



## THE RULES COMMITTEE

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15 November 2002

Minutes/7/02

### **CIRCULAR NO 93 OF 2002**

#### **Minutes of the Meeting held on Monday, 11<sup>th</sup> November 2002**

The meeting called by Agenda/7/02 was held in the Chief Justice's Chambers, High Court, Wellington, on Monday, 11<sup>th</sup> November 2002, commencing at 10.00am.

#### **1. Preliminary**

##### *1.1 In attendance*

The Hon Justice Chambers (in the Chair)  
The Hon Justice Robertson (acting Chief Justice) (from 11:15am)  
The Attorney-General (the Hon Margaret Wilson) (from 12:45pm until 1:30pm)  
The Hon Justice Wild  
The Hon Justice William Young (until 2:30pm)  
The Hon Justice Venning (until 2:30pm)  
Judge Doherty  
Chief Parliamentary Counsel (Mr. G E Tanner QC)  
Mr. T C Weston QC  
Mr. C Finlayson (from 11:45am until 2:20pm)  
Mr. R Gill  
Ms. K Clark (for the Solicitor-General)  
Ms. S. Petersson (for item 5 in the minutes)  
Mr. H Hoffmann (for item 6.1 in the minutes)  
Mr. K McCarron (for the Chief Justice)

Mr. B Hesketh (Secretary to the Rules Committee) (from 12:45pm until 1:30pm)  
Mr. J Drake (Clerk to the Rules Committee)

1.2 *Apologies*

The Chief Justice (the Rt. Hon Dame Sian Elias GNZM)  
The Solicitor General (Mr. T Arnold QC)

1.3 *Confirmation of Minutes*

The minutes of the meeting held on Monday, 9<sup>th</sup> September 2002 were taken as an accurate record and were confirmed.

1.4 *Matters Arising*

No matters were identified.

**2. Papers tabled at the meeting**

Mr. Hoffmann tabled Amendments/20/02.

Chief Parliamentary Counsel tabled the latest version of the High Court Amendment Rules (No 2) 2002 (PCO 4544/1) – please label it Amendments 21/02.

**3. Meeting Dates 2003**

The Committee considered the meeting dates for 2003. It approved the following dates as being suitable:

- 10 February
- 07 April
- 12 May
- 30 June
- 25 August
- 29 September
- 10 November

**4. Membership and Appointments**

The Committee congratulated Justice Venning on his appointment to the High Court bench.

It also noted that Justices Wild and Venning's terms are due to expire on 31 December 2002. Mr. McCarron informed the Committee that the matter was due to be considered by the Chief Justice upon her return. Justice Venning

commented that it would be best to have a current Master on the Committee once his term expired and indicated that, should the Chief Justice so desire, he would be willing to continue as a member for a limited time to see through the case management rules.

The Committee noted Judge Jeremy Doogue's resignation. It recorded its thanks to the judge for his time and efforts on behalf of the Committee. Justice Chambers undertook to write a letter, on the Committee's behalf, to Judge Doogue thanking him for his efforts. He also informed the Committee that he expected the Chief District Court Judge to announce the appointment of a new District Court Judge to replace Judge Jeremy Doogue.

## **5. Proposed reform of Rules**

The Committee welcomed Ms Sandra Petersson, counsel for the Alberta Law Reform Institute (ALRI), who informed the Committee of progress made by the ALRI in reforming the rules in Alberta.

She informed the Committee that their reform project had a budget of C\$3 million and had a 3-year time frame. She said that reform of this nature was a big project which required significant funding and commitment if it were to be done properly. A copy of the handouts which Ms Petersson used is on file with the clerk to the Committee. Justice Chambers then thanked Ms Petersson for her presentation.

The Committee then discussed what matters to raise with the Attorney-General. The Committee noted that, in light of the information presented by Ms Petersson, the timelines in General/8/02 for the proposed reform were too optimistic. Without funding, the best which would be possible would be a re-writing of the rules, whereas what the Committee had in mind involved a 're-thinking' of the rules.

The Acting Chief Justice suggested that the fundamental question to be answered by any review was what should the HCR and DCR cover (i.e. their proper ambit and scope). The Committee had to be careful that in making rules it did not cross over into substantive matters involving access to justice. The Committee noted that many of the subjects within its purview were difficult technical issues. It considered that it had been delegated the job by Parliament to make policy decisions as to the appropriate content of rules.

