



THE RULES COMMITTEE

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Wellington

9 August 2001

Minutes/5/01

CIRCULAR NO 80 OF 2001

Minutes of the Meeting held on Monday 30 July 2001

The meeting called by Agenda/5/01 was held in the Chief Justice's chambers, High Court, Wellington on Monday 30 July 2001, commencing at 9.30am.

1. Preliminary

1.1 *In attendance*

Mr K McCarron (for the Chief Justice)
The Hon Justice Fisher (in the Chair)
The Hon Justice Chambers (from 10.45am)
Master G J Venning
Judge J P Doogue
Mr R Gill (for the Chief Executive, Department for Courts)
Mr A Beck (representing the New Zealand Law Society)
Mr G E Tanner (Chief Parliamentary Counsel, from 10.40am)
Mr B Stewart (Clerk to the Rules Committee)
Mr D Dugdale (from the Law Commission for the item on discovery)
Miss M A Soper (Secretary)

1.2 *Apologies*

The Hon Justice Wild
Chief District Court Judge Carruthers
Judge C J Doherty
The Attorney-General (the Hon Margaret Wilson MP)
The Solicitor-General (Mr T Arnold QC)
Mr T C Weston QC
Mr C F Finlayson *CF*

1.3 *Confirmation of minutes*

The minutes of the meeting held on Monday 11 June 2001 were taken as an accurate record and were confirmed subject to the deletion of the words "on interlocutory applications" from the heading before item 8.5.

2. Papers tabled at the meeting

2.1 *By Mr Tanner*

The High Court Amendment Rules 2001 PCO3980/5 (please number it Amendments/2/01, Circular No. 81 of 2001).

The District Courts Amendment Rules 2001 PCO4051/4 (please number it Amendments/3/01, Circular No. 82 of 2001).

2.2 *By Mr Stewart*

The award of alternative dispute resolution fees as disbursements dated 17 July 2001 (please number it Costs/8/01, Circular No. 83 of 2001).

3. Personnel

- 3.1 The Committee welcomed Mr R Gill as an alternate for the Chief Executive, Department for Courts.
- 3.2 The Committee welcomed Mr A Beck as a representative of the New Zealand Law Society.
- 3.3 The Committee welcomed Mr D Dugdale from the Law Commission who attended for the item on discovery.

4. Meeting dates and times for the remainder of the year and for 2001

- 4.1 The Committee agreed to leave the meeting dates on the Monday in each case, but to start at 10.00am.
- 4.2 The Committee agreed that the meetings for the remainder of the year should start at 10.00am instead of 9.30am.

5. Matters referred to Parliamentary Counsel for drafting

High Court Amendment Rules 2001

- 5.1 The Committee agreed to these Rules as drafted, and noted that Rule ~~601~~⁶⁴⁵ now gives the Court a discretion to direct filing in another registry. The Parliamentary Counsel Office agreed to expand the explanatory note on this point. The Parliamentary Counsel Office also agreed to change the heading of Rule 601 to refer to "title documents".

District Courts Amendment Rules 2001

- 5.2 The Committee agreed to these Rules as drafted.

6. Appeals

District Courts Act 1947

- 6.1 The Committee noted that the proposed amendments to the Act have been referred to the Ministry of Justice for inclusion in the Statutes Amendment Bill.

Part 10 of the High Court Rules

6.2 The Committee noted that Department for Courts has provided a long list of tribunals from which there is a right of appeal to the High Court. It is now for Justice Chambers, with the assistance of Mr Stewart, to refer to the proposals to them.

7. Consolidated rules

7.1 The Committee discussed the advantages and disadvantages of consolidating the High Court Rules and the District Courts Rules.

7.2 The Committee noted that the two sets of rules are made pursuant to different statutory provisions with different concurrence procedures.

7.3 The Committee noted also that a straight consolidation exercise would be difficult without making at least some amendments; the scale of the exercise and the resources needed to do it are probably out of proportion to the benefits that would be obtained by consolidating the rules into a single set.

