THE RULES COMMITTEE

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10 September 2002

Minutes/6/02

CIRCULAR NO 75 OF 2002

Minutes of the Meeting held on Monday, 9th September 2002

The meeting called by Agenda/6/02 was held in the Chief Justice's Chambers, High Court, Wellington, on Monday, 9th September 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)
The Hon Justice Wild
The Hon Justice William Young
Master Venning
Judge Tuohy (standing in for Judges Doherty and Jeremy Doogue)
The Solicitor General (Mr. T Arnold QC) (until 2:10pm)
Chief Parliamentary Counsel (Mr. G E Tanner QC)
Mr. T C Weston QC
Mr. C Finlayson (from 10:25am until 2:50pm)
Mr. R Gill
Mr. K McCarron (for the Chief Justice)
Mr. B Hesketh (Secretary to the Rules Committee) (from 1:35pm)
Mr. J Drake (Clerk to the Rules Committee)

1.2 *Apologies*

The Attorney-General (the Hon Margaret Wilson)
Judge Doherty
Judge J P Doogue

1.3 *Confirmation of Minutes*

The minutes of the meeting held on Monday, 1st July 2002 were taken as an accurate record and were confirmed.

1.4 *Matters Arising*

The Chief Justice asked why the Committee had decided that the plaintiff ought to bear the costs of a telephone conference which the Court had ordered of its own volition (item 2.2 in Minutes/5/02, p. 5 para. 2). The Committee noted that this was just a default provision which would apply unless the Court directed otherwise.

2. Papers tabled at the meeting

Mr. Drake: tabled Amendments/15/02.
tabled PCO4230/8 (High Court Amendment Rules (No 3) 2002) – please label it Amendments/16/02. This is meant to replace Amendments/12/02 which had PCO4230/6 attached to it by mistake.

Chief Parliamentary Counsel tabled District Courts Amendment Rules (No 3) 2002 – please label it Amendments/17/02. Please also note that as a result, the District Courts component of Omnibus 2 will now become District Courts Amendment Rules (No 4) 2002.

Justice William Young tabled Interlocutory Matters/1/02.

3. Matters referred to Parliamentary Counsel for drafting

3.1 High Court Amendment Rules (No 2) 2002 and District Courts Amendment Rules (No 4) 2002 – Omnibus 2

The Committee considered the submissions which it had received. It noted that submissions were received on all areas to which it proposed to make amendments: registry opening hours, authority to file documents, incapacitated persons, discontinuance, disbursements, and admiralty.

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

3.1.1 Registry Opening Hours

The Committee approved the proposed amendment changing registry opening hours from 8:30am to 5pm to between 9am and 5pm. It noted that this amendment had been made at the request of the Department For Courts to facilitate training of staff.

3.1.2 *Authority to File Documents*

The Committee considered the submissions received and noted in particular one from Mr. Andrew Beck in which he pointed out that perhaps a new approach to authorising who could file documents might be appropriate. The current HCR 41 essentially worked by grafting exceptions onto a general rule. Mr. Beck suggested that perhaps it might be better to have a general rule that any 'experienced solicitor' could file documents on behalf of a client.

The Committee noted that prior to 1991 employee solicitors could file documents. It considered that if the purpose of HCR 41 was to ensure that the quality of documents filed was satisfactory, then it was not achieving that. The Committee also noted that the current HCR 41 authorised people to file documents who would not be able to file documents under HCR 237 (solicitor's certificate in respect of *ex parte* applications). It decided that there appeared to be no principled reason why anyone with a practising certificate as a barrister and solicitor was not allowed to file documents. It considered that any concerns about solicitors filing documents without authority would be covered by HCR 41B (solicitor's warranty as to authorisation to file documents) and breaches of such would expose the solicitor to disciplinary action by his or her Law Society and to civil suit. Any other concerns were matters for a firm's internal control policies.

The Committee resolved in principle to amend HCR 41 to provide that any barrister and solicitor with a current practising certificate and with authority from the party he or she is representing could file documents on behalf of that party, unless the New Zealand Law Society could see a difficulty with that. Justice Chambers agreed to consult the NZLS about that. If they could see no difficulty, then HCR 41 would be amended as set out. If they could see a difficulty, then the amendment to HCR 41 would be deferred for further discussion at the next meeting. Omnibus 2 would in that event proceed without any change to HCR 41; any change to HCR 41 would be included with a later set of amendments.

