THE RULES COMMITTEE

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6 August 1999

Minutes/2/99

CIRCULAR NO 31 OF 1999

Minutes of the Meeting held on Thursday 17 June 1999

The meeting called by Agenda/2/99 was held in the Judges' Common Room, High Court, Wellington, on Thursday 17 June 1999, commencing at 9.30 am.

1. **Preliminary**

In Attendance

The Chief Justice (The Hon Dame Sian Elias GNZM)
The Hon Justice Doogue (in the Chair)
The Hon Justice Fisher
The Hon Justice Hansen
The Hon Justice Chambers
Justice Doogue (by invitation)
Ms E D France (for the Solicitor-General)
Mr K McCarron (for the Chief Executive, Department for Courts)
Mr C R Carruthers QC
Mr G E Tanner (Chief Parliamentary Counsel)

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

The Attorney-General (The Right Hon Sir Douglas Graham KNZM)
Chief District Court Judge Young

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

On the motion of Mr Carruthers, seconded by Justice Hansen, the minutes of the meeting held on Friday 19 March 1999 were taken as an accurate record and were confirmed.

(c) *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.

Action By

Welcome to Chief Justice and Judge Doogue

Justice Doogue welcomed the new Chief Justice, Dame Sian Elias to the committee, and also Judge Doogue who attends to represent the District Court.

Papers Tabled at the Meeting

By Mr Tanner:

- The High Court Amendment Rules (No 3) 1999 (PCO 3347/2). Rules Costs Practice Note, dated 18/3/99
- Comparative Table relating to the High Court Amendment Rules (No 3) 1999.

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

(a) *Amendments (including Costs - Costs - Joint Liability, Evidence by Affidavit, Masters' Decisions and Rule 705 (1)(c))*

The Chief Justice said that she had great concerns about the use of a Practice Note to set the daily recovery rate. She said that she though it should be part of the rules and that what research she had been able to do on Practice Notes indicated they were not usually used for this sort of thing. She also expressed concern that there may be Commerce Act issues.

Justice Fisher said that in the past specifying amounts in the rules had quickly become obsolete. He said that the committee had debated the constitutional aspects at length and was satisfied that the use of a Practice Note was appropriate provided that it operated as a guideline as to how judges intended to operate the rules. However now that the Parliamentary Counsel Office is operating efficiently there is no longer any real concern about the amounts becoming obsolete and hence perhaps less pressure to use practice notes

The Chief Justice said she would have no difficulty if the contents of the Practice Note appeared as a schedule to the rules.

Justice Chambers said that these rules are not being made pursuant to s 51C(2)(g) of the Judicature Act, but rather pursuant to s 51C(2)(c) and (d). He noted that if the contents of the Practice Note are contained in a schedule there will be only three figures to update rather than a detailed scale.

The Chief Justice suggested a requirement that the schedule be updated annually. Justice Chambers said that in these days of low inflation that may not be necessary, but Justice Fisher considered it should be addressed annually to avoid any problem of inertia.

Justice Hansen said that there is some overseas precedent for addressing not only costs but also interest rates on judgment by Practice Note. He noted also in countries where

Action By

Masters are responsible for taxing costs the Law Society and Bar Association report annually to the taxing Masters so that there is an empirical base for the assessment.

The Chief Justice queried whether those countries have a legislative power to issue Practice Notes to that effect and Justice Hansen replied that the foundation for a Practice Note is the inherent jurisdiction of the court.

Mr Tanner advised that he had no concerns about the *vires* of the Practice Note in the form in which it was proposed.

Justice Fisher said that an alternative is to have no daily rate but instead have the judge set the figure on the day, and Justice Doogue noted that regime already exists in respect of Masters' rates for standard matters.

Justice Chambers considered that the least desirable option because it could result in the parties adducing evidence on what are the appropriate rates.

Justice Fisher suggested that the issue could be addressed by the Judges starting from rule 48, taking into account the complexity and significance of the case, and the skill and experience of counsel and adopting a daily rate that seems appropriate.

Justice Chambers said that the advantage of having the practice note contained in a schedule is that it achieves predictability with the daily rate fixed in advance in most cases.

Justice Doogue identified three options that had arisen from the discussion: the practice note, turning the practice note into a schedule, and going back to the old style scale.

