



THE RULES COMMITTEE

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10 April 2003

Minutes/2/03

CIRCULAR NO 28 OF 2002

Minutes of the Meeting held on Monday, 7^h April 2003

The meeting called by Agenda/2/03 was held in the Chief Justice's Chambers, High Court, Wellington, on Monday, 7th April 2003, commencing at 10.00 am.

1. Preliminary

1.1 In attendance

The Hon Justice Chambers (in the Chair)
The Hon Justice Robertson (Acting Chief Justice)
The Hon Justice Venning
Judge Doherty
Judge Joyce QC
The Solicitor-General (Mr. T Arnold QC)
Chief Parliamentary Counsel (Mr. G E Tanner QC)
Mr. T C Weston QC
Mr. H Hoffmann (until 1.00 pm)
Mr. C Finlayson (from 11.35 am until 3.10 pm)
Mr. K McCarron (for the Chief Justice) (until 1.55 pm)
Mr. R Gill
Miss. H Lee (Clerk to the Rules Committee)

1.2 Apologies

The Chief Justice (the Rt. Hon Dame Sian Elias GNZM)
The Chief District Court Judge (Judge Carruthers)

The Hon Justice William Young

1.3 *Confirmation of Minutes*

The minutes of the meeting held on Monday, 10th February 2003 were taken as an accurate record and were confirmed.

1.4 *Matters Arising*

No matters were identified.

2. Membership and Appointments

Justice Wild has retired from the Committee due to the expiry of his term.

Justice Venning's membership on the Committee is still being considered in light of the expiry of his term.

3. Personnel

The Committee thanked Justice Wild for his service on the Committee.

4. Omnibus 3

The Committee considered the submissions received on the consultation paper relating to the proposed Amendment Rules (No 3) 2002 (Case Management), together with a paper collating those submissions, various recommendations by Justice Chambers, new rule 264A, and new part 10 of the rules (see Amendments/3/03).

Interlocutory orders

Subject to style modification by PCO, the Committee adopted Justice Chambers's recommendations concerning proposed rules 243(1), 251(2), 254, 262, and 263.

Subject to two modifications, the Committee agreed with Justice Chambers's amendments to proposed rules 257 to 359. Those modifications involve identifying in new rule 257(2) that the Rules may require sealing (for example: "... directed by the Court or is required by the rules to have an order sealed...") and deleting the word "draft" from 257(2)(a).

The Committee considered, but decided against, referring to an "unless" order in proposed rule 260(2). It noted that the types of orders specified in proposed rule 260(2) were only examples.

The Committee agreed with the general scheme for varying or rescinding orders as recommended by Justice Chambers, which involved his redraft of rule 261, new rule 264A, and proposed rule 263. The Committee agreed that the redrafted rule 261 should be entitled "Order may be varied or rescinded if

shown to be wrong". The Committee decided that redrafted rule 261 should be amended so as not to apply to consent orders and should provide that applications be heard by the same judicial officer who made the original order unless the Court otherwise directs. The Committee noted that the word "proceedings" in new rule 264A should read "proceeding" and that "(a)" was not needed in subclause (2). The Committee agreed the word "conduct" in new rule 264A(1)(a) should be changed to "management", subclause (1)(b) should be drafted to ensure that a change in circumstances is the only situation where the rule applies, and subclause (1)(c) should be deleted.

Case Management

Subject to style modification by PCO, the Committee adopted Justice Chambers's recommendations concerning proposed rules 429, 430A, 433, 436, 441P, and Schedules 4 and 5.

The Committee agreed, to adopt whatever the Chief Justice wanted with respect to whether the rules should deal with assignment of proceedings to judicial officers. In the absence of instruction to the contrary from her, the Committee agreed that PCO should proceed on the basis of the current draft (i.e. that the rules should not provide for assignment).

The Committee agreed with Justice Chambers's amendments to proposed rule 427 except that subclause (2)(a) should be modified to adopt wording consistent with rule 4. The Committee noted that a similar amendment needs to be made to rule 425(a).

The Committee agreed with Justice Chambers's amendments to proposed rule 428 subject to the PCO ensuring that the rule provides there will be at least one case management conference in every case and that while subsequent conferences will be possible, there be a presumption in favour of no more than two conferences.

