



THE RULES COMMITTEE

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Wellington

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12 March 2002

Minutes/2/02

CIRCULAR NO 23 OF 2002

Minutes of the Meeting held on Monday 11 March 2002

The meeting called by Agenda/2/02 was held in the Chief Justice's Chambers, High Court, Wellington on Monday 11 March 2002, commencing at 10.00am.

1. Preliminary

1.1 *In attendance*

The Hon Justice Chambers (in the Chair)
The Chief Justice (the Rt. Hon Dame Sian Elias GNZM) (from 1:45pm)
The Hon Justice Wild
Master Venning
Judge J P Doogue
The Solicitor General (Mr. T Arnold QC) (until 11:30am)
Mr. G E Tanner (Chief Parliamentary Counsel)
Mr. T C Weston QC
Mr. R Gill
Mr. K McCarron (for the Chief Justice)
Mr. J Drake (Clerk to the Rules Committee)

1.2 *Apologies*

The Hon Justice William Young
Judge Doherty
Mr. C Finlayson

1.3 *Confirmation of Minutes*

The minutes of the meeting held on Monday 11 February 2002 were taken as an accurate record and were confirmed.

1.4 *Matters Arising*

The Committee noted that the following members' terms expired later this year.

- Mr. T C Weston QC - 27 August 2002
- Mr. C F Finlayson - 27 August 2002
- Judge J P Doogue - 31 August 2002
- The Hon Justice Wild - 31 December 2002
- Master Venning - 31 December 2002

2. Papers tabled at the meeting

- 2.1 No further papers were tabled at the meeting (aside from those already circulated as per Agenda/2/02).

3. Matters referred to Parliamentary Counsel for drafting

- 3.1 *High Court Amendment Rules 2002 and District Courts Amendment Rules 2002 (Omnibus 1)*

The Committee considered the submissions it received on the proposed amendments to the HCR and DCR. It noted that the submissions it received focused on three areas: the Expert Witness Rules, the proposed revocation of HCR 285 and DCR 307, and the Habeas Corpus Rules.

The Committee considered each of the proposed amendments in light of the submissions received.

3.1.1 Change or Representation and Address

It approved the proposed amendments to HCR 45 which dealt with a change of representation or address for service and noted that the proposed changes would also apply to the DCR. Mr. Drake agreed to write a letter to the person who brought the issue to the Committee's attention thanking her and informing her of the Committee's decision.

3.1.2 Leave to Appeal Master's decision

The Committee approved the proposed revocation of HCR 61C(6) and HCR 61C(7) which removed the requirement for leave to appeal.

3.1.3 Interrogatories where defence of honest opinion pleaded in defamation proceedings (HCR 285 and DCR 307)

The Committee noted that both submissions it received on this issue were in favour of the proposed revocation of HCR 285 and DCR 307 (which concerned interrogatories in relation to defamation cases). It approved the proposed amendment and noted that the effect of this was to allow the common law to deal with the matter.

3.1.4 *Expert Witness Rules*

The Committee considered the submissions it received regarding expert witnesses and noted that the writers appeared to have misread some of the proposed amendments.

It noted that there was no opposition to its proposed introduction of a code of conduct for expert witnesses so it approved proposed HCR 330A.

The Committee discussed the submissions it received on its proposal to enable the Court to direct a conference of expert witnesses. It noted that the provision was merely an empowering provision. In order to make clear what could be done without the parties' consent and what could be done only with the parties' consent, it suggested that the proposed HCR 330B(1) (c) and (f) be included in a separate subclause HCR 330B(2) with the rest of the subclauses being renumbered.

The Committee considered proposed HCR 330B(4) and noted that discussions which took place under this rule would be considered as having taken place on a "without prejudice" basis. It also discussed the status of an independent expert appointed by the Court. It was of the opinion that the independent expert should not be eligible to be called as an expert witness unless all parties consented. A subclause to this effect should be added. It directed that the words "or trial" be removed from the proposed HCR 330B(4).

The Committee considered proposed HCR 330C(1) and noted that as currently drafted, it was unclear what its effect was. The Committee discussed what the provision was supposed to achieve. It was of the opinion that it needed to be redrafted as it was unclear what was meant by the words "is subject to rules 441A to 441L". It also considered that the provision did not explain how the joint witness statement was to be adduced as evidence at trial.

The Committee considered it wanted the provision to achieve the following:

- the joint witness statement must be circulated to every party;
- once a joint witness statement was circulated, it should be treated as a written statement served under HCR 441B and 441C in that the respective witnesses could be cross-examined on it;
- a joint witness statement should contain only admissible evidence as per HCR 441J;
- a signatory to the joint witness statement may produce the statement as part of his or her evidence;
- a joint witness statement may be produced as evidence without calling any of the makers of it, if all the parties to the proceeding agree.

