THE RULES COMMITTEE

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Wellington

15 July 1994

Minutes/2/94

CIRCULAR NO 13 OF 1994

Minutes of the Meeting Held on 16 June 1994

1. Preliminary

The meeting called by Agenda/2/94 was held in the Judge's Common Room, High Court, Wellington on Thursday 16 June 1994 commencing at 9.30 am.

2. In Attendance

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

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

The minutes of the meeting held on Thursday 3 March 1994 were taken as an accurate record and were confirmed and signed by the Chairman, subject to the substitution of the expression "*s 26P*" for "*s 26B*". In line 5 on page 5, and the substitution of the expression "*$0.5 million*" for $1.5 million in line 8 on page 10.

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. Admiralty Rules (Item 3 of Agenda)

Justice Doogue recalled that Master Hansen and Mr Carruthers were to look at this issue.

Mr Carruthers said that arrangements were in place for a Judges' clerk to prepare a compendium which would provide a basis for revision.

7. Appeals (Item 4 of Agenda)

Justice Doogue advised that this is a matter that Justice Thomas is to discuss with the President of the Court of Appeal once he has an opportunity to do so.

8. Costs (Item 5 of Agenda)

Mr Carruthers advised that the Courts and Tribunals Committee was concerned that any proposal for a substantive change to the law on costs should be accorded some publicity among the profession to give the opportunity for wider comment. He said there was concern that the move to reasonable solicitor/client costs would upset the balance for the litigant who wishes to pursue a cause. Such a litigant may be deterred by the fear of being unsuccessful.

Justice Doogue raised the issue of the content of the scale, and Mr Carruthers expressed the view that there is a difficulty with formulating a scale in the context of solicitor/client costs. He said that once there is a move away from a reasonable contribution, which lends itself to a scale, to solicitor/client costs, then there is an arbitrary judgment made by the presiding judge. He said that there is a difficulty in formulating a scale in those circumstances. For these reasons, he said that there is an underlying feeling on the part of the Courts and Tribunals Committee that there should be more consultation.

Dr Barton agreed that there should be the widest possible opportunity for comment.

Mr Fulton also agreed and said that costs is a difficult topic with potential for a wide variety of opinion being expressed. He said that he was not necessarily in favour of an incremental approach and that the scale will assume less importance although it will be required where there is no court hearing as, for example, for default judgments.

Chief Judge Young said that costs is a topic for the next District Court Rules Committee Meeting and he should be able to come back to the next meeting with some feedback.

Justice Doogue suggested moving to a regime of reasonable costs with retention of the scale to assist the profession in standard matters or matters where there is no contest. In the interim, until the consultation process is completed, he suggested an update of the scale.

Mr Carruthers said that he would like to see consultation undertaken in a time frame that would not need an update of the scale as an interim measure, and Mr Fulton and Dr Barton both agreed that consultation ought to be able to be conducted reasonably quickly.

Justice Doogue suggested that there is a need to reconsider the scale in any event as to the form it should take. He suggested that he and the Secretary put together a draft for distribution which will be referred to the Committee first.

Justice Doogue also asked who could be consulted and suggested the profession thought "*Law Talk*", the Bar Association, and the Legal Services Board. Mr Carruthers wondered whether there would be some merit in consulting outside of the profession and floated the suggestion of the Consumers Institute, and the Chief Justice suggested that the Judges generally could be approached.

Mr Fulton agreed and noted that there are a number of judgments now where Judges are departing from the traditional formulas.

Justice Doogue identified the second aspect as being how to approach the scale. Mr Fulton and Mr Carruthers agreed that they would work together to draft a new format.

Mr Carruthers queried how a scale can help in other than non contested areas and noted that the difficult area is the preparation of the case which does not lend itself easily to a scale.

Mr Fulton said that the fee fixed for a day in court has a rule of thumb of two days preparation for each day in court, but he noted that more work is involved in preparing a case that is very concise.

9. Directions (Item 6 of Agenda)

(a) Video Conferencing

The Chief Justice referred to the changes to the Evidence Act currently before the House and said that any decision made by the Rules Committee would be dependant on that. He discussed the concept of issuing a protocol as being not a rule, nor a regulation, nor a practice note, but rather a form of practice note of large and general effect.

