



THE RULES COMMITTEE

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28 August 2003

Minutes/5/03

CIRCULAR NO 71 OF 2002

Minutes of the Meeting held on Monday, 25th August 2003

The meeting called by Agenda/5/03 was held in the Chief Justice's Chambers, High Court, Wellington, on Monday, 25th August 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) (until 2.45pm)
The Hon Justice Baragwanath
The Hon Justice Venning
Judge Doherty
Judge Joyce QC
The Solicitor-General (Mr. T Arnold QC) (until 2.30 pm)
Chief Parliamentary Counsel (Mr. G E Tanner QC)
Mr. H Hoffmann (until 11.30 am)
Mr. T C Weston QC (until 2.15 pm)
Mr. K McCarron (for the Chief Justice)
Mr. R Gill (from 12.10pm)
Miss. H Lee (Clerk to the Rules Committee)

1.2 Apologies

The Hon Justice William Young
Mr. C Finlayson

Mr. R Gill (for the morning)

1.3 *Confirmation of Minutes*

The fourth paragraph on page 5 of Minutes/4/03 contained a typographical error in that it referred to "rule 542". This was corrected to read "rule 540".

The second paragraph of page 6 incorrectly identified the HCR equivalent to the DCR to be amended in Omnibus 4. This was corrected by deleting the words ", which involve equivalent amendments to those made to HCR 42A, 307 and 520 to 524 in the High Court Amendment Rules 2003 and the High Court Amendment Rules (No 2) 2003".

The circular reference in the third full paragraph on page 7 was updated to read "Construction Contracts/2/03" instead of "Construction Contracts/X/03".

Subject to the above, the minutes of the meeting held on Monday, 30th June 2003 were taken as an accurate record and were confirmed.

1.4 *Matters Arising*

The Chairman drew the members' attention to the dates for next year's Rules Committee meetings (General/5/03). The meeting dates are:

16 February
5 April
24 May
12 July
6 September
18 October
6 December

2. Papers tabled at the meeting

Justice Chambers tabled Amendments/12/03 and Amendments/13/03.

Hugo Hoffmann tabled Amendments/14/03.

Justice Baragwanath tabled General/6/03

3. Omnibus 3

Justice Chambers thanked PCO for their work on Omnibus 3 especially in light of its heavy workload.

The Committee considered the latest draft of the High Court Amendment Rules 2003 (Amendments/10/03, PCO 4230/15). Justice Chambers highlighted the changes made, or required to be made, to the High Court Amendment Rules since they were considered at the last meeting (Amendments/7/03):

- Paragraph (a) of proposed rule 249(2) has been deleted because there was no substantive difference between paragraphs (a) and (b) of that sub-rule.
- A number of amendments needed to be made to: 1) address inconsistencies between Part 17 of the High Court Rules and High Court Amendment Rules; and 2) avoid disrupting the current fees regime. For these purposes, the Committee adopted, subject to minor alterations discussed below, the amendments contained in Amendments/14/03 (a revision of the amendments contained in Amendments/13/03). The amendment to proposed rule 426 will assist in clarifying the meaning of 'appeal' and to ensure that arbitration appeals fall within the swift track. The amendments to proposed rule 430 allow it to be applied to arbitration appeals and permits the deletion of HCR 885. The Committee agreed that proposed rule 430, as it appears in Amendments/14/03, should be further amended as follows: 1) delete the content of sub-rule (7)(b) and substitute "fixing the setting down date for the appeal"; and 2) delete sub-rule (7)(c)(i) and insert a new sub-rule dealing with cross-appeals under both Parts 10 and 17.
- Proposed rule 703, dealing with applications for leave to appeal, has been inserted (see further Appeals/2/03). This new rule requires a consequential amendment to the definition of 'decision-maker' in proposed rule 702.
- Proposed rule 705A, simplifying when the time starts running for appeal purposes, has been inserted. This amendment will achieve simplicity and, once Omnibus 4 is introduced, uniformity with the Court of Appeal appeal process. Judge Joyce noted that there is often a significant delay in the District Courts between the giving of an oral decision and the written version of that decision becoming available. The Committee agreed that proposed rule 705 was, nonetheless, appropriate because the rules compensated for any harsh application by providing for an open ended extension period.