The Committee approved Justice Chambers's amendments to proposed rule 430 subject to Mr Gill communicating any objection from the Registrars within the next week.

The Committee decided that proposed rule 433(2) be further amended to provide that "... a direction must be given in accordance with subclause (1) unless the Court otherwise directs." The Committee also decided that the proposed rule should have a default provision whereby the Registrar would allocate a hearing date after the second conference if one had not been allocated by that stage, unless the Court otherwise directs.

The Committee rejected Justice Chambers's recommended amendments to proposed rules 441B and 441C. Members of the Committee expressed concern about the status of a document that stated what a party believed a recalcitrant witness would say and whether requiring the completion of such a document would be consistent with the rules governing subpoenas. It was decided that the substance of Justice Chambers's recommendation would be best considered under item 15 of the Minutes.

The Committee considered the New Zealand Law Society's submission on proposed rule 4410 but did not agree with it. The Committee was satisfied that the provision for leave was sufficient to meet the Society's point.

New Part 10

The new Part 10 is to be included in Omnibus 3.

[Subject to style modification by PCO,]the Committee adopted Justice Chambers's recommendations concerning proposed rules 708, 709, 711, 712A, 713(2)(b), 713, and 715.

In terms of proposed rule 701, the Committee directed that PCO ensure only 'pure' appeals under the Summary Proceedings Act 1957 are excluded from the application of Part 10.

The Committee directed PCO to consider whether the definition of 'decision-maker' in proposed rule 702, particularly the reference to 'District Court', is wide enough.

The Committee instructed PCO to reconsider the draft rules so as to achieve the following outcome:

- (a) filing a notice of appeal is a vital step in the bringing of an appeal;
- (b) it should be filed in the nearest High Court registry, unless the parties agree otherwise;
- (c) making a mistake as to which registry it is filed in should not invalidate the filing;
- (d) the court, in the event of mistake as to registry, should have power to transfer the appeal to the correct registry.

The Committee agreed that proposed rule 704(2) be subject to an exception along the lines of "...unless there is no other party" since in some cases the decision-maker will be the only possible respondent.

The Committee agreed that both proposed rules 704(4) and 711(5) should provide that the appellant or respondent (c.f. "The Court"), as the case may be, may, with leave, at any time amend the notice of appeal or cross-appeal.

The Committee considered whether it had jurisdiction to make proposed rule 710 and concluded that it did. It agreed that subclause (3) of that rule should become subclause (1) and subclause (4) should be deleted.

The Committee considered whether it had jurisdiction to make proposed rules 713(4) and 714. It concluded that it did since such provisions were part of providing a proper appeal.

The Committee decided that subclause (1)(b) of proposed rule 715 should be deleted. The Committee considered whether it was appropriate for subclause (3) to adopt the same test for adducing further evidence as is applied in the Court of Appeal. The Committee agreed that the present wording of subclause (3) was appropriate in light of the many different bodies from which an appeal may be made.

The Committee agreed that proposed rule 718(5) should refer to "...an interlocutory or similar decision..." (see PCO's 'Q1', which follows proposed rule 718).

The Committee agreed that the new Part 10 should include a rule similar to the new section 77 in the District Courts Amendment Act 2002 (see PCO's 'Q2', which follows proposed rule 718).

The Committee agreed that proposed rule 718A should require the Registrar to "... give notice in writing". It agreed to further amend that rule by including a provision equivalent to the current rule 718C(d).

Timetable

Once PCO has incorporated the aforementioned amendments, the rules will be circulated for concurrence.

Chief Parliamentary Counsel is to select a convenient date (in terms of PCO workload) for the rules to come into force. The Chief Justice will revoke the Case Management Practice Note once the rules come into force.

Miscellaneous

The Committee decided that the rules should not provide for duplicate filing.

District Courts Rules

Once Omnibus 3 is finalised by PCO, Judges Joyce and Doherty and Justice Chambers will meet to discuss the extent to which these rules may be carried across to the District Courts. They will report to the District Courts Sub-Committee, which will further consider the matter and decide on the extent of formal consultation required, if any. The Sub-Committee will report back to the Committee following any consultation. An attempt will be made to implement the changes to the High Court and District Courts Rules at the same time.