3.1.3 *Incapacitated Persons*

The Committee considered the submission it received on this matter. The submission had suggested that the proposed amendment include a 'catch-all' provision to govern those who did not fall into the proposed definition of 'incapacitated person' but who might nonetheless be considered 'incapacitated' in some way.

The Committee noted that it had already made a deliberate policy choice to remove the 'catch-all' provision from the proposed definition of 'incapacitated person' because it had wanted to make it clear who was caught by the (proposed) rule. The rule was designed to avoid the court having to make what might be a very difficult decision on incapacity at an early stage. Therefore, the rule was 'black and white' as to who was caught by it.

The Committee approved the proposed amendment.

3.1.4 *Discontinuance*

The Committee considered the submissions it had received on this topic.

One of the submissions pointed out there was (potentially) an internal inconsistency in that discontinuance was defined to include the discontinuance of any cause of action but that proposed HCR 476A stated that a discontinuance brought the "proceeding" to an end. This suggested that if a party were to discontinue one cause of action, it potentially might end the entire proceeding or if the plaintiff were to discontinue an action against one defendant, it might end the entire proceeding.

The Committee agreed with this and directed PCO to reformulate the definition of 'discontinuance' in proposed HCR 474 to something consistent with the following: "a reference to the discontinuance of a proceeding means the discontinuance of a proceeding against a particular defendant or all defendants". This would enable a plaintiff to discontinue against one defendant but continue proceedings against another. The Committee noted that this changed the emphasis from a cause of action to a particular defendant. It also noted that subsequent changes would need to be made to proposed HCR 476C and 476D.

Other submissions received, while considered, did not find favour.

The Committee approved the proposed changes as amended.

3.1.5 *Disbursements*

The Committee considered the submissions which it had received on this topic. It noted that the NZLS and other submissions were critical of its decision to require that a $100 per class of disbursement had to be incurred before it could be claimed. The Committee decided to delete proposed HCR 48H(2)(e) and so directed PCO.

The Committee decided that the phone cost of teleconferences should be included in the class of disbursements in proposed HCR 48H(1)(b)

which were automatically recoverable. It directed PCO to make the change.

The Committee decided that any photocopying required by the rules or by a direction of the court was recoverable subject to it being necessary and reasonable. It directed PCO to include this in proposed HCR 48H(1)(b).

The Committee also directed PCO expressly to state that counsel's fees for professional services were not disbursements.

3.1.6 *Admiralty*

The Committee discussed the submissions which it had received on the topic. Justice Chambers reported that he had discussed the submissions and proposed amendments with Justice Williams, a member of the Admiralty Rules Subcommittee. He conveyed Justice Williams's views to the Committee during the discussion of particular points.

The Committee noted that the NZLS has questioned the need for the proposed amendments in rule 16 regarding warrants of arrest. The NZLS was concerned that the proposed rule change might have the effect of raising the status of the issue of a warrant of arrest from an administrative act to one similar to the issuing of *ex parte* injunctive relief. The Committee noted that the requirement to disclose all "relevant information" was to deal with situations such as *The Varna* [1984] 1 Lloyd's Rep 235 in which the deponent had technically complied with every requirement of the rules but failed to advise the Court that the parties had entered into a binding arbitration agreement. It also noted that it was desirable to bring the rules into line with those in England.

The Committee accepted the NZLS's submission that caveators be required to provide copies of caveats to all existing parties. This was to ensure that all parties were fully informed of proceedings. It directed PCO to incorporate this into the proposed rules.

The Committee discussed the NZLS's submission suggesting that interveners be required to obtain the leave of the Court (proposed HCR 783). It noted that the Admiralty Rules Subcommittee had recommended that leave should not be required. The Committee decided that it would ask the Subcommittee to reconsider this issue.

Mr. Finlayson undertook to contact the members of the Subcommittee, by telephone conference, in order to discuss the NZLS's submissions. If the Subcommittee considered that it had doubts on this issue, then the proposed amendment regarding HCR 783 would be dropped from Omnibus 2 and reconsidered at a later date. Otherwise the Committee would accept the Subcommittee's recommendation.