The Chief Justice queried when the setting down fee should be paid. The Committee noted that the fixing of the setting down date is within the discretion of the Court. The Committee agreed that the time of payment of the setting down fee was to be changed this would be best achieved by an amendment to the High Court Fees Regulations 2001.

Justice Baragwanath noted that s 300(2) of the Resource Management Act 1991 requires appeals to be filed in the Wellington registry of the High Court. Justice Chambers undertook to consult with the Principal Environment Court Judge as to whether there is any good reason for this requirement. If there is not, Miss Lee will prepare a short paper setting out a case for statutory reform.

Some concern was expressed about the length of time between the anticipated availability of concurrence copies of the High Court Amendment Rules and the commencement date of those rules. It was suggested that text writers and practitioners needed to have more time to consider the rules before they came into force. For this reason the commencement date for the High Court Amendment Rules was set for 3 November 2003 instead of 23 October 2003.

Miss Lee undertook to liaise with Mr Weston as to the format and appropriate date for publication in Law Talk of the article explaining the proposed amendments.

4. Omnibus 4

The Committee considered Amendments/11/03. Justice Chambers noted that there had been no amendments other than those identified at the last meeting.

Justice Baragwanath suggested that proposed rule 542(2), which states that no step may be taken on a judgment before it has been sealed, may be too absolute. He contended that there should be an exception for, for example, cases of emergency. The Committee agreed that proposed rule 542(2) should be amended by adding the words "except as the Court otherwise directs". It directed that this amendment be highlighted in the consultation paper.

Justice Baragwanath expressed concern that proposed rule 540 was not sufficiently flexible. A countervailing concern was that any exception to proposed rule 540 would undermine the purpose of the rule: to make the delivery of judgment a Registry function. The Committee agreed that the consultation paper should ask whether rule 540 is too much of a 'straight jacket' and whether it should be subject to the Court having power to nominate a different delivery time.

The Committee considered the query raised by Justice Chambers in Amendments/12/03: whether the redraft of proposed rule 522 addresses situations where, for example, a foreign country has no law providing for the administration of an oath or affirmation. The Committee acknowledged that it was not in a position to dictate what form evidence should take. It agreed that current draft of proposed rule 522 should be retained for consultation purposes but that the opinion of evidence law academics should be sought.

The Committee agreed to the following timetable:

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| 15 Sept | PCO have draft of High Court Amendment Rules (No. 2) 2003 and Court of Appeal (Civil) Amendment Rules 2003 available. Miss Lee to have draft consultation paper available. (If a member has further suggestions as to the content of the consultation paper these should be directed to Miss Lee.) |
| 19 Sept | Release draft amendments together with consultation paper. |

3 Nov Deadline for submissions.
10 Nov Rules Committee to consider submissions.

5. Consultation

Ms Cheryl Gwyn, Deputy Secretary of Justice, and Dr Jo Lake, General Manager, Higher Courts Unit, attended the meeting to discuss the delay in the commencement of the High Court Amendment Rules 2003 brought about by the further consultation being undertaken by the Ministry of Justice with various governmental agencies. The Chief Justice expressed concern about this further consultation. She referred to the constitutional principle that it is the judiciary's role to make decisions concerning the practice and procedure of the courts and that the Cabinet should confine its scrutiny of Rules Committee processes to matters of public policy that extend beyond the immediate workings of the Court. The Chief Justice invited a representative from the Ministry to attend the Rules Committee meetings so that the Ministry remains informed of planned amendments to the rules. Such a representative could also assist the Committee in identifying the relevant agencies with which consultation should be made in the first instance.

Ms Gwyn informed the Committee that the planned consultation process would not be lengthy. She advised the Committee that the consultation with governmental agencies was being undertaken in the present case because of the proposed changes to Part 10. Ms Gwyn undertook to raise with Ms Belinda Clark, the new Secretary for Justice, the selection of a delegate to attend the Rules Committee meetings.