It directed that proposed HCR 330C be redrafted to reflect these principles.

The Committee directed that the word "trial" in proposed HCR 330D be replaced by "hearing".

The Committee then considered the proposed code of conduct for expert witnesses contained in Schedule 2. It approved clauses 1 and 2 of the code. The Committee discussed whether, as currently drafted, clause 3(c) achieved its goal of making instructions to expert witnesses transparent. It was of the opinion that it did not and directed that the clause be redrafted so that the expert witness must state the issues his or her evidence addressed and that such issues are within the scope of his or her expertise. The Committee directed that the word "matters" be deleted from clause 3(d) and that the word "in" be inserted into clause 4 in line 3 before the word "his".

The Committee noted that these amendments would not be made in the DCR at this stage.

Mr. Weston QC agreed to write to the authors of the submissions on the proposed expert witness statements thanking them for their contribution.

3.1.5 *Habeas Corpus Rules*

The Committee approved the rules as drafted. Mr. Drake agreed to write to Mr. Ellis thanking him for his submission.

3.1.6 *Proposed Rules 9 to 23*

The Committee considered these amendments and noted that they were of a technical nature. It approved the proposed amendments.

The Committee asked the Chief Parliamentary Counsel to draft concurrence copies of the approved amendments.

3.2 *High Court Amendment Rules (No 2) 2002 (Omnibus 2)*

Amendments to the following areas were proposed for both the HCR and the DCR:

- Authority to file documents
- Incapacitated Persons
- Non-suit and Discontinuance

Amendments to the following areas were proposed for the HCR only:

- Disbursements
- Admiralty

3.2.1 *Authority to file documents*

The Committee considered the proposed amendment of HCR 41(e)(ii) and HCR 41(f). It approved the proposed amendment.

3.2.2 *Disbursements*

The Committee approved the draft rules.

The Committee decided to amend proposed rule 6 which was a transitional provision. The “triggering” event would be when the disbursements were paid or invoiced (as opposed to incurred). The transitional provision would be highlighted in the Consultation Paper due to be released on this subject so as to obtain feedback from practitioners.

3.2.3 *Incapacitated Persons (Proposed HCR 82 to 92)*

The Committee considered the proposed amendments. It noted that HCR 203 (which provided for personal service on minors) and 204 (which provided for personal service on mentally disordered persons) would need to be revoked as the proposed amendments dealt with these matters.

The Committee approved proposed HCR 83 to 88. It amended proposed HCR 89(4) to better reflect its purpose. Wording similar to “In every other case, service on an incapacitated person will be valid if done in accordance with the normal rules of service” was deemed appropriate. The Committee approved HCR 90 to 92.

These proposed amendments specifically would be brought to the attention of the Law Society’s Mental Health Committee when the Committee released its consultation paper on this issue.

3.2.4 *Discontinuance and non-suit*

The Committee discussed the proposed amendments and noted that their purpose was to consolidate the discontinuance and non-suit procedures into one system of rules. It regarded the proposed rules as allowing a plaintiff to discontinue as of right, except in certain defined circumstances where the leave of the Court would be required. The aim of the proposed rules was to simplify and clarify the procedure for obtaining a discontinuance.

The Committee approved the inclusion of the words “or a verdict” in proposed HCR 475(1).

The Committee discussed whether it could make the use of the prescribed forms mandatory and noted that HCR 7 was determinative of the matter. The Committee considered that its policy would be to prescribe the use of the specified forms whilst recognising that HCR 7 allowed them to be varied according to individual circumstances.

The Committee considered proposed HCR 476B and noted that the presumption should be that if a plaintiff discontinued a proceeding, he or she would be liable for costs. The proposed rule should be redrafted to reflect that presumption.

The Committee discussed proposed HCR 476 and noted that this was intended to ensure that the Court turned its mind to what

should happen to any interim injunctions and/or orders in force before it granted a discontinuance.

After taking these considerations into account, the Committee approved the proposed HCR 474 to 476D. It also approved the revocation of HCR 489 to 491.

3.2.5 *Admiralty*

The Committee considered the proposed amendments and approved them subject to the queries raised by the Chief Parliamentary Counsel as to what the Committee meant by inserting after the words "solicitor for" the words "a person interested in" in HCR 772(5) and whether HCR 773(6) conflicted with proposed HCR 773(6A). Mr. Gill agreed to liaise with Mr. Finlayson and Mr. Tom Broadmore to clarify these issues and then communicate the results to the Chief Parliamentary Counsel.

