THE RULES COMMITTEE

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Wellington

16 August 1994

Minutes/3/94

**CIRCULAR NO 24 OF 1994**

**Minutes of the Meeting Held on 11 August 1994**

## 1. Preliminary

The meeting called by Agenda/3/94 was held in the Judge's Common Room, High Court, Wellington on Thursday 11 August 1994 commencing at 9.30 am.

## 2. In Attendance

The Hon Justice Doogue (in the Chair)
The Solicitor-General (Mr J J McGrath QC)
Dr G P Barton QC
Mr C R Carruthers QC
Mr H Fulton
Mr W Iles QC CMG (Chief Parliamentary Counsel) (by invitation)

## 3. Apologies for Absence (Item 1(a) of Agenda)

The Chief Justice (Right Hon Sir Thomas Eichelbaum, GBE)
The Hon Justice Thomas
Master Hansen
Chief Judge Young
The Attorney-General (The Hon Paul East MP)
Mr R F Williams (for the Secretary for Justice)

## 4. Confirmation of Minutes (Item 1(b) of Agenda)

The minutes of the meeting held on Thursday 16 June 1994 were taken as an accurate record and were confirmed and signed by the Chairman.

## 5. Matters Arising from the Minutes (Item 1(c) of Agenda)

Matters arising from the minutes were considered under the topics on the agenda.

## 6. The papers Tabled at the Meeting

By the Secretary:

- Probate/3/94 - Part VIII of the High Court Rules
- Directions/2/94 - Case Management; Proposed Use of Mini Trials in High Court
- Directions/3/94 - Evidence by Video Conferencing

By Justice Doogue:

- Extract from "*Access to Justice and Action Plan*" produced by the Access to Justice Advisory Committee 1994.
- Port Nelson Limited v the Commerce Commission (Court of Appeal, CA 111/94, 1 July 1994).

By Mr Carruthers:

- Draft practice note on Review of Masters' Decisions.
- Letter from Master Hansen dated 13 April 1994 relating to the Admiralty Rules and Rule 700P.

By the Solicitor-General:

- Letter dated 11 August 1994 - Court of Appeal; Technical Advisors.

By Mr Iles:

- The High Court Amendment Rules (No 2) 1994.
- Draft of proposed rules in relation to exchange of witnesses' statements.

## 7. Matters Referred to Mr Iles (Item 2 of Agenda)

In respect of 2(f) Judgment/Acts Interpretation Act, Mr Iles advised that he had prepared a draft new r 543 which is virtually identical to the existing rule except that the references to "*retirement*" have been removed on the basis that that will be dealt with in s 25A of the Acts Interpretation Act.

In respect 2(e) Exhibits to affidavits of service, Mr Iles said that there were three situations; in most cases it should be possible for a person to list the exhibits but not annex them; a person can exhibit the documents if they want to; and a person can exhibit the documents if that it is necessary. He said that the aim of the draft was to permit those three options under the rule. Mr Iles added that when he had redrafted the form in the schedule he had substituted "*place of residence*" for "*address*" in the interests of consistency.

Mr Fulton said that it may be necessary to exhibit the document if it is not already on the court file and Mr Iles said that he had provided that paragraph three in the form could be deleted if it were inapplicable.

Justice Doogue queried whether Mr Iles' wording made it clear that a copy is not required to be served if the affidavit contains a description of the document served.

Mr Carruthers suggested that the provision be worded that it is not necessary to exhibit a copy of the document where the document is already on the court file, provided there is a sufficient description of it.

After discussion, Mr Iles stated the proposition that where the service of the document is proved by affidavit in form 16 and the document served has been filed in the office of the court and the affidavit contains a description sufficient to identify the document, the document served is not required to be annexed to the affidavit.

The Solicitor-General suggested an "*adequacy*" test - the document being either on the file or otherwise adequately identified.

Mr Fulton said that that would be the case if the document were before the court.

