29 November 2000

Minutes/5/2000

CIRCULAR NO 51 OF 2000

Minutes of the Meeting held on Friday 10 November 2000

The meeting called by Agenda/5/2000 was held in the Judges' Common Room, High Court, Wellington on Friday 10 November 2000 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 C J Doherty (for Chief District Court Judge Young)
Judge J P Doogue
The Solicitor-General (Mr T Arnold, QC)
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)
Ms J Derby (Parliamentary Counsel)
Ms E Tobeck (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
The Attorney-General (the Hon Margaret Wilson MP)

(b) *Confirmation of minutes*

The minutes of the meeting held on Monday 9 October 2000 were taken as an accurate record and were confirmed.

(c) *Personnel*

The Committee noted that this was a last meeting to be attended by Elizabeth Tobeck. They expressed their thanks to her for her work as Clerk to the Committee and wished her well in her future career. The new Clerk will be Barnaby Stewart.

2. Papers Tabled at the Meeting

By Justice Fisher

Rough draft for Rules Committee Manual 9/11/00 — Practice Notes.

By Mr Tanner

The High Court Amendment Rules (No 2) 2000 (PCO3769/2)

The District Courts Amendment Rules (No 2) 2000 (PCO3549/4)

3. Matters Arising from the Minutes

The Committee addressed the draft media release dated 7 November 200 entitled "Update on the Rules Committee", which was circulated by e-mail on 8 November 2000. The Committee agreed that the reference to "inter-party costs" in the second paragraph under the heading "District Courts" should just read "costs". The Committee also agreed that the chairman would refer the draft to "Lawtalk" for publication.

The Committee agreed that in due course a copy of the press release could go on the website and also on the judicial intranet.

4. District Courts' Rules

The Committee addressed the District Courts Amendment Rules (No 2) 2000 (PCO3549/4) which were tabled at the meeting.

On page 25, new form 14, paragraph 3, the Committee agreed to replace subparagraphs (b) and (c) with the words, "I know the defendant".

The Committee agreed to leave stylistic changes that would modernise drafting to the Parliamentary Counsel Office.

The Committee agreed that the next draft could be circulated for concurrences.

5. Costs Rules

The Committee addressed the High Court Amendment Rules (No 2) 2000 (PCO3769/2) which was tabled at the meeting.

The Committee agreed to insert the word "appearance" before the word "allowance" in 4.16, 5.4 and 9.2 of the Third Schedule, in order to make it clear that second counsel receive 50% of the hearing fee, not also 50% of the other allocations.

The Committee agreed to design the heading in the Third Schedule more clearly, either by allowing extra space or by using a different font.

In the Third Schedule under the headings "Bankruptcy Proceedings" and "Company Liquidation Proceedings", the Committee agreed to add to the words in brackets (additional to costs in items 1 to 15) the words "if allowed".

6. District Court

Generally, on the subject of the District Courts Rules the Committee identified four goals: addressing District Courts proceedings at the bottom end of the scale, costs, amending the High Court Rules and the District Courts Rules together, and consolidating the rules.

The Committee agreed that it would approach the Chief District Court Judge to get his reaction to having his subcommittee on small claims of the District Courts subcommittee report directly to the Rules Committee through Judge Doherty.

On the issue of appeals from the District Courts to the High Court, the Committee noted that there may be different rules for small claims. Mr McCarron agreed to check with the Ministry of Justice and the Ministry of Economic Development to establish what work those departments are doing on small claims.

The Committee agreed that the Chairman should write to the Chief District Court Judge to establish what work the District Courts Civil Litigation Committee is doing on small claims.

The Committee noted that the District Courts subcommittee is addressing the issue of costs in the District Courts.

The Committee agreed that addressing the procedure for small claims is a high priority.

The Committee agreed that the Rules Committee clerk should prepare a draft to consolidate the District Courts Rules and the High Court Rules in consultation with Mr Tanner. The Committee recognised that the act of attempting a draft should demonstrate whether unification is essentially a drafting exercise or a more major undertaking.

7. Review of Committee

Criminal Procedure

The Committee noted that the subcommittee of the Criminal Practice Committee is reviewing the criminal practice notes. Mr McCarron agreed to report further.

8. Public Relations

The Committee noted that the Rules Committee has had a section in the Report of the New Zealand Judiciary since 1995, but otherwise no formal annual report. The Committee agreed that it is appropriate for that practice to continue.

9. Costs

The Committee noted that the case of *Harley v McDonald* is to be heard in the Privy Council in February and agreed to put this matter on the agenda for the second meeting in 2001.

The Committee noted that a number of other costs issues are with the subcommittee.

10. Electronic transactions

The Committee noted that the real issue is not the problem of electronic filing but the subsequent management. What is needed is a sophisticated computer system for case management once the documents have been filed.

At a crude level it is possible to e-mail a document to the Registrar, which the Court prints out and that can have advantages for interim injunctions, for example.

The issue of electronic filing will also need to address the issue of authenticity.

