THE RULES COMMITTEE

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24 March 1997

Minutes/1/97

CIRCULAR NO 13 OF 1997

Minutes of the Meeting held on Friday 14 March 1997

1. **Preliminary**

The meeting called by Agenda/1/97 was held in the Judge's Common Room, High Court, Wellington on Friday 14 March 1997 commencing at 9.30 am.

2. **In Attendance**

The Chief Justice (the Rt Hon Sir Thomas Eichelbaum GBE)
The Hon Justice Doogue (in the Chair)
The Hon Justice Fisher
The Hon Justice Hansen
Judge Jaine (for the Chief District Court Judge)
The Solicitor-General (Mr J J McGrath QC)
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 J Belgrave (Secretary for Justice, by invitation)
Dr M Palmer (Deputy Secretary for Justice, by invitation)

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

The Attorney-General (the Hon Paul East QC MP)
Mr C R Carruthers QC

4. **Personnel**

Justice Doogue welcomed Judge Jaine to the Committee as representing the Chief District Court Judge and advised that Judge Jaine would be attending the next two meetings also.

5. **Confirmation of Minutes (Item 1(b) of Agenda)**

On the motion of Justice Fisher, seconded by Justice Hansen, the minutes of the meeting held on Thursday 28 November 1996 were taken as an accurate record and were confirmed subject to the addition under point 13 Rule Making Procedure on page 6 that Justice Fisher was concerned about delay if every amendment to the Rules were to go to Cabinet.

6. **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.

7. **Papers Distributed before the Meeting**

By Justice Fisher:

- Memorandum on costs dated 11 March 1997.

8. **Papers Tabled at the Meeting**

By the Secretary:

- Reform of the Judicature Amendment Act 1972 (General/1/97).
- Summary Judgment Applications by Defendants (Summary Judgment/1/97).
- Court Ordered Arbitration and the 1996 Arbitration Act (Directions/2/97).
- Rule Making Procedure (General/2/97).
- Winding Up Applications Subsequent to Liquidation (Winding Up/1/97).

By Justice Doogue:

- Section 5A of the Status of Children Act 1969.

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

Generally, Mr Tanner said that some of the matters referred to the Parliamentary Counsel Office require a lot of work and Parliamentary Counsel need more back up if they are to be progressed quickly. He said that greater progress could be made if Parliamentary Counsel are able to resolve drafting issues or obtain decisions as they arise.

Mr Chambers suggested that the Committee designate a member of the Committee as someone that Parliamentary Counsel can contact, and the Committee agreed.

Mr Tanner said that in respect of some other matters the Parliamentary Counsel Office has insufficient resources and cited as an example incorporating the Insolvency Rules into the High Court Rules. He said that greater progress could be made if the preliminary work were done by staff from the Ministry of Commerce.

Mr McCarron said that the involvement of the Ministry of Justice vis à vis the Parliamentary Counsel Office may need to be addressed at that stage if there are any policy issues arising.

(a) *Rule 626*

Justice Doogue identified as options updating r 626 (which raises the issue of whether rules of a similar kind should also be updated) or updating the Judicature Amendment Act and revoking Part VII. He noted that also before the Committee is an article from "LawTalk" on reform of the Judicature Amendment Act 1972).

Mr Tanner said that the problem arises because r 626 attempts to restate the law and the law is constantly changing. He suggested that the Rules in Part VII could be recast to prescribe the procedure where a prerogative writ is sought.

Justice Fisher said that r 626 was originally worded in that way in order to make it clear that the new Rules, did not by a side wind, abrogate the old prerogative writs; it was in other words intended as a preservation measure.

Mr Chambers said that it was the view of the Public and Administrative Law Committee that the old prerogative writs would fall into disuse as everything was brought under the Judicature Amendment Act 1972. He said that he thought it desirable, instead of amending r 626, to look instead at providing a unified procedure for all judicial review applications. Justice Fisher said that there may be constitutional implications in that because if the remedy is wholly in the statute Parliament can remove it whereas if a basis remains under the prerogative writs this is seen as altering something of a constitutional nature.

The Solicitor-General said that judicial review is now wider than a statutory power or prerogative power and that judicial review should not be tied back to the parliamentary source.

Justice Fisher thought it should be sufficient if the Rules make it clear that the prerogative writs are retained and provide for a procedure.

Justice Doogue agreed and said that the prerogative writs could simply be listed in that context, without attempting to define them. Rule 626 and the corresponding writ rules are to be amended by deleting definitions of the contents of the writs.

(b) *Insolvency Rules*

The Committee agreed that Mr Tanner should have as a contact person Justice Hansen and that a sub Committee should be established of Justice Hansen, a Master and someone from the profession. Justice Hansen suggested it would be convenient to include a Master from Christchurch, and Mr Chambers suggested that the Law Society could pick a Christchurch practitioner as the third member.

Mr Tanner said that it is a question of identifying which Rules should continue and which Rules should not be carried over.

Justice Doogue expressed the agreement of the Committee that the sub Committee could look at that in the first instance.

(c) *Rule 183 and Proposed New Property Law Act*

The Committee noted that this has been referred to the Parliamentary Counsel Office for action when necessary.

