



THE RULES COMMITTEE
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14 February 2003

Minutes/1/03

CIRCULAR NO 20 OF 2002

Minutes of the Meeting held on Monday, 10th February 2003

The meeting called by Agenda/1/03 was held in the Chief Justice's Chambers, High Court, Wellington, on Monday, 10th February 2003, commencing at 10.00 am.

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 William Young
Judge Doherty
Judge R Joyce QC (until 3.10 pm)
The Solicitor General (Mr. T Arnold QC)
Chief Parliamentary Counsel (Mr. G E Tanner QC)
Mr. T C Weston QC
Mr. K McCarron (for the Chief Justice)
Mr. R Gill
Miss. H Lee (Clerk to the Rules Committee)

1.2 Apologies

The Hon Justice Wild
The Hon Justice Venning
Mr. C Finlayson

1.3 *Confirmation of Minutes*

The ninth paragraph on page 5 of Minutes/7/02 contained a typographical error in that it referred to "rule 426(2)(b)(ii)". This was corrected to read "rule 436(2)(b)(ii)". Subject to the above, the minutes of the meeting held on Monday, 11th November 2002 were taken as an accurate record and were confirmed.

1.4 *Matters Arising*

No matters were identified.

2. Papers tabled at the meeting

Justice Chambers tabled Defamation/1/03, Amendments/2/03, Personal Property Securities/2/03, Personal Property Securities/3/03, Property (Relationships)/2/03, Construction Contracts/1/03

Justice William Young tabled Interlocutory Matters/2/03

Papers entitled Originating Application/1/03 and Originating Application/2/03 were renamed Personal Property Securities/1/03 and Personal Property Securities/2/03 respectively.

3. Membership and Appointments

The Chief Justice informed the Committee she is considering the matter of Justices Wild and Venning's membership on the Committee in light of the expiry of their terms.

4. Personnel

The Committee welcomed Judge R Joyce QC in his role as member to the Rules Committee.

The Committee welcomed Miss Lee in her role as Clerk to the Rules Committee

The Chair thanked Judge Jeremy Doogue and Justin Drake for their service on the Committee.

5. Matters referred to Parliamentary Counsel for drafting

5.1 Discovery

The Committee considered the latest draft of the discovery rules (Amendments/1/03) together with Justice Chambers' paper Amendments/2/03.

The Committee approved rules 2 and 3.

The Committee expressed some concern as to whether "general discovery order" was an appropriate title for an order made or deemed to be made under proposed rule 293.

The Committee discussed whether a standard discovery obligation should come into force except in so far as it may be *later* modified either at a case management conference or otherwise. The Committee considered the nature of a standard discovery obligation in the period prior to the case management conference. Two problems were identified with an obligation arising during that pre-conference period. First, it raised the need to delay the crystallisation of the discovery obligation until the case management conference as the parties may wish to change the nature of the standard discovery obligation at that conference. Second, imposing discovery obligations prior to the case management conference was inconsistent with the culture intended to be fostered: that parties should turn their mind to all matters on the conference checklist prior to the conference, not just discovery. The Committee therefore agreed that the approach in rule 293 was appropriate in that discovery obligations, whether standard or otherwise, should take effect following the case management conference.

It considered proposed rule 294, which was regarded as a template for standard discovery.

The Committee agreed that the use of the term "discover" in proposed rule 294(2) could be explained with greater clarity. It agreed that it would be more helpful for proposed rule 294(2) refer to "making a list on oath". It recognised this was just the default position and could be changed at a case management conference if listing was an inappropriate method of discovery.

It agreed that proposed rule 294(5) should specify only one period within which each party must comply with the order, namely, 20 working days. The Committee also considered that the phrase "the order takes effect" is an unsatisfactory expression. It agreed proposed rule 294 should, in part, read: "... discovery to be complied with within 20 working days of the conference".

The Committee discussed the appropriate framework for the contents of the list governed by rule 298.

It agreed that Form 26 be replaced with an affidavit that refers to schedules containing the various lists. The affidavit should open by stating what that party understands his or her obligation to be (determined either by proposed rule 294 or by reference to the orders made by the Court). The affidavit should then refer to the steps taken to fulfil that obligation including, for example, the names of whom inquiries had been made. Finally, reference should be made to the various lists of documents set out in schedules.

The Committee further agreed there should be one list for those documents the party has, one for those documents the party had but no longer has and a list for privileged documents. The deponent must specify clearly the ground on which privilege is claimed: self-incrimination, legal, litigation. The Committee decided it was appropriate to require first person references to the lists in the affidavit, for example, "I list in the first schedule ...". This would have the effect of bringing home the signing party's obligation.

The Committee agreed that documents in respect of which a party claimed there should be restrictions on inspection because of confidentiality should be flagged. The party should set out in the affidavit what his or her proposals were with respect to confidentiality.

The Committee decided that, in terms of proposed rule 298(9)(a), some cases may require that "unmarked copies of listed documents" be discovered. It concluded that proposed rule 298(9)(a) should be deleted and any concerns about disclosure of unmarked copies dealt with on a case by case basis.