Justice Doogue said there might be an issue as to whether a document is before the court as for example where an amended statement of claim is served before filing, but he thought that any doubt about the matter could be raised with the other side or the party could even cross-examine the deponent.

Dr Barton said however, that the Judge or Master may need to be satisfied that the document has been served when the deponent is not before the court.

Mr Carruthers gave as an example that it would not be necessary to have an affidavit sworn in support of the application.

After discussion, the Committee agreed that the document should not have to be annexed if it is filed but that otherwise it should be.

Finally, Mr Iles advised that the amendment to s 25A of the Acts Interpretation Act comes into force on 1 September and that, given the Cabinet's requirements of 28 days notice, the rule has been given a commencement date of 1 October; he said that the one month gap is unlikely to occasion any difficulties.

In respect of 2(d) Exchange of witness briefs, Mr Iles tabled a draft for discussion. Justice Doogue advised that the Court of Appeal decision in *Port Nelson Limited v The Commerce Commission* (tabled) upheld a direction as to exchange of witness briefs under r 437.

Mr Iles advised that he had broken up the draft from Justice Thomas' draft into a number of separate rules and had placed it after r 441 rather than as r 438A; he noted that r 439 runs on from r 438. Mr Iles then advised that he had defined the type of proceedings to which the rule applied in a positive rather than a negative way. Mr Iles also said that the paper put forward by the Bar Association mentioned the relationship of these rules and cases to which rr 500 and 502 applied being cases where there is agreement that the evidence shall be by affidavit or where there is an agreed statement of facts; as a result, Mr Iles said that he had included draft rules (c) and (d) to accommodate that point. Mr Iles said that the rule would not apply generally under sub clause (1) and for that reason he had expanded sub clause (2) so that where there was such an agreement the rules would apply. Finally, Mr Iles said that he had made provision at the end that the rules should not affect r 490.

Justice Doogue said he thought it appropriate for the draft to go to the Law Society and the Bar Association for comment at this stage and Mr Carruthers agreed to co-ordinate that.

Mr Fulton raised the issue in respect of r 441J(b) on page 4 of inadmissible evidence and the Committee agreed that, while the intent is clear, there may be a number of matters that require some fine tuning.

Mr Iles said that he had made no progress on items 2(a) and (b) of the agenda and that no action is at present required on 2(g), being contingent on the Law Commission report.

## 8. Admiralty Rules (Item 3 of Agenda)

Mr Carruthers tabled a letter from Master Hansen and explained that Master Hansen had arranged for one of the Judges' clerks to prepare a paper.

## 9. Appeals

(a) ***R A Bachelor and Others v Tauranga District Council***

Consideration of this matter was deferred until Justice Thomas has spoken to the President of the Court of Appeal.

(b) **Part IX High Court Rules**

Dr Barton queried whether rr 437 to 442 were really apt and he suggested a special rule empowering the court to make directions as to be place of hearing and other like matters.

Justice Doogue suggested that a rule might be framed along the lines of s 10 of the Judicature Amendment Act 1972 and after discussion it was agreed that Mr Carruthers and Mr Fulton would refer the issue to their respective Law Society Committees.

**10. Court of Appeal**

(c) **Technical Advisors**

The Solicitor-General said that the issue was whether there is a power for an adviser to sit with the court and give advice on the meaning of technical evidence and whether that sits comfortably with the phrase "*practice and procedure in the rule making power*" the Solicitor-General said that there is always an aspect of practical significance in that someone who has never felt comfortable with a particular expert being appointed to assist the court may challenge the rule itself. The Solicitor-General agreed that the procedure could be streamlined to help the Court of Appeal but he felt that it is desirable to pursue an early legislative change along the lines of what is already provided in the Patents Act. In respect of his own role, the Solicitor-General said that while in practice the Rules Committee has a responsibility for the rules, in terms of the Act it is one of concurrence and Executive Government still has the primary responsibility. The Solicitor-General considered it appropriate for his advice to be sought if there were any concerns about any proposed rules.

