



## THE RULES COMMITTEE

P.O. Box 2750 DX SP 24007

Telephone 64-4-918 8873

Facsimile 64-4-918 8712

Wellington

12 February 2002

Minutes/1/02

### **CIRCULAR NO 9 OF 2002**

#### **Minutes of the Meeting held on Monday 11 February 2002**

The meeting called by Agenda/1/01 was held in the Chief Justice's Chambers, High Court, Wellington on Monday 11 February 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) (until 12.15pm  
and from 1:35pm to 2pm)  
The Hon Justice William Young  
Master Venning  
Judge Doherty  
Mr. G E Tanner (Chief Parliamentary Counsel)  
Mr. T C Weston QC (from 10:25am)  
Mr. C Finlayson (until 1:05pm)  
Mr. K McCarron (for the Chief Justice)  
Mr. H Hoffmann (from the Parliamentary Counsel Office for item on  
High Court Amendment Rules (No 2) 2002)  
Mr. D Dugdale (from the Law Commission for item on Discovery)  
Mr. J Drake (Clerk to the Rules Committee)  
Mr. B Hesketh (Secretary to the Rules Committee)

##### *1.2 Apologies*

The Hon Justice Wild  
Chief District Court Judge Carruthers  
Judge J P Doogue

The Solicitor General (Mr. T Arnold QC)  
Mr. R Gill

1.3 *Confirmation of Minutes*

The last paragraph in item 12 of Minutes/8/01 contained a typographical error in that it referred to "Chief District Court Judge Young". This was corrected to "Chief District Court Judge Carruthers". Subject to the above, the minutes of the meeting held on Monday, 12 November 2001 were taken as an accurate record and were confirmed.

**2. Papers tabled at the meeting**

- 2.1 No further papers were tabled at the meeting (aside from those already circulated as per Agenda/1/01).

**3. Discussion of Committee Role/Function**

- 3.1 Mr. Finlayson raised the issue of the Committee's workload and function. Concern was expressed that the Committee was being weighed down with minutiae and ran the risk of losing sight of the "big picture".

It was noted that most of the extra workload was the result of new statutes being passed or amended requiring consequential attention from the Committee.

The Committee decided to consider at its next meeting whether there was a need for a fundamental review of court rules and procedure. Mr. Finlayson agreed to prepare a comparative overview of rule structures in other jurisdictions.

**4. Personnel**

- 4.1 The Committee welcomed Mr. Drake in his role as Clerk to the Rules Committee.
- 4.2 The Committee welcomed Mr. Hesketh in his role as Secretary to the Rules Committee.

**5. Matters referred to Parliamentary Counsel for drafting**

- 5.1 *High Court Amendment Rules 2002 and District Courts Amendment Rules 2002 (Omnibus 1)*

The Committee noted that draft rules currently out for consultation and submissions were due by 1 March 2002.

The Committee asked Mr. Drake to prepare a summary of the submissions received which would be considered at the next Committee meeting on 11 March 2002.

## 5.2 *Other Proposed Amendments (Omnibus 2)*

The Committee considered a number of other proposed amendments to the High Court Rules and the District Courts Rules.

It was agreed that these amendments would be considered as a package and that the following timeline would apply.

- Today: after discussion, refer draft rules to PCO for further amendment.
- 11 March: consider at meeting such amendments as PCO has been able to redraft by then.
- 28 March: PCO to provide to clerk such amendments as have been finally drafted (in the form of High Court Amendment Rules (No 2) 2002 and District Courts Amendment Rules (No 2) 2002) (Omnibus 2).
- 5 April: clerk to prepare consultation paper to accompany Omnibus 2.
- 8 April: consider at meeting consultation paper and Omnibus 2.
- 10 April: secretary to distribute consultation paper and Omnibus 2 (with amendments if any) to interested parties for consultation.
- 24 May: closing date for submissions.
- 31 May: clerk to prepare paper summarising submissions and suggesting changes (if any) to Omnibus 2.
- 5 June: consider at meeting clerk's paper and submissions and make decisions on final form of Omnibus 2.

### 5.2.1 *High Court Amendment Rules (No 2) 2002 (PCO 4544/1: Discontinuance and Non-Suit)*

The Committee's attention was drawn to the proposed Rule 475 which outlined the procedure to be followed in the event of a plaintiff deciding to discontinue proceedings. The proposed Rule 475 required that a *notice* of discontinuance be filed in the Court and a copy served on every other party to the proceedings. This is different from the current Rule 474 which requires only that a *memorandum* of discontinuance be filed and a copy served. That change in current practise was agreed.

