



THE RULES COMMITTEE

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3 July 2003

Minutes/4/03

CIRCULAR NO 53 OF 2002

Minutes of the Meeting held on Monday, 30th June 2003

The meeting called by Agenda/4/03 was held in the Chief Justice's Chambers, High Court, Wellington, on Monday, 30th June 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)
The Hon Justice Baragwanath
The Hon Justice Venning
The Hon Justice Robertson (for item 6 in the minutes) (from 1.00 pm until 2.35 pm)
Judge Joyce QC
Chief Parliamentary Counsel (Mr. G E Tanner QC)
Mr H Hoffmann (until 1.00 pm)
Mr. T C Weston QC
Mr. C Finlayson (until 2.50 pm)
Mr. K McCarron (for the Chief Justice)
Mr. R Gill
Mrs. R Hayward (for item 6 in the minutes) (from 1.00 pm until 2.35 pm)
Mrs. M Thompson (for item 6 in the minutes) (from 1.00 pm until 2.35 pm)
Miss. H Lee (Clerk to the Rules Committee)

1.2 *Apologies*

The Hon Justice William Young
Judge Doherty
The Solicitor-General (Mr. T Arnold QC)

1.3 *Confirmation of Minutes*

The minutes of the meeting held on Monday, 12th May 2003 were taken as an accurate record and were confirmed.

2. Papers tabled at the meeting

Judge Joyce tabled General/4/03.

Mr Gill tabled Evidence/5/03.

The Chief Parliamentary Counsel tabled Amendments/8/03 (the latest version of the High Court Amendment Rules (No 2) 2003).

Mr Hoffmann tabled the first draft of the District Courts Amendment Rules 2003. Please attach circular 54, Amendments/9/03, to these rules.

The Chief Parliamentary Counsel also tabled the first draft of the District Court Amendment Rules (No 2) 2003, the rules required by the Construction Contracts Act 2002. Please attach circular 55, Construction Contracts/2/03, to these rules.

The latest version of the High Court Amendment Rules 2003 was distributed as Amendments/7/03 not Amendments/5/03, which was incorrectly referred to in item 2 of Agenda/4/03.

3. Personnel

The Committee welcomed The Hon Justice Baragwanath in his role as member to the Rules Committee.

4. Omnibus 3

The Committee considered the latest draft of the High Court Amendment Rules 2003 (Amendments/7/03) concerning interlocutory orders, caseload management, exchange of witness briefs, and preparation of common bundles of documents.

The Committee anticipates that the High Court Amendment Rules 2003 will come into force on 1 September 2003.

The Chief Parliamentary Counsel undertook to arrange the consequential amendments to the regulations governing setting down fees that will be necessitated by the High Court Amendment Rules 2003.

The Committee agreed to delete proposed rules 427(4) and 252(2) for two reasons. Firstly, it considered this subclause could be interpreted as imposing a compulsory fee and was therefore potentially ultra vires. Secondly, the practice of requiring plaintiffs to pay for conference calls varied between registries throughout the country.

The Committee suggested that PCO merge proposed rules 251 and 252(1).

It agreed to remove the comma from proposed rule 712(1) and change the word 'is' in proposed rule 713(1)(a) and (b) to 'be'.

The Committee agreed that proposed rule 712(5) should be amended to ensure consistency with the Legal Services Act 2000. For example, subclause (5) could instead read:

“(5) If an appellant has applied for legal aid under the Legal Services Act 2000 and at the time of the case management conference the application has not been determined, the Judge must defer the fixing of security until the application for legal aid has been determined.”

Justice Chambers drew the Committee's attention to the addition of proposed rule 250, which provides for occasions where a respondent consents or does not oppose an interlocutory application.

The Committee agreed to allow time for the Chief Parliamentary Counsel to conduct a final check of the High Court Amendment Rules 2003 (Amendments/7/03). The Committee directed that any necessary amendments should be referred to Justice Chambers and the Chief Justice. Justice Chambers undertook to consult with the Committee's High Court judges on any changes suggested by Mr Tanner.

The Committee directed Miss Lee to prepare an article summarising the changes and a flowchart, with appropriate cross-references to rules, setting out the interlocutory stages of a proceeding under the new regime. Both the article and the flowchart should be included on the Committee's website and made available for publication in an August edition of *Law Talk*.

The Committee noted that a NZLS seminar on these procedural reforms is planned for the end of this year or the beginning of next year.

5. Omnibus 4

The Committee considered the High Court Amendment Rules (No 2) 2003 (Amendments/8/03).

Mr Hoffmann undertook to ensure that the definition of 'control' in the proposed amendment to HCR 3, particularly the 'right to inspect' aspect of the definition, was not too broad. A party is not expected to list other parties'

documents, even though they have a 'right to inspect' them once a discovery order is made.

The Committee agreed that the consultation paper should highlight the use of the word 'close to' in proposed rule 48GA(5). The alternative of referring to a percentage of the final amount awarded, such as 90%, should be mentioned.

