THE RULES COMMITTEE

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27 June 1997

Minutes/2/97

CIRCULAR NO 34 OF 1997

Minutes of the Meeting held on Friday 13 June 1997

The meeting called by Agenda/2/97 was held in the Judge's Common Room, High Court, Wellington, on Friday 13 June 1997 commencing at 9.30 am.

1. **Preliminary**

(a) *In Attendance*

The Hon Justice Doogue (in the Chair)
The Hon Justice Fisher
The Hon Justice Hansen
Judge Jaine (for the Chief District Court Judge)
Mr K McCarron (for the Chief Executive, Department for Courts)
Mr R S Chambers QC
Mr G E Tanner (Chief Parliamentary Counsel, by invitation)
Mr R Peden and Ms C Pooke (from the Ministry of Justice, by invitation)
Mr M Steel, Ms L Dome and Mr N Crang (from the Ministry of Commerce, by invitation)

(b) *Apologies for Absence (Item 1(a) of Agenda)*

The Chief Justice (the Rt Hon Sir Thomas Eichelbaum GBE)
The Attorney-General (the Hon Paul East QC MP)
The Solicitor-General (Mr J J McGrath QC)
Mr C R Carruthers QC

(c) *Confirmation of Minutes (Item 1(b) of Agenda)*

On the motion of Justice Fisher, seconded by Mr Chambers, the minutes of the meeting held on Friday 14 March 1997 were taken as an accurate record and were confirmed.

(d) *Matters Arising from the Minutes (Item 1(c) of Agenda)*

Justice Doogue noted that matters of any substance are on the agenda for the meeting.

Papers Tabled at the Meeting

By Justice Doogue:

- Letter from Matthew Palmer, Deputy Secretary for Justice dated 12 June 1997.
- Copy of s 50 of the Defamation Act 1992.
- Copy of pp 94-97 of the Law Commission's report on arbitration.

By the Chief Parliamentary Counsel

- Letter to Justice Doogue dated 12 June 1997.

By the Secretary

- Appeals from interlocutory and final orders of the District Court (Interlocutory Matters/2/97).

2. **Matters referred to Parliamentary Counsel (Item 2 of Agenda)**

Generally, Justice Doogue raised the issue of drafting the rules in a more modern, plain English, style.

Mr Tanner said that the Law Commission has made some recommendations to Government and he noted that some changes in drafting style were adopted in January 1997.

(a) Admiralty Rules (Item 2(k) of Agenda)

Justice Hansen advised that these Rules are now in a form that they could be passed. He said that he had spoken also to Justice Giles who was happy with them.

Mr Chambers commented on the numbering system and suggested that the Admiralty Rules go at the end of the High Court Rules to avoid numbering by reference to numerals and capital letters.

Justice Fisher referred to the English system of numbering the orders and then numbering the Rules pursuant to each order sequentially from one in each case.

Mr Tanner said that that system can break down once the Act has more than twenty-six parts, and that he had reservations about altering the system and inserting one inconsistent with the existing Rules.

Justice Fisher suggested that the system might be progressively changed and the matter was left with Mr Tanner to consider.

(b) Court of Appeal (Civil) Rules 1997 (Item 6 of Agenda)

Justice Fisher referred to Rule 9 which gives either the court below or the Court of Appeal power to stay the proceedings pending the determination of the appeal. He noted that this rule differs from the old Rule 35 in that it gives the court power to order other interim relief. He noted that under the Court of Appeal Rules 1955 there have been some difficulties in preserving the position and he said that new r 9 appears wide enough to allow the court to make a declaration that the Minister ought not to deport or whatever. He noted further that the jurisdiction of the High Court comes from s 8 of the Judicature Amendment Act 1972 which gives the court power to make an interim order to preserve the position of the applicant pending the determination of the appeal. Where the Crown is the respondent, s 8 gives the court power to make a declaration.

Justice Doogue pointed out that s 8 of the Judicature Amendment Act 1972 does not confer jurisdiction on the Court of Appeal and that if the Court of Appeal does not have the jurisdiction it cannot be conferred by the rules. He referred to the decision of the Court of Appeal in *BNZ Finance Limited v Holland* [1996] 3 NZLR 534 where the Court of Appeal held that it has no original jurisdiction to make an interim order.

