



THE RULES COMMITTEE

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Wellington

25 June 2001

Minutes/4/01

CIRCULAR NO 66 OF 2001

Minutes of the Meeting held on Monday 11 June 2001

The meeting called by Agenda/4/01 was held in the Chief Justice's chambers, High Court, Wellington on Monday 11 June 2001, commencing at 9.30am.

1. Preliminary

1.1 *In attendance*

The Chief Justice (the Rt Hon Dame Sian Elias, GNZM) (until 10.00am)
The Hon Justice Fisher (in the Chair)
The Hon Justice Chambers
Master G J Venning
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 QC
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 Hon Justice Wild

Chief District Court Judge Carruthers
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 30 April 2001 were taken as an accurate record and were confirmed, subject to paragraph 5.4 reading:

“The Committee agreed that Form 13A could be deleted because no notice of proceeding is required in an application for summary judgment by the defendant”

2. Papers Tabled at the Meeting

2.1 *By Justice Chambers*

Habeas Corpus Act 2001 (Please number it Habeas Corpus/1/01, Circular No 64 of 2001).

Rules under s 354 of the Crimes Act 1908 (New Zealand *Gazette* 1910) (Please number it Criminal Rules/1/01, Circular No 65 of 2001).

2.2 *By the Secretary*

Evidence/8/01 – Expert witnesses.

3. Personnel

3.1 The members of the Committee expressed their gratitude to Chief District Court Judge Young for his contribution as a member of the Committee and congratulated him on his appointment to the High Court Bench.

3.2 The Committee welcomed Chief District Court Judge Carruthers and noted that Judges Doogue and Doherty would attend meetings on his behalf, on the understanding that the Chief Judge would be available to consider special issues if need be.

3.3 The Committee congratulated Mr McCarron on his appointment as Judicial Administrator to the Chief Justice and looked forward to a continuing association with him on the Committee as an alternate for the Chief Justice.

4. Meeting dates for 2002

4.1 The Committee noted that Mondays are a difficult day for a number of the members. Justice Fisher agreed to check with the Chief Justice on the feasibility of the following Friday in each case.

5. Matters referred to Parliamentary Counsel for drafting

High Court Amendment Rules 2001

Rule 3 - Interpretation

Discussion

- 5.1 The Committee noted that the reason for defining “Court” and “Judge” is to ensure that when a rule confers a power the Master should be able to exercise it provided the Master already has jurisdiction. It is not intended that r 3 itself should give jurisdiction if the Masters do not already have it. The Committee noted that the Master’s jurisdiction is in any event constrained by s 26J of the Judicature Act 1908.
- 5.2 The Committee noted that the powers of a judge in chambers are poorly understood; the distinction between chambers and court was intended to be abolished by the rules but it is still referred to in s 26I of the Judicature Act.

Decisions

- 5.3 The Committee agreed to amend the definition of “Court” to include under (b):
- “A Master of the High Court exercising the jurisdiction conferred on the Master by the Judicature Act 1908 or Rules other than this Rule made pursuant to s 26J of the Act”.
- 5.4 As a separate project, Justice Chambers and Mr Stewart agreed to look at distinction between court and chambers, especially as it relates to the jurisdiction of Masters.

Rule 4 - New r 14 substituted

Discussion

- 5.5 The Committee discussed computations of time taking into account rr 13, 14 and 15 in the High Court Rules and the definition of “working day” in the Interpretation Act 1999.

Decisions

- 5.6 The Committee agreed that in principle time should stop running for a period over the traditional Christmas holiday.
- 5.7 The Committee agreed that in principle and where possible time should be counted in terms of working days.
- 5.8 The Committee agreed that Justice Chambers and Mr Stewart should look at the following issues:
- 5.8.1 The duration of the Christmas vacation.
- 5.8.2 The duration of the Easter vacation.
- 5.8.3 The meaning of “working days”.