The Committee noted that the Rules Committee correspondence is sent to the Ministry.

6. District Courts Omnibus

The Committee agreed that, particularly in light of the Law Commission's workshop papers considered at the last meeting, it would be inappropriate to introduce into the DCR amendments equivalent to those contained in Omnibuses 3 and 4 without first considering how those amendments would tie in with a small claims procedure for the District Courts. The Committee, therefore, agreed that a 'full package' consultation paper should be drafted addressing the following matters:

- 1) suggestions for the treatment of small claims;
- 2) the application of case management rules for both small claims and 'big claims'; and
- 3) the application of the other relevant parts of Omnibus 3 and 4 for both small claims and 'big claims'.

The consultation paper should provide a 'roadmap' for small claims procedure in the District Courts. Rather than detailing individual rules, it should propose a model for small claims procedure. Possible models include that described in

the Law Commission's workshop paper (General/2/03) or a summary trial procedure (see item 9 of these minutes). (At this stage, the Committee agreed that DCR for 'big claims' should be as close as possible to the HCR.) If, after wide consultation, the chosen model is generally accepted, PCO will then draft the necessary rules.

The Committee agreed that, ideally, Judges Doherty and Joyce, together with Miss Lee, should prepare the consultation paper. Contingent upon Judges Doherty and Joyce being released for this purpose, the consultation paper should be presented for consideration at the Rules Committee meeting on 10 November.

7. Admiralty

Justice Chambers explained that the Committee did not have jurisdiction to amend the District Courts (Admiralty) Rules 1976. The Committee agreed that Miss Lee should draft a letter to the Ministry of Justice, explaining that admiralty rules have been drafted and asking whether the Ministry would like the Committee, as part of the District Courts consultation paper, to conduct consultation on those rules on its behalf.

8. Originating Application - Counter-Terrorism Bill

The Committee considered the letter from Mr Phil Divett, Ministry of Justice, (Originating Application/1/03) the relevant provision of the Counter-Terrorism Bill (proposed s 47E(2) of the Terrorism Suppression Act 2002) and the equivalent provision in the Border Security Bill (proposed s 166E(2) of the Customs and Excise Act 1996). Those provisions concern applications for extension of the 7-day 'investigation period'. The Committee agreed that the originating application procedure should apply to such applications and that HCR 458D should be amended accordingly.

The Committee directed Miss Lee to draft a letter to Mr Divett conveying the Committee's decision to amend HCR 458D as requested once the Bills were passed.

9. Summary Trial

Justice Chambers referred the members to Mr Drake's paper summarising the Summary Trial process (Summary Trial/1/02), and briefly explained that procedure himself.

The Committee concluded that, for the purposes of practice and procedure the High Court, the summary trial process was inappropriate.

Nonetheless, the Committee agreed that the summary trial process should be considered as a possible model for small claims in the District Courts.

10. Alternative Dispute Resolution

The Committee discussed the appropriate role of the judge in settlement conferences and caucusing.

The Solicitor-General undertook to ask Robert Dobson QC, President of the NZ Bar Association, for a written summary of the discussions on settlement conferences and caucusing that took place at the recent Bar Association Conference. The response should be forwarded to the Chief Justice who would decide whether there should be further discussion with the judiciary and or whether the Committee needs to engage in consultation on these matters. Judge Doherty asked that the Chief District Court Judge be included in this process.

11. Arbitration

The Committee considered Miss Lee's memorandum concerning the validity of various criticisms of Part 17 of the HCR in *Sim's Court Practice* ('Sims').

The Committee agreed that the use of the terminology of 'plaintiff' and 'defendant' for appeals under cl 5 of the Second Schedule of the Arbitration Act 1996 ('arbitration appeals') did not need to be changed.

The Committee reached a preliminary view that the notice of opposition (see HCR 883) is an unnecessary document for arbitration appeals. It agreed that the refining of issues should be dealt with at the case management conference, as is the case with Part 10 appeals.