## **6. Matters referred to Parliamentary Counsel for drafting**

### **6.1 High Court Amendment Rules (No 3) 2002 – Omnibus 3: Case Management**

The Committee considered the latest draft of the case management rules (Amendments/20/02). It established the following timeline:

11 Nov: Final amendments to draft made.

18 Nov: Clerk to prepare consultation paper.

- 22 Nov: Release of draft amendments and consultation paper to the National Caseflow Management Committee, the New Zealand Law Society, the Bar Association, the Masters of the High Court, the Registrars of the High Court. The papers would also be placed on the HC and DC intranets and the Rules Committee's website.
- 28 Feb 03: Deadline for submissions.
- 7 Apr 03: Rules Committee to consider submissions.
- 12 May 03: Final version of amendments to be considered and approved.

The Committee considered that the definition of "interlocutory application" in proposed rule 3 was too narrow as it excluded oral applications. It directed PCO to remedy this.

It directed that the words "interlocutory order" be included in proposed rule 235.

The Committee directed PCO to amend proposed rule 237(5) so that once the Registrar had advised the applicant of the hearing date allocated for hearing the application, the applicant would have to advise all other parties of the hearing date. This was because often the Registrar would not have the contact details of other parties to the proceedings at that stage.

The Committee directed PCO to amend proposed rule 238(2) make it clear that, if an injunction were granted, it must be on terms providing for the commencement of the proceeding.

It also decided to highlight in the consultation paper whether proposed rule 239 was necessary as it was merely declaratory of the Court's powers. It was suggested that jurisdiction to make Mareva injunctions was now established. Rule 239(3) might, however, still be necessary.

It approved proposed rules 240 to 255.

Justice Chambers said he thought rule 256 could be more clearly expressed. He said he would give a possible redraft to Mr. Hoffmann.

The Committee also decided to highlight in the consultation paper the issue of whether the *Pickwick* procedure ought to be formally included in the rules.

With regard to proposed rules 257 and 258, the Committee decided to highlight in the consultation paper the issue of the circumstances in which a party should have to draw up an interlocutory order. The need for sealed copies might arise in only very limited circumstances.

It approved proposed rules 259 to 263.

It approved proposed rules 425 and 426.

The Committee deleted the words "in the first instance" in proposed rule 427(3) and replaced them with "unless the Court otherwise directs".

The Committee amended proposed rule 428(3)(b) to refer to rule "242" instead of "243". It also directed PCO to ensure that, parallel with proposed rule 430, the rule would provide that the Registrar would notify the applicant of the relevant dates for case management conferences and the applicant would inform the other parties (similar to the provision in proposed rule 430(1)(b)).

It deleted the words "before a Judge or Master" in proposed rule 429(1).

It deleted the words "that is not later than" in proposed rule 430(1)(a) and replaced them with "within". It also amended proposed rule 430(1)(b) to read "give notice of the date of the case management conference to the appellant and everyone who has been, or is to be, served with a copy of the appeal".

It approved proposed rules 431 to 434.

A query was raised as to whether it was necessary to keep different lists of proceedings as seemed to be envisaged by proposed rule 435. This rule is to be highlighted in the consultation paper for Registrars' attention.

The Committee directed PCO to re-word proposed rule 436(2)(b)(ii) to make it clear that the gist of it was that hearing dates were to be allocated in order but only so far as this was practical.

It approved proposed rules 437 and 438.

The Committee approved proposed rule 441A. It amended proposed rule 441B(2) by replacing "21 days" with "15 working days".

It approved the proposed amendment to rule 441C and approved proposed rules 441M, 441N, 441O, 441P, 441Q, and 442.

The Committee directed PCO to renumber the items in Schedule 4 and add the following items:

- Allocation of a setting down date
- Categorisation of proceedings for the purposes of rule 48(2)

It also amended item 4 in Schedule 4 so that it read "The scope of and timetable for any discovery and inspection. Item 13 was amended by inserting the word "notice" after the word "short". The Committee also

directed PCO to fix the numbering of items in Schedule 5 and to take account of decisions made at its last meeting (as outlined in Minutes/6/02, item 3.2). There was to be a common bundle of documents on appeal unless the Court directed otherwise.

The Committee approved all other proposed rules contained in Amendments/20/02.