It modified proposed rule 298(9)(c) to include a qualification that limits its application to cases where it may reasonably be assumed all parties have such correspondence.

It decided the consultation paper should proffer an alternative wording to proposed rule 293(3)(iii), for example, "may reasonably be relied upon by another party" or "reasonably introduced in evidence." The paper should give the reasons advanced for this alternative, namely, it said, the need to:

- ensure that material which assists in establishing the relevant narrative is discoverable; and
- provide a litigant with little evidence with sufficient information to build their case.

The consultation paper should also highlight the use of the word "case" in proposed rule 294 (3). Is it appropriate?

The Committee deleted proposed rules 293(1)(b) and 294A.

It also deleted proposed rules 295(1) and (2) and 297. It decided all that was needed was a provision that empowered the court to vary discovery orders given in a case management conference, by requiring either more or less extensive discovery, in the circumstances set out in proposed rule 295(3).

It deleted proposed rule 296 but suggested that rule 277 be modified, via Omnibus 3, to ensure it applies to discovery orders given in a case management conference. The Committee asked PCO to come up with a redraft of rule 277 for consideration at the next Rules Committee meeting.

The Committee agreed that the discovery obligation should capture what is covered by the common law understanding of "possession" "custody" and "power" (i.e. ownership, physical holding of the document regardless of ownership, and the enforceable right to obtain the document respectively). It recommended adopting the English approach in this area (i.e. using only the word "custody", which is defined to cover all three concepts identified above).

The Committee approved the proposed amendment in rule 9.

It deleted proposed rule 305(2) and agreed that this deletion should be highlighted in the consultation paper.

It deleted rule 300.

The Committee discussed where the obligation for properly completing discovery should lie. It agreed that the primary obligation should rest with the party and that it was the solicitor's obligation to ensure, to the best of his or her ability, that the party completes the obligation faithfully. It further agreed that the draft rules should contain a subclause expressing the solicitors' existing discovery obligations so that they may be "brought home" to the legal profession. Such a subclause need not have an associated remedy, in the (unlikely?) event of breach, in the rules. The Committee agreed that this matter should be highlighted for consultation

The Committee considered whether the term "document" in the rules was inconsistent with the current practice of masking irrelevant portions of a document. It considered that masking should be permitted and referred the matter to the PCO to ensure that the rules achieved this.

The Committee considered the issue of discovering material on the hard-drive of computers. It directed this matter be discussed in the consultation paper.

The Committee requested the PCO to prepare a revised draft of the discovery rules, incorporating the alterations set out above, for consideration at the Rules Committee meeting on 7 April 2003. These amendments will form part of Omnibus 4.

It directed that Miss Lee prepare a draft consultation paper on the discovery rules for consideration at the next Rules Committee meeting.

5.2 Omnibus 3: Case Management Rule Changes

This matter was for noting only. The Committee is still awaiting submissions on this matter, which are due in at the end of this month.

6. Appeals from District Court

The Committee considered the latest draft of the rules governing appeals from District Courts (Appeals/1/03). These rules had previously been considered by the Committee.

The Committee was concerned that the effect of proposed rule 717 may mean an appeal filed in the wrong registry would be invalidated. The Committee asked the PCO ensure that the rules were expressed in such a way to rule out the possibility of invalidation.

It noted that some of the proposed rules, including 717 and 718, needed to be deleted as they are now contained in the District Courts Amendment Act 2002.

The Committee referred the draft rules to the PCO for consideration and to incorporate the alterations identified above. The Committee proposed to consider the revised draft at the next Rules Committee meeting and then decide whether the rules required further consultation. The Committee noted that there might not be time for normal consultation as the Act's implementation was held up pending the passage of these accompanying rules.

7. Costs

7.1 Bankruptcy

The Committee approved the solution proposed by Justice Chambers in the paper Costs/1/03 concerning costs in bankruptcy proceeding (identified in the papers Costs/3/02 and Costs/2/02).

Justice Chambers and Mr G E Tanner QC agreed to further discuss the appropriate format of the Bankruptcy Notice.

This alteration is to be included in Omnibus 4.

7.2 Judgment by default

The Committee approved the solution proposed by Justice Chambers in the paper Costs/1/03 concerning costs claimed on judgment by default in the High Court (identified in the memorandum from Mr. B Hesketh to Justice Chambers, which is attached to the paper Costs/1/03).

This alteration is to be included in Omnibus 4.

7.3 Discovery

The Committee noted that the problem concerning costs claimed for sealing a discovery order when a party has failed to comply with a notice for discovery (identified in the paper Cost/4/02) would be addressed by the proposed changes to the discovery rules.

8. Defamation

The Committee considered and adopted the proposed amendment to rule 285 set out in Defamation/1/03. It also agreed to replace the term "fair comment" in rule 285 with "honest opinion".

These amendments are to be included in Omnibus 4 and highlighted for consultation.

9. Weathertight Homes Resolution Services Act 2002

The Committee considered Constructions Contracts/1/03, which identified the various provisions in the Weathertight Homes Resolution Services Act 2002 that required supporting rules. It requested that the PCO draft the necessary rules and directed that any interim consultation be with Justice Chambers (on behalf of the High Court) and Judge Doherty (on behalf of the District Courts).