The Chief Justice suggested it might be possible to combine the practice note and the schedule options by providing for a rate to be fixed by schedule so that there can be a workable system in place until such time as the schedule with the rates is made by Order in Council.

Mr Carruthers suggested prescribing a procedure for setting the schedule, on the basis that the schedule is calculated by the Rules Committee having consulted the Law Society, the Bar Association and the Legal Services Board. Justice Chambers said that any proposal to pass the rules without a schedule at the same time would undermine the predictability of the system because there would be no judicial uniformity.

Mr Tanner said that the rules would be referred to the Regulations Review Committee and that the Minister of Justice brings any change in fees to the attention of the Cabinet Legislation Committee.

Justice Fisher queried what precedent there is for internal communication among Judges as to how they will jointly act.

Justice Doogue said that that occurs in the High Court in that there are agreed rates on summary judgment, insolvency and dissolution of marriage.

Action By

Judge Doogue said that there is no equivalent in the District Court because local figures are used such that amounts in Auckland are higher than in Dunedin for example.

The Chief Justice said in practice the Judges do take notice of tariffs that are being applied in High Court judgments.

Justice Doogue said that the Court of Appeal has an understood daily rate of $5,000 and a half day rate of $3,000, and he saw no reason why the High Court should not do the same.

Mr McCarron suggested that the Ministry of Justice might need to be consulted about their attitude to putting the content of the practice note in a schedule.

The Committee agreed that the content of the practice note should be included in a schedule and that draft rule 48 be reworded accordingly. He agreed to consult the Judges Fisher and Chambers before bringing any redraft back to the Committee.

Mr Tanner suggested that if the matter of costs is referred to the Cabinet Legislation Committee it may be appropriate to suggest that it be referred to a Cabinet Policy Committee and then have a representative of the Rules Committee explain the background and effect of what is proposed. Something that he anticipated is the proposals being misinterpreted as an increase in legal costs when in fact it is a regime for apportioning legal costs between the successful and non successful parties.

Ms France agreed to brief the Attorney-General and also Matthew Palmer.

Rule 47

The Chief Justice queried the drafting of the phrase "predictable and expeditious unless there are special reasons to the contrary".

Justice Hansen suggested mirroring the words in rule 4 "speedy and inexpensive" but Justice Fisher said that the Committee had meant to express the concept of predictability.

The Committee agreed to a wording along the lines, "as far as possible, predictable, and expeditious".

All of the remaining rules were approved by the Committee.

It was agreed that Mr Tanner should circulate a redraft to Justice Doogue, Justice Fisher, Justice Chambers and Mr Carruthers and then prepare a concurrence copy to be circulated, through the Secretary, to all members of the Committee.

Justice Fisher raised the issue of an education programme in relation to these costs and Justice Hansen said that there is Continuing Education Committee meeting in about three weeks.

Action By

Action required by the Secretary

Justice Doogue agreed to prepare a note for "LawTalk".

The Committee agreed that the part relating to costs should come into force on 1 February 2000 and the remaining rules at an appropriate date.

(b) *Judgment - Time and Mode of Giving*

Justice Chambers said that there were three significant differences between his approach and that taken by the Judges' clerks. First is that in his draft final decisions must be given in court while the clerks permit any decision to be given any where. The second is that Justice Chambers provided that, in respect of oral judgments, the parties must be given an opportunity to be present unless the judgment is *ex parte*, while the clerks have provided that oral judgments can be conveyed by the Judge or Master or an employee of the Court. Thirdly, Justice Chambers said that for written judgments his date is that of delivery by the Registrar while the clerks would provide for the date that the judgment is picked up by the last party with a final cut off if a party fails to collect it. In respect of the first two points on which they differ, Justice Chambers said he had no strong views, but in respect of the third he considers the position taken by the clerks to be impractical and raised the issue of non-suit as an example.

Justice Fisher did not think a final judgment should be limited to delivery in court and said that if the exigencies of the case required a Judge should be able to give judgment elsewhere.

Justice Chambers said that there is a public interest in a final decision and there ought to be public access to it.