The Chief Parliamentary Counsel agreed to have the proposed amendments redrafted by 28 March 2002, to enable Mr. Drake to prepare a consultation paper by 5 April 2002.

4. Costs

During the discussion under 3.2.2, Mr Weston raised the question as to whether parties should be able to recover costs in respect of a failed mediation. In addition, there was the question of whether the mediator's fee could or should be a recoverable disbursement. Mr Weston said that in many mediation agreements it was provided that, should the mediation fail, the costs of the mediation would be costs in the cause. This was a surprise to other members of the committee who had not previously seen such a contractual provision. The committee deferred a decision on Mr Weston's suggestion until more information was to hand.

Mr Drake was requested to find out what LEADR's draft mediation agreement provided. He also undertook to contact the Law Society Disputes Resolution Committee to get its feedback on this issue.

5. Payment into Court

During the discussion under 3.2.4, the question was raised as to whether the payment into court regime was still necessary in view of the now widespread use of Calderbank offers. The committee agreed that this was an appropriate matter to review. As a first step, it was agreed that Mr Drake should find out how frequently the payment into court mechanism was being used.

6. Case Management

The Committee considered its proposed amendments on this area and noted that the National Caseflow Management Committee (NCMC) was also reviewing this area. It expressed its view that it would be desirable that its work be carried out in conjunction or together with the NCMC so as

to avoid duplication of effort and or inconsistent conclusions. To this end, Justice Chambers agreed to contact the NCMC and thank them for their work. He agreed to update them on the Committee's progress and views and inform them that the Committee would like the opportunity at its 8th April 2002 meeting to clarify what it considered appropriate content for the case management rules.

The Committee noted the criticism contained in a recent publication authored by Mr. Andrew Beck (Principles of Civil Procedure) in which he pointed out that the rules of procedure in New Zealand often did not reflect the Court's actual practice, that there were regional variations to the Court's practices, and that it was not possible to find the requirements of civil procedure in one place (i.e. the requirements were located in either the rules or various practice notes).

The Committee discussed the nature of what should be the content of the rules and practice notes. It considered that the test for what should be in the rules was that anything which was mandatory for practitioners should be included in the rules whilst directions as to what was good practice ought to be contained in practice notes. The Committee noted that practice notes were issued in reliance on the Court's inherent jurisdiction.

The Committee considered the draft proposals put forward by the NCMC.

The Committee agreed with the general thrust of what the NCMC was trying to achieve. The Committee noted that it was already considering other changes to Part III, being changes already drafted (under Master Venning's guidance) and changes suggested in an outline prepared by Justice Chambers. What was now needed was a draft set of rules incorporating material from all 3 sources for consideration at the next meeting. The ultimate aim is to produce draft rule changes and a draft practice note which can go out for consultation as a package at the same time.

Mr. Drake was requested to produce a draft set of rules, in conjunction with Justice Chambers.

7. Part III (General) Changes

The Committee considered Justice Chambers' paper on the matter and discussed the issues it raised. It agreed to the following general principles:

- The rules should provide that the court could make interlocutory orders on its own initiative provided it gave the parties an opportunity to be heard. This would bring the rules into line with current practice.
- The rules should require affidavits to be filed with interlocutory applications. This would bring the rules into line with current practice.
- A notice of opposition should have to be filed within 2 weeks of service of an interlocutory application or 3 working days before the hearing, whichever is the earlier.

- Affidavits in opposition must be filed with notices of opposition. This would bring the rules into line with current practice.
- Affidavits in reply have to be filed within one week after service of the notice of opposition.

8. General – Registry Hours

The Committee discussed the Chief Justice's memorandum on this issue. It considered that there needed to be clear rules to ensure that the public and practitioners could still get access to the court so as to file documents. It was reluctant to depart from the current hours of 8:30 am to 5:00 pm weekdays for the above reason.

The Chief Justice said she would write to the Chief Executive of the Department for Courts, informing him of the Committee's views. She would suggest that it might be better to change the hours to 9:00 am to 5:00 pm which would enable training between 8:00 am and 9:00 am.

9. Construction Contracts

The Chief Parliamentary Counsel informed the Committee that the Ministry of Economic Development had decided that enforcement and review of an adjudicator's determination were to be conducted in the District Court. Enabling legislation would be drafted giving the Rules Committee authority to make the rules governing these procedures.

The meeting closed at 3:30pm.

The next meeting will be held on Monday 8 April 2002.

Justin Drake
Clerk to the Rules Committee