(d) *Probate*

Justice Doogue noted that this overlaps with Item 13 on the Agenda relating to letters of administration and in particular to the recipient of an enduring power of attorney. Justice Doogue noted the comments of Ms Walden that what is required is a statutory amendment that should be referred to the Ministry of Justice. The Committee agreed.

The Secretary undertook to ensure that Mr Robertshawe, Justice Barker and anybody else who has expressed an interest in this issue be informed accordingly.

(e) *Review of Masters' Decisions*

Justice Doogue advised that the Minister had agreed that the matter be the subject of a statutory amendment, and the Secretary undertook to forward that letter to the Parliamentary Counsel Office.

(f) *Search of Court Records Generally*

The Committee expressed its gratitude to Ms Nixon for checking the other references to "cause or matter" and agreed that all of these should be amended.

Mr McCarron questioned whether there is also a need to amend the District Court Rules because the language is probably the same, and the Committee agreed.

(g) *Distinction between Interlocutory and Final Orders*

The Chief Justice noted that since Mr Iles drafted this proposed amendment the Court of Appeal has redrafted its own Rules of civil procedure.

Mr Chambers noted that the problem of the distinction between interlocutory and final orders has still not been addressed, and Justice Fisher said that the point affects not just the time limits but also whether or not there is in fact a right of appeal.

The Committee agreed to refer the matter to the Parliamentary Counsel Office to include in the Court of Appeal Rules the point about interlocutory and final orders. Justice Doogue noted that Justices Henry and Blanchard comprise the sub Committee of the Court of Appeal to consider the civil rules and if Parliamentary Counsel had any questions the judges would be pleased to assist.

The Chief Justice noted that because the Court of Appeal is not directly represented on the Committee there may need to be further consultation with that Court and Justice Doogue said that he has an understanding with the President of the Court of Appeal Sir Ivor Richardson that the Rules Committee will not address matters which affect the Court of Appeal without reference to that Court first.

(h) *Power of a Justice of the Peace to take Affidavits*

Mr Chambers said that this draft needs to be further amended to make it clear that a barrister can take affidavits; a barrister is admitted as a barrister and solicitor but holds a practising certificate as a barrister only. He suggested a sub-Rule that for the purposes of this Rule a solicitor means a solicitor of the court regardless of whether or not that solicitor currently holds a practising certificate. He said that the High Court will still have control over a barrister even if the Law Society does not over solicitors who do not have practising certificate. The Committee agreed.

(i) *Admiralty Rules*

Justice Doogue noted that Justice Hansen was the member of the sub Committee who dealt with the Rules and that the matter should be referred to the Admiralty Rules sub Committee to consider. The Committee agreed.

(j) *Summary Judgment Procedure*

Justice Doogue noted that it is clear from the comments made by Ms Melville that some issues require further consideration. He noted also the comments of Mr Williams QC (Summary Judgment/1/97).

The Committee agreed that the Parliamentary Counsel Office should be able to consult a sub Committee and Justice Doogue agreed to be the judge involved and to coopt a local Master to assist.

Justice Doogue expressed the gratitude of the Committee to the Parliamentary Counsel Office for all of the work that has been done to address these drafting issues and said that he appreciated how stretched the resources of the Parliamentary Counsel Office are.

Mr Tanner asked whether the small amendments such as the search of court records and the amendment to r 521 should be passed at this stage, but Justice Doogue with the agreement of the Committee said that they could await the next batch of amendments.

Judge Jaine noted on the search of court records point that the corresponding provision in the District Courts Rules refers to "proceeding" not a "cause or matter" but that proceeding is defined as not including an interlocutory application. He noted that the Committee has approved a Rule change for the High Court Rules which refers to a proceeding or interlocutory application while the District Court Rules refer to a proceeding and define it as not including an interlocutory application.

Mr Tanner drew the attention of the Committee to the changes being made in both drafting style and format in order to improve readability.

10. **Appeals (Item 3 of Agenda)**

(a) *Part X of the High Court Rules*

Justice Doogue referred to the judgment of Justice McGechan in *Moonen v The Broadcasting Standards Authority* and *Television New Zealand Limited v The Broadcasting Standards Authority* (unreported AP 35/95 and AP 298/94, 30 May 1995) and noted that Part X of the High Court Rules is opaque as to who is to be named as a party.

Justice Fisher said that the tribunal appealed from should not be a party to the proceeding.

Justice Doogue noted that in the vast majority of cases the Crown Law Office will be acting for the respondent and the Solicitor-General agreed to address the matter in that quarter.

After discussion the Committee agreed that the Rules ought to be amended to make that clear rather than relying on the Crown Law Office.

Mr Chambers agreed to do a short note for "LawTalk" and to be the contact person for the Parliamentary Counsel Office and the Secretary undertook to send a copy of the judgment to Butterworths and Brookers.

