made the following amendments to proposed rule 437(5):

- It replaced the words "5 to 9" with "4 to 7".
- It replaced "3" with "2".
- It replaced the words "date of the" with "case management".

It also directed that a provision, with words to the effect of "The memorandum may be filed by facsimile" be inserted into proposed rule 437. This mirrored proposed rule 436(6). The Committee considered proposed schedule 5. It deleted proposed clause 4. It deleted the phrase "a synopsis of" from clauses 6(a) and 7(a). It deleted the words "in table form" from clause 6(b). It replaced "2" with "1" in clause 9 and "3" with "2" in clause 10. The Committee directed that footnote 1 in schedule 5 be amended to reflect the gist of rule 9 of the Privy Council (Judicial Committee) Rules Notice 1973.

The Committee discussed the rationale underlying appeal books. It noted that appeal books might not be necessary for all civil appeals. This would just be a default provision.

However, the Committee was of the opinion that the 20-page limit on submissions ought to be strictly enforced, and that, as a matter of

policy, additional submissions on the day of the hearing ought to be discouraged.

The Committee corrected the reference to "rule 437(6)" in proposed rule 438 be amended to read "rule 437(5)".

It approved the revocation of HCR 441.

The Committee approved proposed rules 441A and 441B. It noted that the presumption in a standard track proceeding was that all the rules concerning the exchange of witnesses' statements and the preparation of the common bundle of documents would apply. However, in a swift track proceeding, the presumption was that these rules would not apply. Justice Chambers raised the issue of to whom could statements of evidence be shown. He pointed out that often witnesses read statements of evidence which effectively nullified any orders excluding witnesses from court when other evidence was being given. He said that this was a separate issue which should be considered at some stage in the future.

The Committee approved proposed rules 441M to 441P. It deleted the words "a synopsis of" in proposed rule 441Q. It also deleted the words "in Chambers" from proposed rules 442(1) and 441(2).

The Committee directed that proposed rule 3 of HCAR (No 2) 2002 in respect of the definition of an "interlocutory order" be amended by inserting at rule 3(1)(b)(iii) words to include strike out applications.

3. Overall review of Court rules

The Committee considered Mr. Finlayson's paper (General/4/02). Mr. Finlayson summarised his views which, essentially, were that the Committee had to step back and consider the "big picture" as it was at risk of being weighed down with the minutiae of the rules. He noted that the rules of civil procedure had almost come full circle in that, whilst the HCR were originally introduced with the purpose of standardising how proceedings were initiated, there were now 4 separate methods of initiating proceedings again – this was similar to what had occurred under the code of civil procedure. He further noted that rules tended to be "tacked on" rather than integrating them into the rules as a whole. The main difficulties were as a result of trying to engraft onto the rules case management principles.

The Committee noted that it was a part-time body and that it was essentially reactive in nature. There had been a move way from party and lawyer autonomy towards the court having greater control over proceedings. The Committee considered that, given its essentially part-time status, the main problem here was one of manpower constraints.

It decided to appoint a working group consisting of Mr. Finlayson (chair), Justice Wild and a District Court Judge, preferably from the Wellington District Court. (Judge Doherty undertook to contact Judge Tuohy and raise with him

the possibility of him joining the working group. If he were unable to help, then Judge Doherty was to ask Judge Keane.)

The working group's tasks at this stage are:

- To look at the possible options as to how a revised set of rules might be formulated/redrafted.
- To recommend its preferred option.
- To consider what level of resources would be required to effect its preferred option.
- In particular, the working group was asked to find out how long it had taken to consolidate the rules in respect of the Family Court and how many man-hours had so far been spent on those rules by the Parliamentary Counsel's Office, the Ministry of Justice, the Principal Family Court Judge's Office, Family Court Judges, and lawyers.

4. District Courts Subcommittee

Judge Doherty reported that the New Zealand Law Society previously had considered the issue of whether the costs/disbursements regime proposed for the HCR was suitable for the DCR. Judge Jeremy Doogue already had written to the Parliamentary Counsel's Office to initiate a draft of these proposed rules. Upon completion, the draft was to be forwarded by PCO to Mr. Hesketh for circulation to members of the Committee and to Judge Jeremy Doogue for the purpose (if possible) of his subcommittee considering it before the next Committee meeting.

