



THE RULES COMMITTEE

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30 September 2003

Minutes/6/03

CIRCULAR NO 87 OF 2002

Minutes of the Meeting held on Monday, 29th September 2003

The meeting called by Agenda/6/03 was held in the Chief Justice's Chambers, High Court, Wellington, on Monday, 29th September 2003, commencing at 10.05 am.

1. Preliminary

1.1 In attendance

The Hon Justice Chambers (in the Chair)
The Hon Justice Baragwanath
The Hon Justice William Young (from 10.20 am)
The Solicitor-General (Mr. T Arnold QC)
Chief Parliamentary Counsel (Mr. G E Tanner QC)
Mr. T C Weston QC
Mr. C Finlayson
Mr. H Hoffmann (until 11.30 am)
Mr R Guzman (for items 3 and 4 in the minutes)
Mr. K McCarron (for the Chief Justice)
Mr. R Gill
Miss. H Lee (Clerk to the Rules Committee)

1.2 Apologies

The Chief Justice (the Rt. Hon Dame Sian Elias GNZM)
The Hon Justice Venning
Judge Doherty

Judge Joyce QC

1.3 *Confirmation of Minutes*

The last paragraph on page 7 of Minutes/5/03 contained a typographical error in that it referred to "item X". This was corrected to read "item 12".

Subject to the above, the minutes of the meeting held on Monday, 25th August 2003 were taken as an accurate record and were confirmed.

2. Omnibus 3

Justice Chambers noted that the anticipated commencement date for the High Court Amendment Rules 2003 is now 23 November 2003 but that date is contingent upon an amendment to the District Courts Amendment Act 2002 being included in the Statutes Amendment Bill or the Amendment Act coming into force notwithstanding the drafting error contained therein. Justice Chambers noted that it may be necessary to 'disentangle' the new Part 10 from the High Court Amendment Rules 2003 if the District Courts Amendment Act 2002 was not brought into force this year.

The Committee considered further amendments to the High Court Amendment Rules 2003. It agreed that proposed rule 703 should be amended to include a provision equivalent to proposed rule 5(3)(b) of the Court of Appeal (Civil) Amendment Rules 2003 (Amendments/21/03).

The Committee agreed that proposed rule 704(3) should mirror the reference to "special leave" contained in proposed rule 6(3) of the Court of Appeal (Civil) Amendment Rules 2003 (Amendments/21/03). The Committee considered that the commentary in relevant texts should identify the symmetry between proposed rules 704(3) and 6(3).

Justice Chambers drew the Committee's attention to the amendments to High Court Amendment Rules it had agreed to since the last meeting (Amendments/19/03, Amendments/16/03 and Amendments/17/01).

The Committee agreed with the amendment to proposed rule 712 contained in Amendments/19/03, which provides for the abandonment of appeals.

The Committee considered Amendments/20/03. It reached the provisional view that HCR 539 to 541A should expressly apply to judgments given on appeal under Part 10 of the HCR but that the sealing of such judgments should, nonetheless, be optional. It agreed that Mr Gill should be given an opportunity to discuss this proposal with the Registrars.

The Committee decided not to amend proposed rule 242(2) by adding the words "as soon as practicable". It agreed to instead rely on the inference that Registrars will act promptly.

The Committee agreed to amend proposed rule 248 by deleting the reference to proposed rule 247 in subclause (1) and by adding a new subclause (2):

“Subclause (1) does not apply to an affidavit or to an agreed statement to the extent that the affidavit or statement contains any admission of the kind described in rule 247.”

It agreed that this new subclause should be circulated amongst the members for further consideration and time given for feedback on it.

The Committee agreed that proposed rule 427(2)(c) should be amended to read “if practicable, make other interlocutory orders”. This amendment clarifies that the subclause extends to applications for interlocutory orders set out in a case management memorandum in accordance with proposed rule 429(4)(b).

The Committee agreed to delete proposed rule 428(1)(c).

3. Construction Contract Act 2002

Mr Renato Guzman, who drafted the District Courts Amendment Rules (No 2) 2003 (Construction Contracts/2/03), attended the meeting for the Committee’s consideration of the draft rules for the Construction Contracts Act 2002 and the District Courts Subcommittee’s recommendations on them (Constructions Contracts/3/03).

The Committee expressed dissatisfaction with the numbering of the rules, which makes them difficult to follow and refer to. Mr Tanner commented that the structure of the DCR was not conducive to simply adding a new Part to the end of the Rules. The Committee agreed to leave the numbering of the rules up to PCO but asked that PCO give consideration to this problem, which will only worsen with time if new Parts cannot be added at the end of the DCR, as already happens with the HCR.

The Committee agreed it was unnecessary to redefine “application for an adjudicator’s determination to be enforced” to include the issue of a charging order because an application for enforcement includes an application for the issue of a charging order: s76(2)(a), Construction Contracts Act.