Mr Carruthers reminded the Committee that this issue arose because Justice Temm attempted to dispose of a case when he was not well enough to deliver the judgment in court and for that reason Mr Carruthers said that he agreed with the view taken by Justice Fisher.

Justice Fisher identified as reasons why a Judge should not be able to deliver judgment anywhere the fact that the public ought to be able to hear the judgment and also the fact that the Judge should be able to deliver a judgment to parties simultaneously (as for example by conference call).

Ms France said that in the context of a final judgment there may be a situation of urgency and her preference would be to see judgment being able to be delivered any where.

Mr Carruthers suggested that power might be qualified by reference to special circumstances, but Justice Fisher said that a Judge would not, in practice, deliver a judgment elsewhere than in court.

The Committee agreed that a Judge should be able to deliver a judgment anywhere.

Action By

On the point about an oral judgment being given by an employee of the court, Justice Fisher said that he did not support the clerks because there is room for error once a third party is brought into it. The Committee agreed.

In respect of the date of the judgment, Justice Fisher said that he agreed with Justice Chambers but that there is also a need to go further and cater for the way the Judge can deliver judgment. He pointed out that the mischief to avoid is the situation where someone foresees that they are likely to lose and then prevents the Registrar from delivering the judgment to them. He said that what underlay the clerks approach was that if someone was not cooperative there was a process by which parties can collect the judgment if they want to.

Justice Chambers said that under the clerks regime the judgment is deemed to be delivered if it is not picked up by a certain date. He said that that permits some parties to get the judgment before it is deemed to be delivered.

Justice Doogue considered it strange that a Judge should be able to sign a completed judgment and then have no control over the date that it is delivered.

Mr Carruthers said that while the judge can sign and date a judgment there can be delay in the court getting the judgment to the parties. He agreed that the practice needs to be certain and noted that the clerks scheme of having a judgment delivered when it is picked up is just one more thing that can go wrong.

Justice Fisher agreed that if the judgment were signed and dated by the Judge that would give certainty, but the downside of that is whether the delay in the parties receiving a copy of the judgment can be unduly prejudicial.

Justice Chambers said that if the Judge is on circuit the parties may lose as much as a week of the time to appeal.

Justice Fisher said that the court staff should notify the parties immediately, but Justice Hansen said that one of the difficulties of imposing an obligation on the registrar is that the staff are managers without technical knowledge.

Justice Doogue noted that things like an injunction will be sealed and served and that only a judgment which dismisses an application will be a problem.

Justice Chambers said that it would be simple to provide that a written judgment is given when a Judge has signed and dated it.

Justice Fisher said that the time may also be significant in cases such as where a child is removed from its parents. He suggested that inserting the time would also highlight the urgency and the responsibility of staff to communicate the judgment.

Judge Doogue said that requiring the time to be inserted is one more thing that can go wrong.

Action By

Justice Fisher said that there are occasions where the time can be of significance such as Anton Piller orders, Mareva injunctions, and removal of children.

Mr Carruthers said that those ones differ however because a sealed judgment will be served on the other party.

Mr Tanner summed up the view of the Committee by saying that a written judgment can be given anywhere while an oral judgment must be conveyed to the parties or the parties be given an opportunity to be present. Written judgments are given when signed and dated by the Judge.

(c) *Rule 183 and proposed new Property Law Act*

The chairman noted that this item is for action when necessary.

(d) *Summary judgment procedure*

This matter was considered under item 14(a) below.

(e) *High Court Amendment Rules (No 2) 1999*

Mr Tanner explained that the necessity of this amendment arises because provisions relating to service out of the jurisdiction which used to be in the Carriage by Air Act 1967 are now in the Civil Aviation Act 1990. The committee approved the form of the amendment.

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

(a) *Expert Advisors*

Mr Tanner advised that the bill has been reported back and is set down to go through the committee stages at the next sitting of the house. He said that it could be passed in the following week.

Mr Tanner went on to say that when the bill was reported back from the Select Committee it was amended to reflect the expectation of the committee that there will be rules made relating to expert advisors in the Court of Appeal. The rules are anticipated to provide for information to be given to the parties about the appointment of any expert advisors and about matters on which the expert advisors' assistance will be sought. The Select Committee also expects that the procedure will provide an opportunity for the parties to make submissions to the court on those two matters. Mr Tanner said that the Law Society had made submissions to the Select Committee that the procedure should be similar to that provided in the High Court Rules; there is no obligation to make rules, merely an expectation that rules will be made.