Justice Fisher suggested that the words "including a declaration affecting the Crown" could be inserted into r 9 on the basis that the words would address a lacuna in the Rules while leaving the *vires* issue to be argued if that should later arise.

The Secretary advised that in general the Solicitor-General has held the view that the Crown should be as bound by the law as other citizens, but said that she was not aware that immigration cases in particular were creating such difficulties.

The Court of Appeal (Civil) Rules 1997 were approved subject to any comments that the Court of Appeal might have and to any comments that the Solicitor-General might have about the proposed re-wording of r 9.

(c) Criminal Appeal Rules (Item 2(j) of Agenda)

The Committee noted the advice contained in the letter to Justice Doogue dated 12 June 1997 from the Chief Parliamentary Counsel that the statutory basis for the Criminal Appeal Rules 1946 may have been removed by the Crimes Amendment Act (No 2) 1980, and that there may be a hiatus before the enactment of s 51C of the

Judicature Act 1908. The Committee therefore agreed that there is a need to enact, in a suitable legislative vehicle, that the amendments to s 409 made by the Crimes Amendment Act (No 2) 1980 did not affect the Criminal Appeal Rules 1946 or any amendments to those Rules.

Mr Tanner agreed to take the matter up with the Ministry of Justice.

The committee approved the form of the rules as drafted.

(d) Interlocutory and Final Orders (Item 2(d) of Agenda; Interlocutory Matters/2/97)

Justice Doogue said that the Court of Appeal Rules 1955 currently provide an appeal time of 28 days from an interlocutory order and three months from a final one. He said that r 5 of the Court of Appeal (Civil) Rules 1997 provides for appeal periods of 28 days and two months respectively. He said that the majority of the Court of Appeal would prefer to see this remain, otherwise there are too many applications for leave to appeal out of time. He raised the possibility of a standard time for appeal of 28 days.

Mr Chambers said that in practice leave applications can take almost as long to argue as the substantive case and that if the appeal time is too short there may be more appeals lodged. He noted that litigants feel less inclined to appeal once a certain amount of time has elapsed.

Justice Hansen said that there were conflicting authorities about the appropriate appeal period in the summary judgment procedure, some taking the view that summary judgment is an interlocutory matter and others saying it is a final one. Justice Fisher recalled that the Court of Appeal had referred this issue to the Rules Committee.

Justice Hansen considered that a time limit of one month is generous anyway.

Justice Fisher queried whether the period ought to be twenty-eight days or one month, and Justice Doogue said that it can be easier to count in days if there are any holidays to be excluded.

The Committee then addressed how to define the distinction between interlocutory and final judgments.

Justice Doogue referred to Justice Fisher's definition but said that the disadvantage of this is that proceedings which ought to be disposed of quickly such as summary judgment are drawn out unnecessarily because of a two months time for appeal.

Justice Fisher said that he had two reasons for retaining a final judgment as the sole test. The first is simplicity and he said that once exceptions are made there is the potential to build up the jurisprudence in this area. His second reason is that a final judgment impacts on the parties and they need two months to prepare and raise funds and so on.

Justice Doogue queried whether the delay that would be occasioned in summary judgment proceedings gives a sensible result and he gave as an example the situation where the plaintiff succeeds on summary judgment but the defendant appeals.

Justice Fisher said that the defendant would still have to get a stay of execution.

Justice Hansen said that he is involved in laying down standards in respect of summary judgment which provide for the proceedings to be disposed of within two months and he considered a two month appeal time anomalous in that context. He said that stays of execution are commonly granted.

Justice Doogue said that these points support the argument for a standard twenty-eight day appeal period. Otherwise he said the definition of interlocutory judgment is hamstrung by putting in exceptions such a summary judgment, or there is a situation where proceedings which are expected to be concluded within two months nevertheless have a two month appeal period.

Justice Fisher said that if a definition is to be attempted then he would define final judgment as being any judgment or order which purports finally to determine the substantive rights of the parties, and then define interlocutory judgment as relating to everything else.

Justice Doogue suggested that the wording should refer to finally disposing of the proceeding so as to include strike out applications.

Mr Chambers said that there can nevertheless be a final judgment where costs are left open and said that applications can be made on proceedings after the file has been closed relating for example to security for costs or release of exhibits.

Justice Doogue said that if a final judgment is defined in terms of determining the substantive rights of the parties, the main ones could then be listed to make the meaning clear.