5.8.4 Consistency with the provisions in the Companies Acts.

5.8.5 Whether differences are necessary between the District Courts and the High Court.

5.9 The Committee decided in the meantime not to proceed with rr 4, 5, 8 and 12.

Rule 7 – New r 138A substituted

Decision

5.10 The Committee agreed to delete the reference to rr 219 and 220 because they apply anyway.

Rule 9 – New r 601 substituted

Decision

5.11 The Committee agreed that the rule should refer to the power of the officer to “seize or require title deeds”.

District Courts Amendment Rules 2001

Decision

5.12 The Committee agreed to proceed only with r 5 - new r 155 substituted (service out of New Zealand), on the basis that all of the other rules relate to issues of timing which are to be addressed by Justice Chambers and Mr Stewart.

6. Appeals

Part 5 of the District Courts Act 1947: Appeals to the High Court (draft version 1)

Discussion

6.1 The Committee noted the need to remove procedural provisions from the District Courts Act 1947 and put them in the Rules, and to ensure that all appeals to the High Court from any court are governed by the same procedure.

6.2 The Committee noted that the proposed amendment to s 71 of the District Courts Act would remove the distinction between final and interlocutory orders and give a right to appeal from interlocutory orders in the District Courts.

Decision

6.3 The Committee agreed to redraft the proposed s 71 to read:

“... may appeal to the High Court against the whole or any part of any decision, finding, order, or judgment of the District Court including an interim order.”

Discussion

6.4 The Committee noted s 78 of the District Courts Act, which provides for the High Court to advise the court appealed from of the decision and “such

proceedings shall be had thereon as if the decision had been given by the District Court". The Committee queried whether the final words have implications for execution and flagged it as an issue to make sure that the proposed amendments to Part V of the Act take that into account if need be.

- 6.5 The Committee noted that proposals for inclusion in the Statutes Amendment Bill need to be with the Parliamentary Counsel Office by 31 July 2001, and that before then the Ministry of Justice will need to have obtained the consent of the other parliamentary parties.
- 6.6 The Committee noted that the proposed s 73 of the District Courts Act addresses the issue about interest on a judgment in the District Court.

Decisions

- 6.7 The Committee suggested that the proposed s 73 be worded along the lines:

"If any party has in accordance with the judgment of the court paid any sum to any other party, and on appeal the effect of the judgment is that the sum did not need to be paid, the High Court may make the orders referred to in subsection (2)."

- 6.8 The Committee agreed that there will need to be a cross reference to the rate of interest in s 62B of the District Courts Act.
- 6.9 The Committee agreed that the text of the letter to go to the Ministry should be settled between Justice Fisher, Justice Chambers, George Tanner, the Secretary and Mr Stewart.

Part 10 of the High Court Rules: Appeals to the High Court (draft version 5)

Decisions

- 6.10 The Committee agreed that these rules should be referred to the Tribunals who might be affected. The Liquor Licensing Authority, the Film and Literature Board of Review and the Land Valuation Tribunals are three examples of particular relevance.
- 6.11 Mr McCarron agreed to arrange for his successor to produce a complete list of those Tribunals.
- 6.12 The Committee noted that r 707(1)(c) relating to service of the notice of appeal does not read the same as r 709(1); they should be consistent.

Discussion

- 6.13 The Committee addressed draft rule 717 and noted that the power to rehear any of the evidence is not the same as an appeal by way of rehearing. In an appeal by way of rehearing the evidence will not be heard again (see for example *Pratt v Wanganui Education Board* [1977] 1 NZLR 476 at 490 and *Wilson v Neva Holdings Ltd* [1994] NZLR 481). It is only on a hearing *de novo* that the evidence will be heard again.

Decision

- 6.14 While the meaning of the terms is clear from the cases the Committee agreed that it is desirable to define the powers of the court on appeal.

Discussion

- 6.15 The Committee noted the need to ensure that the Rules and the Act are consistent with any specific statutory provisions providing for an appeal from the District Court or Tribunal.
- 6.16 The Committee queried whether it was appropriate to include the District Court in the definition of "Tribunal" in r 702.

Decision

- 6.17 In this context the Committee noted that the definition of "decision" should be broadened to coincide with the Act so that it can include such things as directions.
- 6.18 The Committee agreed to substitute the term "decision-maker" for the term "tribunal".