Mr Iles advised that there are two law reform miscellaneous provisions bills on the legislative programme for this year which he described as "*the fast train and the slow train*". He said that the "*fast train*" is in preparation at present and a provision could be included if the Committee favoured a legislative solution.

Mr Carruthers questioned how the Solicitor-General would categorise the power if it is not a matter of practice or procedure.

The Solicitor-General saw it as going to what the court itself actually comprises. He said that that is readily understood where people are appointed under the Commerce Act as members of the court but people who sit with the court and have a role as an assessor are coming close to being part of the court and certainly close enough for a lay litigant to object. The Solicitor-General drew attention to s 19 of the Judicature Act which deals with the High Court and pointed out that the contrast is there between persons who sit with the court and persons who are members of the court.

Mr Carruthers recalled that in the case of *Beecham Group Limited v Bristol Meyers* [1981] NZLR 185 Professor Ferrier participated in the hearing to the extent that he commented to the Judge on the evidence.

After discussion, the Committee agreed that the Chairman should write to the Minister of Justice outlining the proposal and the background to it and suggesting that a legislative amendment be included in the Law Reform Miscellaneous Provisions Bill. The Committee agreed that such an approach should be subject to the Chairman speaking first to the President of the Court of Appeal to ensure that proceeding in that way has his support.

## 11. Costs (Item 5 of Agenda)

### (a) Generally

Justice Doogue referred to Costs/3/94 and the draft advertisement calling for submissions from the profession. Mr Carruthers stressed the need for any such advertisement to feature prominently in "*LawTalk*"and Justice Doogue said that he could address a letter directly to the Executive Director of the New Zealand Law Society.

Mr Carruthers advised that the October or November edition of LawTalk is planned to feature a number of litigation issues and he thought the question of costs could well be associated with that.

Mr Fulton recalled that there had been an article published about twelve months ago prepared by the Civil Litigation and Tribunals Committee which could profitably be published again.

Justice Doogue said that he would write to the Chief Justice so that the matter could be raised with the Judges as well. In this context he referred also to the Australian report "*Access to Justice - An Action Plan*" and noted that the Australians are currently facing the same issues. Justice Doogue advised that that report had been prepared by an advisory group, headed by Queen's Counsel and set up by the Attorney-General on behalf of the Australian Government.

Justice Doogue recalled that it was proposed to consult the Law Society, the Bar Association and the Legal Services Board and he recalled that Dr Barton had suggested the Consumers Institute.

Dr Barton mentioned the Ministry of Consumer Affairs, and Mr Carruthers said that there should be some clearer proposals before consulting outside of the profession.

The Committee agreed that Justice Doogue should send a copy of the advertisement to the Chief Justice and also to Mr D Smith of the Legal Services Board.

Mr Carruthers advised also that he and Mr Fulton had conferred on a draft scale and their approach has been to look at the question of how to deal with costs of the hearing, and then to fit the balance of the scale around that. He said that they are looking at an indicative guide by taking a daily rate and that they were moving away from dividing the scale up in terms of amount. Instead they were looking to an appropriate daily rate for hearing and devising a formula for preparation along the lines of two days of preparation for one days trial. He acknowledged that there would be a significant discretionary factor but at least there would be a guide for the profession and the public. He considered it would then be possible to adapt that concept to each item remaining on the scale and he gave the examples of commencement and interlocutory applications as being matters that should fall into place. He said that he hoped to have a draft that could be considered by the Committee at the next meeting.

Justice Doogue recalled that under the old criminal legal aid scheme there were half daily rates with differing levels for QC's, senior and junior counsel.

Mr Carruthers agreed that the move now is towards hourly rates on scales for legal aid.

Mr Fulton said that there was a need to prepare the scale on a different concept and he said that there is an artificiality about relating the scale to the amount claimed such that costs can be either too low or too high.

The Solicitor-General queried how the rate would apply to commencement of proceedings, and Mr Carruthers advised that a period of time would be allocated for commencement.