The discussion on this point, and the difficulties of reaching a definition lead the Committee to conclude that there should be a single time for appeal.

(e) *Judicial Settlement Conferences; Mediation and Alternative Dispute Resolution (Items 2(g) and (h) of Agenda)*

Mr Tanner asked whether the Committee was looking for a replacement r 442 and the Committee advised that that was not intended. Justice Doogue said that the Parliamentary Counsel Office can contact him to discuss it further.

(f) Parties in Miscellaneous Appeals (Item 2(i) of Agenda)

The Committee approved the drafting of this Rule unanimously.

(g) Power of a Justice of the Peace to take Affidavits (Item 2(e) of Agenda)

The Committee agreed that "solicitor" should be defined as the holder of a current practising certificate so that they would come within the disciplinary powers of the Law Society.

(h) Rule 626 (Item 2(a) of Agenda)

Justice Doogue said that the draft prepared as Attachment 6 and forwarded under cover of the Parliamentary Counsel Office's letter of 5 June 1997 addresses deleting definitions of the content of the writs from r 626, and raises the issue of whether there should be an amendment to the Judicature Amendment Act 1972. Justice Doogue proposed adopting everything suggested in the draft except in relation to r 628 so as not to compound the conflict between the High Court Rules and the Judicature Amendment Act. As a secondary step he suggested that the Committee could look at the Act with a view to making positive suggestions to its amendment. Adopting the rule change would entail modernising the language relating to mandamus etc but leaving r 628 standing.

The Committee agreed with that approach.

(i) Search of Court Records Generally (Item 2(c) of Agenda)

Justice Doogue noted that this draft was approved at the last meeting and now awaits inclusion in the next batch of amendments.

(j) *Summary Judgment Procedure (Item 2(f) of Agenda)*

Justice Doogue advised that there is a letter from the Ministry of Justice dated 6 June agreeing that summary judgment be extended to defendants. He noted that the Statutes Amendment Bill is proposed to be introduced in August but that the Courts and Criminal Matters Bill may not be introduced this year.

Justice Doogue referred to the threshold to be satisfied by a defendant if summary judgment is to be available and noted that Parliamentary Counsel had worded it in terms of "no serious question to be tried". Justice Doogue noted the overlap with rr 476, 478 and 426A. In r 426A the test is "proper issue to be tried in the proceeding". Rule 477 uses the expression "no reasonable cause of action is disclosed". Other tests are "no arguable case" or "no serious question to be tried".

Justice Doogue said that Mr Williams QC had referred to the Ontario legislation where the procedure is available if the party can show that there is no issue involving a trial. Justice Doogue said that there may be an arguable case even if there is no serious question to be tried and the tests are different because an arguable case may succeed on the evidence.

For his part Justice Fisher said that he could not think of a case where one test was satisfied but not the other.

Mr Tanner said that this point had occasioned some difficulties for the Parliamentary Counsel Office because the plaintiff has to show that the defendant has no defence and that the reverse of that from the defendant's perspective is that the defendant must show that the plaintiff cannot succeed.

Justice Fisher agreed that the issue needs more thought because if the plaintiff has to show that the defendant cannot succeed the plaintiff has to make a positive case and the defendant cannot really eliminate the possibility that the plaintiff may succeed.

Justice Doogue suggested that one of the judges clerks could pursue that item and see what other jurisdictions do. He suggested also that Mr Williams QC could make available any source material that he had based his submissions on.

Justice Doogue then referred to the future of r 138(3) which provides that summary judgment is not available if it is based on an allegation of fraud. Justice Doogue queried whether the position should be the same for the defendant.

Justice Fisher said that a defendant ought to be able to get the proceedings struck out in a fraud case. He said that the reason for restricting it in the case of the plaintiff is the seriousness of a positive fraud finding but that that is not the same in reverse.

Justice Doogue considered it odd to make the distinction because of the onus of proving fraud and he noted that the likelihood of the plaintiff obtaining judgment in a fraud case is not high. He considered that anything available to the defendant ought also to be available for the plaintiff, especially if fraud is not going to be easily established anyway.

Justice Hansen said that there will be complaints from the profession if the defendant can get summary judgment in a fraud case but the plaintiff cannot.

Mr Tanner mentioned the timing of amendments to the High Court Rules and said that the Statutes Amendment Bill is not likely to be passed this year.

