



## THE RULES COMMITTEE

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21 October 2004

Minutes/6/04

### **CIRCULAR NO 104 OF 2004**

#### **Minutes of the Meeting held on Monday, 18 October 2004**

The meeting called by Agenda/6/04 was held in the Chief Justice's Chambers, High Court, Wellington, on Monday, 18 October 2004, commencing at 10.05 am.

#### **1 Preliminary**

##### *In attendance*

Hon Justice Baragwanath (in the Chair)  
Judge Joyce QC  
Mr A Beck, NZ Law Society representative  
Mr G Tanner QC, Chief Parliamentary Counsel  
Mr H Hoffmann, Parliamentary Counsel  
Dr J Lake, General Manager, Higher Courts, Ministry of Justice  
Ms L Fong (Clerk to the Rules Committee)

##### *Apologies*

Rt. Hon Dame Sian Elias GNZM, Chief Justice of New Zealand  
Ms K Clark, Deputy Solicitor-General  
Hon Justice Chambers  
Hon Justice Robertson  
Hon Justice Venning  
Judge Doherty  
Mr T Weston QC  
Mr C Finlayson  
Mr R Guzman  
Mr K McCarron  
Mr R Gill

### *Confirmation of Minutes*

The minutes of the meeting held on Monday, 6 September 2004 were taken as an accurate record and were confirmed.

## **2 Omnibus 5**

The Committee invited Mr Tanner QC to make the following changes to Omnibus 5:

### *Rule 65A*

Reword draft r 65A in order to place the obligation to give notice that a witness or party intends to speak Maori on the party calling that witness or intending to speak Maori.

### *Rule 251A*

Increase the preparation time for the filing of a skeleton argument, by stipulating 2 working days instead of 3 working days before the hearing. This allows an extra day's preparation once the applicant knows whether the application will be defended or not.

### *Arbitration rules*

The Chairman will consult with Mr David Williams QC (the president of AMINZ) as to his thoughts on the proposed arbitration rules. Subject to his contribution, the Committee agreed these rules should proceed in their current form.

The other rules in Omnibus 5 were approved without further comment.

## **3 Costs and Admiralty consultation**

### *Admiralty*

The Committee agreed with the view expressed by the NZLS Civil Litigation and Tribunals Committee that the District Court should continue to have in personam jurisdiction under the Maritime Transport Act even although it has the power to transfer proceedings to the High Court (p25 of District Courts/12/04). However, the Committee saw value in the continued division of Admiralty rules from other in personam claims for the benefit non-experts in the admiralty area and declined to take up the suggested consolidation of the rules.

### *Costs*

The Committee agreed that the words "special skill and experience" should be removed from r 47(1) category 3 proceedings.

### *Renumbering of rules*

Mr Tanner QC indicated that there is no power to renumber the rules without reissuing them entirely. The Committee agreed that this process should be deferred until the outcome of the District Court Claims paper was known, and root and branch reform had been discussed in more detail.

### *General*

The Committee will invite the Chief Justice to report on root and branch reform after further discussion of funding and strategy with the NZLS and the Ministry of Justice.

The Committee invited Ms Fong to send notes of thanks to the contributors of submissions on the District Court Claims paper and the costs and Admiralty rules paper. In particular, the letter to Ms Hinde will note the matter of timing as to the numeration point she raises.

Ms Fong was also asked to ensure appropriate notification is made that the District Courts costs and Admiralty rules will come into effect along with the Construction Contracts and Weathertight Homes Resolution Services rules on 1 January 2005.

## **4 Construction Contracts and Weathertight Homes Resolution Services rules**

The Committee agreed with the final draft of these rules and will send out the appropriate concurrence forms.

## **5 Court of Appeal Criminal Rules 2004**

The Committee agreed with Justice Chambers' note on summary proceedings appeals in his memo Court of Appeal/5/04 and invited Mr Tanner QC to incorporate the point in the draft rules.

The Committee invited Ms Fong to send the draft rules, once updated, to those institutions consulted with regarding the Court of Appeal rules.

## **6 Rule making for the District Court**

Mr Tanner QC reported that the Associate Minister of Justice would like the Statutes Amendment Bill 2004 to proceed, with additions to be collated later and consulted on en bloc by the Select Committee. This leaves the Committee with time to write to the Ministry for inclusion of the rule making jurisdiction at the Select Committee stage.

## **7 Meeting dates for 2005**

The Committee endorsed the proposed meeting dates for 2005.

## **8 Document destruction**

The Committee noted the comments by Mr Finlayson and Mr Till on the separation of ethical obligations and rules of procedure. It considered however that for practical reasons there should be a rule prohibiting document destruction. The particular advantage of inclusion in the rules is that they are readily accessible by the parties who have heavy incentives to put documents through the shredder available. In addition, ethical rules are not part of the subordinate legislation the judges enforce day by day as part of the law of the land.