5. Omnibus 4

The Committee considered Amendment rules PCO5101a (excluding appeals), Amendment rules PCO5101/2, and Justice Chambers's recommendations in respect of these proposed rules (see Amendments/4/03).

Timetable

PCO will complete a revised draft of these amendments and Miss Lee will prepare an accompanying consultation paper for consideration at the next meeting (12 May 2003), if possible. Formal consultation will then take place.

Calderbank offers and payment into Court

The Committee adopted Justice Chambers's amendments to proposed rule 48G, including the deletion of subclauses (5) and (6). It decided that subclause (4) should refer to 'benefit' as well 'value' to ensure the rule applies to cases not solely concerned with monetary claims. The Committee noted that the payment into Court rules (rules 347 – 368) will need to be repealed.

Defamation

As agreed at the meeting on 10 February 2003, the redrafted rule 285 (see page 27 of Amendments/4/03) will be highlighted for consultation.

Personal Property Securities Act

The Committee adopted Justice Chambers's amendments to proposed rule 458D.

Delivery of judgment

The Committee adopted Justice Chambers's redraft of rule 540. Mr Weston raised concerns about the fact that the Registry only had to 'attempt' to contact the parties or their solicitors or counsel. The Committee agreed to leave rule 540 as drafted by Justice Chambers and await feedback from the consultation process on this point.

Discovery

The Committee agreed with the amendments recommended by Justice Chambers to proposed rules 293, 293A, 294, 300, 303, and 306 to 312.

The Committee considered Justice Chambers's proposed rule 294A. Some members expressed concern that it involved quite an onerous obligation and queried how the rule would be enforced. However, the Committee agreed that the rule merely codified the common law position. The Committee also considered paragraph 3 of the new Form 26. It thought that the present wording may involve a waiver of legal privilege and was inappropriately worded for lay litigants. The Committee decided that paragraph 3 should instead read "I am aware of my obligations under the discovery order and I know what I have to do to comply with those obligations". The Committee decided that paragraph 3 of new Form 26, together with proposed rule 294A, should be highlighted for consultation.

The Committee agreed that the consultation paper should ask whether it is appropriate include in a rule a provision concerning the use to which discovered documents may be put. The Solicitor-General undertook to provide examples of appropriate wording for such a provision.

The Committee decided that proposed rule 295(2)(a) should remain as it is currently drafted but agreed with Justice Chambers's addition of subclause (2)(e) and deletion of subclause (3).

Except for the amendment to paragraph (2) the Committee adopted Justice Chambers's recommended changes to new Form 26. It directed PCO to address Mr Weston's grammatical concerns with the recommended changes.

The Committee decided that rule 310 should come earlier in rules (i.e. after discovery and before the inspection rules) so that the rules follow a logical chronological order.

The Committee was referred to and considered Discovery/1/03, which had been omitted from the agenda. It agreed that the 'pre-actions protocols' adopted in the United Kingdom should be identified in the consultation paper. Discovery/1/03 will be further considered at the next meeting if necessary.

Miscellaneous

The Committee agreed that Omnibus 4 should include an amendment to rule 33 making provision for the "next event date" and the name of the appropriate judicial officer if the case has been assigned on the cover sheet of filed documents.

District Courts Sub-Committee

The District Courts Sub-Committee is to give preliminary consideration to Omnibus 4 and the extent the reforms can be applied to the District Courts Rules.

6. Weathertight Homes Resolution Services Act 2002

Chief Parliamentary Counsel reported that PCO, in consultation with Justice Chambers (on behalf of the High Court) and Judge Doherty (on behalf of the District Courts), is still in the process of drafting the rules necessitated by the Weathertight Homes Resolution Services Act 2002 (see Constructions Contracts/1/03).

7. Construction Contracts Act 2002

Chief Parliamentary Counsel reported that PCO is still in the process of drafting the rules necessitated by the Construction Contracts Act 2002 (see Construction Contracts/2/02).

8. Admiralty Rules for the District Courts

The Committee considered Admiralty/1/03. The Committee considered that the proposed [(and current)] admiralty rules were otiose. The Committee asked Mr Finlayson to report the Committee's provisional view to the Sub-Committee and seek feedback. The matter will be considered again at the next meeting. The Committee will then reconsider the matter in light of the Sub-Committee's views.