The Chief Justice said that there will be pressure to get rules completed quickly because there is a need for Maori experts for a fisheries case which is coming up in the Court of Appeal in August.

Action By

Action required by Mr Tanner

Justice Doogue said that once the bill is passed it is for the Court of Appeal to decide what they want to do in respect of their own rules and that the court has a subcommittee of Justices Henry and Blanchard who address civil rules issues. Justice Doogue asked Mr Tanner to draw the attention of the Court of Appeal to the issue of rules.

(b) *Merger of High Court and District Court Rules Committees*

Mr Tanner advised that this amendment, along with the one relating to expert advisors is also contained in the Judicature (Rules Committee and Technical Advisors) Amendment Bill. He said that it will come into force a month after assent so that it will be necessary to have the appointment process ready for the enlarged committee.

(c) *Winding up - Masters' jurisdiction*

Justice Doogue advised that this bill was assented to on 7 May 1999 and came into effect the day after.

4. **Admiralty Rules (Item 4 of Agenda)**

(a) *Generally*

Mr Carruthers recalled that the Committee had already discussed a small amendment to deal with Mr Corry's point. In respect of the more substantial matters raised by Mr Fantham, he said that he had drafted a paper which he wanted to discuss with Mr Fantham before circulating.

5. **Appeals**

(a) *Appeals from the District Court*

Justice Doogue explained the background by saying that this issue arose in respect of appeals from the High Court to the Court of Appeal. He said that the distinction between interlocutory and final orders was overcome by abolishing it and making the time limit 28 days regardless of whether the order was an interlocutory or final one. He said that the Committee wanted appeals from the District Court to the High Court to run the same as from the High Court to the Court of Appeal but that requires a statutory amendment. He said that the same simple answer is not available at District Court level because it would permit appeals on interlocutory matters in the District Court to the High Court which is neither necessary nor sensible where trivial procedural matters can be used as a delaying tactic. He noted that in the High Court most interlocutory matters are dealt with by Masters and are therefore subject to a review rather than an appeal to the Court of Appeal. Justice Doogue referred to the paper from the Chief District Court Judge which proposes an internal review of interlocutory matters; this has the disadvantage that it brings back the distinction between interlocutory and final orders.

Action By

Justice Fisher said there may be some merit in the consistency of having appeals from interlocutory orders in the District Court and then ensure that the right to appeal was not abused through awards of costs.

Justice Doogue also drew a distinction between interlocutory matters such as discovery and interlocutory matters which bring the proceedings to an end such as a strike out and said that there should be a right of appeal against the latter if not the former.

Justice Chambers said that he was inclined to give a right of appeal on all interlocutory matters on the basis that not many litigants would want to incur the costs of appeal unnecessarily.

Mr Carruthers said that he would be concerned about delay occasioned by a losing party using the appeal process to string out the proceedings.

Justice Fisher said that there is a precedent for allowing an appeal on everything because that is the case now between the High Court and Court of Appeal. He noted that the fact that an appeal is filed does not stop the case from proceeding and that most Judges do not allow unmeritorious appeals to delay matters. Judge Doogue said that the cost of an appeal is much more out of proportion to what is at stake in the District Court than it is in the High Court.

Justice Doogue said that all that can mean is that the more wealthy litigant can freeze out the party on the other side.

Justice Fisher said that it is very rare to see a review of a District Court Judge's decision and suggested there may be more review proceedings if the appeal right is taken away. Having said that, he noted that appeals from an interlocutory decision of the District Court are also rare.

Justice Doogue considered it anomalous that in the High Court the decision of a Master can be subject to a review while the decision of a Judge on an interlocutory matter is subject to an appeal to the Court of Appeal.

Justice Fisher noted that some interlocutory decisions are determinative of the proceedings and cited as an example strike outs and stays and said that he thought there should be an appeal to the Court of Appeal in such instances. He suggested that Masters' decisions given in chambers be subject to review but that everything else go to the Court of Appeal.