The Committee considered that the issue of whether the Department for Courts should charge a commission on vessels seized was a matter for the Government and outside the Committee's ambit of authority.

Mr. Finlayson reported that Judge Perkins had prepared District Courts admiralty rules, which the Subcommittee was currently considering. The draft rules would be presented to the Committee at its next meeting. Justice Chambers undertook to inform the NZLS that this issue would soon be considered by the Committee.

The possibility of an internet accessible register of admiralty proceedings was considered by the Committee. Mr. Gill reported that his understanding was that this was feasible but dependent on the implementation of the Department for Courts' new computer system.

Mr. Drake undertook to draft a letter for Justice Chambers to the NZLS explaining the Committee's reasoning and policy decisions in relation to Omnibus 2 and outlining to them the progress of the proposed amendments.

The Committee directed PCO to redraft Omnibus 2 taking today's discussion into account. The draft was to be finalised and concurrence copies were to be circulated to the members. The Secretary would liaise with PCO.

3.2 High Court Amendment Rules (No 3) 2002 and District Courts Amendment Rules (No 5) 2002 – Omnibus 3

The Committee noted that Amendments/12/02 should have contained PCO4230/8 (i.e. version 8 of PCO draft 4230) not PCO4230/6. Mr. Drake subsequently tabled PCO4230/8 which has been labelled Amendments/16/02.

The Committee considered the informal submissions it had received in this area. It decided to delete the definition of 'executive judge' in proposed rule 3 of the HCR. The Committee's policy was that matters of internal judicial administration were not the appropriate subject matter for the rules.

The Committee considered a submission from Mr. Andrew Beck that the proposed definition of 'interlocutory application' in terms of 'interlocutory orders' might cause difficulty in relation to some processes, such as an application for summary judgment, which were required to be made by way interlocutory application. It directed PCO to consider Mr. Beck's submission and determine if the definition could be reworked.

It approved proposed HCR 234 to 236.

The Committee considered that interlocutory applications made under proposed HCR 237 should be able to be filed by post. Mr. Gill noted

that applications still could not be made by fax because some applications required the filing of a fee to accompany them.

The Committee noted that the word 'adversely' deliberately had been chosen for proposed HCR 239(3) because it was wider than the term 'detrimentally'.

The Committee considered whether the term '*ex parte*' should still be used in proposed HCR 240. This was part of a wider issue concerning the use of Latin-origin words in the law. The Committee noted that the phrase 'without notice' was now used in England. The Chief Justice expressed the view that the Committee's policy ought to be the use of 'modern English' as long as it was adequate to and did not affect technical definitions. The Committee decided to maintain the '*status quo'* and retain the use of the word '*ex parte*' for now, but it would look at an overall updating of the language as a later project.

The Committee discussed proposed HCR 241 and noted that as per its earlier discussion regarding proposed HCR 41 and who would have authority to file documents, any solicitor or barrister should be able to certify an *ex parte* application.

The Committee considered proposed HCR 243 and noted that the policy decision behind it was that the 'hearing date', which was allocated, was to be the date which practitioners could expect that the matter would be heard. Practitioners should be ready to proceed on a matter on that date unless it was obvious that there would be insufficient time. It directed PCO to make no changes to proposed HCR 243.

The Committee noted that HCR 206 allowed service of documents by facsimile and that proposed HCR 244 did not disallow that. It also noted that every party in the proceeding was to be kept informed of the hearing date for any applications.

The Committee decided that proposed HCR 247 should be amended to clarify that affidavits in reply should be limited to new matters raised by the respondent. Something along the lines of HCR 141B(2)(a) is required.

The Committee directed PCO to consider if there was any inconsistency between proposed HCR 234(4) and 251 and to take remedial action if necessary. It noted that proposed HCR 251(2) reflected current practice.

It approved proposed HCR 252.

The Committee amended the heading of proposed HCR 257 to read "Determination of ex parte application". It deleted the word "hear" in proposed HCR 257(1) and replaced it with "determine". It amended proposed HCR 257(2) by deleting the words "On the hearing of" and replacing them with "Before the determination of". The Committee directed PCO to spell out in the rule the three possibilities of what

could happen to an *ex parte* application: it could be granted, refused, or adjourned for parties to be served.

The Committee considered proposed HCR 261 (Enforcement of interlocutory order). It noted that it reflected existing HCR 277. The equivalent DCR was slightly differently expressed. The Committee asked PCO to see which wording was preferable.

