THE RULES COMMITTEE

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Wellington

11 October 2000

Minutes/4/2000

CIRCULAR NO 44 OF 2000

Minutes of the Meeting held on Monday 9 October 2000

The meeting called by Agenda/4/2000 was held in the Judges' Common Room, High Court, Wellington on Monday 9 October 2000 commencing at 9.30am.

1. Preliminary

In attendance

The Hon Justice Fisher (in the Chair)
The Hon Justice Chambers
The Hon Justice Wild
Judge C J Doherty (for Chief District Court Judge Young)
Mr K McCarron (for the Chief Executive, Department for Courts)
Mr T C Weston QC
Mr C F Finlayson
Ms J Derby (for the Chief Parliamentary Counsel)
Ms E Tobeck (Clerk to the Rules Committee)
Miss M A Soper (Secretary)

(a) *Apologies*

The Chief Justice (The Rt Hon Dame Sian Elias GNZM)
Master G J Venning
Judge J P Doogue
The Attorney-General (The Hon Margaret Wilson)
Ms E D France (Acting Solicitor-General)

(b) *Confirmation of minutes*

The minutes of the meeting held on Friday 25 August 2000 were taken as an accurate record and were confirmed, subject to page 4 item 5(c) deleting from the first sentence the words "to work on specific projects" such that the first sentence reads, "The Committee agreed to meet as a full committee eight times a year with every second meeting with an emphasis on specific projects".

2. Matters tabled at the meeting

By Justice Wild

Memorandum dated 9 October 2000 on Costs.

By Elizabeth Tobeck

Memorandum dated 22 September 2000 on District Court's jurisdiction.

Memorandum dated 25 September 2000 on Rules 138A/140 summary judgment.

Memorandum dated 29 September 2000 on Exhibit notes/bundles of documents.

Memorandum dated 5 October 2000 on District Court Amendment Rules – memo from Court Advisory Group.

3. Unification of High and District Courts Rules

Discussion on Rules Committee jurisdiction

The Committee noted that the decision to give the Rules Committee jurisdiction to make rules just under the District Courts Act 1947, and not under other statutes in respect of the District Courts was a deliberate political decision. There was some concern to keep the Family Courts Rules separate for example. The Law Commission had also expressed concern that after 1992 small claims procedures became inaccessible and not cost-effective.

The Committee noted that its membership has a heavy weighting towards litigation experience at the upper end rather than at the lower. Judge Doherty advised that he is the Chairman of the Civil Litigation and Case Processing Committee which is a Standing Committee of the District Courts' Judges. That Committee's next priority is to investigate small claims and it could report back to the Rules Committee through the District Courts Sub-Committee.

Decisions

The Committee agreed to recommend to the District Courts Subcommittee that it expand its membership so that small claims expertise is represented. The Consumers Institute was suggested as the possible source of an additional member and also Paul Thomas from Auckland.

The Committee agreed to defer writing to the Minister of Justice about giving the Rules Committee jurisdiction over all rules of procedure in the District Courts until the Committee had widened its membership and prepared a report for public dissemination on small claims in the District Court.

Discussion on concurrence procedures

The Committee noted that it has power to make rules under the District Courts Act but not under any other Acts in respect of the District Courts. In respect of the numerous other statutes that have been identified, the Committee noted that some of them contain procedures for an application to the District Court and some of them contain a rulemaking power.

The Committee noted that it was the intention of the legislation that if there were a specific rulemaking power in another Act, but no specific rules had been made pursuant to it, then the procedures in the District Courts Rules would apply.

The Committee noted also that if there were any rules to be made for the District Courts where the source of the legislative authority was not the District Courts Act, the Ministry of Justice needed to be alerted. However in principle it could see no objection to a blanket concurrence from the Rules Committee in respect of a given set of rules only some of which required this committee's formal concurrence.

Decision

The Committee agreed that the drafting of the preamble to the District Courts Amendment Rules (No. 2) 2000 (PCO3549/3) covered the point that the Rules Committee concurred only in those rules made under the District Courts Act.