Mr Carruthers said that the principle on which they were working is that party and party costs would be a reasonable contribution to the actual costs and that the scale is really intended to be an indicative guide. He added that the word "*scale*" would probably not be used.

(b) **Withdrawal of Solicitor from Proceedings**

Mt Fulton said that the short point made by the Canterbury District Law Society is: why should a solicitor who wants to obtain an order to be no longer on the record have to pay court filing fees on the interlocutory application?

The Solicitor-General suggested that there should be an incentive to get the matter before the court as soon as possible, but Mr Carruthers suggested that if solicitors are not protected for their fees then that is a matter for them. Mr Fulton pointed out that the erstwhile solicitor has an advantage in getting an order from the court that they are now off the record.

Justice Doogue said that he had never seen such an application and that the matter had always arisen orally when the case was next before the court.

Mr Carruthers said that the former firm may be relieved to get off the record and be quite willing to pay the filing fee to achieve that.

Dr Barton asked why the solicitor should not simply file a notice, and Mr Fulton said that the reason was probably to enable the court to give directions as to service of documents.

Justice Doogue and Mr Fulton were both able to recall occasions when another solicitors office had been nominated as an address for service.

The Committee agreed to make no recommendation on the fee, and that if the solicitors wished to pursue the issue they should address that with the Department of Justice. Mr Fulton agreed that he would report to Mr Buchanan.

(c) **Security for Costs**

Justice Doogue asked whether the High Court should have power to vary the amount set for security for costs.

Mr Carruthers said that he could not think of a practical problem that he had ever encountered with the rule and noted that the present suggestion looked like a tactical move to get rid of the appeal. He added that if a party does not like what the registrar has done then there is an opportunity to deal with it in a set framework.

Mr Fulton referred to the last paragraph on page eight of the judgment and the reference to some other approach to fixing security for costs. He said that he was not aware that the profession was dissatisfied with the present rule but suggested that the Civil Litigation and Tribunals Committee might look at it.

Mr Carruthers agreed to raise it with the Society and the Bar Association and report back.

Mr Carruthers noted that the practice in Auckland and Wellington varies such that in Wellington the Registrar fixes security automatically when the duplicate notice is lodged in the High Court, while in Auckland the party needs to make an application.

Justice Doogue agreed that there should be consistency in amounts and procedures amongst the various registries, particularly given the draconian provision that the appeal is deemed to be abandoned in the absence of security for costs.

(d) **Costs on Interlocutory Applications**

Justice Doogue expressed sympathy for the position, but said that the Committee should not be fiddling with just one item in the scale when the whole topic of costs is being considered. Justice Doogue suggested that the Secretary reply saying that the whole topic of costs is under review and that the Committee does not want to look at any particular item in the scale in isolation; the writer will be well aware that costs on summary judgments have attracted fees in excess of those in the scale. Finally, Justice Doogue suggested that the writer could be sent a copy of the advertisement which is to be published in "*LawTalk*"and advised that his views will be taken into account in the process.

**12. Directions (Items 6 and 10 of Agenda)**

(a) **Video Conferencing**

Mr Iles advised that the Evidence Amendment Act 1994 No 31 has been passed and is to come into force on a date to be appointed by Order in Council. On the Australian side, he advised that the Australians could well be making rules by the end of September and then be looking to New Zealand to pass reciprocal rules before the next meeting of the Rules Committee. He explained that Mr Hoffman from the Department of Justice is involved in this area, and that Mr Tanner of the Parliamentary Counsel Office was aware of the need for rules to be drafted.

Justice Doogue referred to Directions/3/94 (tabled) being the paper from Mr Williams, to Directions/1/94 being the memorandum from Justice Barker and Pleadings/2/94 relating to the Australian Protocol. He advised that the Chief Justice had responded to the Department of Justice saying that he was aware of the Australian Protocol and that if the Department wished to base a draft on that, the Rules Committee could consider it. He advised that neither the Chief Justice nor Justice Barker saw the need for the Rules Committee to be pro-active on this matter.