The Committee considered whether proposed HCR 262 (Variation or rescission of orders) in its current form was necessary. It decided not to determine its position on this issue at the moment but to continue with the proposed rule.

The Committee approved the National Caseflow Management Committee's (NCMC) suggestion that proposed HCR 425 refer to "just, speedy, and inexpensive" (instead of "just, expeditious, and economical") in order to make it consistent with current HCR 4.

The Committee considered the NCMC suggestion about including matters such as applications for interim injunctions and judicial review and admiralty proceedings in proposed HCR 426(2) in the list of swift track proceedings. However, the Committee considered that just because a proceeding involved (for example) an application for an interim injunction did not mean that the entire proceeding ought to be on the swift track. It noted that the interim injunction application would certainly be dealt with quickly but that the rest of the proceeding (if it were appropriate and as often was the case) could be dealt with quite satisfactorily on the standard track designation. The Committee was satisfied with the current classifications and decided to retain them. The NCMC also had pointed out that the proposed rules currently only provided that cases on the standard track could be assigned to a particular judge or master. It submitted that cases on the swift track should also be capable of such designation. During the discussion, the Chief Justice raised the issue of why such an internal judicial administration matter was being included in the rules in the first place. Per its policy that it was not appropriate to include internal administrative matters in the rules, the Committee deleted proposed HCR 426(4).

The Committee considered proposed HCR 427 and noted that as currently drafted, there might be confusion as to who was required to attend a proceeding. The Committee did not consider that it had power to compel a party to attend court for a conference. It also noted that parties were not required to attend the substantive hearing and therefore this reinforced the undesirability of compelling them to attend the interlocutory hearings. It deleted the reference to "with the parties to a proceeding" in proposed HCR 427(1). The Committee noted that the proposed rules potentially allowed one or both parties' counsel to attend a conference by telephone video link. The Committee accepted the NCMC's suggestion that words similar to "but will be disbursements in the proceeding unless the Court otherwise directs" be added to proposed HCR 427(3).

The Committee agreed with the NCMC's suggestion that direction ought to be given as to when an hearing date should be allocated during the case management process. It directed that words similar to "if not allocated at the first conference, an hearing date must be allocated at the second conference" be included in proposed HCR 428(2)(c). The Committee also agreed to specify in proposed HCR 428(2) that the first conference must be held within 35 working days of the filing of the proceeding.

The Committee then considered proposed Schedule 1 of Omnibus 3 which added proposed Schedules 4 and 5 to the HCR. It directed that the following changes be made to proposed Schedule 4.

- Item 2 on the list of matters for consideration was to be changed to 'whether the pleadings are in final form or require amendment'.
- Item 7 was amended by replacing "may be" with "is to be".
- Item 8 was amended to words similar to "whether a settlement conference under HCR 442 should be scheduled or whether time for negotiation or mediation was required".
- Item 13 was amended by replacing the words "24 hours" with "3 working days".
- Item 16 was to be deleted.
- A new item heading 'List of issues' was to be included.

The Committee directed that the following changes be made to proposed Schedule 5.

- Item 2 was amended by replacing "quarter days" with "half days".
- It discussed whether the requirements in item 4 would be too onerous for an impecunious appellant but noted that these requirements could be varied by the Court. No change was made.
- Item 7 was amended by deleting paragraph 7(a).

Justice Chambers and Master Venning undertook to finish considering submissions on Omnibus 3 and to give instructions to PCO. PCO would then prepare Draft 9. It would be sent to Committee members and to the National Caseflow Management Committee. Draft 9 and any further comments from the National Caseflow Management Committee would then be considered at the next meeting before formal consultation began.

4. Daily Recovery Rates

The Committee noted that the NZLS had recommended that no changes be made to the daily recovery rates. Justice Wild expressed disappointment that the NZLS had not given reasons for its recommendation. The Committee noted that it had been at least four years since the current rates were set.

It decided that it would not make any changes this year to the daily recovery rates but that next year it would make a specific suggestion to the NZLS as to what the rates should be. If the NZLS did not agree, the Committee would then require a detailed explanation.