7.4 The general feeling on the Committee is that it is a project where the disadvantages outweigh the benefits, but the Committee deferred a final decision until the next meeting.

8. Contempt - fine for contempt and warning about contempt

8.1 The Committee agreed that Justice Chambers and Mr Stewart should address the issue about fine for contempt and also consider whether the rules can be expressed in less archaic language.

8.2 Judge Doogue agreed to look at r 628 of the District Courts Rules to see if any similar problems arise.

9. Costs

Annual review of Second and Third Schedules to the High Court Rules

9.1 The Committee noted that submissions have been sought on the annual review of the Second and Third Schedules to the High Court Rules.

Costs against barristers and solicitors

Discussion

9.2 The Committee noted that the decision of the Privy Council in *Harley v McDonald* (9 and 50 of 2000, 10 April 2001) is very clear. The Committee remains to be convinced that rules in this area are necessary but since the suggestion has been made feels it ought to invite comment on it.

9.3 The Committee noted that the justification for making any rules would be ease of reference rather than clarification.

Decisions

- 9.4 The Committee agreed that, with slight amendments, the discussion paper on a wasted costs rule should go on the website inviting comments. The Secretary, Mr Stewart and Ms Casey should settle the amendments to the text of the discussion paper and the Secretary should write an introduction.
- 9.5 The material on the website needs also to refer to a decision by Justice Baragwanath and other decisions where such costs orders have been made, and the fact that a statutory amendment would be necessary to make rules of this sort in the District Court.

Costs for lay litigants

Discussion

- 9.6 The Committee noted that a lay litigant would not necessarily incur more costs than a represented one and that a lay litigant is usually little help either to the Judge or the other practitioners with the result that the work is picked up by the court. The personal contribution of a represented litigant would often be as much as a lay litigant.
- 9.7 The Committee noted that lay litigants can also be vexatious litigants. In the United Kingdom litigants who represent themselves can be awarded two thirds of the costs available to represented litigants, but the jurisdiction to declare litigants vexatious and restrict their access to the courts tends to be exercised more robustly.
- 9.8 One option might be to award a lay litigant 10 or 15 percent of the costs that would be awarded in Schedules 2 and 3 of the High Court Rules, by reference to the lowest skill category.

Decision

- 9.9 The Committee agreed that Mr Stewart should amend the paper on the award of costs to unrepresentative lay litigants and arrange to put it on the website to invite comment.

Disbursements

- 9.10 The Committee noted that disbursements as an item do not rest easily in the Third Schedule to the High Court Rules and should perhaps be referred to in a separate schedule.
- 9.11 The Committee was not aware that disbursements were occasioning any difficulties, but agreed that the Secretary would write to the Registrars of the High Court and check that point.

Mediators' fees as a disbursement

- 9.12 The Committee noted that parties may seek alternative dispute resolution at the suggestion of or independently of the Court. The Committee discussed whether or not allowing mediators' fees as a disbursement would encourage

the parties to settle, and noted that in Queensland where alternative dispute resolution is compulsory the parties meet their own costs.

- 9.13 The Committee agreed to put the issue on the website and invite discussion, amending the last paragraph of the discussion paper to say:

“Because of room for argument over jurisdiction, it would seem wise, if this were to be pursued, to seek a statutory amendment in combination with an appropriate rule change.”

Costs on summary judgment

- 9.14 The Committee noted the suggestion that the successful party on a summary judgment application should be awarded indemnity costs. The Committee noted that there is power now to award indemnity costs in appropriate cases.
- 9.15 The Committee noted that there is no provision for preparation time for a summary judgment in the current Rules. The Committee noted that that was deliberate because it was intended to be covered by Item 1 of the Third Schedule relating to commencement of proceedings. That time allocation was deliberately generous in anticipation that any summary judgment application would be done at the same time.
- 9.16 After discussion, the Committee noted that something in the order of three-quarters of the summary judgment cases would be debt collection while one-quarter would give rise to other arguments. The Committee noted also that the application for summary judgment does need to be separately prepared.