4. District Courts Rules

The Committee addressed the District Courts Amendment Rules (No. 2) 2000 (PCO3549/3).

The Committee approved the draft with several minor changes. It was noted that if Judge Doogue and his committee were unhappy with the suggested changes they would have the opportunity for further input before the rules were approved in their final form

Discussion of draft District Courts Amendment Rules (No 2) 2000 (PCO3549/3)

In the introduction to the explanatory note the Committee agreed that the amendments are not just to bring the Rules up to date with the changes made to the High Court Rules since 1992 or to equate the District Court Rules with the High Court Rules. Rather, the intention is to give the District Courts the benefit of procedures that have streamlined the High Court to the extent that there are no reasons unique to small claims which would warrant any differences between the two sets of rules. A more detailed explanation would make it clear that if the District Court rule is not the same as the High Court one that is deliberate because of the difference between the two jurisdictions.

In respect of the other explanatory notes, the Committee agreed that the notes should not just paraphrase the new rule, but give some indication of what the change is from the old one. Elizabeth Tobeck agreed to assist Jacqueline Derby on this aspect.

Rule 2 Commencement – the Committee agreed that the rules should commence on 1 March 2001. That would bring the rules into force at the same time as a new practice note for the District Courts and a departmental Practice Manual for staff. It also allows Judges and the staff to have the administrative procedures in place to implement the new rules relating to the giving of judgments. The Committee noted that the Ministry of Justice need to do a paper for Cabinet and that some time will be lost to the Christmas break.

Rule 4 Office Hours – The Committee noted that to the extent any forms have office hours in them, the office hours should also be amended.

Rule 7 New Rules 151 to 167 substituted –

Rule 151 Application of summary judgment procedure – the Committee agreed that Part IX relating to appeals should be exempted from Rule 151, and noted that it is not the intention that fresh evidence can be introduced as of right on an appeal.

Rule 154 Interlocutory application for summary judgment – the Committee noted that subclause (6) should refer in its text to subclauses (2) and (3); the application for leave would attach a draft of the proposed notice of interlocutory application for summary judgment and the supporting affidavit will be in support of the application for leave rather than the substantive matter. In practice however the court will deal with both together on the day of the hearing. In the light of those comments the Committee decided to delete Rule 154(6), thus making the rule the same as High Court Rule 138.

Rule 22, new **Rule 452** – The Committee noted that it does not have the power to make rules under the statutes listed and Rule 452 should be drawn to the attention of the Ministry of Justice.

Rule 25, new **Rule 530** substituted (time and mode of giving judgment) – Judge Doherty undertook to send a note to District Court Judges about the new procedure, and also drawing attention to the time limits for appeal.

Schedule 1, new **form 14** inserted in the First Schedule of Principal Rules – The Committee agreed to insert an additional paragraph as paragraph 3 to read, "I believe that it was the defendant I served because the defendant was known to me/acknowledged they were the defendant/other" or words to that effect.

Other decisions

The Committee agreed to circulate a new draft to the District Courts Rules Subcommittee and to the Rules Committee on the basis that if there were no difficulties that copy could form the basis of concurrences.

The Committee agreed that the Ministry of Justice should be notified that Rule 452 contains matters over which the Rules Committee does not have jurisdiction.

5. Website for Rules Committee

The Committee agreed that Chapters 1, 2.1 to 2.4.4 and 3 of the Rules Committee Manual could, with editorial changes, form the basis for information for the website. The Committee agreed also to include a list of members, Mr Weston's paper on expert witnesses, an explanatory paper on the new costs regime, the minutes of the last meeting and, in due course, an explanation for the rules changes in the District Courts.

6. Costs

In the light of responses received, particularly from the New Zealand Law Society, the Committee agreed to make no change to the daily rates.

Justice Fisher agreed to prepare a note for "LawTalk" giving information for the profession on the District Courts Rules, the costs (including costs in the District Courts and anomalies) expert witness and the case flow rules.