11. **Costs (Item 4 of Agenda)**

(a) *Generally*

Justice Doogue said that Justice Hansen and he were generally in agreement with the thrust of Justice Fisher's paper but were concerned about any possibility of trials about costs and suggested there needs to be clear guidelines to avoid that outcome. Mr Chambers said that he agrees with the process proposed by Justice Fisher but does not agree with his option (d). He said that the Law Society members that he has consulted are in favour of some form of scale as per option (c). He noted that

in fact England already has a taxation system. He said that the certainty factor is a great benefit for the profession while option (d) may lead to widely differing results. He said that there is opposition from the profession to (d) in case it leads to a second form of cost revision process. By that he means that if a judge adjusts a bill downwards the practitioner will then face a client saying that the bill is too high. He suggested the Committee should agree to the assessment method. He noted that the German approach is for a fixed scale and that in general German lawyers charge whatever the scale is.

Justice Fisher said that interlocutory costs are in a different category and that he was only addressing trial costs in his paper. In respect of interlocutory costs he said that he would favour the Woolf approach that they be assessed on each occasion on the merits of the interlocutory application and not at the end of the trial as part of the litigation. He said that there is room for a scale which covers many things including standard interlocutory matters and cases where the input is predictable such as winding up and summary judgment. He said the Committee would need to look carefully at how much should be included in the standard category. He also said that the Committee should not underestimate the importance of the criteria which the judges ought to take into account in moving to any presumptive starting point. He said that the Committee should look not just at giving the winner costs but also at the necessity of each of the steps taken by the winning party, compliance (or not) with any Rules or directions and so on. He said that the thrust of the Woolf Report, once away from the standard predictable classes of litigation, is to use costs to get counsel to conduct litigation responsibly. He said that there needs to be a formula which allows the trial judge to encourage an economic approach to litigation.

Justice Doogue said that the Committee has already agreed that the presumptive approach be two thirds of the actual and reasonable costs. He noted that in Australia and the United Kingdom there has traditionally been a common law approach (the second model put forward by Justice Fisher). He compared that to the United States model of no costs but with contingency fees.

Mr Chambers suspected that the average member of the public would support the indemnity approach on the basis that they do not see why they should still be out of pocket if they win.

Justice Doogue said that Mr Fulton and Mr Carruthers had done some work on a guideline approach to a scale, and that Justice Hansen had made suggestions based on his Hong Kong experience where the judiciary and the profession set guidelines on an annual basis. In Hong Kong the profession advised the judges of actual costs for small, medium and large firms.

Judge Jaine said that the scale has failed as inadequate and there is a need to define and implement a system that enables regular updating. He said that there may however be room for a more robust approach in complex litigation and cases that take more time in the High Court.

Justice Doogue said that the mechanism for updating the scale should not be dependent on a Rule change because that has been the downfall of the schedule in the past. Justice Fisher agreed that a scale approach has some advantages in simplicity and predictability and said that he would like to spell out the criteria from which the judge moves away from the scale.

Mr Chambers suggested as an alternative that the scale be more sophisticated, but Justice Doogue said that the scale proposed by Mr Fulton and Mr Carruthers was in fact simpler.

Mr Chambers said that there may need to be differing rates and he cited the example of a list of documents that has ten items and list of documents that has 2,000.

Justice Doogue said that the Australian report and the Woolf report both adopted a different policy point based on indemnity, but he said that nothing in those reports had led the Committee to reinvestigate its approach.

Justice Fisher came back to the Rules drafted by Mr Fulton and suggested that the framework be enacted as Rules but that for the amounts there could be some way of expressing standards that express relativity.

Mr Chambers suggested that the amounts could be amended by reference to a percentage increase, but Justice Fisher said that this may be objectionable to the politicians.

The Secretary drew the attention of the Committee to the formula in the Crown Solicitors Regulations.

Justice Fisher suggested a percentage of "A", "A" to be determined by a practice note.

Mr Chambers expressed doubts that that was constitutionally proper. He also expressed concern about different grades of counsel that queried why an opponent should be up for more costs because the other side has engaged a Queen's Counsel.

Justice Doogue suggested, and the Committee agreed, that Justice Fisher and Mr Chambers look at the issues together and to refer to the Woolf Report and the Australian Report in the draft by Justice Fisher.

The Secretary undertook to compile the bibliography. Justice Fisher and Mr Chambers agreed to put together a commentary that could appear in "LawTalk".

Justice Doogue reiterated the need for figures to come from somewhere capable of annual revision. Mr Chambers suggested indexing them to the consumer price index and that that may be more acceptable to the Government.

Justice Fisher said that that would result in a complicated set of figures, and that a judge needs to be able to deal with costs quickly at the end of the trial. He

suggested there might be a protocol for some arrangement for an annual meeting to set the level for the forthcoming year. That meeting could be a simple consumer price index adjustment or could go further to see whether the relativities in the scale are still appropriate. He envisaged the meeting between the Law Society and the judiciary.

Mr Chambers queried how accurate the Law Society could be about this and referred to the difficulty of identifying the prevailing market rates because not everybody charges by the hour.

Justice Fisher suggested that the consumer price index could be rounded up so that there is not a mathematical problem every time a judge comes to award costs.

Judge Jaine noted that if the process is difficult to fix initially, it will be equally difficult to do annually.

Justice Fisher said that setting the quantum can be a discrete exercise from the rules and schedule which is an approach in principle. He suggested the Committee look at how to set the quantum each year while Justice Fisher and Mr Chambers concentrate on the content.