Mr Williams noted that there was a procedural and practical aspect and likened a protocol to circulars which are issued in the courts on new procedures.

The Chief Justice noted that the papers on video conferencing related to English conditions and that they would need to be translated to New Zealand terms.

Mr Carruthers said that he would like to see the profession consider it.

The Chief Justice referred also to the Australian draft and said that he would endeavour to obtain a copy of that.

Mr Carruthers noted that in relation to CER there is already provision for video conferencing in trade practices matters.

Mr Williams said that he would ask the Law Reform Division of the Department of Justice to summarise the present state of the legislation. That would give information on trade practices and also the Australian protocol. In this context Mr Fulton mentioned also Part III B of the rules relating to dumping under the Commerce Act and Mr Williams agreed to check this aspect also.

(b) Mini Trials

The Committee noted that Justice Barker had published an item in Northern News on 29 April 1994.

Mr Carruthers raised the question of the relationship between rr 441 and 442 to settlement conferences.

Mr Fulton referred to the two pilot schemes running in Auckland and Napier and noted that Justice Barker regards rr 441 and 442 as a stop-gap.

After discussion, the Committee decided that the matter could be brought up again next year for further reconsideration.

10. Discovery (Item 7 of Agenda)

Mr Carruthers said that he had referred four issues to the Courts and Tribunals Committee; time for compliance, "*unless*" orders, implied undertakings and filing a list of documents. In respect of time for compliance, he said that the time varied so much that members did not see the point of having a time limit at all. The Committee would like to see how the pilot scheme worked and whether it were successful in achieving a standard period. He felt that setting a minimum period was not satisfactory and that it is better to have an early directions hearing to fix a time for each individual case as appropriate.

On the issue of time for compliance, Mr Carruthers said the view of the Committee was that "*unless*" orders are undesirable. The Committee expressed the view that the powers under the rules were expressed rather softly.

On the issue of implied undertakings, Mr Carruthers said that the Committee were not aware of any practical problems; it was seen as desirable to draw the undertaking to the attention of practitioners.

Finally, Mr Carruthers advised that the Committee considered it desirable to file a list of documents so that the list is there as a matter of record and there may be cross-examination on it.

Justice Doogue raised the issue of whether there should be verification, and mentioned also that if time limits are to be set on a case by case basis that there should be a rule in the event of default by the party from whom discovery is sought.

Mr Carruthers agreed that the absence of a default rule had an unsatisfactory element to it but said that in any event very few file within the time limit.

Dr Barton said that in the vast majority of cases practitioners agree on a time and there should be a necessity to come to the court only when there is a default on that agreement.

Mr Fulton suggested it might be better to concentrate on a rule that requires the party who has not complied with discovery to be the initiator to obtain an extension. He noted that under the case flow pilot, discovery is a topic at the first conference but that may be three months out by which time discovery may have been completed.

The Chief Justice said that the parties may, of their own motion, file a notice for discovery before a conference is held.

Justice Doogue noted that the whole procedure benefits those who have not complied with the rules, although he does not understand the profession to be arguing for that to be changed.

Mr Carruthers said that he still favoured a notice requiring discovery without any time being fixed, followed by an early conference to set a timetable. He suggested that compliance should be as soon as reasonably practicable having regard to the circumstance of the case with the intention that a date for formal compliance be fixed at the directions conference.

Mr Carruthers picked up on the point made by Justice Doogue and noted that the new rules depart from the situation under the old code such that discovery has to be enforced by the person in the right.

Justice Doogue considered that there should at least be a default rule to take care of the straightforward proceeding.

The Chief Justice said that it is always open to the parties to proceed in a voluntary way; the purpose of r 294 was drafted in that way. He doubted whether it has been successful in practice and referred to the need to provide for a fall-back or bottom line position. For the rest, he considered a matter of education of the practitioners.

Mr Carruthers suggested that in the event of a breach of the discovery procedure, parties should be able to apply for an "*unless*" order at the time when an application for an order for discovery is made; that would put the parties in the same position as under the old code.