The Committee noted that it can be possible for the costs that are awarded to be higher than what the client is required to pay, particularly for a practitioner doing a lot of summary judgments. The Committee noted that Rule 47(f) provides that an award of costs should not exceed the costs incurred by the party claiming costs. The Committee considered replacing the word "should" by "must" but noted that it may as a result be difficult to avoid getting into the taxing of costs. The Committee also noted that the rules are based on times that are considered reasonable; in the interests of simplicity and certainty some element of over or under compensation is inevitable.

Wasted costs

The Committee noted that the decision in *Harley v McDonald* [1993] 3 NZLR 545 is under appeal to the Privy Council. The Committee noted also that while the rules in the United Kingdom provide for wasted costs orders, the duty of counsel to the court is lower in England than it is in New Zealand.

The Committee noted that *Harley v McDonald* is set down for hearing in the Privy Council in February 2001, and agreed to defer further consideration until after the appeal.

Appeals – lack of any provision in the time allocations in the Third Schedule

There should be a separate set of items relating to "Civil appeals and Review of Masters".

The Committee noted that the usual rule is that the allocation for preparation time is twice the allocation for the hearing time. In the case of appeals however the Committee considered that the times should be equal given the preparation already carried out for the original hearing. Both preparation and hearing would be measured in quarter days.

The Committee agreed that the time allocations for preparation for an appeal judicial conference for bands A, B and C should be .1, .2, and .4 of a day respectively.

The Committee agreed that the time allocations for the appearance on an appeal judicial conference for bands A, B and C should be .1, .2, and .4 of a day respectively.

The Committee agreed that there should be a separate provision for commencing an appeal. This should include assessing the original decision, noting the appealable points and filing and serving the notice of appeal and points on appeal. The Committee noted that judgments from the Environment Court for example can be lengthy and complex.

The Committee agreed that the time allocations for the notice of appeal and preparation of points on appeal for bands A, B and C should be .2, .5 and 1.5 days respectively.

Interlocutory applications

The Committee noted that there is no provision for preparation time for the hearing of an interlocutory application and there can be huge variations in the scale of an interlocutory application.

The Committee discussed whether the preparation time should follow the rule of being twice the hearing time and decided that for an interlocutory application the preparation time is more likely to be the same as the hearing time. The hearing time for an interlocutory application is the appearance in court measured in quarter days.

The Committee agreed that there should be an allowance for preparation time and that it should be the same as the hearing time, ie the appearance in court measured in quarter days.

Second counsel for interlocutory applications

The Committee agreed to provide for a second counsel for interlocutory applications on the same basis as in the Third Schedule, 8 Appearance at Hearing ie second and subsequent counsel if certified for by the court at 50% of the allowance for principal counsel.

Originating applications

The Committee noted that the Third Schedule contains no specific time allowances for originating applications.

After discussion, the Committee noted that item 1 relating to the commencement of proceedings by the plaintiff is expressed broadly enough to include originating applications in that it refers to "statement of claim and notice of proceeding or equivalent" but for the removal of doubt "originating applications" should be expressly included. For the originating application itself the Committee agreed the time allocations for general and civil proceedings under paragraph 1 are appropriate.

The Committee noted that the preparation of affidavits is included in item 7 under Preparation for Hearing.

The Committee agreed that for all types of proceedings it would separate item 7 into two parts, one comprising preparation of affidavits or statements of evidence and the other comprising lists of issues and authorities and selecting documents for common bundle of documents and all other aspects of preparation for a hearing. The Committee also agreed that the existing time allocation should be divided in half equally between those two parts.

That means that the plaintiff's preparation for affidavits and statements of evidence for bands A, B and C should be 1.5, 2.5 and 5 days respectively and the plaintiff's other preparation for a hearing should also be 1.5, 2.5 and 5 days respectively. The defendant's preparation of affidavits and statements of evidence should be 1, 2 and 4 days respectively, and the defendant's other preparation for a hearing should also be 1, 2 and 4 days respectively. That will have the result that the affidavits required in support of an originating application can be dealt with in the same way as the affidavits required for any other hearing.