Justice Doogue said that there is then the problem of defining what is meant by a chambers hearing and Justice Fisher said that in practice that deals with interlocutory matters.

Justice Doogue suggested that an analysis of the rules might classify rules into categories as to whether they are appropriate for a review (such as timetable orders), and appeal (such as orders which bring the proceedings to an end) or neither (such as a consent order).

Action By

Justice Fisher queried whether any orders should be totally non-reviewable and said that consent orders may be reviewed if there has been a mistake or fraud.

Justice Fisher mentioned also the jurisdiction of the District Court and noted that in a commercial case where $190,000 is at stake, may be subject to the view of only one judge on the question of whether privilege applies to a document.

At the other end of the scale, Judge Doogue noted that the District Court is close to the jurisdiction of the Disputes Tribunal.

Justice Hansen noted that the importance of the point may be independent of the monetary amount that is at stake.

Action required by Judge Doogue and Justice Chambers Judge Doogue agreed to look at the issue, and Justice Chambers agreed to liaise with them about making a Judges clerk available.

(b) *Appeals from the High Court*

This item was considered as part of 5(a) above.

(c) *Time within which an application to appeal should be made*

Justice Hansen said that he has still to get his clerk to do a paper on this issue.

(d) *Interest on judgment from the District Court*

The problem is that there is no provision for interest on a judgment from the District Court on appeal to the High Court and it may be a difficult jurisdictional problem to address by way of an amendment to the rules because of the wording of s 77 of the *Action required by Judge Doogue* District Courts Act 1947. Judge Doogue agreed to address this as part of the problem of appeals from the District Court.

6. **Arbitration**

(a) *Rules under s 16(a) of the Arbitration Act 1996*

Justice Chambers said that he had made provision for every application to be by way of an originating application under Part IV A of the High Court Rules, with the exception of three special applications, namely appeals, leave to appeal, and entry of the award as a judgment which would be subject to their own special regime set out in draft rule 820.

Justice Fisher said that the only thing that would be appropriate for a practice note rather than the rules is the issue of a Judge hearing the application of the merits after dealing with the leave application.

Justice Fisher noted that challenges to the award by way of judicial review and appeals on a point of law tend to come in tandem.

Action By

Justice Chambers said that he had tried to put the two together but found it too difficult because the application for review raises different issues and has different evidence. He said that he thought having two files was the lesser evil.

Mr Tanner raised the possibility of having a discrete part for arbitration awards and Justice Doogue said that if that were to be the case then everything relating to arbitration should be in it.

Mr Tanner also raised the issue about giving reasons and suggested that the rule might provide that no reasons be given on the leave application unless there are special reasons to the contrary. Justice Doogue noted that the parties may in fact agree that reason not be given.

Action required by Justice Chambers and Mr Tanner

The Committee agreed that Mr Tanner and Justice Chambers should work together on these rules for the next meeting.

7. **Evidence**

(a) *Expert witnesses*

Justice Doogue said that he had spoken to Judges of the Federal Court of Australia and that their rules and practice directions were working well in the majority of cases. The result has been that experts, usually on opposite sides, sit down and reach some agreement. Justice Doogue said that the papers had been shown to the High Court Review Committee who have agreed it is appropriate for the Rules Committee to look at the issue.

Justice Fisher regarded it as inevitable that New Zealand will regulate the use of expert witnesses in New Zealand in order to reduce expense and save time. He considered that the Rules is the appropriate place (as opposed to a practice note or the code of evidence) to regulate procedure (as opposed to regulating what evidence the experts can give). He said that it would be worthwhile waiting to see how the English and Australian regimes go and noted that the Woolf Report brought about intervention in England almost at the same time as Australia.

Justice Hansen noted that the proposals in the Woolf Report come from the Official Referees Court and there may be some experience in England already.

Justice Fisher said that in England the parties need leave to call an expert witness and there is a heavy emphasis on the court appointing its own expert or alternatively limiting each side to one expert with a referee system.

Justice Doogue said that New Zealand does not yet have the volume of cases as are being heard in Melbourne or London so the issue does not have the same immediacy.

Action By

Justice Chambers suggested the preparation of a paper that looked at the areas of difference between Australia and England and which could then form a basis for decisions for the Rules Committee.