Justice Doogue said that he had no strong feelings about reverting to the old order; he noted there is unanimity that the 14 day time limit is unrealistic and that brings the rule into contempt. He suggested that more realistic time frames might be 28 and 42 days respectively and that those times would be appropriate for all but major litigation.

The Chief Justice did not disagree with that but expressed scepticism that the issue turns on time limits. He was not however opposed to the proposal and noted that the time limits can be shortened in time of need.

Justice Doogue said the Committee should make its views known to the Masters and noted that the Masters make "*unless*" orders at the time of an application for an order for discovery.

Mr Fulton raised the issue of the Masters' jurisdiction to make "*unless*" orders and Justice Doogue said that the Law Reform (Miscellaneous Provisions) Bill before parliament has addressed that issue. The Chief Justice referred also to the inherent jurisdiction of Masters in that context.

11. Interrogatories (Item 8 of Agenda)

Detailed discussion on this topic was deferred until the next meeting.

12. Judgment (Item 9 of Agenda)

Justice Doogue noted that the Law Reform (Miscellaneous Provisions) Bill (No 2) proposed to amend s 25A of the Acts Interpretation Act such that High Court and Court of Appeal Judges can remain in office for the purposes of delivering any judgments outstanding upon retirement.

The Committee noted the need to ensure that the High Court Rules are amended in keeping with the amendment to the Act.

Chief Judge Young said that the District Court Rules is the same as the High Court Rule and apparently in conflict with s 25A.

Mr Iles advised that the intention was to defer commencement of the Act until 1 August so that any amendment to the rules to ensure consistency could be done. Mr Iles agreed to draft an amendment to r 543 in the event that s 25A was amended as proposed.

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

Mr Iles said that he had not been able to make any progress on the matters referred to him but that he had given some consideration to Item 2(c) of the Agenda relating to the power of the Court of Appeal to seek the assistance of an expert as a consultant. Mr Iles said that he was increasingly worried about the power to make a rule along the lines proposed without statutory authority (and he noted that there is statutory in respect of patents). He considered there is a need for an express provision in the Act for such a wide rule making power because it raises questions of the constitutional position of the court and the relation of litigants to the court advisor. He considered it was going quite a long way under the rule making power to make the Crown responsible for the remuneration of experts.

Mr Fulton said that, according to Minutes/4/93, page 11, the Acting Chief Justice commented that under the Commerce Act the additional member is part of the court. That is not what is contemplated by the President; what the President contemplates is an advisor and Mr Fulton queried whether a statutory change is necessary.

Mr Iles noted that in respect of patents the authority is in the Act and that rr 324 and following of the High Court Rules set out detailed provisions relating to the role of the Court expert.

The Committee agreed that they should write to the President, enclosing a copy of the relevant extracts from Minutes/3/93 and Minutes/4/93 and obtain the comment of the President and his reaction to the advice of Mr Iles.

The Chief Justice suggested that the Committee should seek advice on the question of vires. He noted that there are two aspects - the constitutional point as well as the issue of appropriation.

Mr Williams said that the issue of payment is probably going to arise so infrequently that it does not loom as a major issue of concern.

Mr Iles said that if his office were in doubt about the vires of regulations that had been drafted, in the first instance that should be resolved at the official's level. Otherwise, he would prepare a memorandum that does not certify that the rules are in order to be made; notice would then go to the Attorney-General, the Minister concerned and Cabinet and it is then over to them to decide if they wish to proceed. They may at that point seek an opinion from the Solicitor-General.

In those circumstances it seemed appropriate to Justice Doogue that the Committee could ask the Solicitor-General for comment. The Chief Justice said that he could not recall an occasion when the opinion of the Solicitor-General had been sought but considered it would be appropriate to do so. Mr Iles said that the Solicitor-General is normally regarded as the final arbiter of such things.

The Committee therefore agreed that it would seek the advice of the Solicitor-General on both aspects of the issue.

In respect of Agenda, Items 2(d) and (e), Mr Iles said that he hoped to have those before the Committee for the next meeting. Mr Carruthers noted that the point relating to exchange of witness briefs was not a machinery matter that could be dealt with quickly, and Mr Iles said that it may be possible to concur on some of the rules, but that if he had a draft before members then their concerns could be addressed. The Committee noted the need for a copy of any draft to go before Justice Thomas.