5. Overall Review of Court Rules

The Committee considered the Committee Role/Function Working Group's report (General/6/02). The report concluded that changes were needed to the structure of the current rules due to rapid technological change and the widespread perception that the rules were out of date and needed reform. The Working Group considered that change needed to be made to the rules and that the best option would be to consult with various stakeholders in the process and undertake the reform as a matter of urgency.

Justice Chambers noted that the resource requirements for achieving this might be quite onerous. He enquired of the Chief Justice whether a High Court judge might be released for this purpose. The Chief Justice stated that she recognised the need for a total overhaul. She noted that the work ought to be done under the supervision of the Committee but that someone, who would 'push the matter along', would need to be identified: this person would not necessarily be a High Court judge.

Chief Parliamentary Counsel raised the possibility that *vires* issues might be encountered. The Committee noted that s 51C(2)(a) of the Judicature Act 1908 empowered it to repeal the entirety of the HCR and substitute a new set of rules. It discussed various options for bringing about any changes and noted that the Law Commission probably did not have the technical expertise adequately to deal with the matter.

The Committee asked the Chief Parliamentary Counsel for an indication of the resources required for the consolidation process concerning the Family Court which had recently been completed. Chief Parliamentary Counsel noted that that had been only a technical reformulation of the rules relating to the Family Court and had consisted of consolidating the various rules into one place. It still had taken approximately 5 years and that PCO had had five people working on it over the past three years. He further noted that the proposed changes here were more than a mere technical consolidation; they were fundamental.

The Committee agreed and noted that the key to this project would be to ensure that it was resourced adequately.

The Committee asked the Working Group to work with Mr. McCarron to draft up a bid to present to the Government seeking funding for this project. It also noted that organisations such as the Law Foundation might be alternative sources of funding. If the project were to go ahead, whoever funded it would need to be convinced that the proposed changes were desirable and, as such, there was a need to economic benefits which the reform process might be expected to achieve. This would need to be balanced against any cost involved in making the change.

6. Payments into Court

The Committee noted that its preliminary view was that the payments into court rules needed to be reformed. Some members were of the opinion that they should be abolished completely. Consequently, the Committee had asked for submissions from the New Zealand Law Society and the Solicitor-General. It noted that, on balance, the NZLS was in favour of abolishing the payment into court rules.

The Solicitor-General reported to the Committee that it was his office's preliminary view that the payments into court regime was advantageous and promoted settlements. A payment into court put more immediate pressure on parties to take offers seriously. He wondered whether the apparent low level of usage had anything to do with the advent of case management. He expressed the view that if the Committee decided to abolish the payment into court rules the Calderbank letter procedure would definitely need to be 'beefed up'.

Mr. Drake reported to the Committee that the earlier indication that the payment into court procedure was rarely utilised in the High Court was also reflected in the District Court. Judge Tuohy asked for the specific figures from the Wellington region District Court. Mr. Drake read from an email Nicholas Munn, Civil Caseflow Manager, Wellington Cluster: so far this year, the Masterton District Court had had two payments in, Porirua one, whereas none had been made in the Upper Hutt, Lower Hutt, and Wellington District Courts.

Justice Chambers then posed a question to the Committee: Assuming that the Calderbank letter regime was 'beefed up', should the payment into court rules be repealed? Six members of the Committee were in favour of such a repeal, with two opposing.

The Committee then directed Mr. Drake to prepare a paper on how a revised Calderbank scheme could be developed.

7. District Courts Subcommittee

This matter was carried over to the next meeting.

8. Rulemaking for the District Court

This matter was carried over to the next meeting.

9. Arbitration

This matter was carried over to the next meeting.

10. Discovery

This matter was carried over to the next meeting.

11. Third Party Notices – Summary Judgment

This matter was carried over to the next meeting.

12. Part IV – procedure in special cases

This matter was carried over to the next meeting.

13. Summary Trials

This matter was carried over to the next meeting.

14. Contempt – new rules

This matter was carried over to the next meeting.

15. Small Claims

This matter was carried forward to the next meeting.

16. Costs in Bankruptcy Proceedings

This matter was carried over to the next meeting.

17. Meeting Dates 2003

This matter was carried over to the next meeting.

18. General

All other matters were carried over to the next meeting.

The meeting closed at 3:25pm.

The next meeting will be held on Monday, 11th November 2002.

Justin Drake
Clerk to the Rules Committee