Mr Chambers suggested that when the issue is promulgated with the profession the Committee should stress the amounts are purely indicative in order to discuss the issues of principle and quantum.

Justice Fisher identified three elements: the structure of the Rules, the structure to create the annual review and the actual quantum. He said that the profession does need to be involved.

Justice Doogue noted that Mr Carruthers is Chairman of the Law Society Committee that has the most responsibility for input. He suggested that the Committee state the approach in the Rules with the amounts to be determined by annual practice note.

Mr Chambers noted that written briefs have lead to shorter trials and a longer preparation time and that if a percentage approach is adopted then it may need to be adjusted. He said there may be opposition by Government to the quantum not being part of the Rules.

Justice Fisher said that the judiciary has always had an overriding discretion on costs.

Mr Chambers suggested that Mr Fulton's schedule could be adopted by deleting the figures and looking to the practice note for the rates.

Justice Doogue said that the Rules should not refer back to the practice note.

Justice Fisher said that the second schedule could set out items for costs for various matters and the practice note then set out a schedule of specific figures, each year or from time to time. He suggested it would be wise to make the review annual

although it does not follow that there needs be a change. He said there would however need to be a formula to direct people to the practice note and practitioners would need to be clear on what was contemplated. He asked whether it is envisaged a meeting take place between delegates of the Rules Committee and the Law Society where the starting point is to look at the consumer price index. He queried what body should determine the practice note and what criteria it should look at.

Judge Jaine said that that ought to be a reasonably simple mathematical exercise.

Mr Chambers noted that if the amounts are addressed in this way then control of that moves away from the Committee to the Chief Justice on behalf of the judges in consultation with the Law Society and the Bar Association.

Justice Fisher said that the Chief Justice might hope for guidance from the Rules Committee and the Law Society Representative could be asked to give draft input from the profession.

Mr Chambers suggested that these points be included in the paper without suggesting that the mechanism have legislative force, and the Committee agreed.

Justice Doogue referred to Justice Hansen's Hong Kong practice and the need to avoid a mini trial on costs. He noted also that the Judge may by awarding costs on interlocutory matters exacerbate feelings between parties who might otherwise settle and he said that a distinction can be made between indicating the judges thinking on costs and actually awarding them.

Mr Chambers said that there is an advantage in fixing costs at the time because they can be assessed by the judicial officer who has just heard the interlocutory application.

He said that the test could be formulated as to whether bringing the application has been a sensible legal step or not and if not then the party should have to pay costs.

Justice Doogue referred to "unless" orders where the parties cannot go on to the next step in the proceedings until they have paid the costs awarded in the earlier interlocutory applications.

Mr Chambers said it would be useful to articulate a general presumption in the Rules.

12. **Court of Appeal Rules**

(a) *Removal of Proceedings from High Court into Court of Appeal*

The Chairman advised that the Minister of Justice is aware that a statutory amendment is required and that the matter has been referred to the Ministry.

(b) *Expert Advisers*

The Chief Justice advised that this statutory amendment had been incorporated into the same bill as that to abolish the right of appeal to the Privy Council and the question is being pursued as to whether this and some other matters can be extracted and dealt with separately.

(c) *Draft Court of Appeal Rules (Court of Appeal/3/96)*

Justice Doogue said that the draft rules had been prepared by Justices Henry and Blanchard of the Court of Appeal and that a copy had been made available by Mr Carruthers to the Law Society and the Bar Association. At this stage no comments have been received.

The Committee agreed to refer the matter to the Parliamentary Counsel Office to provide a draft for further consideration.

13. **Criminal Appeal Rules (Item 6 of Agenda)**

(a) *Revised version of Criminal Appeal Rules*

Justice Doogue advised that the draft rules have been referred to the Criminal Practice Committee and that comments have been received from Justice Henry, Justice Neazor, the New Zealand Law Society and the Crown Law Office. Justice Doogue said that he had spoken to Justice Blanchard who has seen the comments and is happy for the Rules Committee to adopt any of the suggestions it thinks fit.

The Committee agreed with the suggestions made by Justice Henry.

The Committee agreed with the suggestions made by Justice Neazor. The Chief Justice noted that there is particular force in Justice Neazor's suggestion (b); frequently notices of appeal do not bring the summing up into question and that does not emerge often until submissions are lodged or a more explicit statement of points on appeal is filed.

The Committee discussed whether the matter could be left to general courtesy, but Justice Fisher said that a transcript should be prepared when the Registrar requests it, and the Committee agreed.

In respect of the New Zealand Law Society's point about removing the reference to bail in Forms 1 and 1B, Justice Doogue noted that the Court of Appeal proposed that there be a reference on the forms for the need to use a separate form to apply for bail.

14. **Directions (item 7 of Agenda)**

(a) *Mediation*

The committee agreed that this matter should be referred to the Parliamentary Counsel Office and that Justice Doogue should be the liaison person for the Parliamentary Counsel Office.

(b) *Judicial Settlement Conferences in Course of Hearing*

The Committee agreed that this matter should be referred to the Parliamentary Counsel Office and that Justice Doogue should be the liaison person for the Parliamentary Counsel Office.

(c) *Canadian Bar Association*

The Committee agreed that this matter should be deferred until the next meeting.