14. High Court Amendment Rules 1994

Mr Iles said that he had no comment to make on-the substantive content of these rules, and noted that they are driven by the need to have amendments in place for the new companies legislation.

15. Masters (Item 10 of Agenda)

Mr Carruthers said that he had consulted with the Courts and Tribunals Committee and also with the Bar Association and that both were of the view that if there were a substantive judgment delivered by the Master then than should not be the subject of a review.

Mr Fulton expressed concern that there should be some clear rules to avoid jurisdictional arguments. He personally favoured the de novo approach.

The Chief Justice expressed the view that where there is a considered judgment from the Master he did not favour the de novo approach, and Mr Carruthers agreed that the de novo approach is aimed at a judgement given after a two to ten minute appearance.

The Chief Justice said that he understood the right of review to be in accordance with the rule relating to the review of Judges orders in chambers, and he agreed that that is more difficult where the Master has delivered a reasoned judgment.

Mr Carruthers suggested that the legislation provides for a right of review in every case and it is not therefore for a practice note to abrogate this.

The Chief Justice suggested Mr Carruthers might try to draft a practice note which could be placed before the Judges for their reaction.

Alternatively, Justice Doogue suggested that r 61C(4) could be amended.

After discussion, the Committee agreed that Mr Carruthers would attempt to draft a practice note which would indicate that the right of review should be confined to those cases where there has been a short appearance with limited argument, akin to a chambers hearing before a Judge, and that the right of review should not be exercised where the Master has delivered a fully considered and reasoned judgment.

16. Pleadings

(a) Proper office of the court for filing urgent matters

Mr Carruthers considered that the present rules are perfectly satisfactory and the Committee agreed with that.

(b) Definition of Pleadings

The Committee noted that it had agreed at the last meeting there was no need to make any amendment to the rules relating to the definition of pleadings and the close of pleadings.

17. Probate and Administration (Item 12 of Agenda)

This matter was deferred until the next meeting, to enable Mr Carruthers to refer it to the Courts and Tribunals Committee, and Mr Fulton to report back to the Law Society.

18. New Property Law Act (Pleadings/1/94)

The Law Commission had referred to the Committee r 183 of the High Court Rules which contains a reference to the statute of frauds, as well as a reference to the Contracts Enforcement Act 1956 which is proposed to be repealed and incorporated into the new Property Law Act.

The Chief Justice noted that the Contracts Enforcement Act 1956 preserves the reference to the statute of frauds for contracts prior to the coming into force of the Act.

The Committee agreed to refer the matter to Mr Iles for an appropriate amendment once the Contracts Enforcement Act is incorporated into the new Property Law Act.

The meeting closed at 12.45 pm.

The next meeting will be held on Thursday, 11 August 1994 and the following meeting on Thursday, 24 November 1994.

Secretary

MAS:5829

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

Action required by:

The Chief Justice

1. Obtain Australian video conferencing draft on protocol.

Justice Doogue

1. Put together, with the Secretary, a draft on costs for distribution to be referred in the first instance to the Committee.

2. Write to the President, enclosing a copy of the relevant extracts from Minutes/3/93 and Minutes/4/93 and obtain comment.

Justice Thomas

1. Discuss appeals with the President of the Court of Appeal.

Master Hansen

1. Look at Admiralty Rules

Chief Judge Young

1. To advise the Committee at the next meeting the feedback on costs discussed at the District Court Rules Committee meeting.

Mr Williams

1. Ask the Law Reform Division of the Department of Justice to summarise the present state of legislation with regard to video conferencing.

2. To check on Part III B of the rules relating to dumping under the Commerce Act.

Solicitor-General

1. To give advice on vires of Court of Appeal seeking the assistance of an expert as a consultant.

Mr Carruthers

1. To work in conjunction with Mr Fulton to draft a new format for the scale of costs.
2. Draft a practice note on right of review of Master's decisions.
3. Refer probate and administration to the Courts and Tribunals Committee.
4. Look at Admiralty Rules.

Mr Fulton

1. To work in conjunction with Mr Carruthers to draft a new format for the scale of costs.
2. Report back to the Law Society on Probate and Administration.