The Committee considered that a change should be made to the proposed Rule 475. Delete "or after trial" and substitute "judgment is given" or words to that effect. In the case of an oral judgment, the plaintiff should not be able to discontinue after the judge has started to deliver his or her judgment.

No other changes to the draft rules are required at this stage. The Committee noted however, that the consultation paper for Omnibus 2 should specifically raise the following questions:

- (a) Should a plaintiff be able to discontinue after the trial has commenced
  - (i) at all? or
  - (ii) only with leave?

(The Current draft permits discontinuance as of right, subject only to r 476.)

- (b) Is r 476B appropriate or should a plaintiff, provided he or she pays costs on the discontinuance, be able to file a new proceeding as of right?
- (c) If r 476B is maintained, should the rules provide guidelines as to how the court's discretion is to be exercised?
- (d) What should be the status of any proceeding filed after a discontinuance? Is it a continuation of the discontinued proceeding or is it a new proceeding? Should the rules specify which?

#### 5.2.2 *High Court Amendment Rules (No 3) 2002 (PCO4230/3: Case Management)*

The Committee noted that there were two issues here: the "setting down rules" and the "case management" rules.

The Committee decided that 425(c) of the existing Rules should be omitted from the proposed Rules but that this was to be highlighted in the Consultation Paper.

The Committee decided to amend r 426 by adding:

- (4) If the Court allocates a hearing date for a proceeding but fails, through oversight or otherwise, to give a direction under subclause (1) or to fix any other setting down date under subclause (3)(b), then the proceeding, for the purposes of these Rules, is deemed to have been set down for hearing on the later of -----
  - (a) the date on which the Court allocates a hearing date; and
  - (b) the date 12 weeks before the allocated hearing date.

The Committee decided to delete Rule 427 because Rules 478 (and 477) combined with the case management system adequately dealt with it. This would be highlighted in the Consultation Paper.

The Committee decided to delete proposed Rules 429 and 430 but to highlight this decision in the Consultation Paper.

The Committee decided to delete the words "that has been allocated a hearing date" from the proposed rule 431.

The Committee decided to delete proposed Rule 433(3).

The Committee decided to amend proposed Rule 442(1) by deleting 442(1)(b) and adding words to the effect that "And the judge considers it appropriate". The Committee decided to amend r 442(3) by adding the words "attempt to" before "settle".

Justice Chambers produced a draft he had prepared on Interlocutory Orders. He generally felt that the current Rules still do not reflect current practice regarding interlocutory matters, even after these planned amendments. Justice Chambers agreed to discuss this with Master Venning. They will bring a proper discussion paper for consideration at the next meeting.

#### 5.2.3 *High Court Amendment Rules (No 4) 2002 (PCO 4493/1:Disbursements)*

The Committee considered the proposed Rules and agreed to include them in their next consultation paper when it was released.

## **6. Discovery**

The Committee welcomed Mr. Dugdale and considered the Law Commission's report.

Mr. Dugdale indicated that he would consider the Committee's views. The Law Commission would finalise its report in the next week or so.

Justice Chambers thanked Mr. Dugdale and the Law Commission for their assistance on this topic.

The matter will return to the agenda next month for discussion of the Law Commission's report in its final form and for the draft amended rules.

## **7. Admiralty**

The Committee considered Admiralty/1/02. It was decided to adopt the recommendations made in it and the matter was referred to the Chief Parliamentary Counsel for incorporation into Omnibus 2.

## **8. Rules for mentally disordered persons and minors**

The Committee considered Mentally Disordered Persons/1/02. The question of whether a minor could conduct litigation in his/her own name was raised. It was decided that Mr. Drake would prepare a paper for the next meeting looking into this matter in order to determine whether as a matter of law, minors could ever conduct litigation in their own name. It was suggested that it might be appropriate to redraft proposed rule currently numbered r 2(3).

In the meantime, the draft rules were referred to PCO for inclusion in Omnibus 2.

## **9. Parties (Authority to File Documents)**

The Committee considered Parties/1/02. This issue concerned the position whereby an insurance company, having a contract of indemnity with an insured, is currently unable to use its own in-house lawyer in litigation because Rule 42 does not give the in-house lawyer authority to file documents.

The Committee accepted the recommendation in Parties/1/02 but adding the words "in New Zealand" after the words "principal legal advisor" in both Rule 41(e)(ii) and proposed Rule 42(f). The matter was referred to the Chief Parliamentary Counsel for inclusion in Omnibus 2.

Mr. Drake was asked to write to Mr. Asher QC thanking him for bringing this problem to our attention and advising him of the proposed solution.

## **10. Construction Contracts**

The Committee considered Construction Contracts/1/02. The Committee noted that it would not have jurisdiction to make rules for the District Courts under the proposed Construction Contracts Bill.