The Committee agreed to retain the seemingly redundant words “if this Part requires” contained in proposed rule 461ZZN to maintain consistency with Part 6A of the DCR. The Committee asked Mr Guzman to give further consideration to the parenthesised words contained in proposed rule 461ZZN.

The Committee agreed that proposed rules 461ZZO and 461ZZQ should be retained for informational purposes even though they effectively repeat provisions of the Constructions Contract Act. However, it agreed that proposed rule 461ZZV was inappropriate and should be deleted.

The Committee decided that, unless PCO concluded there was a good reason otherwise, the “information” referred to in proposed rule 461ZZP(1)(b) must

be contained in an affidavit; the words "or some other means" should be deleted. It agreed to delete proposed rule 461ZZP(1)(b)(i) as the grounds for the dispute must be contained in the application for review itself. It also agreed to delete proposed rule 461ZZP(1)(b)(ii) as subparagraph (ii) merely repeats subparagraph (iii). These amendments are to occur notwithstanding any inconsistency with Part 6A of the DCR.

The Committee agreed that proposed rule 461ZZR should be deleted and that the standard filing rules should apply to applications under the new Part 6D. It agreed to amend proposed rule 461ZZS(d) as the applicant, not the Registrar, should be responsible for serving the application and any accompanying documents.

The Committee agreed that, unless the Court so directs, there should be no requirement to serve the adjudicator with a copy of an application for review or a notice of opposition thereto.

The Committee agreed that the deadline for filing and serving notices of opposition in proposed rule 461ZZT(1) should be extended to 10 working days.

The Committee agreed that proposed rule 461ZZU should be amended along the same lines as the amendments to proposed rule 461ZZP(1)(b). It also agreed that provision should be made for the calling of a case management conference.

The Committee asked Mr Guzman to check Part 17 of the HCR and the Arbitration Act for helpful parallels for the purpose of proposed rules 461ZZW, 461ZZY and 461ZZZ.

The Committee noted that the application for review Form sets out the consequences for the defendant if the defendant takes no steps in relation to the application.

The Committee agreed that PCO should make consequential amendments, where appropriate, to Part 6A to reflect amendments to any of the new Part 6D rules that are based on Part 6A.

The Committee agreed that the District Courts Amendment (No 2) Rules 2003 should be presented in a stand alone consultation paper. Once PCO has redrafted the proposed rules and received feedback from the Ministry of Economic Development, the consultation paper will be circulated to interested parties for feedback, including adjudicators, the Arbitrators Institute, and construction lawyers. Mr Finlayson undertook to obtain from the NZLS a list of lawyers to whom the consultation paper should be sent.

4. Weathertight Homes Resolution Services Act 2002

The Committee noted that Mr Guzman is responsible for the drafting of the rules for the Weathertight Homes Resolution Services Act 2002.

5. Omnibus 4

The Committee noted that the consultation paper for Omnibus 4 has been released. It also noted that the error in the Court of Appeal (Civil) Amendment Rules 2003 in the first released version of the consultation paper (Amendments/18/03) had now been corrected and the consultees notified of the amendment (see Amendments/21/03).

6. District Courts Omnibus

Justice Chambers informed the Committee that the Chief District Court Judge has agreed to relieve Judges Doherty and Joyce from sitting duties for two weeks beginning 26th January 2004 to prepare the District Courts Omnibus consultation paper. Justice Chambers noted that Miss Lee's employment contract would be extended so that she could assist the Judges over the two week period.

The Committee agreed that the exercise should produce, by 5th February 2004, a consultation paper covering the following topics:

- A suggested division between small claims and big claims.
- The applicability of recent amendments to the HCR for all claims.
- The applicability of recent amendments to the HCR for big claims.
- Case management rules for small claims and big claims.
- A small claims procedure (possibly using the Law Commission's working paper (General/2/03) as a model).
- A costs regime for all claims.

The Committee agreed that the consultation paper should not contain draft rules but otherwise be as detailed as possible. It agreed that the consultation paper should be considered at the Rules Committee meeting scheduled for 16 February 2004.

The Committee agreed that District Courts Omnibus project should be governed by the following principles:

- The procedure for big claims should mirror High Court procedure as far as possible.
- The procedure for small claims should be proportional to the money at stake.

The Committee agreed that provision should be made for claims to be switched between "tracks" with judicial approval. It also agreed that, if possible, the need for any Practice Note should be eliminated.

The Committee agreed that the District Courts Omnibus project may require additional personnel. It considered that Justice Keane would be an ideal addition and agreed to investigate this possibility. Mr Finlayson undertook to ask the NZLS, and Mr Weston the NZ Bar Association, to recommend practitioners who could be approached to join the project. They would need to be available for the two week period and be prepared to assist in actual drafting of the consultation paper. If a suitable practitioner could be identified, some funding may be possible.

The Committee agreed to further develop the instructions for the District Courts Omnibus project at the next meeting.

7. Daily Recovery Rates

The Committee considered the submissions from the NZLS and the NZ Bar Association on whether the daily recovery rates contained in the Second Schedule to the HCR should be amended (Costs/3/03).

