



## THE RULES COMMITTEE

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Wellington

17 September 2001

Minutes/6/01

### CIRCULAR NO 94 OF 2001

### MINUTES OF THE MEETING HELD ON MONDAY 10 SEPTEMBER 2001

The meeting called by Agenda/6/01 was held in the Chief Justice's chambers, High Court, Wellington on Monday 10 September 2001, commencing at 10:00am.

#### 1. Preliminary

##### 1.1 *In attendance*

The Chief Justice (the Rt Hon Dame Sian Elias, GNZM)  
The Hon Justice Fisher (in the Chair)  
The Hon Justice Wild  
The Hon Justice Chambers  
Master Venning  
Chief District Court Judge Carruthers (until 1pm)  
Judge Doherty  
Judge Jeremy Doogue  
The Solicitor-General (Mr T Arnold, QC)  
Mr R Gill (for the Chief Executive, Department for Courts)  
Mr T Weston QC  
Mr C Finlayson (from 10:30am)  
Mr G Tanner (Chief Parliamentary Counsel)  
Mr K McCarron  
Mr B Stewart (Clerk to the Rules Committee and acting Secretary)

##### 1.2 *Apologies*

The Attorney-General (the Hon Margaret Wilson MP)

### 1.3 *Confirmation of minutes*

The minutes of the meeting held on Monday 30 July 2001 (Minutes/5/01) were taken as an accurate record and were confirmed, subject to the following. At 5.1, the first reference to rule 601 should be a reference to rule 643. At 9.11, whether the rules should define disbursements in more detail is still an open question to be addressed in a paper by Mr Stewart. At 18.2, the last line should read "to make" rather than "of make". At 19.2, the words "in writing" should be deleted.

## 2. **Papers tabled at the meeting**

### 2.1 *By Mr Tanner*

Revised clause 392A of the Crimes (Criminal Appeals) Amendment Bill (please number it Court of Appeal (Criminal) Rules/8/01).

## 3. **Personnel**

- 3.1 The Committee expressed its sympathies for the Secretary, Margaret Soper, and agreed to send her a card wishing her a speedy recovery.
- 3.2 Justice Fisher, owing to his appointment as Executive Judge for Auckland, is to step down from the Committee at the end of this meeting. The Committee expressed its gratitude to Justice Fisher for his service as a member of the Committee for the past six years and as the Chair for the past year. It was noted that Justice Fisher's stewardship of the Committee had brought system and momentum to its work.
- 3.3 The Committee congratulated Justice Chambers on his appointment as Chair of the Committee.
- 3.4 The Committee noted that, given the important role which the Law Society representatives play on the Committee, it would be desirable if one or both of them had alternates. It was thought that the attendance of Mr A Beck in that capacity had worked very well at the last meeting. Mr Weston agreed to raise this matter with the Law Society. It was noted that there might be difficulties with respect to payment of alternates (see s 51B(5) of the Judicature Act 1908), although it may be that other funding could be accessed.
- 3.5 The Committee noted the desirability of having a member of the Court of Appeal on the Committee. The Chief Justice agreed to give this matter further consideration.

## 4. **Matters referred to Parliamentary Counsel for drafting**

### *Third Schedule*

- 4.1 The Committee noted that the amendment to the Third Schedule to allow for preparation time on summary judgment applications will be included with any amendment to the costs rules and will come into effect on 1 January 2002. This item will no longer appear on the agenda.
- 4.2 The Committee deferred any amendment of the provisions relating to disbursements pending further discussion on the topic.

## **5. Districts Courts Subcommittee**

- 5.1 The Committee referred to the proposal, as discussed between Justice Fisher and the Chief District Court Judge, for reorganising the District Courts Subcommittee. The Subcommittee would then be asked to consider the topics of small claims, practice notes, and costs.
- 5.2 The Chief District Court Judge expressed his support for the proposal, subject to further discussions with Executive Judges. It was agreed that the Chief District Court Judge would report back to the Committee once those discussions had taken place.

## **6. Practice Notes in the District Courts**

### *Discussion*

- 6.1 The Committee noted that this project was essentially the same as that which the Committee conducted in relation to practice notes in the High Court, namely an analysis of the extent to which existing practice notes are compatible with the rules.
- 6.2 The Committee thought that it would also be useful to review the District Courts practice notes generally to see whether any needed to be revised or withdrawn.

### *Decision*

- 6.3 Mr Stewart agreed to commence this project once the District Courts Subcommittee reorganization has been implemented.