9. District Court Rules – Part 6B

The Committee considered whether it is appropriate to update the references to the now repealed and replaced provisions of the Local Government Act 1974 in Part 6B of the District Courts Rules. Chief Parliamentary Counsel explained that it was PCO's policy to rely on section 22 of the Interpretation Act 1999 and that any reprint of the rules could update the references. The Committee therefore agreed not to update Part 6B but directed Miss Lee to send her draft amendments to the publishers of commentaries to the District Court Rules so the appropriate cross-references could be made. Miss Lee was also asked to send her paper to Mr Peter Mitchell (Christchurch City Council) for comment.

10. High Court (Criminal) Rules

Miss Lee is currently drafting rules to replace the Criminal Practice Notes and that draft will be considered at the next meeting.

11. Grant of Administration on Intestacy

Mr Gill reported that the Registrars accepted that a change to Form 53 of the High Court Rules to permit the simultaneous filing of the 'notice of choice' form under Property (Relationships) Act 1976, s 65 and the affidavit to lead grant required by High Court Rules, Schedule 1, Form 53, paragraph 7(b) is not possible (see Property (Relationships)/2/03). The Department for Courts is currently in the process of recommending to the Ministry of Justice that the Property (Relationships) Act be amended to permit the simultaneous filing of these documents.

12. Discussion of Committee Role/Function

Mr Finlayson reported to the Committee that the paper drafted by himself and Mr McCarron (General/8/02) is presently with Dr Jo Lake (General Manager, Higher Courts) who will refer the paper to the Higher Courts Unit, which she is presently establishing.

Justice Chambers undertook to write to Dr Lake seeking formal acknowledgement of the paper and requesting a timetable for its consideration. The Committee also agreed that Justice Chambers should write to the Ministry of Justice seeking their views on Messrs Finlayson and McCarron's proposals.

The responses from Dr Lake and the Ministry of Justice will be considered at the next meeting.

[The Committee noted Justice Wild's willingness to be involved with this project.]

13. District Courts Subcommittee

The Committee agreed that the redrafted cost rules and schedules (see Amendments/17/02), together with the amendments and notes discussed below, be included in Omnibus 4 for consultation. For consultation purposes, PCO should use the daily recover rates recommended by the New Zealand Law Society.

The Committee considered Costs/2/03.

The Committee agreed to highlight in the consultation paper the fact that costs may be awarded for undisputed 'small claims' matters in the District Court but, generally speaking, no costs may be awarded for disputed matters in the Disputes Tribunal. The consultation paper should ask: "With the exception of disbursements, should costs not be awarded for "bottom end" work in the District Court?"

The Committee considered whether it was appropriate to make provision for the award of costs for preparation for and conduct of judicial settlement conferences. The Committee agreed that while it may be appropriate to award costs in circumstances where a party fails to attend, it would be inappropriate to award costs by reference to the reasonableness of the parties' conduct at the conference. The Committee agreed not to include provision for the award of costs for judicial conferences in the proposed rules but directed that the matter be highlighted in the consultation paper.

The Committee approved all the remaining amendments to the proposed costs rules and schedules recommended in Costs/2/03.

14. Rulemaking for the District Court

Miss Lee undertook to follow up with Mr Hesketh the progress of the amendment to the District Courts Act 1947 to equip the Committee with general rule-making power for the District Court in its civil jurisdiction (excluding family law).

15. Exchange of Evidence

The Committee noted that this matter was not discussed at either the District Courts or High Court conferences.

The Committee briefly considered whether it was appropriate to replace the Practice Notes concerning the exchange of evidence in the District Court with rules.

Justice Chambers undertook to prepare an options paper responding to the questions he posed in Evidence/3/02 and, with input from Judges Joyce and Doherty, considering a possible reform of the District Court Rules for the exchange of evidence.

16. Part IV – procedure in special cases

This matter was deferred to the next Rules Committee meeting.

17. Third Party Notices – Summary Judgment

This matter was carried over to the next Rules Committee meeting.

18. Contempt – new rules

This matter was carried over to the next Rules Committee meeting.

19. Summary Trials

This matter was carried over to the next Rules Committee meeting.

20. Small Claims

This matter was carried over to the next Rules Committee meeting.

The meeting closed at 3:20pm.

The next meeting will be held on Monday, 12th May 2003.

Heidi Lee
Clerk to the Rules Committee