Mr Carruthers said that in the past the Committee has also looked at other jurisdictions as, for example, Canada.

The Chief Justice suggested making inquiries of a jurisdiction where expert evidence is often given such as the Environment Court. In that jurisdiction she noted that they have a process for mediation which may extend to the expert witnesses.

Action required by Judge Doogue and Justice Doogue

Justice Doogue agreed to make a Judges clerk available to assemble the relevant rules from overseas jurisdictions, and Judge Doogue agreed to find out if the Environment Court had any specific way of dealing with the problem.

Justice Fisher said that in the United Kingdom the rules give the Judges a discretion which if firmly exercised would result in either no experts being called or experts being subject to their own mediation and providing a report to the Court. On the other hand, if the discretion is exercised liberally, nothing might change. He said that he would be interested to see which if the differing systems in Australia and the United Kingdom is the more successful.

Mr Carruthers said that the Federal Court has trade practices jurisdiction which necessitates evidence on economic theory and he suggested that New Zealand should be prepared for any need that might arise in this area.

Action required by Mr Carruthers

Mr Carruthers agreed to follow up some inquiries about superannuation and actuarial cases.

8. **Execution**

(a) *Charging orders*

Mr Carruthers agreed to check with the New Zealand Law Society to find out how widespread the problem is.

9. **General (Item 9 of Agenda)**

(a) *Servicing of the Rules Committee*

Action required by the Secretary

Mr McCarron said that the item is on the agenda for the Committee looking at the High Court Review and the Secretary agreed to make sure that Justice Goddard is aware of this issue relating to the Rules Committee.

Action By

(b) *Search of Court records*

Justice Doogue referred to General/3/99 and said that the issue had arisen out of some correspondence between Mr Mabey of Tauranga and the Law Commission, that the Law Commission had referred it to him and that he had referred it in turn to the Criminal Practice Committee.

The Committee agreed to leave the item on the agenda for follow up with the Criminal Practice Committee in due course and to see if that Committee wants the Rules Committee to do anything further.

10. **Insolvency Rules (Item 10 of Agenda)**

(a) *Redraft*

Mr Tanner tabled the High Court Amendment Rules (No. 3) 1999 (PCO 3347/2), together with the comparative table.

Justice Doogue said that the thanks of the Committee should go to Marian Hinde for giving the Committee her time to such a detailed analysis of what is proposed.

Mr Tanner suggested referring this draft, the comparative table and Marian Hinde's comments to Justice Hansen's subcommittee. Mr Tanner also suggested that Jenny Walden who drafted the rules might meet with the members of the subcommittee once they have had time to consider it.

Justice Hansen agreed that that may be appropriate and, as Mr Guest is in Dunedin, it may be appropriate to meet in Dunedin at sometime when Master Venning is there.

11. **Interlocutory matters (Item 11 of Agenda)**

(a) *Generally*

Justice Doogue referred to the paper prepared by Susan Taylor on 26 February 1997, Interlocutory Matters/1/97. He noted that the paper gives a general review of interlocutory applications and starts by comparing the New Zealand procedure with other jurisdictions.

Justice Hansen suggested that interlocutory applications be looked at in the context also of the case management regime because many interlocutory applications are now filed in memoranda of counsel at judicial conferences.

Justice Fisher said that case management presupposes consent and that when the application is defended it will be dealt with through the rules at a defended hearing.

Justice Hansen noted that anything not disposed of at a conference will be given a hearing date.

Action By

Justice Chambers flagged a problem with the rule that a notice of opposition be filed by 1pm the day before the hearing. He said that the difficulty is that when the application is filed the applicant never knows if the case is going to be argued on that date, and tends to assume that it will not be.

Justice Hansen noted that the notice of opposition comes in so late there is no time for the applicant to file and affidavit in reply. He suggested the notice needs to be filed three days before the hearing.

Justice Fisher was critical of those rules which calculate times for filing by reference to the hearing date and suggested they would be better calculated by reference to the time of service.

Justice Hansen noted that other jurisdictions require the notice of application to be served a specific time before the allocated hearing date. He suggested that there should be an obligation on applicants to serve within a specific time as well.