(d) *Arbitration*

This point was referred to the Committee by Mr Williams QC (Directions/2/97) and the Committee agreed that consideration of this matter should be deferred until the next meeting.

15. **Discovery (Discovery/1/96)**

Justice Doogue said that the Chief District Court Judge has referred to the Committee a LawTalk article by a United States Attorney on pre trial discovery dealing with deposition procedures. He equated it with interrogation of deponents and possible witnesses.

Mr Chambers floated the possibility of referring the matter to the New Zealand Law Society's Civil Litigation Committee.

Justice Doogue said that he has also seen an article written by an English barrister who said that the United States is ahead of the United Kingdom in many ways but behind the United Kingdom in this respect, and the barrister was very critical of what was described as a stultifying and costly process.

Justice Fisher agreed that this is one of the worst excesses of United States litigation with interminable pre-trial evidence taking sessions.

Judge Jaine said that the Chief District Court Judge would not be disturbed if the matter was simply removed from the Agenda and the Committee agreed with that course of action.

16. **District Court Rules (Item 8 of Agenda)**

(a) *District Court Rules Committee*

Dr Palmer said that the Ministry is proceeding with the preparations to bring the District Court Rules Committee into the Rules Committee. He said that the Ministry really only had concerns about how the process would work in relation to membership of the Rules Committee.

17. **Family Courts (Item 9 of Agenda)**

(a) *Family Courts Rules*

Dr Palmer said that the paper sets out the background, and that the intention is to develop Rules for practice and procedure in the Family Courts. He said that this paper is to seek the Minister's views on that.

Justice Doogue said that the Family Court Rules do impact on the High Court where there is a conjoint jurisdiction such as in matrimonial property, family protection and testamentary promises matters.

Judge Jaine said that the Family Court would prefer to have separate Rules and that the Chief Family Court Judge has been pushing for this for a number of years. Judge Jaine said that the Chief District Court Judge had indicated tentative support for the proposal

The Chief Justice asked what the proposal is in relation to areas of conjoint jurisdiction: would there be one set of rules for proceedings commenced in the Family Court and another for proceedings commenced in the High Court, or would the District Court Rules, Family Court Rules and the High Court Rules be the same in these instances?

Dr Palmer said that he was not sure if the Committee examining the Family Court Rules had addressed that issue and suggested the Rules Committee may wish to discuss it with the Chief Family Court Judge. The other issue that he identified is who should be responsible for the Family Court Rules and he noted in this context the proposal to amalgamate the District Court Rules Committee with the Rules Committee. Mr Chambers said that it would be anomalous if the District Court Rules came under the jurisdiction of the Rules Committee while the Rules for the Family Court, which is a division of the District Court should be separate.

Justice Doogue said that the Committee is also trying to avoid stand alone Rules because of the need to obtain consistency and clarity. For the Family Court to have stand alone Rules cuts across this policy.

Dr Palmer said that the proposed Family Court's Rules do however amalgamate a number of sets of Rules.

Mr Chambers suggested that the Committee could agree in principle to these Rules being amalgamated without making any commitment on whether the Rules should form part of the District Court Rules.

Justice Fisher said that the Family Court Rules could become effective almost immediately on the basis that they are a transitional measure only and that, in order for them to form part of "the grand design" the Committee could do as was done with the Electoral Petition Rules and insert a "sunset clause".

Dr Palmer said that the Ministry would need to prepare a Cabinet paper to get agreement to the existence of the Family Court Rules and would need in addition to seek legislative change on how the Family Court Rules are to be made in the future. He said that it would be difficult to take that as an interim solution.

Justice Doogue suggested that the Chief Family Court Judge could attend the next meeting of the Rules Committee and Judge Jaine said that Judge Mahoney would like the opportunity to be heard.

Justice Doogue stressed that having two different sets of Rules for the same jurisdiction but in different courts would be the most confusing thing possible for the profession.

Justice Fisher agreed to liaise with the Chief District Court Judge and the Chief Family Court Judge before the next meeting of the Rules Committee.

18. **General (Item 10 of Agenda)**

(a) *Rule Making Procedure*

As a preliminary point Mr Chambers noted s 130 of the Employment Contracts Act 1991 which provides that the Employment Court may make rules to regulate its practice and procedure.

Mr Belgrave said that his interest was only in rules that involve questions of policy, and not where the rules govern the operation of the court itself. He noted the suggestion from the Solicitor-General on how the procedure might operate and said that the Ministry would not seek formal membership of the Committee.

Mr Chambers asked how the procedure would operate in the instance where there was a policy issue involved and where there was not.

Mr Belgrave said that he wanted to be sure that if there were a policy issue the Rules Committee was aware of that view before the matter went to the Minister.

Dr Palmer said that when a matter appears to raise policy issues he would be looking to alert the Rules Committee to that as early as possible so that the Cabinet paper process could be gone through and the Rules Committee could take that into account in determining what rules the Committee would recommend.

Mr Chambers asked who would decide if it were a policy issue, and Dr Palmer said that he would envisage discussing it with the Committee and that it may need to be discussed with the Minister or be the subject of a Cabinet paper.

Mr Belgrave said that any Cabinet paper would be prepared after discussions with the Rules Committee and said that it would be undesirable for the Minister and the Rules Committee to be at loggerheads.