3. Matters Referred for Statutory Amendment (Item 3 of Agenda)

(a) *Expert advisors (item 3(c) of agenda)*

Justice Doogue advised that this matter has been held over for inclusion in next year's legislative programme.

(b) *Grant of Probate or letters of administration to an attorney (item 3(e) of agenda)*

Justice Doogue advised that this matter is on track for inclusion in the Statutes Amendment Bill.

(c) *Review of Masters' decisions (item 3(a) of agenda)*

Justice Doogue advised that this matter is on track for inclusion in the Statutes Amendment Bill.

(d) Removal of proceedings from High Court into Court of Appeal (item 3(b) of agenda)

Justice Doogue advised that this matter is on track for inclusion in the Statutes Amendment Bill.

(e) *Winding Up (item 3(e) of agenda)*

Justice Doogue advised that this matter has been held over for inclusion in next year's legislative programme.

(f) *Summary judgment by defendant*

Mr Tanner advised that this matter is with his office for drafting (see the discussion under item 2(j) below).

(g) *Service on Companies*

This matter is with the Ministry of Commerce (see discussion under item 14 below).

4. **Appeals - Repayment of Judgment Sum and Interest (Item 4 of Agenda)**

Justice Doogue referred to the point raised by Mr Chapman that on the face of it there is a gap between the High Court Rules and the Court of Appeal Rules relating to the rights of an appellant to recover interest on a judgment between the date of payment and the date of repayment.

Justice Fisher said that this question has been raised where a defendant is concerned that if the judgment is satisfied it is not clear when and how the defendant recovers the money if the defendant wins on appeal. He said there should be a rule to the effect that where there is a successful appeal and the defendant has paid money over, that payment should be treated as the equivalent of a judgment which requires its return plus interest. He suggested that practitioners would expect to find such a rule in the Court of Appeal Rules.

Justice Hansen considered there would need to be a similarly worded Rule mirrored in the High Court Rules.

Justice Doogue asked the Secretary to send a copy of Mr Chapman's letter to the Court of Appeal, together with a copy of the minutes of the committee's discussion on the point, for the comments of the Court of Appeal.

5. **Costs (item 5 of agenda)**

This matter was deferred until the next meeting.

6. Court of Appeal (Civil) Rules (item 5 of agenda)

This item was discussed under matters referred to Parliamentary Counsel (item 2 above).

7. Directions

(a) *Canadian Bar Association (item 7 (a) of agenda*

This paper (Directions/1/97) was circulated for information.

(b) Arbitration (Item 7(b) of Agenda)

Justice Doogue said that the Law Commission has recommended an amendment to the Judicature Amendment Act to provide for court ordered arbitration. He tabled a copy of the Law Commission's recommendations on this point. He said that the issue arises because Mr Williams QC has drawn attention to the fact that after 1 July 1997 there is no court ordered arbitration because the new Arbitration Act is entirely consensual. He said that the question is whether this Committee should be pursuing legislation akin to the Law Commission proposal to fill the void created by the new Arbitration Act.

Justice Fisher said that there is some sense in the Committee adopting Rules which are in substance akin to old ss 14 and 15.

Justice Hansen queried whether as from 1 July it will also mean that a Master cannot arbitrate (as has often been done in the South Island).

Mr Tanner said that s 26M of the Judicature Amendment Act was substituted with effect from 1 July and that this section arose from the Law Commission proposals. It provides that a Master may act as a referee under the High Court Rules.

Justice Doogue queried whether it is appropriate for the Rules Committee to put in the Rules to order Arbitration if the Committee has doubts about its ability to put in Rules to order mediation.

Justice Fisher said that such a rule would not be unconstitutional because the courts function to resolve disputes and how the courts do that is a matter for the courts. He considered it would be appropriate for the Rules to provide for a court supervised arbitration.

Justice Fisher said that there are some proceedings where it would be undesirable for the parties to have the sole power to stay them. He cited as examples proceedings that involve a charitable trust or a company with interested creditors.

Justice Doogue expressed the agreement of the Committee that the matter be referred to the Parliamentary Counsel Office to draft an appropriate amendment.

Justice Hansen referred to draft Rule 383F proposed by the Law Commission and the Committee referred to the matter to the Parliamentary Counsel Office to consider.

