



THE RULES COMMITTEE

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9 April 2002

Minutes/3/02

CIRCULAR NO 28 OF 2002

Minutes of the Meeting held on Monday 8 April 2002

The meeting called by Agenda/3/02 was held in the Chief Justice's Chambers, High Court, Wellington on Monday 8 April 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)
The Hon Justice Wild
Master Venning
Judge J P Doogue
Judge Doherty
Mr. T C Weston QC
Mr. C Finlayson (until 2:45pm)
Mr. R Gill
Mr. H Hoffmann (for Chief Parliamentary Counsel)
Mr. K McCarron (for the Chief Justice)
Mr. J Drake (Clerk to the Rules Committee)

1.2 Apologies

The Hon Justice William Young
The Solicitor General (Mr. T Arnold QC)
Chief Parliamentary Counsel (Mr. G E Tanner)

1.3 *Confirmation of Minutes*

The minutes of the meeting held on Monday 11 March 2002 were taken as an accurate record and were confirmed.

2. Papers tabled at the meeting

2.1 The following papers were tabled at the meeting:

Mr. Drake tabled Criminal/1/02. (Mr. Hoffmann also tabled Criminal Proceedings (Enforcement of Fines) Amendment Rules 2002 (PCO tba) and District Courts Amendment Rules 2002 (PCO tba/2) which are the attachments to this document.)

Master Venning tabled draft rules relating to case management rule changes – please label it Case Management/3/02.

3. Matters referred to Parliamentary Counsel for drafting

3.1 *High Court Amendment Rules Act (No 2) 2002 and District Courts Amendment Rules Act (No 2) 2002 (Omnibus 2)*

The Committee considered the draft rules which were due to be released for comment by the public.

The Committee considered each of the proposed amendments in turn.

3.1.1 *Authority to file documents*

The Chief Justice expressed some concern about the wording of proposed HCR 41(f). PCO was requested to review the wording to ensure that it does not validate or purport to validate filing by an insurer in circumstances not permitted under the contract of insurance. What the Committee wants to authorise is filing by an insurer's in-house lawyer in circumstances where the insurer has validly exercised its right of subrogation.

The Committee also decided that, as part of the consultation process, this proposed change would be brought to the attention of the Insurance Council for its view.

3.1.2 *Disbursements*

The Committee considered the proposed amendments and decided to raise as an issue in the consultation paper whether these amendments also should be made to the District Courts Rules. The tentative view was that this change should be made even though the costs regime in the District Court has yet to be reformed. Disbursements recovery is a stand-alone activity.

The Committee directed that the wording of proposed HCR48H(4) be amended. Words similar to "A Registrar must, if directed by a

Judge or Master, exercise the powers of the Court under this rule" were approved.

The Committee also asked Mr. Drake to provide a paper answering the following question: does a registrar's power to fix disbursements arise from empowering provisions in the Judicature Act 1908/District Courts Act 1947 or does it arise because of a judicial direction?

The Committee further noted that the reason for the transitional provision rule 6 was to allow for the fact that parties may have already incurred large expenditure based on the old rules.

3.1.3 *Incapacitated Persons*

The Committee decided that proposed HCR 82 should be amended by removing the words "a person who is incapable of making the decisions required of a litigant for conducting proceedings; and includes the following persons". It also noted that the Intellectual Disability (Compulsory Care) Bill 1999 is currently before Parliament. When and if it is passed, it will probably include a definition of an intellectually disabled person. It may be appropriate at that stage for the definition of "incapacitated person" to be broadened to include an intellectually disabled person as defined in that Act.

The Committee decided that there should be a rule specifying that any proceedings involving an incapacitated person are to be in the name of the incapacitated person "by his or her litigation guardian [insert name]" and that this should appear in the intituling.

The Committee formulated the following policy with respect to the liability of an incapacitated person and a litigation guardian for the other party's costs:

- (a) Where at the time of a costs award the litigation guardian is still in office, he or she is liable for that costs award.
- (b) At the time a litigation guardian ceases to be in office, the court must consider what the litigation guardian's responsibility for costs should be. The court may order:
 - (i) the litigation guardian to indemnify the incapacitated person in respect of any costs subsequently awarded with respect to steps taken prior to the cessation of the guardianship;
 - (ii) the litigation guardian to indemnify the incapacitated person in respect of future costs on some specified basis;
 - (iii) in respect of (i) and (ii), a contribution instead of an indemnity;
 - (iv) the litigation guardian to be absolved from any liability for costs.