7. Consolidated Rules***Discussion***

- 7.1 The Committee considered the sample scheme for consolidating the rules
- 7.2 Particular concern was expressed that the procedures applicable to small claims be in keeping with both the magnitude of the claim and the complexity of it. The Committee noted that the Queensland Rules distinguish small claims on the basis of the monetary amount claimed and provide for distinct rules to apply to those claims. The United Kingdom Rules, on the other hand, distinguish between types of claim on the basis of monetary amount and complexity, and provide for distinct rules and distinct case management procedures to apply the different levels of proceedings.
- 7.3 The Committee noted that a consolidation of the rules should consolidate the two sets of rules into a single set of rules while retaining the existing distinctions between High Court and District Court Rules. There would be no amalgamation or rewriting of the rules except in defined levels of proceedings and other necessary areas.
- 7.4 The Committee noted that the High Court Rules are a schedule to the Judicature Act while the District Courts Rules are made by Order in Council as separate regulations. The different statutory origins of the two sets of rules may be a factor mitigating against consolidation.

Decision

- 7.5 The Committee agreed that Mr Stewart should prepare a paper discussing the advantages and disadvantages of consolidating the rules

8. Costs

Issues for Costs Subcommittee

Decisions

- 8.1 The Committee agreed that the Costs Sub-committee comprising Justice Wild (Convenor), Master Venning, Judge Doherty and Mr Weston should convene to consider the following matters:
- 8.1.1 The annual review of the Second and Third Schedules to the High Court Rules.
- 8.1.2 Costs in the District Court.
- 8.1.3 Wasted costs orders.
- 8.1.4 Costs for lay litigants.
- 8.1.5 Disbursements.
- 8.1.6 Costs on summary judgment (LawTalk No. 557).
- 8.1.7 Update of the Witnesses and Interpreters Fees Regulations 1974
- 8.2 If any amendments to the Second and Third Schedules to the High Court Rules are to come into force on 1 January 2002, the rules need to be made by the end of November at the latest. That means that the Committee needs to consider any amendments at its meeting on Monday 8 October 2001 and finally agree on any amendments at its meeting on Monday 12 November 2001.
- 8.3 The sub-committee therefore needs to meet in time to report to the Rules Committee meeting on Monday 30 July. The subcommittee also needs to seek comments from the profession by the end of September so that it can report to the meeting of the Rules Committee to be held on Monday 8 October 2001.
- 8.4 The Committee suggested that the Costs Sub-committee meet in Christchurch.

Costs on interlocutory applications for small claims

Discussion

- 8.5 The Committee addressed the issue of costs ~~on interlocutory applications~~ for small claims and noted that both the United Kingdom and Queensland have special rules.

Decision

- 8.6 The Committee agreed that Mr Stewart would report back to the Committee on the procedures in other jurisdictions.

9. Criminal Appeals

Discussion

- 9.1 The Committee considered concerns raised with Justice Fisher by the Criminal Practice Committee. It appeared that the draft of the Court of Appeal (Criminal) Rules 2001 that the Criminal Practice Committee had before them at their meeting was PCO3940/3. The Rules Committee read the Criminal Practice Committee's comments in the light of PCO3940/4.
- 9.2 The Criminal Practice Committee's first concern was to have provision for making submissions on the merits separate from the submissions made on whether the hearing is to be on the papers or oral, and that there should be provision for leave to separate the two. The Committee noted that this concern is still apposite in the context of rr 22 and 25 of PCO3940/4. The Committee noted also that to some degree the concerns are addressed by r 4(3), which gives the court a general discretion to depart from the rules for reasons of urgency or for any other reason.
- 9.3 The Committee noted the concern of practitioners not to have to unnecessarily write extensive submissions suitable for a hearing on the papers if the hearing were to be an oral one.

Decisions

- 9.4 The Committee agreed to make no change on this aspect of the rules .

Discussion

- 9.5 The Criminal Practice Committee secondly indicated that it would like to have a notice advising of the legal aid rights on the general appeal form.