(c) Rule 426A (Sunset Rule) (Item 7(c) of Agenda)

Justice Hansen said that he considered r 426A is being overtaken by case management which will soon be nationwide.

Justice Fisher said that it is however envisaged that the court can "park" a case under case management.

Justice Doogue said that this Rule needs to be looked at with rr 477 and 478 and look at the options open to a defendant to knock out bad claims.

Justice Hansen considered it would be necessary to bring in a de facto limitation period to accommodate Mr Chapman's point.

Justice Doogue referred to s 50 of the Defamation Act which gives power to strike out for want of prosecution.

Justice Fisher said that the Committee's approach depends on the underlying objective, namely whether the Committee wants to follow the s 50 of the Defamation Act approach or whether it wants the approach of the Court of Appeal in *McEvoy* where it is over to the defendant to persuade the court. He said that s 50 has more teeth than r 478. He identified the conflict between the principles of case management with preserving the rights of the parties.

Justice Doogue said that r 426A still has a role to play because there must be a cause of action worth pursuing. He said that the issue is whether the Committee wants to strengthen it.

Mr Tanner said that there are no equivalents in other statutes to s 50 of the Defamation Act and s 50 does not appear to have any history to it which would suggest that it was enacted to meet particular problems with defamation proceedings.

Justice Hansen agreed that gagging writs would be an example. He considered it unnecessary to review the Rule at present until the outcome of the case management pilot is known.

Justice Fisher expressed the sentiment of the Committee when he suggested that the point be left at the moment, but to advise Mr Chapman that case management should largely overtake his concerns. The issue needs to be brought up to be addressed again in a years time.

8. District Court Rules Committee (Item 8(a) of Agenda)

Justice Doogue referred to the letter received from Matthew Palmer, Deputy Secretary for Justice dated 5 June 1997, and noted his support for the proposal to include the District Court Rules within the jurisdiction of the Rules Committee. He noted that he did not agree with the statement that Rules governing the procedure of the High Court may be made only by the Governor-General in Council with the concurrence of the Chief Justice and the Rules Committee. He also disagreed with the statement that there were no problems of delay with the District Court Rules. Having said that, he considered it appropriate to advise Matthew Palmer that the Committee agrees with the proposal (even if the Committee does not agree with the entire content of the draft).

Judge Jaine noted the proposal that the Committee be expanded to include the Chief District Court Judge, a District Court Judge and another practitioner. He suggested it may be possible to have the same number of representatives from the profession but just include one who has a knowledge of the District Court.

Mr Chambers said that he had no firm view of it because s 51C of the Judicature Act 1908 requires the concurrence of the Chief Justice and two other members of the Committee, and Rules need not be approved by a majority of the Committee.

Justice Fisher referred to the potential role of the Family Court and said it would be untidy to address this issue in two stages. He suggested that Matthew Palmer be invited to say only that the membership of the Rules Committee be increased, leaving the precise membership to be determined later, because the Family Court may need to be appropriately represented.

Judge Jaine said that there is no movement calling for the inclusion of the Family Court Rules in the District Court Rules because while there is some concurrent jurisdiction the courts are basically quite different.

Justice Doogue said that there is no reason why the Rules Committee should not have people attending by invitation on special issues, and he noted that the District Court Rules Committee has been effectively defunct now for some two or three years.

Justice Fisher said that he thought there should be three practitioner members on the Rules Committee because they are often unable to attend because of fixtures.

Justice Doogue said that a large committee is more unworkable and suggested there might be a system of an alternate attending by invitation.

Mr Chambers noted that this can also be a useful way of getting specialist work done by practitioners who are experts in their field.

At Justice Doogue's suggestion the Committee agreed to put the composition and servicing of the Committee on the agenda for the next meeting.

9. Election Petition Rules (Item 9 of Agenda)

The Committee agreed that the in the interests of addressing the Election Petition Rules in detail the "sunset clause" in the Election Petition Rules 1996 should be extended.

Justice Fisher noted that the Electoral Act refers to a "petition" but he suggested that the Rules could provide for a petition to be brought by notice of proceeding and statement of claim.

Justice Hansen agreed that all proceedings before the High Court should be in a common form.

Mr Tanner said that s 229 of the Electoral Act 1993 provides that no election shall be questioned except by a petition, and that s 230(3) provides for the petition to be in such form as are prescribed by Rules of court. He did not consider it was therefore open to the Rules to provide for notice of proceeding and statement of claim.

