THE RULES COMMITTEE

P.O. Box 2750
Wellington

Telephone 64-4-918 8873
Facsimile 64-4-918 8712
Email: rulescommittee@courts.govt.nz

www.courts.govt.nz/rulescommittee

6 June 2002

Minutes/4/02

CIRCULAR NO 46 OF 2002

Minutes of the Meeting held on Wednesday, 5 June 2002

The meeting called by Agenda/4/02 was held in the Chief Justice's Chambers, High Court, Wellington on Wednesday, 5 June 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
Master Venning
Judge J P Doogue
Judge Doherty
Mr. T C Weston QC
Chief Parliamentary Counsel (Mr. G E Tanner QC)
Mr. H Hoffmann (for item 3 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)
Mr. C Finlayson

1.3 *Confirmation of Minutes*

The minutes of the meeting held on Monday 8 April 2002 were taken as an accurate record and were confirmed.

1.4 *Matters Arising*

The Committee congratulated the Chief Parliamentary Counsel, Mr. G.E. Tanner QC on his appointment to the Inner Bar.

2. Update and Status Report on Omnibus 1 (High Court Amendment Rules 2002 and District Courts Amendment Rules 2002)

Mr. Tanner reported that the Omnibus 1 had been signed by the Governor General and was due to come into force on 1 July 2002. The Committee noted that its proposed amendments of deleting 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) had not been included in the final amendments.

The Committee agreed that Justice Chambers should make an informal approach to the media representatives on the In-Court Media Coverage Committee and/or the Commonwealth Press Association in order to obtain their views on the proposed amendments. It noted that there was no urgency on this matter.

Justice Chambers undertook to report back to the Committee on this matter at the September meeting.

3. Omnibus 3

3.1 *Part III (Interlocutory Matters) Rule Changes*

The Committee noted that any proposed changes were to reflect the principle that the HCR themselves reflected the "reality" of the Court's practice.

The Committee amended proposed rule 234 by deleting 234(3)(c) and adding the words "which includes a case management conference" to proposed rule 234(3)(a).

The Committee decided that it should recognise two methods of applying for an interlocutory order.

- By filing an application; or
- By making an oral application.

The Committee had considered whether an application for an interlocutory order could be sought by way of filing a memorandum but noted that the purpose of a memorandum was to "foreshadow" an oral application. To that end, it deleted proposed rule 235(b) and the word "formally" from 235(a).

It approved proposed rules 236 to 238 as they reflected current practice.

The Committee noted proposed rule 239 only set out the mechanics of obtaining an ex parte application but that proposed rule 258 dealt with whether the Court would hear it. Justice Wild raised the question of what exactly the certificate, which a solicitor must give to the Court when applying for an ex parte order, was meant to be certifying. The certificate should clarify that the application fulfils one of the criteria in 258(1). To that end, the Committee decided to alter the order of the current sub-paragraphs. Proposed rule 239(5) becomes 239(3), 239(3) becomes 239(4) and 239(4) becomes 239(5). Words to the effect of "and that there is a proper basis for seeking such an order on an *ex parte* basis" are to be added to the (new) rule 239(3).

The Committee also noted that, as currently drafted, the rules implied that a solicitor's certificate needed to be filed with every ex parte (interlocutory) application. However, in the case where an applicant is self-represented, no such solicitor's certificate could be given. The Committee did not think that this procedural requirement ought to stop the filing of an ex parte application but thought it best to let the Court deal with this on a case by case basis.

The Committee approved proposed rule 240.

The Committee approved proposed rule 241 and noted that it gave a Registrar greater flexibility as to whether an application went to a case management conference or was placed on a chambers' list.

The Committee deleted proposed rule 242(1)(a) and noted that its deliberate policy choice was that document could not be served until it had been filed with the Court.

The Committee approved proposed rules 243 and 244. It directed that a general provision be included in the HCR that any requirements as to time for interlocutory applications in the HCR were merely default provisions and could be altered by the Court if necessary.

The Committee directed that words to the effect of "Nothing in this rule prevents the later filing of an affidavit if good cause is shown" be added to proposed rule 245.

It approved proposed rules 246 and 247.