Dr Palmer said that the Rules Committee needs to be satisfied that the issues are accurately reflected in the Cabinet paper.

The Chief Justice asked whether it was envisaged that policy issues go before Cabinet at two different stages in the process: once before the Rules are drafted and once after.

Dr Palmer said that he envisaged the first paper would indicate that the Rules Committee is considering a particular issue and be referred for the Minister to make a decision on the policy matters.

Mr Chambers said that this process seemed to be quite different to that provided for in s 51C of the Judicature Act 1908 and asked, if a Cabinet Committee is determining the policy and the Parliamentary Counsel Office is drafting the Rules, what role is left for the Rules Committee.

Dr Palmer said that the policy issue would not be the only issue to be the subject of instructions to the Parliamentary Counsel Office.

The Solicitor-General said that the Rules Committee would not be left out because under s 51C of the Judicature Act the Rules have still to be made by the Governor-General in Council with the concurrence of the Committee. He said that he envisaged amendments that do not raise policy issues to proceed as at present on the fast track but that if a policy issue is raised there should be departmental input at an early stage and the views of the Minister ascertained. He noted that the Rule making procedure provides for the Rules to be made by the Governor-General in Council which means that Ministers have a say. He said that his proposal gives a procedure that should not delay the Committee but instead allow Ministers to adequately consider matters if a question of policy arises.

The Chief Justice said that, so the Committee is clear of the extent of the policy issues that are discussed, the Secretary for Justice had indicated to him in a letter that what was envisaged by way of Rules that might have economic consequences were Rules as to costs, the availability of summary judgment, contempt and non party discovery. He commented that these are very much the nuts and bolts of Rule making.

Dr Palmer said that that letter is not saying that the detail of those Rules would necessarily be the subject of policy issues but just that they may contain policy issues. By way of example he said that the economic incentives of parties to litigate

is overall a matter of government policy. Similarly he said that if a general or major change were contemplated in the summary judgment procedure there may be fiscal implications for the Department for Courts. Dr Palmer referred also to the human rights implications of contempt provisions.

Justice Doogue said and the Chief Justice agreed that any rule changes could be interpreted as having policy implications.

Mr Belgrave said that if a Cabinet Committee approves the policy issue then in almost all cases the Cabinet will just rubber stamp the Rule change.

Dr Palmer said that if a policy issue is identified then they would be looking to discuss a timetable with the Committee.

Justice Fisher said that he sees Cabinet as having a power of veto rather than a power to take the matter out of the hands of the Rules Committee. He noted that Rules still cannot be made without concurrences from the Rules Committee and that he agrees with the Solicitor-General's approach. He identified two courses of action open to the Committee if it does not agree with Cabinet's view on a policy matter: to drop the Rule change altogether or, in reliance on the inherent jurisdiction of the High Court to govern its own procedure, rely more extensively on practice notes. He expressed the hope that matters would not reach that stand off situation but also that the Department would recognise that the judiciary is not without control over its own procedure.

Justice Hansen said that if a policy issue can be identified in almost everything done by the Rules Committee, he had real concerns about delay in making amendments to the Rules.

Mr Belgrave said that it was not in their interests to hold things up, and Justice Doogue noted that there have been delays in the past from the Parliamentary Counsel Office but that with Senior Parliamentary Counsel allocated to the Rules Committee work that has not been a problem.

Dr Palmer said that he would not want to overstate the degree to which the Department would find policy issues and said that only significant changes would attract attention. He noted that the Department does not have the resources to do work on minor issues.

Justice Doogue cited the issue of the Masters jurisdiction over companies winding up as a classic example of delay. He said that if the issue of Masters being able to deal with voidable transactions were a Rule matter it could be corrected quickly. He said however that Dr Palmer had replied only the previous day saying that he was unable to accord it a very high priority. Justice Doogue said that this is the sort of inaction that has been associated with the Department of Justice in the past.

Mr Belgrave said that the Committee is not now dealing with the Department of Justice and noted that the passing of the new Companies Act was running five to six

years late from the Law Commission Report and that because of pressures to enact it some decisions were taken at some speed. He said that if the procedure where the Ministry is involved in Rule changes proves to be unworkable that needs to be addressed promptly. He noted that the Masters' issue is a legislative one and will be done when possible around other priorities for the Ministry.

Justice Fisher referred to the Solicitor-General's suggestion and said that if the papers go to the Ministry of Justice regularly, ninety-nine percent of the time the Ministry would not seek any input into the Rule changes. He suggested that the Ministry undertake to front up to the next meeting if a policy issue is identified.

Dr Palmer agreed that something of the order of ninety-nine percent of cases would not have policy implications.

Judge Jaine detected a concern that policy issues might be found in many Rules Committee changes which would seriously impede the functioning of the Rules Committee. He said that he shared the concern that the percentages suggested by Justice Fisher and agreed by Dr Palmer would not be borne out by the practicality for the situation. He sought an assurance that policy issues would be raised only in rare instances and suggested that the procedure be adopted on a trial basis only.

Mr Chambers said that the Committee needs a commitment from the Ministry that it will come to the next Rules Committee meeting to identify what matters raise policy issues and precisely what those policy implications are.