Decision

- 9.6 The Committee considered that, although it would do no particular harm to include advice on legal aid, there is sufficient notification in paragraph 1(c) of Form 1 and 3 in that the appellant or applicant is asked whether they have applied or intend to apply for the Legal Services Agency for a grant of legal aid. The Committee noted that the answer to that question means that the Registrar will automatically advise the appellant or applicant what steps are required.

Discussion

- 9.7 The Criminal Practice Committee thirdly expressed concerns about r 17(2) that the report must be disclosed to any person who requests a copy of it unless the Court of Appeal otherwise directs. The Committee agreed while noting that the Court of Appeal does need to retain a discretion in the case of confidential documents such as, for example, an interception warrant.

Decision

- 9.8 The Committee agreed that the rule should read,

“The Registrar must send copies of the report to the parties as soon as possible unless the Court of Appeal otherwise directs and may disclose the report to any other person if the Court of Appeal so directs”.

Discussion

- 9.9 The Criminal Practice Committee raised the issue of time limits in r 27. The Solicitor-General noted that r 27(3) and (4) give the Crown too short a time to respond, particularly if the appellant’s written submissions are late.
- 9.10 The Committee discussed whether the time limit should be defined in terms of working days so as to exclude the weekends. Although it is working days which matter for time limits, the Committee thought that it would be simpler just to increase the calendar days given this definition is used throughout the Court of Appeal (Criminal) Rules.

Decisions

- 9.11 The Committee decided that the time limit in r 27(3)(a) should be 21 days, and that 27(3)(b) be 14 days, that 27(4)(a) be 14 days and 27(4)(b) be 7 days before the hearing. These are calendar days not working days as defined in the Interpretation Act 1999. The Committee noted that the Court of Appeal can waive time limits in r 4(3).

- 9.12 The Committee compared r 29(7) with r 4(3). After discussion, the Committee decided that r 29(7) should read,

“a Judge of the Court or the Court may extend any appointed period”.

- 9.13 The Committee agreed that r 4(3) should read,

“On its own initiative or on the application of a party, a Judge of the Court or the Court may direct, authorise or accept a departure from these rules or shorten or extend any time periods for reasons of urgency or for any other reason.”

- 9.14 The Committee agreed that r 6 should provide that Form 3 be used with the necessary modifications, and that Form 3, after “[*conviction*] [*sentence*] and [*conviction and sentence*]” the following: “[*other*]” to accommodate the, albeit rare, appeals against orders for costs, appeals against a refusal to state a question of law and appeals against a finding of contempt.

- 9.15 The Committee agreed that final decisions on the form of the rules could not be made until the legislation has been passed and the final form of it is known.

10. Criminal Rules in the High Court

- 10.1 The Committee referred to the Habeas Corpus Act 2001 and the rules made under s 354 of the Crimes Act 1908 made in 1909, and noted the need to have criminal rules in the High Court.

11. Discovery

Discussion

- 11.1 The Committee noted that there needs to be some curtailing of the present right to unlimited discovery because the time and expense involved can be out of proportion to the claim. The Committee noted that the rules in Queensland provide for judicial discovery for certain types of claims.
- 11.2 At the same time, there are classes of case where extensive discovery is vital such as tax and commerce.

Decision

- 11.3 The Committee agreed that discovery is an appropriate issue to refer to the Law Commission. In the light of the knowledge and experience of Rules Committee members the Committee suggested that any discussion papers prepared by the Law Commission be referred to the Rules Committee before being published for public consultation, and suggested that a member of the Commission may wish to attend a meeting of the Rules Committee.

12. Electronic transactions

Discussion

- 12.1 The Committee noted that the Department for Courts is looking first to electronic filing, and ultimately to maintaining all of its official records in electronic form.
- 12.2 The Committee noted that the Companies Office, the Land Titles Office, the Maori Land Court and the Family Court all have some experience with computerisation. Issues include protection from computer viruses and generally protecting the integrity of official records.

Decision

- 12.3 It was agreed that the Committee would write to Dick Williams of the Department for Courts indicating that while the Committee has not yet taken a final position, it does have a general view as to the direction of electronic transactions as they affect the rules. In the long-run the formal record of the courts would be electronic rather than hard copy. As an intermediate step, however, the Committee thought that it would probably be more practicable to move first to a stage in which parties and practitioners could file by electronic means. The court staff could then print out the documents in hard copy for formal record keeping purposes if thought appropriate.