Justice Chambers highlighted the differences between rules 41 and 237(3). Rule 41 provides who can file documents while rule 237(3) relates to the signing of the certificate.

Justice Doogue referred to the general undertaking to comply with rules and said that the requirement for a certificate helps to convey the seriousness of the responsibility.

(b) *Rules which bring proceedings to an end*

Justice Doogue asked, now the new summary judgment procedure is in place and a number of rulings of the Court of Appeal have blunted the effect of rule 426A, whether the Rules Committee should look at groups of rules which bring proceedings to an end and see if they need to be further refined. By way of example, he referred to striking out applications when it is now possible to move for summary judgment.

Justice Hansen noted that rule 426A and striking out for want of prosecution have largely been overtaken by case management.

Justice Doogue said that strike out applications are frequently a waste of time in that they can succeed at first instance, fail on appeal, and then the parties go back to deal with the merits of the matter. He said that strike out applications commonly have no merit, do not dispose of the substantive proceedings, or just reduce the issues in the substantive proceedings which summary judgment can do equally well.

Justice Fisher said that the Crown Law Office would act for the Government in a number of instances where strike out is appropriate, and that most of the others merely serve to demonstrate to the plaintiff how the action should have been pleaded.

Justice Doogue suggested that the rules which bring proceedings to an end should be considered together and Justice Chambers noted that they are scattered throughout the rules at the moment. The rules in question are listed in Appeals/4/98.

Action By

The Committee agreed to consider the issue further at the next meeting.

12. **Masters (Item 12 of Agenda)**

(a) *Jurisdiction*

Justice Fisher said that the difficulty is that Masters are not able to deal with interlocutory matters in *mandamus* or other prerogative proceedings including declaratory judgments. He considered as a matter of policy that the Masters ought to have power to make interlocutory orders in such proceedings.

Ms France noted that an amendment to s 26J(4) of the Judicature Act 1908 would be necessary.

Justice Doogue noted that the decision *Reid v New Zealand Fire Services Commission* (1995) 8 PRNZ 550 decided that striking out is a form of relief. He noted however that s 4(1) of the Judicature Amendment Act 1972 is framed around relief being granted to the applicant on an application for review, not the respondent.

The Committee explored the possibility of taking the issue to the Court of Appeal but Ms France pointed out that there would need to be some basis for taking an appeal given that the Masters would follow the High Court decision and hold that they do not have jurisdiction in a strike out application.

Justice Fisher suggested that the Committee might promote an amendment to s 26J(4) of the Judicature Act to make it clear that Masters have jurisdiction to deal with interlocutory matters including striking out in those classes of proceedings. He noted that interim injunctions and interim orders under s 8 of the Judicature Amendment Act 1972 are in a special category and should not come under the Masters jurisdiction.

Justice Doogue suggested that there might be grounds for having the Judges reconsider their position about interim injunctions, because while Judges might be available in the metropolitan areas, the Masters are frequently on circuit and are often asked to deal with injunction applications. Justice Hansen noted that the Masters have that jurisdiction in South Australia.

Justice Fisher said that it would be a significant shift in the Masters' jurisdiction and he noted that in cases involving intellectual property and commercial affairs a great deal may turn on the interim injunction.

Justice Fisher summed up by saying that s 26J(4)(b) and (c) of the Judicature Act should be amended to clarify that any relief refers to the prayer for relief in the substantive proceedings.

Justice Fisher also noted that s 26(4)(b) should make it clear that it does not extent to interim orders, for the removal of doubt.

Action By

(b) *Voidable Transaction Procedures*

Justice Chambers referred to Masters/2/99 and said that the essence of the proposed change is to set out a specific form as to how the liquidator should challenge a transaction which is considered void, and which sets out what office of the court the notice is to be filed in. He suggests that the correct challenge should be by an originating application under Part IVA of the High Court Rules. He said that his proposals have been approved by the Auckland Masters at this stage.

Justice Hansen said he thought the issues would be better raised in a statement of claim, but Justice Chambers said that a statement of claim is more complicated and costly and he noted that the sums of money involved can be quite small. Justice Chambers said that he has heard back from the Masters and he now proposes to take the issue to the Joint Insolvency Committee of the Law Society and the Society of Accountants.

Justice Fisher said that the originating application procedure provides for affidavits from the outset.