The Committee directed Mr. Drake to highlight in the consultation paper the issue of whether the Committee had the power to compel parties personally to attend case management conferences and, if it did, whether the rules should provide for compulsory attendance.

## **6.2 High Court Amendment Rules (No 2) 2002 and District Courts Amendment Rules (No 4) 2002 – Omnibus 2**

The Committee considered the latest draft of the High Court Amendment Rules (No 2) 2002.

It considered the issue of whether proposed HCR 41 explicitly should recognise the authority of a barrister to file documents. Justice Chambers noted that this would also be an issue where a barrister was appointed to represent an infant. The Committee decided to leave the issue and approve the proposed rule as is.

Chief Parliamentary Counsel drew the Committee's attention to proposed rule 48H and noted that 48H(1)(b)(iv) had been included so as to show explicitly that 'disbursements' included the telephone expenses of a teleconference. He also noted that the reference to a \$100 minimum for a class of disbursements had been removed. The Committee approved these changes.

With regard to proposed HCR 783, Mr. Finlayson informed the Committee that he had been in discussion with the other members of the admiralty rules subcommittee and that the subcommittee was of the firm opinion that an intervener should not be required to obtain the leave of the Court before intervening. The Committee noted that the Civil Litigation and Tribunals subcommittee of the New Zealand Law Society had a differing view. The Committee accepted the admiralty rules subcommittee's recommendation and approved proposed HCR 783 as is.

The Committee also decided to retain the commencement date of 1 February 2003 for Omnibus 2.

It approved the draft of Omnibus 2 subject to the comments at this meeting. PCO was to prepare concurrence copies as soon as possible to enable the amendments to be considered by Cabinet.

### **6.3 District Court Amendment Rules (No 3) 2002 – Family Court Rules**

Judge Doherty reported to the Committee the views of the District Courts subcommittee.

The Committee approved the draft and directed the Secretary to arrange copies for concurrence.

## **7. Construction Contracts**

The Committee considered a letter from the Ministry of Economic Development to the Secretary concerning the need for amendments to the DCR consequential upon the passing of the Construction Contracts Bill.

The Committee noted that the Bill had not yet been passed by Parliament. Chief Parliamentary Counsel informed the Committee that a supplementary order paper had already been attached to the Bill to deal with the 'leaky building' issue and had been referred to a Parliamentary subcommittee.

PCO informed the Committee that rules would be required to facilitate the enforcement of adjudicator's decisions et al as provided for in the Bill. These would need to be in place from the date when the Act came into force. The Committee accepted that this was an urgent matter and directed PCO to begin drafting rules to deal with this. PCO was to do this in conjunction with the Ministry of Economic Development. The proposed rules would then be circulated to the District Courts subcommittee and the Committee would consider them at its 10 February 2003 meeting.

## **8. District Courts Subcommittee**

Judge Doherty reported to the Committee that the subcommittee had made no further progress on the issue of costs in the District Courts. The issue had been complicated by the resignation of Judge Jeremy Doogue who was the chair of the subcommittee. The Committee confirmed that membership of the subcommittee comprised Judge Doherty (chair), Justice William Young, the District Court Judge to be appointed, and the two New Zealand Law Society representatives.

Judge Doherty said that, before the next meeting of the Rules Committee, the subcommittee would:

- a) discuss the extent to which Omnibus 3 (case management) could be carried across to the DCR;
- b) discuss the draft costs rules prepared by PCO.

Both these matters will be discussed by the Rules Committee at its 10 February 2003 meeting.

## **9. Discussion with Attorney General**

The Committee welcomed the Attorney-General to the meeting. The A-G informed the Committee that the Statutes Amendment Bill which provided for the repeal of Part V of the District Courts Act 1947 was unlikely to be passed this year.

The Committee then discussed the issue of the reform to the rules with the A-G. Justice Chambers informed the A-G of Ms Petersson's comments as to the Alberta experience and noted that this had resource implications for the Government. The A-G explained that there was much competition for Government funding and that, consequently, a good business case would need to be put forward justifying the expenditure. On the issue of timing the A-G noted that it was really too late for funding to be expected in the 2003 budget. The A-G informed the Committee that her view was that funding for completing the case management system and proper evidence recording in all courts took priority.

Justice Chambers explained that what was involved was a 'fundamental re-thinking' of the rules. As such, to cut down on the work involved, he raised the idea of identifying an overseas model of reform and seeing if it could be adopted in NZ. The A-G emphasised the need to quantify any financial benefits from such a project and agreed to put it on her agenda for Cabinet.