10. Grant of Administration on Intestacy

The Committee agreed that Mr R Gill should discuss the contents of Property(Relationships)/2/03 with the Registrars. The matter was otherwise adjourned until the next Rules Committee meeting.

11. High Court Criminal Rules

The Committee considered Criminal Practice/1/03. It directed that Miss Lee draft rules to replace the Criminal Practice Notes currently in force. The draft rules should also confirm that notes of evidence are part of the public record.

12. Assistance to judgment creditors to recover debt

The Committee considered the proposal that provision be made to enable judgment creditors to obtain the address details of judgment debtors for enforcement purposes (Execution/1/03). The Committee agreed that Justice Chambers would draft a letter to Ms F North (Department for Courts) stating that the Committee thought the proposal posed a number of difficulties, that it understood she now also thought there would be difficulties, and, because of the principles involved, it lay outside the scope of the function of the Committee.

13. Discussion of Committee Role/Function

This matter was deferred to the next Rules Committee meeting due to the absence of Mr C Finlayson and Justice Wild.

14. District Courts Subcommittee

Judge Doherty reported back on the meeting of the District Courts Subcommittee held last week. It had agreed to prioritise matters in the following order: costs rules, Omnibus 3, then small claims rules. The Subcommittee will report back on the costs rules at the next Rules Committee meeting and on Omnibus 3 at the Rules Committee meeting on 30 June 2003.

The Committee directed that Miss H Lee locate a copy of the draft admiralty rules for the District Courts prepared by Judge Perkins

15. Rulemaking for the District Court

The Committee considered the update on the rulemaking power of the Committee with respect to the District Court in District Courts/1/03. The Ministry of Justice has the Government's approval for the proposed widening of the Committee's rule making power and is now seeking approval from the other political parties for the proposed amendments to the District Courts Act.

16. Personal Property Securities Act 1999

The Committee considered the problems raised in Personal Property Securities/1/03, namely:

- it appears that the District Courts do not have jurisdiction to grant orders under the Personal Property Securities Act 1999: and
- it is unclear what procedure should be adopted when applying for an order under that Act.

The Committee agreed to recommend to the Ministry of Justice that the High Court and the District Courts have concurrent jurisdiction to grant orders under the Personal Property Securities Act 1999. It also agreed to recommend that consideration be given to validating orders purportedly made by District Courts pursuant to the Act.

It agreed that, subject to research by the PCO concluding otherwise, the Originating Application procedure in Part IV A of the High Court Rules should apply to all the orders "the Court" is empowered to make under the Personal Property Securities Act to the extent that they are an original application as opposed to a follow up application. This would be achieved by listing the empowering sections of the Personal Property Securities Act in rule 458D(1)(a) with the appropriate qualification.

17. Exchange of Evidence

The Committee considered the various questions posed by Justice Chambers in Evidence/3/02. More particularly, it discussed whether:

- a return to the oral tradition was appropriate;
- supplementary oral evidence should be permitted; and
- briefs of evidence should be replaced with affidavits.

The Committee agreed that recommendation should be made to the Chief Justice and the Chief District Court Judge to seek judicial feedback, at their respective judicial conferences, on the questions raised in Evidence/3/02 and identified above. Justice Chambers agreed to seek similar feedback from the New Zealand Law Society and Bar Association by way of letter.

18. Part IV – procedure in special cases

This matter was deferred to the next Rules Committee meeting.

19. Review of Masters' decisions

The Committee considered the issues raised in Interlocutory Matters/1/02 and Interlocutory Matters/1/03, which concerned the jurisdiction of a Master to review a case management direction given by a Master. The Committee agreed that Mr G E Tanner QC and Justices Chambers and William Young should devise a solution that would permit such review and present that solution for consideration at the next Rules Committee meeting.

20. Payment into Court

The Committee considered Mr Drake's proposed revision to the Calderbank scheme (Payment into Court/6/02).

It agreed that the revised rule should adopt a more generic form, as opposed the use of "plaintiff" and "defendant" in the proposed draft, to ensure the rule applied to all parties to the proceedings. A more generic approach was also needed to ensure the revised rule was not limited to monetary offers.

It agreed with the idea that an offer should still be taken into account when it is "reasonably close" to the judgment amount (see proposed draft rule 48G(3)(b) and (4)(b)).

It agreed that proposed draft rule 48G(4) needed to be more clearly expressed.

The Committee requested that the PCO redraft the Calderbank rule to incorporate the changes above. It proposed that this amendment be included in Omnibus 4.

21. Delivery of Judgments

The Committee discussed the concerns about Rule 540 raised in Judgment/1/03.

Justice Chambers agreed to prepare a draft revision of rule 540 to address the concerns raised by the Chief Justice. It proposed that the Department for Courts be consulted on this matter.

22. Third Party Notices – Summary Judgment

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

23. Contempt – new rules

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

24. Summary Trials

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

25. Case Management

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

26. Small Claims

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

The meeting closed at 3:30pm.

The next meeting will be held on Monday, 7th April 2003.

Heidi Lee
Clerk to the Rules Committee