## **7. Consolidated rules**

### *Discussion*

- 7.1 The Committee discussed the advantages and disadvantages of attempting to consolidate the High Court Rules and the District Court Rules. The principal hurdles were thought to be the different rule making processes which apply to the two sets of rules, and the Committee's inadequate



resources for a project of this scale. Whether there is to be any restructuring of the court system would be another relevant consideration.

*Decision*

7.2 The Committee agreed to suspend this project and raise it for discussion again in one year's time. The item will not appear on the agenda until then.

**8. Appeals to the High Court**

*Discussion*

8.1 The Committee noted that the proposed amendments to the District Courts Act 1947 had the support of the Ministry of Justice and that consultations between the Ministry of Justice and political parties were ongoing. Mr Tanner noted that Parliamentary Counsel had received formal instructions to include the amendments in the Statutes Amendment Bill currently being drafted. That Bill was unlikely to become law until about this time next year.

8.2 It was noted that if the proposed amendments went ahead they would come into effect in approximately 12 months.

*Decision*

8.3 Justice Chambers and Mr Stewart agreed to begin consulting affected courts and tribunals if and when the proposed amendment receives political support.

**9. Validity of rule 61C(6) of the High Court Rules**

*Discussion*

9.1 The Committee discussed whether r 61C(6) is valid and what should be done to fix the rule if it is found to be invalid. The Committee refrained from expressing a view as the validity of the rule, acknowledging only that there is a question in that regard.

9.2 Assuming that the rule is invalid, the Committee thought that it would be desirable to impose some form of check on the right to appeal from a Judge's review of the decision of a Master in Chambers. One possibility was that leave to appeal could only be granted by the High Court.

9.3 Another possibility would be to require the would-be appellant to obtain leave to appeal from the High Court, or, in the event that leave was refused, from the Court of Appeal. A variation thereon was to allow the Court of Appeal to determine such applications on the papers without giving reasons.



- 9.4 A subsidiary question is whether time limits should be imposed upon any right of appeal. In that regard, a useful model is s 24G of the Judicature Act 1908 which relates to appeals from interlocutory decisions in commercial list proceedings.
- 9.5 The Committee noted that these suggestions gave rise to at least two issues. The first issue is whether the suggested check could be imposed through the rules, or whether an amendment to the Judicature Act 1908 was necessary. This turns, in part, upon whether a leave requirement is a matter of practice and procedure. The Committee refrained from expressing a view on this issue. The second issue was whether the Committee should revoke r 61C(6) until the question of its validity has been properly addressed.

***Decision***

- 9.6 The Committee agreed not to revoke the rule at this time.
- 9.7 The Committee agreed to take the following steps in the meantime. The Chair is to write to the President of the Court of Appeal to ask the views of that court's members. The Secretary is to write to the Law Society to ask its views on the question. Mr Stewart is to investigate further the issue of whether a leave requirement can be imposed through the rules. Mr Stewart is also to address the question of what, if any, time limits should be imposed on a right of appeal. Mr Stewart's paper is to be modified accordingly and placed on the website with an invitation for public comment.

**10. Criminal Appeals to the CA**

***Discussion***

- 10.1 Mr Tanner reported that the Crimes (Criminal Appeals) Amendment Bill has been referred back to the Justice and Electoral Committee which was considering a revised new s 392A.
- 10.2 If the revised section is included in the Bill when it goes before Parliament changes will be required to the draft Court of Appeal (Criminal) Rules. In particular, the form will need to accommodate paras (a), (b), (e), and (f) of subs (2). The Committee agreed that the explanatory notes of the form should refer to all the criteria contained in subs (2) and invite submissions on those criteria.

***Decision***

- 10.3 It was agreed that a subcommittee consisting of Justice Fisher, Justice Chambers, Mr Arnold and Mr Tanner would revise the draft Court of Appeal (Criminal) Rules.

10.4 In light of the possibility that further amendments to the rules will be necessitated by changes to the Bill, it was agreed that appeal forms should not be printed until the Bill has been passed.

## 11. Contempt

### *Fine for contempt*

11.1 The Committee noted that Mr Stewart is to consider whether the rules should provide for a fine for contempt. Mr Stewart's paper is to be referred to Judge Doogue for comment.

### *Rule 628 of the District Court Rules*

11.2 The Committee noted that, according to r 628 and the accompanying form(s), an order in the nature of an injunction cannot be enforced unless it is accompanied by a warning as to the consequences of disobeying the order. One practitioner has expressed the concern that this requirement is not conspicuous enough and can be easily overlooked.