The Committee also noted s50A(2) which provided for an application to enforce an adjudicator's determination to be made to "any court of competent jurisdiction". The problem is that the Bill does not state what courts are to have jurisdiction (or "competence") in this regard. Although this is a matter for Parliament, not the Rules Committee, the Committee considered Parliament had three options:

- (a) it could nominate the High Court, by analogy with the enforcement of arbitrators' awards under the Arbitration Act 1996;
- (b) it could nominate the District Court, on the basis that the Courts would have exclusive jurisdiction in respect of challenges to adjudicators' awards; or
- (c) it could nominate the District Court for awards up to \$200,000 and the High Court for all other determinations.

The Committee considered (b) the most sensible option, and asked Mr. Drake to write to the Ministry of Economic Development to advise that view.

The Committee agreed that it could do nothing further on the issue until the jurisdiction issues were resolved.

Mr. Drake agreed to follow up this matter with the Ministry of Economic Development.

#### **11. Appeals to the High Court**

The Committee considered the Chief Parliamentary Counsel's report and noted that the Statutes Amendment Bill, including the new Part 5 to the District Courts Act 1947, was introduced into Parliament last year but had not yet had its first reading. It was decided that this matter would come back on the agenda when there was further progress.

#### **12. Insolvency**

The Committee considered Master Venning's report (Insolvency/1/02) on the proposed changes to Part XV of the Insolvency Act. It agreed with the report's conclusions that it would be more appropriate for this matter to be dealt with by Parliament as the changes necessitated substantial legislative reform.

The Committee noted that no further action was required of it on this issue.

#### **13. Costs for Lay Litigants**

This matter was adjourned until the next meeting to allow the Chief Justice to contribute to the discussion. The Committee noted that Costs/7/01 was to be discussed at the next meeting. As the Wellington and Christchurch High Court Judges had discussed the matter, Justice Wild and Master Venning would advise of those judges' views at the next meeting.

#### **14. Small Claims**

Justice Chambers reported back on his informal discussions with Justice Robertson of the Law Commission. The Commission would be prepared to consider how small claims should be dealt with in the District Court. The Committee asked Justice Chambers to write to Justice Robertson formally to ask the Law Commission to undertake this study.

#### **15. Rulemaking for the District Court**

Judge Doherty reported to the Committee that on the issue of whether the Rules Committee should have general jurisdiction to make rules for the District Courts, the initial response was that it should. However, the Chief District Court Judge wanted to consult further with Executive Judges before a

formal response was given. The District Courts Civil Committee was meeting on Friday 15<sup>th</sup> February. Judge Doherty would report back after that.

The Committee agreed to consider the matter at its next meeting.

**16. District Courts Subcommittee**

The Committee noted that the New Zealand Law Society had nominated as its representatives Keith de Ridder and Paul Chisnall. Their appointment would be confirmed as soon as they were approved by the Chief Justice and the Chief District Court Judge. Mr. McCarron agreed to liaise with the Chief Justice and Chief District Court Judge on this matter and report back to Mr. Drake

Mr. Drake agreed to follow up with Mr. Gill progress on airfares (if required) and meeting fees for the Law Society's representatives on the subcommittee.

Judge Doherty reported that a District Court research counsel would be available to prepare minutes and perform associated tasks for the subcommittee.

The Committee noted that the subcommittee's first tasks would be the issues of case management and its relationship with the District Courts Rules, incorporating practice notes into the District Courts Rules, and costs.

**17. Summary Judgment by defendant on a particular cause of action**

The Committee agreed to put the matter on the next agenda to allow Mr. Finlayson to address the Committee.

**18. Contempt – new Rules**

Deferred to the next meeting.

**19. Part IV – procedure in special cases**

The Committee noted that Mr. Drake had prepared a paper on this subject but as it had not had time to consider it, the matter would be placed on the next meeting's agenda.

**20. Arbitration**

As Justice Wild has sent his apologies, the Committee agreed to put this on the next meeting's agenda.

**21. Summary Trials**

No progress on this matter.

**22. Manual and Public Relations**

Mr. Drake informed the Committee that articles providing updates as to what the Committee was doing had appeared in recent issues of *LawTalk* magazine. Work on updating the manual would be commenced and the website updated.

**23. General – Registry Hours**

The Committee considered a proposal (General/1/02) to close the various Registries for one hour on Friday mornings for training purposes. The Committee considered the matter and asked Mr. McCarron to obtain a formal response from the Chief Justice and Executive Justices on the proposal. The matter was to be further considered at the Committee's next meeting.

The meeting closed at 3.05pm

The next meeting will be held on Monday 11 March 2002.

Justin Drake  
Clerk to the Rules Committee