The Committee agreed that, for the purpose of obtaining feedback on the proposed amendment to HCR 285, the consultation paper should be sent to the following individuals or organisations:

- Commonwealth Press Union
- Newspaper Publishers Association
- William Akel
- Paul Norris
- The Rt. Hon. Sir Ian McKay
- The six defamation barristers consulted when the evocation of HCR 285 was earlier proposed.

The Committee agreed with Mr Hoffmann's recommendation, given at a previous meeting, that Omnibus 4 should include a redraft of all of the discovery rules.

Justice Baragwanath expressed concern that the deemed discovery order (proposed rule 293(1)) may not be sufficiently explicit, especially since the breach of such orders carry the potential sanction of imprisonment. The Committee agreed that the rule should be redrafted so that it requires the Court to expressly make a discovery order, whether in default terms or otherwise.

The Committee discussed proposed rule 296. Justice Chambers explained that the basis for including such a rule is to make explicit solicitors' discovery obligations and promote change in the current culture whereby discovery is usually a task given to legal executives. However, some members expressed concern that an obligation upon a solicitor to ensure, to the best of their ability, that their client had complied with the discovery obligations was too onerous. The Committee agreed that proposed rule 296 should remain in its current form in the consultation paper to elicit feedback. The consultation paper should ask whether the content of the rule is appropriate for inclusion in rules. It should identify alternative wording, which merely requires the solicitor to explain to his or her clients their discovery obligations. The consultation paper should also draw attention to the associated clauses 4 and 11 of proposed Form 26.

The Committee agreed that the consultation paper should ask whether proposed rule 298 provides sufficient guidance on the degree of specificity to which documents must be described in the list. It directed Miss Lee to investigate how other jurisdictions approached this issue.

It directed Miss Lee to ensure that the consultation paper raised the question of whether the rules were adequate to cover electronic discovery. Mr Finlayson undertook to send to Miss Lee an *ABA Journal* article discussing electronic discovery.

The Committee agreed that the substance of current HCR 312 should be incorporated into HCR 299 (Order for particular discovery before proceeding commenced) and HCR 301 (Order for particular discovery against non-party after proceedings commenced).

The Committee considered the proposed changes to HCR 520 to 524 (Amendments/8/03, Evidence/5/03 and Evidence/4/03). It agreed that proposed rule 522(1) should be amended to include a new paragraph (c), which refers to any person who is authorised by a judge to take an affidavit, together with any consequential amendments to proposed rules 520 to 522. This amendment is necessary to cover situations where, for example, a foreign country has no law providing for the administration of an oath or affirmation. The Committee directed that this further amendment be highlighted in the consultation paper.

The Chief Parliamentary Counsel undertook to ensure that the proposed amendments to HCR 520 to 524 comply with the Evidence Amendment Act 2000. In light of the proposed amendments to HCR 520 to 524 the Committee directed that the consultation paper be sent to Mr Peter Fantham and the Ministry of Foreign Affairs and Trade.

The Committee considered proposed rule 542. It agreed that PCO should redraft subclause (5) so that it ultimately provides for the following:

- 1) prior to the judgment becoming available from a registry, the registrar must attempt to notify the parties by telephone of the time when the judgment will be made available;
- 2) the registrar must post a copy of the judgment to the parties' address for service once the judgment has been given; and
- 3) a party may request the registrar to send a copy of the judgment to him or her by email or facsimile; and
- 4) a party may request the registrar to have a copy of the judgment made available for uplifting at the registry.

It agreed that HCR 44 should be amended to require that a party state their email address, where available, in the memorandum at the end of the first document filed by that party.

The Committee agreed that paragraphs (a) and (b) of proposed rule 542(3) should be simplified. It agreed that the rule need not specify a particular date by which the party must have filed the judgment for sealing. Proposed subclause (3) could instead provide, for example, "... even though the judgment appealed against has not been sealed, provided that the party takes steps to ensure that the judgment is promptly sealed."

The Committee confirmed that HCR 33 should be amended to require specification of the next event date and, where applicable, the judge to whom a case has been assigned.

Subject to the modifications explained above, the Committee approved the High Court Amendment Rules (No 2) 2003 for consultation purposes.

The Committee approved the Court of Appeal (Civil) Amendment Rules 2003 (Amendments/6/03) for the consultation purposes, although it requested PCO to reconsider the use of the word 'or' in proposed rule 5(1)(a). Justice Chambers undertook to consult Justice Gault, President of the Court of Appeal, on the proposed amendments prior to commencement of the consultation process.

The Committee briefly considered the first draft of the District Court Amendment Rules 2003. It agreed that any amendments to the DCR should not limit potential future reforms that provide for a truncated procedure for small claims in the District Courts. Therefore, Omnibus 4 will include only the amendments contained in rules 4, 11, and 21 to 24 of the District Court Amendment Rules 2003, 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. Amendments to the DCR equivalent to the case management, interlocutory applications and discovery reforms to the HCR will be postponed pending further discussion by the Committee on procedural options for 'small claims'. Justice Chambers undertook to seek feedback on this approach from the District Courts Subcommittee.

The consultation paper for Omnibus 4 will not attach a truncated version of the District Court Amendment Rules 2003. Instead, it will point out, when discussing the relevant amendments to the HCR, that it is proposed that equivalent amendments will be made to the DCR.