The Committee considered the wording of HCR 887(2). Justice Chambers noted that, at the time of drafting Part 17, the intention was to maintain a neutral position as to whether 'no evidence' for a factual finding constituted a 'question of law'. At the same time, the Committee had thought that the Court needed to have the power to order the transcription of evidence for an arbitration appeal. In light of a recent High Court decision, however, the Committee now considered that HCR 887(2) needed amendment. It agreed that paragraphs (a) and (b) in that sub-rule should be conflated and that the Court simply be given power to order that a transcript be made. The Committee decided that this amendment should be included in Omnibus 3.

The Committee considered whether it was appropriate that arbitration appeals should be by way of rehearing (see HCR 889(1)). It formed the tentative view that HCR 889(1) should simply be deleted. However, the Committee agreed that Miss Lee should further research the meaning of an 'appeal by way of rehearing' so that the possible deletion of r 889(1) could be properly explained.

Justice Baragwanath identified three principles relating to HCR 889(2) and the argument in *Sim's* that that rule did not actually empower the Court to make suppression orders for the purpose of an arbitration appeal: 1) justice should be done in public; 2) arbitration is usually a private matter; 3) the nature of the High Court's inherent jurisdiction (item 12 of these minutes). Miss Lee undertook to review *Television New Zealand Ltd v Langley Productions Ltd* [2000] 2 NZLR 250, which addresses these principles. The Committee agreed

that this matter should be considered further at the next meeting together with the substance of item 12 of these minutes.

With the exception of the amendment to HCR 887(2), the Committee agreed that the proposed amendments to Part 17 should eventually form part of Omnibus 5.

12. Inherent jurisdiction

Justice Baragwanath spoke to his memorandum concerning the inherent powers of the High Court (General/6/03). Upon the Chief Justice's request, this matter was deferred for consideration at the next meeting to allow: 1) the members to give this matter further thought; and 2) discussion of the matter with judges of the Court of Appeal.

13. Weathertight Homes Resolution Services Act 2002

Due to delays and lack of drafting resources in the Department of Internal Affairs the Committee agreed that Miss Lee should draft the rules required by the Weathertight Resolution Services Act 2002 and send the draft rules to Judges Doherty and Joyce for their consideration and input. The Committee considered it would be unnecessary to consult on these rules.

14. Construction Contracts Act 2002

Judge Doherty, on behalf of the District Courts Subcommittee, agreed to review the draft rules contained in Construction Contracts/2/03. The Subcommittee's comments should be sent to PCO so that a revised draft could be sent to the Ministry for Economic Development for consideration.

15. Personal Property Securities Act

The Committee directed Miss Lee to draft a letter to Ms Gwyn asking that the Ministry of Justice consider including in the Judicial Matters Bill an amendment to s 26I of the Judicature Act 1908 authorising Masters to grant orders under the Personal Property Securities Act 1999.

16. Rule Making for the District Courts

The Chief Parliamentary Counsel noted that, despite much correspondence between the Ministry of Justice and the Committee, little progress had been made on this matter. He considered that the Committee should promote an amendment to s 122 of the District Courts Act 1947 equivalent to s 51 C of the Judicature Act 1908. In light of a discussion he had had with Ms Gwyn, he suggested that the best way forward would be for Miss Lee to prepare a paper identifying all the Acts that confer a power to make rules for the District Courts other than the District Courts Act. The paper should also identify whether there are any special reasons making the Executive, as opposed to the Rules Committee, the appropriate rule-making body. The analysis of the

relevant Acts should identify the responsible Department to facilitate any necessary consultation.

The Committee agreed with the Chief Parliamentary Counsel's suggestion and directed Miss Lee to prepare the suggested paper for consideration at the next meeting.

17. Reform of the High Court Rules

The Committee agreed that further consideration of reform of the High Court Rules should be delayed while the District Courts Omnibus is being prepared.

18. High Court Criminal Rules

This matter was deferred to the next Rules Committee meeting.

19. Contempt – new rules

This matter was deferred to the next Rules Committee meeting.

20. Exchange of Evidence

This matter was deferred to the next Rules Committee meeting.

The meeting closed at 3:10pm.

The next meeting will be held on Monday, 29th September 2003.

Heidi Lee
Clerk to the Rules Committee