13. Expert witnesses

Discussion

- 13.1 The Committee noted that the response to the paper on expert witnesses had been mixed. The Committee noted also that it had not been driven by problems just in the context of competition law. In particular, the Code of

Conduct is seen as being generally of great benefit and does not change the legal position that the witness belongs to the court not to the parties.

- 13.2 The Committee noted that the issue about whether or not to exclude lawyers from conferences has generated the most concern.

Decisions

- 13.3 The Committee agreed that Mr Weston should update his paper.
- 13.4 The Committee agreed that there should be wider consultation to include the Intellectual Property Practitioners Association (John Katz and Andrew Brown), the Securities Commission and Commerce Commission. The Committee agreed also to seek comments from the Environment Court, the Family Court, the Maori Land Court, and the Employment Court.

14. Fees

Discussion

- 14.1 The Committee expressed concern at the application of recent fee rises to all civil proceedings and noted that there should be no disincentive for particular sorts of applications such as applications by trustees for directions.
- 14.2 The Committee discussed the suggestion that the level of fees be differentiated according to the type of proceedings.

Decision

- 14.3 It was agreed that Justice Fisher would provide to the Chief Justice for conveying to the Department for Courts a draft wording which would allocate each type of proceeding to one of two fee categories.

15. Practice Notes

Discussion

- 15.1 The Committee noted that the Rules need to be amended to accommodate case management. Two particular amendments are needed:
- 15.1.1 A rule to set up the case management conference to underpin case management; and
- 15.1.2 A rule to identify when and how a matter is to be set down under case management (rather than a *praecipe*).
- 15.2 The Committee noted that the proposed rule should be the subject of consultation with the Case Management Committee and with the Department for Courts with a view to getting input from the registries.
- 15.3 The Committee noted that a decision on the issue of paying for a telephone conference has still to be made, but that the registries are currently recovering the disbursement by billing the cost of the call to the solicitor for the plaintiff.

- 15.4 The Committee discussed whether to retain a *praecipe* as a transitional measure and decided there was no need for it.
- 15.5 The Committee queried when a matter is set down and noted that the old "ready list" seems to be inappropriate in the context of case management. In any event, how the Registrar allocates a fixture is an internal matter.
- 15.6 The Committee noted that separate considerations arise in the context of a jury trial because of the need to make special arrangements. At very least a party should not be able to elect a jury trial after the date on which the court sets the matter down for hearing.

Decisions

- 15.7 The Committee agreed that a case could be set down by a direction of the court and that if for any reason the parties needed to indicate to the court that they were ready for the matter to be set down they could file a consent memorandum.
- 15.8 The Committee agreed that Mr McCarron's successor should consult with the Department for Courts and the National Caseflow Management Committee before any decision is made to delete r 431.
- 15.9 The Committee agreed on the need to revisit the rules to ensure that the expression "cut off date" is used where appropriate, noting that it may or may not be the same as the date when the matter is set down for trial.
- 15.10 The Committee agreed that in the event of a dispute over a jury trial an interlocutory application in respect of it must be filed by the cut off date for filing interlocutory applications which is set in the timetable.
- 15.11 The Committee agreed that Master Venning and Mr Weston should redraft the paper in the light of discussions and consult with the Department for Courts and the National Caseflow Management Committee through Justice Hansen.
- 15.12 The Committee noted that the National Caseflow Management Committee meets on 29 June 2001, and agreed that the Secretary should send a copy of the minutes to Justice Hansen who chairs that committee.
- 15.13 The Committee agreed that in prescribing rules for written submissions it was not intended that closing submissions be filed in advance.

16. Probate

Decision

- 16.1 The Committee agreed to amend r 643, to provide in effect that if the deceased died outside New Zealand and left no property in New Zealand then any application filed in New Zealand should be filed in the Wellington Registry.

The meeting closed at 3.15pm.

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

Secretary