Mr Belgrave conceded that if an issue goes to the Minister and is held up there there is little that the Ministry can do about it, but he said that that should not happen too often.

The Solicitor-General said that there needs to be some transparency in the process, and the Chief Justice said that if the Rules Committee sends all its papers to the Ministry the Committee cannot help being transparent. He said however that he has some concerns about how transparent the Ministry might be.

Justice Doogue agreed that it is hard not to be concerned when Dr Palmer puts on the back burner an important issue such as the jurisdiction of Masters over voidable transactions under the Companies Act.

Dr Palmer said that this is not a Rule change but a statutory one and that the Minister needs advice on policy.

Justice Doogue said that the overall policy issues of the Masters' jurisdiction can indeed wait, but that the problem of judges having to deal with voidable transactions is an urgent one that will seriously impact on judges' time.

The Chief Justice said that some of us have had thirty years of this: a simple practical amendment holds up the work of the courts while the old Department of Justice says it needs to look at the whole principle. He said that that then leads on

to the wearisome business of reminding them while nothing progresses for very long periods of time.

The Solicitor-General said that one advantage of the new procedure is that if the Ministry identify a policy issue and take it to Ministers or the Cabinet then Dr Palmer should also take responsibility for ensuring that the matter is dealt with in a timely way.

Dr Palmer said that the process of identifying a policy issue should not take long, and Justice Fisher said that the process of resolving a policy issue could take considerably longer. He noted that the proposal to abandon oral hearings on custody appeals had been put up a year ago.

The Chief Justice expressed concern that the day to day procedure of the courts will be regarded as a boring detail and accorded little priority.

Mr Chambers said that what is needed is a clear understanding on the protocol to be adopted. He suggested a guarantee that the Ministry would attend the next meeting to identify matters which raise a policy issue and that the view of the Minister or Cabinet Committee would be available by the following meeting.

Mr Belgrave said there needs to be some flexibility if something slips.

Justice Hansen said that if the Rules Committee is being asked to be more transparent then the business of the Rules Committee needs to be accorded a higher priority than it has had in the past.

The Chief Justice recorded the reservation of the Committee that in agreeing to this the Committee is agreeing to nothing more than a pilot. He said that the procedure has the potential to impinge on the court's control over its rule making process.

Dr Palmer suggested that it would be desirable to assess the protocol on the basis of experience.

The Chief Justice said that Cabinet has until now recognised that the power to make rules is primarily one for the judges and that it is inappropriate for Cabinet to do otherwise than "tick it off". He said that going back in history illustrates that the courts have made rules by simply promulgating them.

Dr Palmer disagreed that Cabinet does recognise that, and said that if a policy issue arises the Cabinet would want to address it.

(b) *Access to Justice*

Further discussion on this matter was deferred until the next meeting.

19. **Parties (Item 11 of Agenda)**

(a) *Service on Companies*

The Secretary advised that no response has yet been received from the Ministry of Commerce and agreed to draw the issue specifically to Mr Tanner's attention.

20. **Pleadings (Item 12 of Agenda)**

(a) *Certificate by Lawyer responsible for Document*

Justice Doogue said that a matter was raised at the Judges' Conference about counsel being required to certify other aspects of the materials before the courts such as briefs of evidence and bundles of documents. He suggested that before this matter is referred to the Parliamentary Counsel Office it might be considered as an overall package.

Justice Fisher agreed that the scope of certification by counsel should be broadened at least to include briefs of evidence and that counsel should certify they are relevant, admissible and do not contain argumentative material.

Justice Doogue said that a similar discussion can arise in relation to bundles of documents and there should be a principle bundle of documents which are relevant and admissible.

Justice Fisher noted that a bundle of documents needs to be signed by both counsel while briefs of evidence may be signed by just one.

Mr Chambers said that there may be difficulties with both counsel signing in respect of bundles of documents if there is a dispute about the relevance of some of the documents and suggested that certification be limited to the documents which each counsel has requested.

Justice Fisher agreed to prepare a brief paper on the topic and promulgate it for comment from the profession.

Mr Chambers noted that a document might be admissible for one purpose and not for another and there will be a need to ensure that counsel are not being asked to certify that the documents are admissible for all purposes subject to any rulings that might be made at the trial.

Judge Jaine suggested that the matter might be more appropriately dealt with by a practice note rather than a rule change so that the background can be explained.

Justice Doogue said that it had been the general view of judges in the past that practice notes should be sparingly used and suggested that it could be dealt with as a schedule to the Rules rather than be in the Rules themselves. The Committee agreed to leave that issue to Justice Fisher to consider.

Justice Fisher said that Judge Jaine's point could be accommodated by publishing a draft in "LawTalk".

The Committee agreed not to refer this matter to the Parliamentary Counsel Office at this stage.

21. **Probate (Item 13 of Agenda)**

(a) *Letters of Administration*

Justice Doogue said that under s 5A(1)(a) of the Status of Children Act the applicant has to show that he has made reasonable enquiries. To satisfy those enquiries, he must have a search made of the register.

Judge Jaine said that the concern seems to be that if the register is incomplete it is not worth searching it at all. Judge Jaine said that he did not agree with that argument.