Justice Fisher said that the companies winding up provisions are parallel in that in both cases proceedings are instituted against a particular entity and both have to be advertised.

Mr Chambers queried whether the statement of claim could be advertised, and Justice Hansen said that the Rules could provide a form for the advertisement.

Mr Chambers agreed that a statement of claim is simply a vehicle for coming to the court with the relevant facts and stating why a party should receive a particular form of relief.

Mr Chambers said that the term "petition" equates with the term "proceeding" in the High Court Rules and he saw no reason why if the form of proceeding in the High Court Rules is notice of proceeding and statement of claim a petition should not be presented in the same way.

Alternatively, Justice Fisher suggested that the form could be called a petition at the top but be in the same form as a statement of claim. The matter was left with Mr Tanner to settle in the draft.

Mr Chambers queried whether the entire petition or statement of claim has to be advertised and said that people need only to know that there is a petition and who is bringing it. In this context Mr Peden noted that people may also want to know the grounds.

In respect of r 458S Justice Doogue noted that it provides for delivery of the notice to the registrar at the office of the court nearest the place where the election was held, and said that there may be more than one court in the larger electorates.

Mr Peden said that the same term is used in the Act, but Justice Fisher said that the Rules may be able to clarify it.

Justice Doogue agreed that this matter needs to be addressed further.

Justice Fisher identified a number of matters including mode of service, substituted service, form of security and special forms to subpoena witnesses as matters that need to be considered further and he agreed to do a brief memorandum on those points for Mr Tanner and officials from the Ministry of Justice.

Justice Doogue, on behalf of the Committee, thanked Mr Peden and Ms Pooke for attending for this item.

10. **Family Courts Rules (Item 10 of Agenda)**

Justice Doogue said that he had suggested Judge Mahoney not attend the meeting because there would not be enough time to discuss this item. He noted that the District Court Judges have no wish to force the Family Court into the District Court structure because the Family Court operates in a different fashion and its Rules are stand alone except where there are concurrent jurisdictions. He said that he has arranged to meet Judge Mahoney and the Chief District Court Judge.

Justice Fisher said that there is room to revisit the High Court Rules in some family law areas such as matrimonial property and he said that the disclosure provisions in the Family Court ought to apply to the High Court.

10A. **Forum Non Conveniens - Trans-Tasman Harmonisation (Forum non conveniens/1/97)**

Justice Doogue expressed the view that so long as the outcome is clear any proposal to clarify the situation between countries is to be commended. He said that Australia is adopting a modified *Spiliada* rule. He said that he is happy to see the scheme pursued and has no objections in principle to the proposal contained within the letter. He agreed to respond accordingly.

11. **General - Amicus Curiae (Item 11(a) of Agenda)**

Justice Doogue said that in cases where there is an issue to be argued but one party is not represented, or there is a public interest beyond that being argued by the parties, his practice is to ask for an amicus. He noted that r 724J is confined just to Part IX relating to cases stated.

The Committee agreed that the Rule should be of general application and the matter was referred to Parliamentary Counsel to draft a suitable amendment. The Committee noted that all that should be required is to move the Rule into the body of the general Rules.

Justice Hansen suggested that it might go under the Rules relating to directions and Justice Fisher suggested it might appear as r 437A but that matter was left to Mr Tanner.

12. **Habeas Corpus (item 12 of agenda)**

This matter was noted for information.

13. **Interlocutory Matters (item 13 of agenda)**

Consideration of this item was deferred.

14. **Parties - Service on Companies (Item 14 of Agenda)**

Justice Doogue said that the requirement in the statute for service on the company gives problems for documents which are served after the originating documents. He noted that what needs to be established is the agreement of the company and said that the Act needs to be amended if the rules are to be able to provide for service at an address for service.

Mr Steel said that he did not know why rules of procedure were included in the Act in this way, but said that the intention at the time was that the Act would be a code for companies. He said that the Ministry is not wedded to a particular point of view and wants to do what is practical in the circumstances.

Justice Fisher said that for its part the Rules Committee considered that when it comes to the conduct of court proceedings there should be only one place to look for the Rules.

Mr Chambers said that in practical terms once litigation has commenced the responsibility for that falls on the company's solicitors who become the port of call for delivering documents.