The Committee agreed to the following revised daily recovery rates:

Category 1	\$970
Category 2	\$1450
Category 3	\$2150

That Committee agreed that the amendments to the Second Schedule should be contained in a separate set of rules and come into effect 1 January 2004. The Committee asked PCO to draft the required amendments together with an appropriate transitional provision.

Justice Chambers undertook to write a letter to Ms Belinda Clark informing her of the proposed amendments to the Second Schedule and the reasons for them. The Solicitor-General undertook to similarly inform the Attorney-General so that she is forewarned of the proposed rules.

The Committee directed Miss Lee to send a letter to both the NZLS and the NZ Bar Association thanking them for their submissions.

8. "Working Days"

The Committee considered and agreed with Justice Chambers proposed amendment to HCR 3(4), which provides a presumed meaning of the phrase "working days". The Committee agreed that this amendment should be included in Omnibus 4.

9. Counterclaims and Rates Recovery

The Committee considered Mr David Neutze and Ms Vanessa Bruton's proposal that the Committee make a rule equivalent to HCR 169 in relation to rates recovery by local authorities (General/8/03). The Committee also

considered Miss Lee's recommendation in relation to the proposed rule (General/8/03).

The Committee's provisional view was that it did not have the jurisdiction to make the proposed rule. It noted that, apart from HCR 169, the rules generally do not prohibit particular defences for particular claims.

The Committee directed Miss Lee, however, to reconsider, in consultation with Justice William Young, the effect of s 60 of the Local Government (Rating) Act 2002 and, if required, revise her memorandum on the proposed rule. If Justice William Young considers that reconsideration did not alter the Committee's provisional view, then Miss Lee should send the revised memorandum, together with a letter explaining the Committee's provisional view, to Mr Neutze and Ms Bruton. If Justice William Young considered, however, that the Rules Committee should reconsider the issue before replying to Mr Neutze and Ms Bruton, then the matter should be put back on the agenda for the next meeting.

10. Search of District Courts' Records

The Committee considered the request from the Ministry of Justice that the Committee make rules restricting the disclosure of a judgments debtor's address information on a court file (District Courts Rules/2/03). This request was made in the context of the proposed amendments to the Residential Tenancies Act 1986.

The Committee agreed that the proposed restriction on access to address information involved policy considerations and was therefore best dealt with in statute. Mr Tanner undertook to communicate the Committee's view to Ms Pooke.

11. Personal Property Securities Act

The Committee noted that Ms Kay Brown (Ministry of Economic Development), in consultation with Ms Cheryl Gwyn (Ministry of Justice), is driving the proposed amendment that would extend Masters' jurisdiction to the granting of orders under the Personal Property Securities Act 1999. The Committee directed Miss Lee to keep a watching brief on this matter and report back to the Committee on the progress made at the next meeting.

12. Inherent jurisdiction

Justice Baragwanath spoke to the Court of Appeal decision in *McKnight v Davis* [1968] NZLR 1164 and emphasised the necessity for clarification of the scope of the High Courts' inherent jurisdiction and its relationship with the HCR (also see General/6/03).

The Committee directed Miss Lee, in conjunction with Justices Baragwanath and William Young, to prepare a paper giving full consideration to the scope of the court's inherent jurisdiction, particularly in relation to the HCR. The

paper should give separate consideration to the scope of such jurisdiction when hearing arbitration appeals, taking into account the comments made in *Pot Hole People Ltd v Fulton Hogan Ltd* (HC, Christchurch M304/02, 4 February 2003, Justice William Young) and Arbitration/1/03. Mr Tanner undertook to draft an appropriate rule encompassing the substantive conclusions of the paper. The Committee agreed that the proposed amendment should be included in Omnibus 5 for consultation purposes.

13. Arbitration

The Committee considered the discussion of various types of appeals contained in Arbitration/2/03. It agreed that HCR 889(1) should be retained but highlighted for consultation purposes in Omnibus 5.

14. Rulemaking for the District Courts

The Committee is awaiting Miss Lee's paper on this topic.

15. Alternative Dispute Resolution and the Judiciary

Justice Chambers informed the Committee that the NZ Bar Association is currently conducting a survey of its members on the manner in which judicial settlement conferences should be conducted. This matter was, therefore, deferred until the Committee had received results from that survey.

16. High Court Criminal Rules

This matter was deferred to the next Rules Committee meeting.

17. Part VI - Reform

This matter was deferred to the next Rules Committee meeting.

18. Exchange of Evidence

This matter was deferred to the next Rules Committee meeting.

19. General Business

The Committee noted that once the Supreme Court Bill 2002 was passed the Supreme Court would prepare a blueprint of the rules it required, which would then be considered by the Committee and distributed for consultation.

The meeting closed at 3:05pm.

The next meeting will be held on Monday, 10th November 2003.

Heidi Lee
Clerk to the Rules Committee