The Committee noted that the obligation should extend not only to the lawyer but to the parties. The Court's contempt power can then more readily be prayed in aid, whereas this is not so for ethical obligations. A contempt-based rule was agreed to have more force in light of the fact the existing common law principle is diffuse, especially with the recent consideration and rejection of the tort of spoliation of evidence.

The Committee indicated that such a rule will require precise drafting of the required level of deliberateness and the length of time documents are to be held and there should be further consideration of the breadth of the rule. The Committee invited Ms Fong to prepare a concept paper, to be sent out for consultation, with responses to be received by the end of the year.

## **9 District Court Claims paper**

The Committee considered the submissions on the District Court Claims paper. The Committee proposed the following change to the consultation paper to incorporate the objections to the original initiation of claims centred on the onus on the defendant, while retaining the front-end loaded system:

- (1) The procedure will retain the exchange of non-filed documents by the plaintiff and defendant.
- (2) The notice of claim will be substantial, not merely formal and will be made on oath. A balance must be struck to avoid abuse through lack of detail, without requiring the level of detail currently required. The notice will state who will support the plaintiff's claim and why, and what documents will be relied upon. Notice of proposed adjustments used in tax assessment disputes, and skeleton arguments should be a guide to the appropriate level of detail. There will be consequences in costs for a plaintiff's failure to articulate its claim.
- (3) The defendant's response will mirror the plaintiff's notice of claim.
- (4) At this stage the plaintiff can elect to pursue the claim through the court. If this course is taken, the appointed judge can determine the appropriate path for the claim to take, for instance whether the matter can be determined on the filing of affidavits, or whether a full hearing is necessary. Potentially, a centralised panel of judges could assess this. This should be expressed as achievable through video conferencing, although the appropriate technology does not exist in all courts at present.

Ms Fong was invited to draft the notice of claim and response documents and circulate another paper for consideration at the next meeting, reflecting these improvements. Ideally, an electronically accessible notice of claim and response form is envisaged. Ms Fong was asked to send the draft forms to the NZLS for their consideration, and to indicate that a roadshow on the consultation paper was proposed. Assistance with drafting of the forms could come from the Parliamentary Counsel Office, AUT, and Waikato University.

The Committee noted the point made by the NZLS Civil Litigation and Tribunals Committee that explicit provision should be made for increased costs where a matter should have been brought in the Disputes Tribunal, but the Committee agreed that the existing costs discretion is sufficient, and it need not be adopted.

#### **10 DCR 580**

The Committee agreed with the points advanced by Ms Fong's memo. However Dr Lake noted that it is the Collections registrars who examine the judgment creditors under ss 84B and 84D of the District Courts Act 1947. The Registrars in Collections (an independent business unit) are unlike the registrars associated with the administrative functions of the courts, as they administer orders of the court, rather than make decisions in the nature of a court. "Registrars" under s12 of the District Courts Act 1947 are presumed to be "of the court". The question became whether the Collections registrars have authority to undertake examinations of judgment creditors.

Dr Lake was invited to talk to Ms Norton, General Manager of Collections, as to where the authority of the Collections registrars lies to conduct such examinations, then liaise with Judge Joyce QC and Ms Fong before the next meeting.

#### **11 HC rules 840 and 700U(1)**

The Committee invited Mr Tanner QC to arrange for PCO to systematise counsel and solicitor signatures and certificates where indicated in Ms Fong's memo and wherever else is necessary.

#### **12 Adjustments to time allocations and/or daily recovery rates**

The Committee agreed that there is sufficient flexibility in the rules to respond to the concerns expressed in Costs/3/04, particularly if r 48C(3)(a) were applied. It noted that the rates were set in response to the profession's assessment, which also reduces the need to depart from the rules.

Mr Beck was invited to confer with practitioners as to their satisfaction with costs allocations and rates, so that the appropriate action may be taken at the next meeting.

The Committee agreed that practitioners should be consulted on costs allocations and rates annually at the same time the CPI increases are made available.

### **13 Electronic filing**

The Committee agreed that the next agenda should include an item for consideration of Justice Heath's points on collaboration with other jurisdictions to ensure consistency between electronic filing systems.

The Chair will confer with Justice Heath and in liaison with Mr Tanner QC and Ms Fong provide a paper for consideration at the next meeting.

### **14 Electronic discovery**

Ms Fong was invited to speak with Justice Venning to prompt further action on this matter.

### **15 General business**

#### *PPSA*

Mr Tanner QC noted that the PPSA Amendment proposed last year by the Committee to allow Associate Judges appropriate authority under the relevant provisions has been included in the Statutes Amendment Bill 2004. Clarification that the High Court has jurisdiction under the PPSA is also included in the Bill.

#### *District Court rules consistency*

Judge Joyce QC raised the matter that changes to the High Court discovery rules need to be reflected in the District Court rules, and that the Committee should as a policy keep the District Court rules commensurate with the High Court rules as changes are made, to avoid the need for large catch up projects later on. The Committee agreed this should be an item on each agenda where High Court change is contemplated.

The meeting closed at 2.10pm.

The next meeting will be held on Monday, 6 December 2004.

Lisa Fong  
Clerk to the Rules Committee