11.3 The Committee agreed that Secretary would write to the editors of Butterworths *District Courts Practice (Civil)* and Brookers *District Courts Procedure*, bringing the matter to their attention. No further action would be taken by the Committee.

## 12. Costs

### *Costs against barristers and solicitors*

12.1 Mr Stewart agreed to report back to the Committee at its next meeting with a summary of any feedback received on this topic.

### *Costs for lay litigants*

12.2 Mr Finlayson agreed to consult with the Law Society on this topic, both in relation to whether unrepresented lay litigants should be able to recover party and party costs, and in relation to whether unrepresented solicitor litigants should be able to recover party and party costs.

### *Disbursements*

12.3 Mr Gill reported that the High Court Registrars had expressed no concerns in relation to the costs provisions dealing with disbursements. The Committee noted that Mr Stewart is preparing a paper on this topic for the next meeting.

### *Mediator's fees as disbursements*

- 12.4 The Committee noted that the Secretary had written to the Alternative Dispute Resolution Committee of the Law Society asking for comment on the Committee's consultation paper published on the website. Mr Stewart agreed to report back to the Committee at its next meeting with a summary of any feedback received on this topic.

*Update of the Witnesses and Interpreters Fees Regulations 1974*

- 12.5 The Committee noted Mr Stewart is to address this topic in his paper on disbursements.

*Consultations over scale revision*

- 12.6 The Committee noted that the deadline for receipt of submissions on this topic is 31 October 2001.

**13. Habeas Corpus Act 2001**

*Discussion*

- 13.1 The Committee considered what, if any, amendments to Part IVA of the High Court Rules were required in order to make the rules consistent with the Habeas Corpus Act 2001.
- 13.2 In the event that amendments are required, the Committee considered whether they should be effected by means of a new Part IVB dealing with originating applications on habeas corpus applications, or whether to amend the existing Part IVA.

*Decision*

- 13.3 The Committee agreed that any amendments necessitated by the Habeas Corpus Act should be effected by means of an amendment to Part IVA. In particular, r 458D should state which rules under Part IVA apply to applications under the Habeas Corpus Act. Mr Finlayson agreed to consider how the rule should be worded.

**14. Rule 458D of the High Court Rules**

*Discussion*

- 14.1 In the course of discussing the need for an amendment to Part IVA to allow for applications under the Habeas Corpus Act, the Committee also discussed the adequacy of r 458D in general.
- 14.2 In particular, the Committee noted the concern that it was not always clear whether certain types of proceedings should be brought by way of originating application. The failure to specifically provide for some types of



proceedings in r 458D(1) made it necessary to have a hearing to determine whether they come within r 458D(1)(e).

### ***Decision***

14.3 Justice Wild and Master Venning agreed to conduct a review of r 458D in order to determine whether to add more types of proceedings to those listed in subs (1). Members of the Committee agreed that they would bring to Justice Wild's attention any specific examples of which were aware.

## **15. Electronic transactions**

15.1 Mr Finlayson noted that he would soon be meeting with persons in the Australian court system to consult with them in relation to electronic transactions. It was agreed that Mr Finlayson would report back to the Committee at its next meeting.

15.2 Mr Gill reported that the Department for Courts anticipates having implemented the technical infrastructure for the initial stages of the new case management system by July 2002. Mr Gill agreed to report back to the Committee at its next meeting on the likely timeframe for implementation of the infrastructure necessary for electronic filing.

## **16. Criminal appeals in the High Court**

16.1 Mr McCarron noted that recommendations for the Chief Justice are still being prepared.

## **17. Expert Witnesses**

17.1 The Committee noted that copies of the revised draft rules were to have been sent to Heads of Benches with a covering letter. The minutes do not show whether this has been done. Mr Weston agreed to consult with the Secretary in that regard and, if necessary, to ensure that the necessary letters are sent before the next meeting.

17.2 Mr Stewart reported that the second discussion paper has been uploaded to the website. Mr Stewart agreed to check whether this paper contains the revised draft rules.

## **18. Website and public consultation**

18.1 The Committee noted that the format and content of the website have been significantly improved. Mr Stewart agreed to consult with relevant persons in the Department for Courts in regards to making relevant legislation available on the website, and in regards to monitoring the number of visitors to the site.