The Committee approved proposed rule 248 but noted that current HCR 254, which allowed for the cross-examination of deponents, would need to be carried across to the proposed rules. It felt that the best

place for this to be inserted was the part of the rules dealing with how hearings are dealt with. It further noted that proposed rule 260 made provision for oral evidence.

The Committee deleted proposed rules 249 to 253.

The Committee approved proposed rule 254 but directed that words similar to the following be added as a further ground justifying an oral application: "an application is foreshadowed in a memorandum for a case management conference."

The Committee deleted proposed rule 255 as it felt that proposed rule 260 sufficiently dealt with this issue.

The Committee approved proposed rule 256.

The Committee discussed proposed rule 257 and noted that the New Zealand Law Society had raised some concerns that the Committee was placing the burden of costs of telephone conferences on the parties involved. The Committee was of the opinion that this was appropriate given that telephone (or video conference) hearings were for the benefit of the parties and not the Court. It deleted the words "or a case management conference" from proposed rule 257(1).

The Committee approved proposed rules 258 to 263.

The Committee deleted proposed rule 267(5). It directed, however, that there should be a rule somewhere – probably around HCR 45B – stipulating a general obligation on solicitors to inform their clients of court orders and directions. Mr. Weston thought this should be reinforced in the NZLS Rules of Professional Conduct and undertook to write to the NZ Law Society's Ethics Committee informing them of this.

The Committee also directed that proposed rule 268 explicitly refer to "interlocutory" orders. It approved the rest of proposed rules 264 to 269A and noted that they were not materially different from the current rules.

The Committee considered proposed rules 425 to 432. It directed that the word "substantive" be inserted into the title of proposed rule 426 before the words "hearing dates". It also noted that these rules were meant to apply to "standard track" cases, but not to "swift track" cases.

The Committee approved proposed rule 431A, but directed that it be renumbered as 424A. It considered that this would be a good place to put its general directive regarding time limits (i.e. that they were default provisions which applied if the Court did not order otherwise).

The Committee approved proposed rule 432.

The Committee considered proposed rule 433, which dealt with "track assignment". It considered that this rule should come before the

descriptions of what should occur at a case management conference. The Committee re-iterated its policy of opposition to putting "internal management" procedures (e.g. timelines) in the HCR; it considered that, at best, they be included in a practice note. Judge Doherty reported the views of the National Caseflow Management Committee (NCMC) on this issue. NCMC raised the possibility of there being a "complex" category for case management. The Committee disagreed with this suggestion.

To this end, the Committee deleted proposed rule 433(2)(c), 433(6), and 433(7). It directed that proposed rules 433(6) and 433(7) be replaced with words similar to the following: "At any time, the Court or a Registrar acting on the direction of the Executive Judge, may on its, his, or her initiative, or on an application by a party, assign a proceeding on the standard track to be case-managed under the control of a Judge or Master."

It also directed that proposed rule 433(3)(g), 433(3)(h), and 433(3)(i) be removed from the list of matters which automatically are assigned to the swift track. To that end, it also directed that proposed rule 425 be amended to account for this. The Committee noted that proposed rules 433(3)(h) and 433(3)(i) were originating applications and that interim injunction applications would be dealt with under proposed rule 241. It also directed that "originating applications" be redefined to explicitly include any actions for a writ of *habeas corpus*.

The Committee considered proposed rule 434 and decided that it should provide that, on filing, swift track proceedings will be allocated a hearing date before a Judge or Master. The rule would also need to cover the allocation of hearing dates (on filing) for swift track cases.

The Committee decided that proposed rule 435 should allow for a maximum of 2 case management conferences for cases on the standard track unless more were needed. It considered that the agenda for each conference should be contained within 1 appendix (not two as proposed by NCMC) and that, in accordance with its policy, no timelines were to be provided for in the appendix.

Justice Chambers undertook to contact NCMC and recommend to them that there be 1 appendix listing general matters to be considered by the parties at a case management conference.

The Committee deleted proposed rule 436 and 437. It also deleted current proposed rule 432(4). It amended 432(5) to refer to "two working days" and directed that wording be used which accomplished the following aim: 'The parties must file memoranda or a joint-memorandum two working days before the case management conference unless the Court orders otherwise … and the memorandum must deal with relevant matters from the relevant appendix/schedule.'

The Committee approved proposed rule 438.

It deleted proposed rule 433.