Justice Chambers thanked the A-G for her attendance and comments.

The Committee then continued discussing the issues involved in any reform. Mr. Weston noted that if another jurisdiction's set of reforms was adopted, work would be required first to identify which set of reforms were preferable and what benefits would accrue to NZ from adopting those reforms. Ms. Clark suggested that the Committee, in its business case, should identify different options available to it and indicate its preferred option.

The Acting Chief Justice raised the issue of what the Committee aimed to achieve from the project. The Committee considered that simplifying the rules and potentially unifying them so far as possible were the main aims.

The Committee adopted Ms. Clark's suggestion. Justice Wild and Messrs. Finlayson and McCarron undertook to prepare a further paper outlining a 'business case' on the basis of the 'options approach' outlined by Ms. Clark. Mr. Finlayson would co-ordinate the preparation of this paper which would also look at the resourcing of the project and consider the 'why' (the justification for the project), the 'how' (how it would be implemented), the 'who' (who would be best placed to undertake the project), and the 'which' (which institution ought to have overall control of the project).

## **10. Interlocutory Matters**

The Committee considered Justice William Young's paper on the issue of 'reviewing' a master's decision. The problem was that the concept of an 'order or decision made by a Master in Chambers' was uncertain in scope.



Justice Chambers raised the question of whether the proposed solution in Justice William Young's paper conflicted with s26P of the Judicature Act 1908.

Justice William Young undertook to prepare a further paper on this issue. PCO was to look at the history of the amendment to s26P of the Judicature Act 1908 and prepare a background paper to the change and suggest possible solutions to the problem. The Committee would consider the matter again at its 10 February 2003 meeting.

#### **11. Rulemaking for the District Court**

The Committee noted that the Ministry of Justice supported the delegation of further power to the Rules Committee with respect to making rules for the District Courts.

#### **12. Arbitration**

Justice Wild reported that Arbitrators' and Mediators' Institute of NZ Inc had recommended that no changes were to be made to the arbitration rules in the HCR. This matter was removed from the agenda.

#### **13. Discovery**

The Committee considered how to progress the issue. It agreed with Justice Chambers's suggestion that the discussion initially be confined to the HCR in case the District Court had special requirements.

The Committee considered the Law Commission's report on discovery (Report No. 78). A majority of the Committee was in favour of accepting the Law Commission's recommendations on discovery which essentially were that material had to be 'directly relevant' and that a party would be able to seek further discovery orders if necessary.

The Committee decided that there would be no need for there to be a 'notice of general discovery' as discovery was now always dealt with at case management conferences; an application should be necessary only if a party required further discovery.

The current procedure of listing documents would be the default position unless varied at the case management conference.

The Committee also discussed whether specific rules were needed for electronic documents or whether the existing rules were adequate.

It directed PCO to draft replacement rules on discovery along the lines recommended by the Law Commission's report (Report No. 78) but also incorporating the changes the Committee had discussed today. The rules were to include one specifically stating that the reasoning from *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD

55 (CA) which allowed a party to seek discovery of documents if it might 'fairly lead him to a train of inquiry' did not apply as a general proposition.

The Committee then considered the issue of discovery in the District Court. A suggestion was made that there should be no general right to discovery at all in the District Court for claims involving less than \$30,000.

The Committee decided to mention this suggestion in the eventual consultation paper but decided that a decision to that effect should be await the District Courts Subcommittee's recommendations on small claims generally.

**14. Exchange of Evidence**

This matter was carried over to the next meeting.

**15. Part IV – procedure in special cases**

This matter was carried over to the next meeting.

**16. Payments into Court.**

This matter was carried over to the next meeting.

**17. Third Party Notices – Summary Judgment**

This matter was carried over to the next meeting.

**18. Costs in Bankruptcy Proceedings**

This matter was carried over to the next meeting.

**19. Contempt – new rules**

This matter was carried over to the next meeting.

**20. Small Claims**

This matter was carried forward to the next meeting.

**21. Summary Trials**

This matter was carried over to the next meeting.

## **22. Case Management**

This matter was carried over to the next meeting.

The meeting closed at 3:30pm.

The next meeting will be held on Monday, 10<sup>th</sup> February 2002.

Justin Drake  
Clerk to the Rules Committee