- (c) Where at the time of a costs award the litigation guardian has ceased to be in office, the other party looks to the (previously) incapacitated person for payment of the costs.

The Committee also formulated its policy with respect to the litigation guardian's responsibility for the incapacitated person's own costs. There the litigation guardian must bear the costs, but he or she must be able to apply to the court to have these costs paid out of the property of the incapacitated person. Such application should be able to be made at any time (i.e. prospective or retrospective).

PCO was requested to review the draft to see if it fulfilled these policy objectives. In particular, the Committee asked that rules clearly differentiate between the incapacitated person/litigation guardian's own costs and the incapacitated person/litigation guardian's liability to pay party and party costs.

PCO was requested to consider further when and in what circumstances (if any) a litigation guardian should have to provide security for costs. Is it satisfactory just to rely on the normal security rules?

The Committee amended proposed HCR 90(5) to read "In the case of retirement, removal or death of a litigation guardian..."

The Committee amended proposed HCR 91(1) to read "If a person ceases to be an incapacitated person, all subsequent steps in the proceeding must be carried on by that person."

The Committee decided to raise the following issues in the consultation paper:

- Did the proposed definition of "incapacitated person" cover everyone who should be covered by these rules?
- Should there be a "catch-all" provision covering people who are not covered by the current four categories?
- If the answer to the above question is yes, what would be the best way to provide for it?
- How would an "incapacitated person" show that he or she was capable of making the decisions required to conduct litigation (proposed HCR 84)?
- Whether a form should be prescribed for a person applying to conduct litigation in his or her own name. (The Committee's present view is that given the many differing circumstances that may exist, it is inappropriate to prescribe a form.)

3.1.4 *Discontinuance and Non-Suit*

The Committee considered that oral applications for discontinuance should be allowed. It noted that flexibility was needed, as it may

be impractical to require the filing of written notices of discontinuance in every situation.

It amended proposed HCR 475(1)(a) to read "filing a notice of discontinuance; and"

It deleted proposed HCR 476(3) and 476(4).

The Committee directed that proposed HCR 476A be reworded to reflect the principle that a defendant may apply to the Court to set aside a notice of discontinuance if the discontinuance constitutes an abuse of process. A suggestion was made that this rule might be inserted only in the DCR; in the case of the HCR, the Court would rely on its inherent jurisdiction.

It was decided to highlight this in the consultation paper. The consultation paper would ask whether the proposed rule also should be introduced for the High Court given the existing case law on the subject.

The Committee amended proposed HCR 476B(1) to reflect the presumption that a plaintiff who discontinues a proceeding must pay costs to a defendant unless the defendant otherwise agrees or the Court orders otherwise. It also amended proposed HCR 47B(1) by deleting "the costs incurred by" and substituting "costs to". It also amended proposed HCR 476B(2) so that the costs which must be paid by a plaintiff who discontinues a proceeding only as to a particular cause of action are assessed at the conclusion of the proceeding.

4. Costs (of failed mediations)

At its previous meeting, the issue of whether the costs of a failed mediation should be recoverable as a disbursement had been raised by Mr. Weston QC who seen such a clause in a contract. Mr. Drake reported to the Committee the comments he had received on this issue from LEADR and the New Zealand Law Society's Civil Litigation Committee. The comments noted that such clauses were uncommon and expressed opposition to the idea that the costs of failed mediations be recoverable as a disbursement. The Committee accepted these comments and noted that no further action would be taken on this issue.

5. Payment into Court

Mr. Drake reported to the Committee that he had been informed by the Registrars at the High Court in Auckland, Wellington and Christchurch that the procedure was not used often. This reflected the Committee's view that Calderbank offers were more commonly used given their flexibility. The Committee discussed the relative merits of the payment into court procedure and Calderbank offers and noted that with the payment into court procedure, the other party was assured that the money was available should they accept it.

Mr. Drake agreed to prepare a paper outlining the principles behind the payment into court procedure and whether the procedure could be simplified.

6. Discussion of Committee Role/Function

This matter was adjourned for further discussion at the next meeting.

7. Rules for Mentally Disordered Persons and Minors

This topic was discussed during the discussions in item 3.1.3.