- 18.2 While noting that the website will be a very useful mechanism for soliciting comment on proposed rule changes, the Committee agreed that usually it will still be necessary to contact particular persons and bodies directly. The Committee also agreed that the Chair should provide *Lawtalk* with a regular update of the Committee's work.
- 18.3 The Chief Justice agreed to include a similar update in her newsletter to the judiciary. The Committee agreed that the Clerk should prepare the relevant text in consultation with the Chair. Mr Stewart agreed to contact the Chief District Court Judge to see whether he would be willing to include a similar column in his newsletter.

## **19. Funding of the Rules Committee**

- 19.1 The Committee discussed the background to this issue and noted that there were two ways to approach the funding of the Rules Committee. The first approach would be for the Rules Committee to administer its own budget autonomously. The second approach would be the budget to continue to be administered by the Department for Courts. If the second approach were retained, it would be necessary for the responsible persons in the Department for Courts to consult closely with the Chair of the Committee.
- 19.2 Mr Gill agreed to speak with the responsible persons in the Department for Courts and report back to the Committee at its next meeting.

## **20. Nonsuit and discontinuance**

- 20.1 The Committee noted that Mr Stewart is preparing a paper on this topic for the next meeting.

## **21. Practice notes**

- 21.1 Master Venning reported that the National Caseflow Management Committee has agreed in principle to the Rules Committee providing in the rules for judicial conferences, costs at judicial conferences, and setting down cases for hearing. The Practice Notes Subcommittee of the Rules Committee has begun the exercise of drafting these rules.
- 21.2 Mr Tanner agreed that, once the draft rules are completed, he would refer a copy of them to the National Caseflow Management Committee with the aim of receiving that Committee's comments before the next meeting.
- 21.3 Mr Tanner also agreed to refer a copy of the completed draft rules to Judge Doogue so that he can give consideration to whether they can be adapted to the District Court Rules.

## **22. Admiralty Rules – joint committee with Australia**

22.2 Mr Finlayson agreed to report back to the Committee at its next meeting in respect of the proposed amendments. The joint committee with Australia is a project for the longer term.

**23. Summary judgment by a defendant on a particular cause of action**

23.1 Mr Finlayson agreed to update his paper in light of the *Kembler* decision.

**24. Summary trials**

24.1 The Committee noted that Mr Stewart is conducting further research on this topic and hopes to have a paper ready by the next meeting.

**25. Rules relating to mentally disordered persons**

25.1 The Committee noted that Justice Chambers, Judge Doogue and Mr Stewart are preparing a paper on this topic for the next meeting.

**26. Defamation Act 1992 and rule 285 of the High Court Rules**

26.1 The Committee noted that it had received no response from the practitioner(s) who were consulted in relation to an amendment to rule 285.

26.2 Mr Weston agreed to prepare a paper on this topic for the next meeting.

**27. Insolvency Rules**

27.1 The Committee discussed Master Gambrill's decision in *Palmer v Harts Contributory Mortgages Nominee Co Ltd* and the points raised therein.

27.2 The Committee agreed to amend form 92 of the First Schedule to the High Court Rules by inserting the word "witness" before the words "(Deputy) Registrar". Mr Tanner agreed to implement the amendment and Master Venning agreed to write to Master Gambrill informing her of the Committee's decision.

**28. Issue of Judgments and rule 540 of the High Court Rules**

28.1 The Committee noted that it was conducting a survey of practitioners and Judges' and Masters' Associates to determine how well r 540 is working in practice. Justice Chambers reported that responses received so far had been positive and that they had offered some constructive suggestions.

28.2 Justice Chambers and Mr Stewart agreed to report back to the Committee at its next meeting on the results of the survey

**29. Rules Committee Manual**



- 29.1 Mr Stewart agreed to update the manual to incorporate a section on the reviewability of rules of court.

### **30. Arbitration Rules**

#### *Discussion*

- 30.1 The Committee noted that Part 17 of the High Court Rules omits rules providing for the enforcement of interim relief orders made by an arbitrator. The Committee noted that the omission may have been intentional; Part 17 does not purport to cover every application under the Arbitration Act.
- 30.2 The Committee agreed that there were two issues to be addressed. The first issue is whether Part 17 should contain rules for enforcing an arbitrator's interim orders. In the event that it is decided that such rules are unnecessary, the second issue is whether Part 17 should direct readers to other legislative sources which may be relevant to enforcement.

#### *Decision*

- 30.3 Justice Wild agreed to conduct further research on this topic.

### **31. General Business**

- 31.1 The Committee agreed that the Secretary should consider whether a system can be put in place which would advise members when Committee papers are no longer necessary and may be disposed of.

The meeting closed at 2pm.

The next meeting will be held on Monday 15 October 2001.

Secretary.