Mr Tanner said that the provisions in the Companies Act 1993 relating to service had their genesis in recommendations from the Law Commission. He said that r 198(1) and (2) were put in to signal to practitioners that the Companies Act covered the point.

Justice Doogue said that what is new in the Companies Act 1993 is s 387(2) which provides that the methods of service specified are the only methods by which a document in legal proceedings may be served on a company in New Zealand.

Mr Steel said that he wanted to complete some enquiries and discussions on why that section was passed as it was and then go back to Mr Tanner. He advised that there will be some difficulty in passing an amendment to the statute and asked what risk there would be in leaving it until next year.

Justice Doogue said that it only requires one astute practitioner to notice that service was invalid and there could be serious consequences for parties to litigation.

Justice Doogue thanked Messrs Steel and Crang and Ms Dome for attending the meeting for this item.

15. **Pleadings - Certificate by lawyer responsible for document(Item 15 of Agenda)**

This matter was deferred until the next meeting.

16. **Tax - Proposed new rules of procedure (item 16(a) of agenda)**

Justice Hansen said that no case has been made out for a stand alone part and that to do so would be to defeat the objective of having a common procedure. The Committee agreed.

Justice Doogue said that, depending on the documentation, it may be appropriate to consider an originating application rather than a statement of claim but that this should be a matter for the parties to the litigation.

Justice Fisher said that he has heard a number of tax cases and would favour a statement of claim. He said that the procedure of annexing correspondence as a substitute for pleadings just demonstrates the need to define the issues.

The Committee agreed that the Secretary should write to the Department accordingly and also to ask it to indicate what amendments are necessary to the High Court Rules.

17. **Winding Up - Applications Subsequent to liquidation (item 17(a) of agenda)**

Justice Doogue said that the Chief Justice had a meeting with the Minister of Justice, Bill Moore and Matthew Palmer. Mr Palmer was satisfied that there were no policy issues but the matter had nevertheless been referred to the Ministry of Commerce for their comment.

The Committee agreed that the Secretary should write to Mr Palmer indicating that the Committee is grateful for that indication and would be pleased if the matter could be pursued.

Mr Tanner referred to his letter to the Chairman of 12 June 1997 and noted that the jurisdiction of Masters to set aside voidable transactions and charges were not included in the Judicature Amendment Act 1994, and that it was apparently not included because it was not intended to extend the jurisdiction.

Justice Hansen said that there were concerns at the time to bring all the sections into line but that the amendments were done in haste and his understanding was that it was intended to include voidable preferences within the Masters' jurisdiction. He noted that there is a wider issue in the letter from Marian Hinde namely as to whether applications in winding up should be brought by way of a separate set of proceedings.

Justice Doogue referred to Master Thomson's memo of 26 November 1996 where the Master referred to a decision of Justice Greig that court ordered liquidations are commenced by notice of proceeding and statement of claim and that all subsequent applications made by a liquidator should be by way of interlocutory application. Where there is a voluntary liquidation there will be no extant notice of proceeding

and statement of claim and thus an application in those cases should be commenced by notice of proceeding and statement of claim.

Justice Fisher said that the Court would have a power to direct pleadings at any stage. Justice Hansen said that the difficulty is the different approaches being taken in Auckland and Justice Fisher agreed that some practitioners have assumed that the matter is an interlocutory one but have had to start again with fresh proceedings.

Justice Doogue suggested that a practice note or an indication to the Masters on what the preferred procedure is should solve that problem.

The Committee agreed that the Secretary should respond to Marian Hinde.

The meeting closed at 3.30 pm.
The next meeting is to be held on Friday 29 August 1997

Secretary

ADDENDUM TO THE MINUTES OF THE MEETING

HELD ON FRIDAY 13 JUNE 1997

ACTION REQUIRED BY:

Justice Fisher: *Election Petition Rules*

Brief paper for Mr Tanner and Ministry of Justice

Miss Soper: *Forum Non Conveniens (Item 10A of Agenda)*

Draft letter for Justice Doogue to sign.

Proposed New Rules of Procedure (Item 16(a) of Agenda)

Write to the Department. Ask the Department to indicate what amendments are necessary to the High Court Rules.

Rule 426A

Write to Mr Chapman.

Winding up Applications subsequent to liquidation

Write to Mr Palmer and Ms Hinde.