In the interim, the Department for Courts is exempt from the provisions of the Electronic Transactions Act until it can provide the infrastructure.

Mr Findlayson agreed to press on with the preparation of rules for electronic filing and related matters

11. Expert Witnesses

The Committee addressed the second discussion paper prepared by Mr Weston that was circulated by e-mail on 6 November 2000.

Draft rules in Schedule B

Rule 1 — The Committee agreed that the expert should be aware of his or her obligations, at the latest, prior to giving evidence. The Committee identified the timing options as being: at the time of engagement, when proceedings are contemplated, and when the evidence is given. The Committee noted in this context that making the expert aware of his or her obligations may be particularly relevant for overseas experts who are used to playing a more adversarial role.

While the court may be interested only in how the expert gives evidence in court, the role of the expert may be significant if the expert's advice is sought on whether or not to issue proceedings.

The rule is to be amended to leave the timing issue open.

Rule 2 — The Committee addressed the issue of what sanctions, if any, should be imposed in the event that the expert does not acknowledge that he or she has read the code and agrees to be bound by it. The Committee agreed that the evidence should be inadmissible without such an acknowledgment.

Rule 3 — The Committee discussed whether the court should have a power to appoint a chairperson in the form of an independent expert to facilitate concessions.

On one view, an independent chairperson ought not to be necessary if the expert witnesses have standing in their professions, there are good directions from the court and a clear code of conduct.

On another view, concern was expressed that a strong expert can dominate the proceedings and a chairperson might be useful. The Committee did, however, want to avoid setting up a de-facto arbitration.

Mr Weston agreed to put this in the draft as an option and get some feedback on it when the document goes out for wider consultation.

Rule 4 — The Committee noted that the status of any document that comes out of a conference between the experts needs to be clarified. It may be regarded as just a report to the court and a type of witness statement. The Committee agreed that it should be regarded as a witness statement.

The Committee noted that there may be proper reasons why an expert witness might reflect later on the joint statement and the Committee agreed that any joint statement should be circulated to the parties.

The Committee discussed whether lawyers should be involved with the conference of expert witnesses. The Committee agreed this should be left to the Court in each case. The draft rule is to be amended accordingly. *Code of Conduct (Schedule X)*

The Committee agreed to insert the word "impartially" to assist the court in 1.

On page 2, Code 4 (c) the Committee agreed that a statement of the ambit of the evidence to be given and that the evidence is given within the expert's area of expertise, is an appropriate way to deal with the issue about the expert revealing his or her instructions.

The Committee agreed with the drafting of the remainder of the Code of Conduct.

Introductory discussion

In paragraph 5 the Committee agreed to insert, "There are strong views amongst the judiciary about lack of impartiality and irrelevance", or similar.

General decisions

Mr Weston and Mr Tanner agreed to finalise the paper, obtain the Chair's approval, and then to circulate it for consultation purposes.

The Committee agreed that this discussion paper should be specifically referred to the heads of benches. In this regard the Committee identified, in particular, the Maori Land Court and the Environment Court.

The Committee agreed that the paper should in due course go on to the website.

The Committee agreed that the paper should be referred to the ten people who responded to the initial consultation.

Mr Weston agreed to prepare a note for "Lawtalk".

12. Practice Notes

The Committee noted that there are conflicts between practice notes and the High Court Rules. The Committee will need to discuss whether individual practice notes should be incorporated in the Rules (with or without other amendments to the Rules) or whether the practice note should be altered to comply with the Rules.

Rough Draft for Rules Committee Manual 9/11/00 – Practice Notes

The Committee addressed the, "Rough Draft for Rules Committee Manual 9/11/00 – Practice Notes". In particular, the Committee addressed the Rules Committee policy as to practice notes on page 4.

On point one, the Committee agreed to use the expression "should be" rather than "better".

On point two, the Committee noted that the intention of the term "ease of access" was to mean "all in one place".

In point three, the Committee agreed that the introductory line should refer to practice notes being appropriate only where rules are not justified.

The Committee noted that under 3 (a) an example is provided by the pilot scheme for case management.

In 3 (d) the Committee agreed to delete the reference to notes of evidence on the basis that they should be in the rules and not in the practice note.

In 3 (f) the Committee noted that local rules are hard to find and cause confusion.

The Committee agreed that in due course it will be appropriate to recommend to the Chief Justice and heads of court that they set up formal protocols for the issuing of practice notes. One of the objects will be to ensure that practice notes do not contradict the High Court Rules. The Committee noted that in Australia practice notes are, in fact, referred to the Rules Committee.

Case Management

The Committee noted that in due course the practice notes on case management needed to be incorporated in the High Court Rules.

The Committee agreed that the secretary should write to Justice Hansen, who was still a member of the original Case Management Committee, indicating that the Rules Committee would value the input of the Case Management Committee on the Rules Committee's proposals to incorporate practice notes in the High Court Rules. It would also appreciate comments from the Case Management Committee on the draft rules, once those have been prepared.