The Committee agreed that the existing transitional provisions probably remain appropriate, but expressed some doubts about whether the preparation of affidavits might come under the new rules costs regime while the proceedings had been filed under the old one. The point is a minor one however and is flagged for the attention of the Parliamentary Council Office if Parliamentary Counsel think that appropriate.

Reviews of decisions of Masters

The Committee noted that there is no time allocation for reviews of decisions of Masters. The Committee noted that, like an interlocutory application, the grounds are contained in the application. In other respects however the Committee noted that the review of a decision of a Master is analogous to an appeal.

The Committee agreed that the section to be called "Appeals" should be called "Appeals and Review of Masters".

Security for costs

The Committee noted the argument that security for costs on an interlocutory application is largely now redundant because costs are fixed and awarded at the time and the issue will be addressed if the costs are not paid.

The Committee noted that under Rule 48E costs become payable when they are fixed. The Committee also noted that under the rules that apply in the United Kingdom a party who has not paid costs cannot continue with the proceedings.

The Committee agreed that the subcommittee on costs should seek feedback on whether the proceedings should be stayed automatically if the costs are not paid or whether the proceedings should be stayed by an order of the court.

This matter was deferred until Master Venning could be available.

Costs on unsuccessful application for summary judgment

The Committee noted that Rule 48E(3) expressly excluded applications for summary judgment from the general rule that costs on an interlocutory application should be fixed and become payable when they are fixed. The Committee noted that the intention of this rule was to encourage applications for summary judgment and that if they were not successful costs should be left to await the outcome of the proceedings.

Notice of proceeding – claim for costs

The Committee agreed that there needs to be a specific provision governing the solicitors' costs to be sought in a notice of proceeding. With reference to Rule 121(2) form 5 of the First Schedule needs to be brought into line with the Year 2000 amendments to the costs provisions.

Numbers and headings

The Committee noted that the individual items in the Third Schedule are not numbered which makes it awkward to refer to them in practice. The Committee also noted that a greater use of headings such as interlocutory applications, appeals and so on, with collection of relevant items under those headings, would make it easier to follow.

7. Expert witnesses

In general the profession were happy with the existing provisions relating to expert witnesses. The Committee noted that submissions had been received from only one Judge.

Some submissions indicated that there could be repercussions for the Maori Land Court and the Environment Court; it would be desirable if the rules relating to expert witnesses were consistent in all the jurisdictions. There had been an approach from those courts with the request that they be consulted. The Secretary will write to them thanking them for their interest, asking for any comment on the earlier discussion paper, and advising that further proposals would be referred to them for further comment.

The expert witnesses themselves have indicated that guidelines would be useful to make it clear that the witness is there to assist the court.

The experts also agreed that there might need to be a definition of expert. They also suggested guidelines on pre-trial conferencing which would clearly establish the status of any documents (ie without prejudice).

The experts also suggested a statement of instructions and a definition of the area in which the evidence is being given.

The subcommittee agreed to prepare a draft for further consultation.

The Secretary agreed to send a copy of the submissions to Justice Chambers, Justice Wild, Judge Doherty and Mr Finlayson.

The Secretary agreed to write to the Judges of the Environment Court and Maori Land Court asking specifically for their views.

The meeting closed at 3.15pm.

The next meeting will be held on Friday 10 November 2000.

Secretary

ADDENDUM TO THE MINUTES:

Action required by:

Justice Fisher:

- Note for "LawTalk" on costs and other matters

Judge Doogue

- Membership of District Courts subcommittee to include small claims expertise

Judge Doherty

- Membership of District Courts subcommittee to include small claims expertise

Mr McCarron

- Website (with Mr Finlayson and Secretary)

Mr Weston

- Expert Witnesses

Ms Tobeck

- Assist Jacqueline Derby with drafting of explanatory note to District Courts Amendment Rules