Decision

- 9.17 The Committee agreed that the preparation time for a summary judgment application should be the same as for an interlocutory application.

Update of the Witnesses and Interpreters Fees Regulations 1974

Discussion

- 9.18 The Committee noted that these regulations apply in criminal proceedings and have resource implications for the Crown. Depending on whether the offence is charged indictably or non-indictably the costs are met by Department for Courts or the Police.
- 9.19 In the civil context the Committee noted that witnesses' fees will initially be paid by the party, who may or may not later recover party and party costs including disbursements.
- 9.20 The Regulations determine what the witnesses will be paid by the Crown. Any Rules would need to be consistent, i.e. witnesses' fees as a disbursement should be the same amount as provided for in the Regulations. The Committee noted that there is a discretion to pay above what it provided for in the scale, but that it can be difficult to ensure the discretion is not exercised arbitrarily.

Decisions

9.21 The Committee agreed that Mr Stewart would research the issues, in consultation with Justice Chambers, and that in due course the Committee would explore with the Ministry of Justice options for putting the issue on the website for comments. The Committee also agreed in due course to invite comments separately from the Crown Law Office, the Department for Courts and the Police.

10. District Courts

10.1 Justice Fisher agreed to write to the Chief District Court Judge about restructuring of the District Courts Subcommittee. In addition to Judges, the Subcommittee will need a practitioner with District Courts experience and the facility to consult with a District Courts Registrar as required.

10.2 The Committee agreed that the issues of costs on small claims and also practice notes should be referred to the Subcommittee.

10.3 The Committee agreed that the Subcommittee should meet alternately with the Rules Committee until the issues of small claims, costs, and reconciling the rules with practice notes have been addressed.

11. Criminal appeals to the Court of Appeal

11.1 The Committee noted that the Parliamentary Select Committee has still to meet.

12. Criminal appeals in the High Court

12.1 The Committee noted that the Criminal Practice Committee has now received feedback from the Executive Judges on the review of the criminal practice notes and that a number of recommendations have been received on revoking or combining existing practice notes.

12.2 Mr McCarron agreed to go back to the Criminal Practice Committee and convey the preference of the Rules Committee for directions to be in Rules rather than in practice notes.

13. Discovery

13.1 The Committee expressed its gratitude to Mr Dugdale for an excellent preliminary paper.

13.2 On the issue of honest compliance, the Committee noted that the anecdotal evidence is that standards have dropped dismayingly. The Committee noted also that solicitors can include large numbers of irrelevant documents in order to bury a "smoking gun". There are also instances where undiscovered documents come to light in the course of the hearing.

13.3 The Committee noted in general the intention to have a layered approach to procedure with a presumption that cases at the bottom strata should not have discovery at all unless there is some special reason for it.

14. Electronic transactions

14.1 Mr McCarron agreed to refer to Mr Finlayson and to Mr Williams a copy of "A Guide Book for Electronic Court Filing" from the National Centre for State Courts in the United States, which contains a guide for policy makers in Courts and Government on official records.

15. Expert witnesses

15.1 Mr Stewart undertook to check that the second discussion paper is on the website.

16. Fees

16.1 The Committee noted that the issue of fees is now under review and that this matter can be deleted from the agenda.

16.2 The Committee noted that a Bill is currently before Cabinet to amend both the District Courts Act 1947 and the Judicature Act 1908 to clarify the power to waive and remit fees.

17. Habeas Corpus Act 2001

17.1 The Committee noted that the Habeas Corpus Act 2001 is now very prescriptive, but that ss 7(1) and 7(3) suggest that some rule change may be necessary. It may be that all that is needed is a notation in the High Court Rules to the effect that they do not apply to *habeas corpus* applications but Mr Gill agreed to check what rule amendments might be necessary. In the event that Mr Gill needs research assistance that can be provided by Mr Stewart.