Justice Doogue said that a response could go back saying the Committee is not persuaded of the case being made out for dispensing with searches because a search could produce evidence that is relevant to the application. He suggested that the Committee indicate that it is not prepared to recommend a statutory change. If the Committee has misunderstood the point the solicitor is making he could come back to the Committee or alternatively approach the Law Society to take up the issue of a statutory amendment.

22. **Tax (Item 14 of Agenda)**

(a) *Proposed New Rules of Procedure*

Nothing further has been heard from the Department and the Committee agreed to remove the item from the agenda.

23. **Winding Up (Item 15 of Agenda)**

(a) *Applications subsequent to liquidation*

Dr Palmer said that it was not clear that the intention at the time was to give Masters jurisdiction over preferential and voidable transactions.

Justice Hansen said that it was his understanding that it was the intention for Masters to have that jurisdiction.

The Chief Justice agreed that the matter seemed to have been overlooked in the package of amendments with the new Companies Act and Judicature Act at the time, and Mr Belgrave acknowledged the rush to get the Companies Act through.

Justice Doogue said that the amendment to the Judicature Act sat around for some considerable time after the Companies Act had been passed, and the Chief Justice said that his recollection was that there was no input of a policy nature in respect of the amendment to the Judicature Act.

Mr Tanner said that on the wording of the Judicature Act it looked as though s 26I had been very carefully and deliberately worded.

Mr Chambers said that he could not see any difficulty with the proposal to give Masters jurisdiction over preferential and voidable transactions and that this should not impinge on having a wide ranging inquiry.

Justice Hansen said that voidable transactions are common and that judges have to do them if the Masters can't.

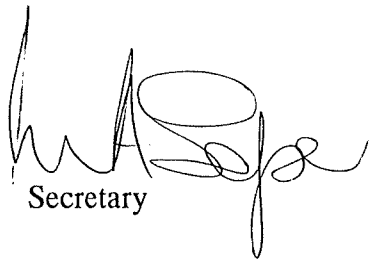
Dr Palmer said that there may have been a Departmental report to the Minister. He said that if the Ministry in liaison with the Parliamentary Counsel Office and Justice Hansen can find the background papers they would be able to identify if there were any policy issues considered at the time. If there were that would have to be revisited and if not then the matter would need to be put up to the Minister with a note on why the amendment is desirable.

Justice Hansen raised whether the other matters under the Companies Acts identified in Dr Palmer's letter of 13 March 1997 should be within the Master's jurisdiction, and Justice Doogue agreed that this matter should be placed on the agenda for the next meeting.

The Committee agreed that Mr Tanner should locate anything on the Judicature Amendment Act 1994 relating to s 2 of that Act which amended s 26I of the Judicature Act 1908, and make that available to Dr Palmer and with a copy to the Secretary.

The meeting closed at 4.00 pm.

The next meeting will be held on Friday 13 June 1997



Secretary

ADDENDUM TO THE MINUTES OF THE MEETING

HELD ON FRIDAY 14 MARCH 1997

ACTION REQUIRED BY:

Justice Doogue:

Summary Judgment Procedure:

- Assist Parliamentary Counsel.

Mediation:

- Assist Parliamentary Counsel.

Judicial Settlement Conferences in Course of Hearing:

- Assist Parliamentary Counsel.

Justice Fisher:

Family Courts Rules (Family Courts/1/97):

- Liaise with the Chief District Court Judge and the Chief Family Court Judge before the next meeting of the Rules Committee.

Pleadings (Item 12 of Agenda):

- Prepare a brief paper.

Costs (Item 4 of Agenda):

- With Mr Chambers look at the issues together and to refer to the Woolf Report and the Australian Report in the draft by Justice Fisher.

- Together with Mr Chambers put together a commentary that could appear in "LawTalk".

Justice Hansen:

Admiralty Rules:

- Consider Parliamentary Counsel draft.

Winding Up (Item 15 of Agenda):

- Applications Subsequent to Liquidation - Liaise with the Ministry and the Parliamentary Counsel Office to find any background papers to identify if there were any policy issues considered at the time.

Rule 626 - Sub committee.

Mr Carruthers QC:

Admiralty Rules:

- Consider Parliamentary Counsel Office Draft.

Mr Chambers QC:

Appeals (Item 3 of Agenda):

- Prepare a short note for LawTalk on Part X of the High Court Rules.

- Act as contact person for Parliamentary Counsel.

Costs (Item 4 of Agenda):

- With Justice Fisher look at the issues together and to refer to the Woolf Report and the Australian Report in the draft by Justice Fisher.

Costs (Item 4 of Agenda):

- Together with Justice Fisher put together a commentary that could appear in "LawTalk".

Secretary (Miss M A Soper):

Appeals (Item 3 of Agenda):

- Send a copy of the judgment of Justice McGechan in *Moonen v The Broadcasting Standards Authority* and *Television New Zealand Limited v The Broadcasting Standards Authority* (unreported AP 35/95 and AP 298/94, 30 May 1995) to Butterworths and Brookers.

Costs (Item 4 of Agenda):

- Compile a bibliography.

Probate:

- Advise Mr Robertshawe and Justice Barker.