5. Arbitration

The Committee considered Justice Wild's report on whether Part 17 of the HCR explicitly ought to provide rules for the enforcement of interim relief orders made by an arbitrator. It agreed with his conclusion that nothing further needed to be done unless the Arbitrators and Mediators' Institute of New Zealand disagreed. Justice Wild undertook to write to the Institute informing them of this and asking for their view.

6. Discovery

Mr. Drake reported to the Committee that he had contacted the UK Law Society by email but had not yet had a reply. Mr. Weston informed the Committee that the Bar Association had raised concerns that the requirement to hand over documents detrimental to a party's own case could prove to be an onerous obligation given that it required an accurate pre-trial assessment of what was detrimental to a party's case. The Committee agreed that this was a relevant concern.

It directed Mr. Drake to (1) Find any academic articles on the English experience of the new rules; (2) make enquiries of English Barristers and Solicitors of the effect of the new rules in practice; and (3) Make enquiries of Australian practitioners on the Queensland and New South Wales models; and (4) Report back to the Committee at the next meeting.

7. Part IV – procedure in special cases

The Part IV subcommittee (Justice Wild and Master Venning) was to report to the Committee at its next meeting on what changes to other parts of the HCR were necessary, if the Committee abolished Part IV.

8. Interrogatories

The Committee considered Judge Doherty's report on this matter which conveyed that, in general, there was no concern amongst District Courts Judges that interrogatories needed to be numerically limited. Justice Chambers reported that the Masters of the High Court in Auckland had expressed a similar view.

The Committee agreed that the matter should be removed from the agenda and not proceeded with any further.

9. Third Party Notices – Summary Judgment

The Committee considered Mr. Drake's paper on this issue of whether the requirement that a defendant seeking to join a third party in a summary judgment application had a higher threshold to meet could be justified. The paper concluded that the distinction was not justified.

The Committee did not reach a decided view on this topic. It deferred the matter to the next meeting for further consideration.

10. HCR 499 – Expenses of bringing an inmate before the Court as a witness

The Committee considered Mr. Drake's paper on this issue. The paper concluded that HCR 499(2), which dealt with the expenses of bringing an inmate before the court as a witness, was *ultra vires*. The Committee accepted this and directed that the recommendation proposed in the paper (the revocation of HCR 499(2)) be included in Omnibus 3.

11. Summary Trials

Mr. Drake to report back to the Committee at its next meeting.

12. Contempt – new rules

Mr. Drake to report back to the Committee at its next meeting.

13. Small Claims

This matter was carried forward to the next meeting.

14. Payments into Court

The Committee noted that Lord Woolf initially had agreed with the Committee's own initial conclusion that the payment into court rules should be revoked. However, the English Law Society had convinced him otherwise and the procedure had been retained. The Committee suspected that personal injury claims, which were not prevalent in New Zealand given our ACC law, might be a factor in its wide use in the United Kingdom.

Mr. Weston expressed the view that there were no compelling reasons in the UK material presented to the Committee (Payment into Court/5/02) that justified keeping the payment into court rules. The Committee was sympathetic to this view. It also noted that HCR 48C and 48D already allowed the Court to increase or decrease any costs awarded if a reasonable offer to settle had been disregarded.

The Committee directed Mr. Drake to:

- Make enquiries of District Courts Registries at Auckland, Hamilton, Wellington, Christchurch, and Dunedin as to how frequently the payment into court procedure was used.

- Draft a letter for Justice Chambers to sign, to the New Zealand Law Society, the Bar Association, and the Solicitor General seeking their preliminary views as to whether the payment into court procedure should be retained.

15. General

The Committee directed the Costs subcommittee to undertake the annual review of the Second Schedule daily recovery rates.

The meeting closed at 3:12pm.

The next meeting will be held on Monday, 2nd September 2002.

Justin Drake
Clerk to the Rules Committee