**13. Discovery (Item 7 of Agenda)**

Justice Doogue recalled that the amended time limits for complying with notices for discovery had been referred to Mr Iles from the last meeting.

Mr Carruthers raised the desirability of revisiting the exchange of statements and requiring some form of disclosure at an early stage. He alluded to the depositioned procedure in criminal cases and said that if the Committee is looking at a system designed to promote an early focus on the issues of the case with a view to resolution supported by settlement procedures under the rules, the one thing missing is a requirement of a statement of evidence that sets out the main evidential features of the case.

Justice Doogue asked whether Mr Carruthers was suggesting that every proceeding should start along the lines of a summary judgment and Mr Carruthers agreed. Mr Carruthers said that a restricted use should be made of the statement; he saw it as a disclosure mechanism so that there could be a proper focus on the case. In the commercial list procedure for example Mr Carruthers thought that the statement of issues at an early stage did tend to focus the case and the next step from that is an outline of the evidence on which the case relies.

Mr Carruthers said that he would like to see how the case management project runs. Mr Fulton agreed and said that the scope of discovery, and whether there is any practical and sensible way of limiting it is still an issue in respect of which the case management project may give some insight. He said that he understood overseas jurisdictions are grappling with the same issue.

Mr Fulton, in his capacity as a member of the case management pilot committee, mentioned that such issues can be raised at an early directions conference.

After discussion the Committee agreed that this item should be considered on the agenda for the meeting in June 1995.

**14. Interrogatories (Item 8 of Agenda)**

This matter was deferred until the next meeting, noting that it would be helpful to have Master Hansen present for any discussion. Justice Doogue and the Secretary agreed to confer on whether there is a need to schedule an all day meeting to consider the issue.

**15. Masters (Item 9 of Agenda)**

Mr Carruthers tabled a suggested practice note, and Justice Doogue considered it expressed the matter admirably and succinctly.

Mr Carruthers said that his draft does not (and cannot) deal with the point about a considered reasoned judgment being the end of the matter because there is a power of review in the Act.

Mr Fulton put it that the onus on the party seeking review is an appellate onus.

Mr Carruthers noted that under the Human Rights Act it is clear any appeals are de novo, and Justice Doogue said that that was the case also in respect of the Guardianship Act.

Mr Fulton queried whether it was necessary to use the expression "*matter of routine*", but Mr Carruthers said that one would hope every Master's decision was a reasoned decision.

Mr Carruthers said that in the vast majority of cases the question of what is a "*matter of routine*" is going to be clear beyond measure, and the Solicitor-General noted that this is not

a rule but rather as a practice note which can give guidance for some ninety five percent of the cases.

The Committee agreed that Justice Doogue should refer the draft to the Chief Justice with a view that, if the draft is acceptable to him, it can then be referred to the Judges for their consideration.

**16. Probate and Administration (Item 11 of Agenda)**

Mr Fulton identified the issue as whether there needs to be provision in the rules that proceedings relating to an estate should be filed in the same registry as the other proceedings relating to that estate. He advised that the New Zealand Law Society did not see any need for a change to the present rules.

Mr Carruthers said that the Courts and Tribunals Committee had not considered it because the matter was resolved by the General Practice Committee and there seemed to be no need for any amendment.

Mr Fulton said that r 643 probably covers the point about the place of filing.

Justice Doogue referred to the second to last paragraph of Mr Corry's letter of 21 March which submits that there should be a rule within Part VIII which deals with other applications for administration which logically should be filed in the same registry as r 643 requires and he said that r 643 makes it plain that all matters in that part have to be filed in the same registry in any event.

Dr Barton queried why it is more appropriate to have proceedings relating to the administration of the estate filed in the same court where the application for probate is filed.

Mr Carruthers said that it is more likely than not that it will be, and Dr Barton agreed that the executors of the estate will normally be the defendants.

Mr Fulton suggested that Mr Corry's point may have been to achieve a regime similar to that relating to companies where all proceedings are on the one file. As against that, Dr Barton said that probate proceedings relate to title, in that the executors represent the deceased, and that seemed to him to be a separate issue from proceedings which might be brought against the estate.