18. Non-suit

Discussion

18.1 The Committee noted concerns that a plaintiff can elect non-suit at any time prior to judgment. The Committee noted that non-suit can have a place where the plaintiff has pleaded the wrong cause of action. Equally however it is plainly an abuse of the processes of the court for a plaintiff who perceives that they are losing, to elect non-suit either in the hope of getting a different and more sympathetic judge or in order to take the opportunity to change their evidence.

18.2 The Committee noted that the problem is addressed in the United Kingdom by two controls. The first is that the plaintiff can elect to discontinue at any time, in some cases with the leave of the court, but the defendant has the right to have that set aside if the discontinuance amounts to an abuse of the process of the court. The second is that a plaintiff who discontinues a claim may need the leave of the court of make another claim against the same defendant.

18.3 The Committee noted that under the High Court Rules discontinuance is available pretrial and non-suit available before judgment is given. In principle it would seem appropriate that both have the same name.

Decision

18.4 Justice Chambers, Mr Stewart and Mr Tanner agreed to liaise in preparing a paper encapsulating the Committee's current views, with draft rules attached, the paper to be posted on the website. They undertook also to check that the rules are the same in the District Courts.

19. Practice notes***Discussion***

19.1 The Committee noted that the National Caseflow Management Committee supports amendments in relation to setting down, costs and telephone conferencing. There is however danger of the project being swamped if the National Caseflow Management Committee addresses all of the necessary amendments at once.

Decisions

19.2 Master Venning agreed to write to the National Caseflow Management Committee and address with them the Rules Committee's proposals on specific issues, minuting a copy of that to the Secretary. In writing, Master Venning agreed to provide draft rules, in consultation with Mr Tanner.

19.3 The Committee noted that a similar exercise needs to be done in respect of the practice notes of the District Courts and Mr Stewart agreed to undertake the exercise of comparing the District Courts practice notes with the Rules.

20. Rules Committee Manual

20.1 Mr Stewart agreed to update the Rules Committee Manual on the issue of judicial scrutiny of rules of court.

21. Summary judgment by a defendant on a particular cause of action

21.1 The Committee deferred further consideration on this matter until the next meeting but noted that summary judgment by a defendant will be rare because it would be more usual for the defendant to apply for strikeout.

22. Summary trials***Discussion***

22.1 The Committee noted that in overseas jurisdictions summary trials operate as a halfway house between a full trial and a summary judgment application. A summary trial is conducted on affidavits without oral evidence. If the Judge decides the case does not lend itself to a summary trial then it will go to a full trial.

Decisions

22.2 Mr Stewart agreed to undertake some further research. In particular, the Committee asked for some empirical evidence on how well summary trials work by reference to the percentage of cases that are disposed of, the length of

time the procedure takes, and costs. In that context, the Committee noted that summary judgement has been very successful and is still productive even in the absence of a result.

- 22.3 Mr Stewart agreed to look at the Australian Federal Law Commission Report on Civil Litigation, the Woolf Report and the New Rules in Queensland. He also undertook to check with Justice Hammond to see if a copy of the paper that was presented can be made available.

23. Website

- 23.1 The Committee noted that the format of the website has been improved with a new address and that arrangements are being put in place so that Mr Stewart can do the updates.

24. General

Drew v Attorney-General

- 24.1 The Committee noted the decision of the Court of Appeal in *Drew v Attorney-General* (CA189-00, 12 July 2001) where the Court held that a regulation-making power did not authorise the making of regulations that are inconsistent with the New Zealand Bill of Rights Act 1990.

- 24.2 Mr Stewart undertook to incorporate a reference in the Rules Committee Manual.

The meeting closed at 2.35pm.

The next meeting will be held on Monday 10 September 2001 commencing at 10.00am and finishing at 3.45pm.

Margaret Soper
Secretary