The Committee considered the draft consultation paper for Omnibus 4 (Amendments/6/03). It directed that that paper be amended in the following ways:

- Number the pages and paragraphs.
- Change the commentary on the proposed District Courts admiralty rules to reflect the other justification for preliminary acts: freezing witnesses' versions of collision details.
- Include a reference to the Defamation Act 1992 in the commentary to the proposed amendment to HCR 285 and DCR 307.
- Replace the word 'purports' in the commentary to the amendment to the judgment delivery rule.
- Include a more comprehensive discussion on the reasons for abolishing the payment into court regime and ask whether this is appropriate. Also, annex the paper discussing this matter.
- Abbreviate the paper included in Appendix 4 and amend it to include discussion on the inclusion of proposed rule 522(1)(c).

6. Discussion with members of the Law Commission

The Committee engaged in a general discussion with Justice Robertson (President of the Law Commission), Mrs R Hayward (senior researcher, Law Commission's Structure of the Courts Review) and Mrs M Thompson (project manager, Law Commission's Structure of the Courts Review). In particular, the contents of the Law Commission's workshop papers entitled *Civil Processes* and *Community Court Civil Processes* (contained in General/2/03)

were considered. Additionally, methods of conducting and funding a reform or review of the rules were discussed.

On behalf of the Law Commission a request was made for a formal response from the Rules Committee to the proposals in *Civil Processes* and *Community Court Civil Processes*. The Committee agreed that Justice Chambers and Miss Lee should draft a response that would first be circulated amongst the members of the Committee for comment before being sent to the Law Commission. It agreed that the response should include a proposal that the Law Commission become involved with various discrete aspects of rule reform.

7. Construction Contracts Act 2002

The Chief Parliamentary Counsel informed the Committee that PCO was presently awaiting feedback from the Ministry of Economic Development on the draft version of the DCR for the Construction Contract Act contained in the District Court Amendment Rules (No 2) 2003 (Construction Contracts/X/03). Some Committee members expressed dissatisfaction with the numbering of the proposed rules.

The Committee agreed that Miss Lee should send a letter to Ms Liz Fellow, Ministry of Economic Development, indicating the Rules Committee's official interest in the development of DCR for the Construction Contract Act.

The Committee agreed that any comments on the District Court Amendment Rules (No 2) 2003 should be referred to Judge Joyce who would then discuss appropriate amendments with the Chief Parliamentary Counsel. Judge Joyce undertook to consult, if necessary, with Justice Smellie and Mr. Kennedy-Grant on the proposed DCR.

8. Weathertight Homes Resolution Services Act 2002

The Chief Parliamentary Counsel informed the Committee that the draft rules required by the Weathertight Homes Resolution Services Act would be prepared by the end of the week beginning 7th July 2003.

9. Parliamentary privilege

The Committee agreed with Justice Chambers's view, expressed in Discovery/3/03. This matter can be removed from the agenda.

10. Costs provisions in High Court Rules

The Committee directed Miss Lee to write a letter to the New Zealand Bar Association and the New Zealand Law Society asking whether the daily recovery rates in the High Court Rules remain appropriate. It also directed Miss Lee to draft a note for inclusion in Law Talk asking the same question. Mr Weston undertook to arrange for the publication of that note.

11. Personal Property Securities Act 2002

The Committee considered Personal Property Securities/4/03 concerning jurisdiction to grant orders under the Personal Property Securities Act (PPSA). The Committee agreed that the High Court should have exclusive jurisdiction to make orders under the PPSA and that the Masters' jurisdiction should be extended to empower them to make such orders. Justice Chambers undertook to send a letter, drafted by Miss Lee, to the Ministry of Economic Development recommending that section 26I of the Judicature Act 1908 be amended to provide Masters with jurisdiction to grant orders under the PPSA. The Committee noted that such an amendment could be included in the recently introduced Business Law Reform Bill. The Chief Justice requested that the letter to the Ministry first be sent to Justice O'Regan for comment.

12. Rule Making for the District Courts

The Committee considered District Courts/4/03. The Committee noted that the Ministry of Justice's proposed amendment to section 122 of the District Courts Act 1947 achieved no substantive change to the current position and failed to address the reason for the Committee's request for the amendment. The Committee agreed not to pursue the Ministry's proposed amendment. It agreed to request that the Ministry consider promoting the alternative amendment to section 122, set out in District Courts/4/03. Justice Chambers undertook to write a letter, drafted by Miss Lee, to the Ministry of Justice requesting this change.

13. High Court Criminal Rules

This matter was deferred to the next Rules Committee meeting.

14. Contempt – new rules

This matter was deferred to the next Rules Committee meeting.

15. Summary Trials

This matter was deferred to the next Rules Committee meeting.

16. Exchange of Evidence

This matter was deferred to the next Rules Committee meeting.

17. Exchange of Evidence

This matter was deferred to the next Rules Committee meeting.

The meeting closed at 3:15pm.

The next meeting will be held on Monday, 25th August 2003.

Heidi Lee
Clerk to the Rules Committee