8. Arbitration

This matter was adjourned for further discussion at the next meeting.

9. Summary Judgment by Defendant

The Committee noted that this matter had been substantively considered by the Court of Appeal in *Westpac Banking Corporation v MM Kembla* [2001] 2 NZLR 298. Consequently, it would be taken off the agenda and not proceeded with any further.

10. Small Claims

Justice Chambers reported to the Committee that the Law Commission was keen to help in this area but needed to first clarify its own opinion on the court structure in general.

The Committee noted that there was a perceived need in the community for a default judgment type procedure to enable small claims to be dealt with expeditiously. The Chief Justice and Messrs. Gill and McCarron agreed to look into this matter and report back to the Committee at its next meeting.

11. Rules for Wasted Costs

The Committee considered Mr. Jim Farmer QC's response to this. It noted his opposition to the introduction of such a scheme and agreed with it. The matter would not be proceeded with.

Mr. Drake undertook to write a letter to Mr. Farmer QC thanking him for letting the Committee know his views.

12. Fees

No further action was required of the Committee so this matter was removed from the agenda.

13. Rulemaking for the District Court

The Committee considered the Chief District Court Judge's comments as relayed by Judge Doherty in District Courts/3/02. It noted that the Chief District Court Judge favoured having the District Courts Act amended so that the Rules Committee, in respect of civil matters, would have general rule-making power for the District Court save Family Court jurisdiction.

The Committee endorsed the Chief District Court Judge's recommendation and asked Mr. Drake to draft a letter for Justice Chambers to send to the Ministry of Justice informing them of this.

14. District Courts Subcommittee

The Committee noted that both the Chief Justice and Chief District Court Judge had approved the New Zealand Law Society's two representatives on the subcommittee. It also noted that allowances had been approved for the subcommittee to meet. Judge Jeremy Doogue, the Chair of the subcommittee, would finalise dates for the meetings and inform Mr. Drake so that he could inform the Law Society's representatives.

Judge Jeremy Doogue informed the Committee that the subcommittee would consider the issue of costs/disbursements in the District Court and report back at the Committee's next meeting.

15. Costs for Lay Litigants

Justice Wild and Master Venning reported to the Committee that the Judges and Masters of the High Court in Wellington and Christchurch had considered this matter at a meeting in February. The view from that meeting was that there were issues involving access to justice, the efficient use of the Court's resources, and the efficient conduct of litigation.

The Committee considered that there were important issues involved but noted that given the status of the law involved, it would be more appropriate that any changes made would have to be by legislation. It decided that, as there was nothing more that it could do, the matter would be removed from the agenda.

16. Case Management Rule Changes

Master Venning tabled the draft rules which he had prepared (Case Management/3/02). The Committee noted that proposed rule 426 was intended to cover existing practice around the country. It deleted proposed rule 429(4).

The Chief Justice, Justice Chambers and Master Venning agreed to discuss whether proposed rules 429(1) and 429(2) ought to be included in the rules. Mr. Weston advised that the Law Society and Bar Association both wanted to be consulted about any rule changes relating to case management.

17. Criminal

The Committee considered a letter from the Ministry of Justice outlining consequential rule changes required to the Criminal Proceedings (Enforcement of Fines) Rules 1967 and the District Courts Rules 1992. These were consequential on the passing of the Sentencing and Parole Reform Bill which the government hoped to have enacted by July 1, 2002.

Mr. Hoffmann agreed to provide the Bill to Mr. Hesketh. Mr. Hesketh would then circulate copies to Justices Wild and Chambers and Judges Doherty and Jeremy Doogue. The Committee asked Justices Wild and Chambers to review the proposed draft rules concerning the High Court. Judges Doherty and Jeremy Doogue were to review the proposed draft rules for the District Court. Justice Chambers and Judge Jeremy Doogue would then co-ordinate the responses from these ad hoc subcommittees and circulate them amongst the other members of the Committee. If the Committee concurred, Mr. Drake would inform the Ministry of Justice.

18. Interrogatories

The Committee asked Mr. Drake to prepare a paper outlining the Australian position on this issue. It would consider this and the issues raised in Interrogatories/1/02 at the next meeting.

The meeting closed at 3:30pm.

The next meeting will be held on Wednesday 5 June 2002.

Justin Drake
Clerk to the Rules Committee