The Committee noted that the practice notes on case management cut across the existing rules in many respects. Caseflow management is a continuing process, commenced soon after the proceedings have been filed. It is inconsistent with the rules which identify the close of pleadings as the point when the issues will be defined and evidence briefed on an assumption that the case is defined at that point. A major difference is that under caseflow management cases are set down without a *praecipe*, while in the rules a number of matters are triggered by the *praecipe*.

The Committee agreed that Master Venning and Mr Weston should address the conceptual issues relating to setting down in the context of caseflow management.

Practice Notes relating to Appeals

The Committee addressed Appeals/1/2000. The Committee agreed that the practice note should be in the Rules. The Committee noted that the practice note was drafted to cover criminal appeals as well and agreed to delete references to bail or sentences so that the practice note is confined to civil matters for the moment.

In respect of section 2, relating to contested hearings, the Committee agreed that it was too complex and that the matters would be better addressed by directions from the court in each case.

The Committee agreed that paragraph 2.3, relating to briefs of evidence, was essentially exhortatory, and should not be included in the Rules.

The Committee agreed that paragraph 2.4, relating to submissions after hearing, should be in the Rules.

The Committee agreed that section 3, relating to hypothetical questions during cross-examination, should not be included in the Rules.

The Committee agreed that section 4, relating to the official record of notes of evidence, should be in the Rules.

In section 5, relating to other practice notes still in effect, the Committee identified the substitution of executors should be in the Rules.

Master Venning and Mr Weston agreed to settle the content of the practice note and the Rules and to prepare a draft as a basis for Mr Tanner.

The Committee noted that in the District Courts jurisdiction an amalgamated practice note goes into place in March 2001.

13. Appeals

(a) Appeals from the District Court and the High Court.

The Committee noted that s 71A of the District Courts Act 1947 can occasion difficulties. A party may appeal to the High Court with or without the leave of the District Court depending on whether the claim is less than $500, the title to a hereditament is in question or the order is interlocutory. Where the leave of the District Court is required, the application must be filed within 21 days. Separately, there is a right to apply to the High Court for leave within one month of the expiry of the 21-day period. In practice, if the District Court declines leave outside of 21 days it is possible for a party to lose the right to seek leave from the High Court.

The Committee agreed that these provisions should not be in the Act, but should instead be in the Rules.

The Committee noted that there is a general right of appeal from the High Court to the Court of Appeal which, unlike in the District Courts, makes no distinction between interlocutory and final orders. In addition, there is, in the High Court, a right to review a master, and there is no equivalent in the District Courts. In the District Courts an appeal from an interlocutory matter requires leave.

The Committee agreed that the rules in the District Courts should be the same as the High Court and there should be an unconditional right to appeal in all cases.

On the point about allowing appeals on interlocutory matters from the District Courts, the Committee noted that there is some force in the argument that the right of appeal can be open to abuse. The Committee noted that High Court Rule 264 gives a right to review an interlocutory decision; the right of review was introduced because interlocutory decisions used to be made in chambers without giving reasons. In practice, Rule 264 is confined to orders that were inadequately argued / ad hoc, and is not now commonly used.

The Committee noted that there would be little abuse of the right to appeal an interlocutory order if costs orders against the unsuccessful party were significant.

The Committee agreed that the provision in s 71A of the District Courts Act restricting appeals where the amount involved is less than $500 is not an effective filter; cases up to $10,000 are, in any event, uneconomic to appeal. The Committee agreed that restrictions on appeals for amounts of less than $500 should be removed.

The Committee addressed the issue of whether time should run from the date of the judgment or the date of sealing. Sealing of the judgment has the advantage that it defines the effect of the judgment and makes it clear what it is that is being appealed from. The disadvantage, particularly in the District Court, is that every interlocutory order would need to be sealed if for no other reason than to get time running against the other side.

The Committee noted that Andrew Beck had written a paper on appeals, in which he submitted that time should run from the date of sealing.

The Committee agreed that the right of appeal from the District Court should be the same as in the High Court i.e. 28 days, subject to a discretion to extend that period in both Courts.

The Committee agreed that Part X of the High Court Rules should also include appeals under the District Courts Act.

The Committee noted that s 73 of the District Courts Act was amended in 1995 to provide that time for appeal should run from the date on which the order is sealed. The secretary agreed to check with the Ministry of Justice on the rationale of that amendment.

The Committee agreed that moves should be undertaken immediately to address the statutory amendments required. In particular, the Committee suggested that an equivalent of s 66 of the Judicature Act should be inserted in place of s 71 in the District Courts Act.

The secretary agreed to check with the Ministry of Justice on the procedure for facilitating the statutory amendments required.

(b) *Interest on Judgment from the District Court*

In the context of the necessity for a statutory amendment, the Committee noted that provision needs to be made to ensure that a defendant who is unsuccessful in the District Court and pays the judgment, and who is then successful in the High Court and gets the amount of the judgment back, should also get interest on the judgment for the duration that it was paid.

The meeting closed at 3.10 p.m.

The next meeting will be held on Monday 19 February

Secretary