3.2 *Changes to rules regarding exchange of evidence: standard form directions*

The Committee's policy is that these rules are meant to be the default provisions which apply unless a party does not want them to apply in a particular case, in which case the party must apply to the Court for a direction ordering otherwise.

It approved proposed rules 441B and 441M.

It directed that words similar to "or such other order as counsel may agree" be added to proposed rule 441N(2)(a).

It approved proposed rules 441O, 441P, and 441Q but directed that the word "bundle" be used instead of "compilation" (when referring to documents).

The Committee approved the rest of the proposed amendments in PCO 4230/4 (24661v4, drafted by Mr. Hoffmann) and thanked Master Venning and Mr. Hoffman for their work on Part III.

4. Matters referred to Parliamentary Counsel for drafting – Omnibus 2 (High Court Amendment Rules (No 2) 2002 and District Courts Amendment Rules (No 2) 2002).

The Committee approved the following timeline proposed by Justice Chambers.

- 24 June: PCO to provide redraft of Omnibus 2.
- 27 June: Clerk to prepare consultation paper to accompany Omnibus 2.
- 1 July: Committee to consider consultation paper and Omnibus 2.
- 8 July: Secretary to distribute consultation paper with amendments (if any) to interested parties for consultation.
- 19 August: Closing date for submissions.
- 28 August: Clerk to prepare paper summarising submissions and suggesting changes (if any) to Omnibus 2.
- 2 Sept: Committee to consider clerk's paper and submissions at meeting.

4.1 *Disbursements*

It deleted proposed rule 48H(3). It decided to highlight in the consultation paper the question of whether proposed rules 48H(2)(b) and 48H(2)(c) were necessary (as by definition, a disbursement must be both specific to the proceeding and necessary for its conduct).

It approved the rest of the proposed rules dealing with disbursements.

4.2 *Incapacitated Persons*

The Committee directed that the proposed rule 82(a) which dealt with the definition of "litigation guardian" be deleted for the HCR but maintained for the DCR.

It approved proposed rules 83 to 86 but noted that proposed rules 85(1) and 86(1) were to be deleted for the HCR only.

It directed that proposed rule 87 be redrafted to reflect the principle that a litigation guardian could do anything which a party to litigation could normally do.

It deleted the word "full" from proposed rule 88.

It approved proposed rule 89 and directed that it be relocated to an earlier part of the proposed rules.

The Committee deleted the words "a determination" in proposed rule 90 and replaced them with "an award".

The Committee considered that its policy in relation to proposed rule 91 was that an award of costs could be enforced against a litigation guardian. However, a litigation guardian was entitled to be reimbursed out of the incapacitated person's estate (unless the Court ordered otherwise).

The Committee noted that proposed rule 92(2) allowed the other party to claim directly against the former litigation guardian if necessary. That party should be able to look to the former litigation guardian if that person had been required to give an undertaking as to an indemnity or contribution. It decided to highlight proposed rules 92(1)(b) and 92(3) in its consultation paper.

The Committee deleted the words "incapacitated person's own" from the heading of proposed rule 93.

It noted that proposed rule 94(2) was to be deleted from the HCR but retained for the DCR.

It approved proposed rules 94A and 94B.

4.3 *Discontinuance*

The Committee noted that, subject to proposed rule 476, proposed rule 475 allowed a discontinuance to be obtained by way of oral application.

It deleted the words "against a defendant" from proposed rule 476A(1) and added "or on the making of a Court order under rule 476" to the end. It inserted the word "of" before the word "costs" in proposed rule 476A(2).

The Committee noted that there was a typographical error in the proposed rules in that there were two proposed rules 476C. It directed PCO to correct this and noted that the reference to "rule 476B" in the second 476C had to be changed to "rule 476C". It also deleted the word "affect" and inserted the word "effect" from proposed rule 476D.

4.4 *Admiralty*

The Committee noted that a ship can be a defendant in an admiralty proceeding but could not be represented by a solicitor. Its policy is that an unconditional appearance was not to be treated as a submission to the jurisdiction. It approved the proposed amendments and noted that this was subject to the Admiralty Subcommittee's submissions, which were to be presented later.

PCO undertook to redraft the amendments by the date specified in the proposed timelines and Mr. Drake undertook to prepare the consultation paper to accompany the amendments.