Justice Hansen said that the statement of claim does force a statement of the issues.

Justice Fisher noted that in judicial review proceedings the statement of claim procedure does combine with affidavits.

Justice Chambers said that he would hesitate to create another statement of claim procedure with affidavits and said that the originating application procedure ought to work provided the plaintiff delineates the grounds. Justice Chambers suggested that he could pass the issue on to the Masters and to the Joint Insolvency Committee and ask them if they agree with the originating application procedure or whether it should be a statement of claim procedure with affidavits, detailing the advantages and disadvantages of both approaches.

Justice Doogue said that the procedure should be as simple as possible because there can be very small sums of money involved.

Judge Doogue noted that a statement of claim can define the issues while an originating application may not state detailed legal grounds.

Justice Doogue suggested that the summary judgment procedure might also be considered.

Action required by the Secretary The Committee agreed the Secretary should facilitate referring the matter to the Masters and to the Joint Insolvency Committee.

Justice Doogue queried whether the proposed amendment relating to voidable transactions covered both insolvency as well as companies winding up.

Action By

13. **Pleadings (Item 13 of Agenda)**

(a) *Certificate by lawyer responsible for document*

Action required by Mr Carruthers Mr Carruthers agreed to prepare something for the next meeting.

(b) *Document numbering*

Justice Fisher noted that Master Gambrill's concern is with the annotation which is being added to the file number to indicate whether a case has been assigned to the fast track or the regular track. Justice Chambers said that there was some initial confusion because the system was introduced without any explanation to the profession but that in his view matters had settled down now.

Justice Doogue agreed that it is not a matter for the Rules Committee, unless the National Case Management Committee requires a change to the rules for management of document purposes.

Action required by the Secretary The Committee agreed to respond to Master Gambrill accordingly.

14. **Summary Judgment (Item 14 of Agenda)**

(a) *Rule 138(2) - Whether Leave Required to Bring Summary Judgment Proceedings After the Commencement of the Substantive Proceeding*

Justice Fisher said that as a general policy the rules should permit practitioners to issue the proceedings that they choose unless there is some reason why they should not. He said that no contrary indications occurred to him.

Justice Hansen said that if leave is not required there will be more applications for summary judgment coming in further down the track.

Mr Carruthers said that he saw no reason why a litigant should not apply for summary judgment after discovery, for example when it becomes apparent that the case is suitable for summary judgment.

The Committee agreed that there is no need for leave to bring a summary judgment application, but noted that if summary judgment is not elected at the outset that will add to the cost of the litigation.

Justice Hansen also noted that the New Zealand procedure of electing summary judgment procedure at the outset means that the procedure works well in this jurisdiction compared to others.

In the end, the Committee decided not to make any change to the rule on the basis that there does not seem to be any particular problem in the meantime.

Action By

(c) *Written briefs rules*

Mr Carruthers agreed to prepare a paper for the next meeting. He said that he has done some work on this issue and had wondered if New Zealand could somehow gain the benefit of a United States depositions procedure without the downside of it. He said that what is needed is disclosure of the essential facts on which the case depends, a process more elaborate than the issues paper in the commercial list but less elaborate than having to have a depositions procedure.

Action required by Mr Carruthers He described it as more akin to discovery of documents. Mr Carruthers agreed to prepare an issues paper setting out the essential matters for the next meeting.

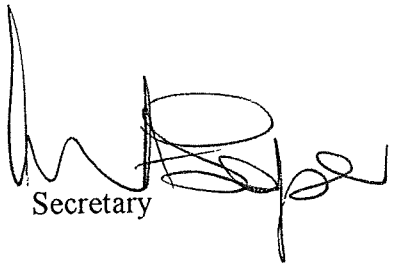
15. **General Business (Item 15 of Agenda)**

Justice Fisher queried whether it might be possible for the members of the Rules Committee to have an updated copy of the High Court Rules but without all the annotations.

Mr Tanner agreed to look into the matter and come back to him.

Action required by the Secretary The Secretary agreed to put the matter on the agenda for the next meeting.

The meeting closed at 4.45 pm.
The next meeting is to be held on Thursday 2 September 1999
and is scheduled to last a full day.



Secretary