Mr Fulton said that it is conceivable that a caveat might be lodged in a different registry, but Mr Carruthers said that the purpose of r 107 is to isolate the most convenient registry in any event.

Justice Doogue suggested that the Secretary should write to Mr Corry expressing their thanks for drawing the matter to their attention but that the Committee considers that no change is required as the existing procedures deal with the matter satisfactorily on a day by day basis. He further suggested that a copy of Mr Alston's letter be made available to him

and that Mr Corry be advised that the Committee does not consider it necessary to make any specific provision relating to filing proceedings relating to the estate in the registry where the application for probate or administration is made as r 107 enables the most appropriate registry to be the place where the proceedings should be filed.

**17. Winding Up Rules (Item 12 of Agenda)**

Justice Doogue referred to page 21 of the minutes of 30 November 1993, and Mr Carruthers said that both he and Robert Buchanan had chased up the Corporate Lawyers Association but that no response had been received. The Committee agreed to take the item off the agenda.

**18. Mini Trials (Directions/2/94)**

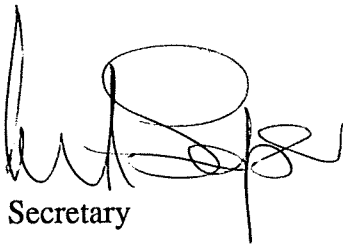
Mr Carruthers advised that he had sent the matter forward to the Civil Litigation and Tribunals Committee which is keeping the procedure under review and that no response is currently required.

**19. General Business**

In respect of the new companies legislation, Mr Fulton queried whether there should be any systematic review given that all that had been done so far was a number of amendments to accommodate the new legislation.

In the first instance, the Committee agreed to enquire of the Department of Justice as to whether any other rules are required.

The meeting closed at 12.40 pm. The next meeting will be held on Thursday 24 November; I will advise whether the meeting will be scheduled to go all day in order to give time to discuss interrogatories.



Secretary

MAS:5829

# ADDENDUM TO THE MINUTES OF THE MEETING HELD ON 16 JUNE 1994

Action required by:

## Justice Doogue

1. Address a letter directly to the Executive Director of the New Zealand Law Society enclosing the draft advertisement calling for submissions on costs.

2. Send a copy of the draft advertisement calling for submissions from the profession on costs to the Chief Justice and Mr D Smith of the Legal Services Board.

3. Speak to the President of the Court of Appeal on technical advisors.

4. Write to the Minister of Justice on technical advisors in the Court of Appeal.

5. Confer with the Secretary on whether there is a need to schedule an all day meeting to consider interrogatories.

7. Refer the draft on review of Masters decisions to the Chief Justice.

## Justice Thomas

1. Speak to the President of the Court of Appeal with regard to ***R A Bachelor and Others v Tauranga District Council***

## Master Hansen

1. Arrange for one of the Judges' clerks to prepare a paper on Admiralty Rules.

## Mr Carruthers

1. In conjunction with Mr Fulton refer the issue of Part IX of the High Court Rules to respective Law Society Committees.

2. Prepare a draft scale to be considered by the Committee at the next meeting.

3. Arrange for draft rules on exchange of witness briefs to go to the Law Society and the Bar Association for comment.

4. Discuss security for costs with the Law Society and the Bar Association and report back to the Committee.

**Mr Fulton**

1. In conjunction with Mr Carruthers refer the issue of Part IX of the High Court Rules to respective Law Society Committees.

2. Report to Mr Buchanan on withdrawal of solicitor from proceedings.

**Miss Soper**

1. Reply on costs on interlocutory applications.

2. Confer with the Justice Doogue on whether there is a need to schedule an all day meeting to consider interrogatories.

3. Write to Mr Corry on probate and administration.

4. Enquire of the Department of Justice as to whether any other rules are required on Companies Winding Up. (Justice Doogue or Miss Soper?).