5. Court and Registry Hours

The Committee noted that the Department for Courts had agreed to the Chief Justice's suggestion that opening hours be standardised to 9am to 5pm across the country. It directed PCO to make amendments to HCR 22 and the relevant DCR to reflect this. These changes are to be included in Omnibus 2.

6. Revocation of Judicature (Interest on Debts and Damages) Order 2002

The Committee noted the proposed changes would set the prescribed interest rate under s 87 of the Judicature Act 1908 at 7.5% p.a. (from 11% p.a.) This matter was not within its jurisdiction but it had been asked to comment by the Ministry of Justice.

The Committee raised no objection to the change but noted that the change had the effect of reducing the Court's discretion when setting the applicable interest rate in these matters. It also noted that as this was the first change of the prescribed interest rate in approximately 20 years, it would be appropriate if the rate was reconsidered more frequently.

Mr. Drake undertook to draft a letter on Justice Chambers' behalf to the Ministry of Justice conveying the Committee's view.

7. Discussion of Committee Role/Function

This matter was deferred to allow Mr. Finlayson to address the Committee.

8. Rulemaking for the District Court

Justice Chambers reported to the Committee that he had sent a letter to the Ministry of Justice outlining the Committee's position. The Committee preferred that it have general rulemaking power for the DCR in relation to civil jurisdiction.

The Statutes Amendment Bill revising procedure on appeals to the High Court was currently before Parliament and a submission by the Law Society had been received on it.

9. District Courts Subcommittee

Judge Jeremy Doogue reported that the subcommittee was looking at modernising the costs regime in the District Courts. The NZ Law Society's position on this issue had not changed.

He undertook to report further at the Rules Committee's next meeting.

10. Discovery

The Committee considered the Law Commission's Report on Discovery (Report 78: General Discovery).

The Committee noted that the proposals were based on the new English model of discovery.

It discussed what policy was appropriate regarding discovery and noted that the aim of the proposals was to decrease the cost of litigation whilst preventing the practice of parties burying the other under an 'avalanche' of paper.

The Committee directed Mr. Drake to accomplish the following tasks.

- Find (any) academic articles on the English experience of the new rules.

- Make enquiries of English Barristers and Solicitors of the effect of the new rules in practice.

- Consider the Queensland and New South Wales models and report back on them to the Committee.

11. Part IV – procedure in special cases

The Committee considered Mr. Drake's paper, which recommended that Part IV of the HCR be deleted.

It noted that the main difference was that Part IV allowed for evidence to be given by the exchange of affidavits and or agreed statements of facts. This could still be accomplished under the case management conference regime. One of the features of Part IV was that it allows a party to seek directions for service in difficult cases; this suggested that there might need to be a general rule in Part II regarding service in difficult cases.

The Committee noted that the recommendation, if acted on, would be quite a major change. It decided that, in principle, deleting Part IV was a good idea subject to a detailed analysis by the Part IV Subcommittee. To that end, Justice Wild and Master Venning agreed to consider Part IV in greater detail and determine what the best place was for the various statute specific rules in Part IV.

12. Interrogatories

The Committee considered Mr. Drake's paper summarising the Australian (Federal and State) approaches. It was unsure of how common the problem identified by Master Thomson in *Wiley v Morison Guildford & Associates Ltd* (HC, WGTN, CP235/00, 12 Sept 01, Master Thomson) was.

Justice Chambers undertook to make enquiries of the Auckland Masters and report back at the next meeting. If the Masters considered that there wasn't a (major) problem, then the Committee would drop the matter.

Judge Doherty undertook to raise the matter with District Court Judges and report back at the next meeting.

13. Small Claims

The main issue here was the possibility of introducing a quick debt recovery procedure for lesser amounts. Mr. McCarron undertook to raise the issue with the Chief Justice and report back at the next meeting.

14. Payments into Court

The Committee considered Mr. Drake's paper, which recommended that the payments into Court procedure be reformed. It agreed that, in principle, the procedure should be reformed.

It directed him to prepare a paper looking at any consequential changes, which might be needed to HCR 48G, if the payments into Court procedure was abolished.

The meeting closed at 3:25pm.

The next meeting will be held on Monday, 1 July 2002.

Justin Drake
Clerk to the Rules Committee