THE RULES COMMITTEE

P.O. Box 5012 DX SP 20208
Telephone 64-4-472 1719
Facsimile 64-4-499 5804
Wellington

9 April 1999

Minutes/1/99

CIRCULAR NO 13 OF 1999

Minutes of the Meeting held on Friday 19 March 1999

The meeting called by Agenda/1A/99 was held in the Judges' Common Room, High Court, Wellington, on Friday 19 March 1999 commencing at 9.30 am, adjourned for lunch in the Chief Justice's Chambers at 12 noon and reconvened at 1.30 pm.

1. **Preliminary**

In Attendance

The Chief Justice (The Right Hon Sir Thomas Eichelbaum GBE)
The Hon Justice Doogue (in the Chair)
The Hon Justice Fisher
The Hon Justice Hansen
Chief District Court Judge Young
Ms E D France (for the Solicitor-General)
Mr K McCarron (for the Chief Executive, Department for Courts)
Mr C R Carruthers QC
Mr R S Chambers 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)
The Solicitor-General (Mr J J McGrath QC)

(b) *Confirmation of Minutes (Item1(b) of Agenda)*

On the motion of Justice Fisher, seconded by Mr Chambers, the minutes of the meeting held on Friday 20 November 1998 were taken as an accurate record and were confirmed, subject to:

(i) The text under items 2(a) and (b) on page 2 being transposed;

(ii) Item 11(a) on page 12, the penultimate paragraph being amended to record the Committee's agreement with Justice Fisher's proposal in paragraph 9 of his memorandum;

(iii) Item 12(a) on page 16, a second paragraph being amended to include the Committee's agreement to Justice Fisher's proposal;

(iv) Item 12(a) on page 18, last sentence on paragraph 3 amended to read, ". . . the issues are already defined by the notice **and** the application to set aside the notice."; and

(v) Item 12(a) on page 18, last paragraph being deleted.

(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.

Retirement of Chief Justice

Justice Doogue proposed a vote of thanks to the Chief Justice for his active participation over the years and noted his incredible stamina and staying power and his ability to be always able to pick up on some point worthy of consideration. The vote was carried with acclamation.

Papers Tabled at the Meeting

By Justice Fisher:

- (Draft) High Court Rules Costs Practice Note, dated 18/3/99

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

(a) *Costs*

The Committee considered the High Court Amendment Rules (No.2) 1999, PCO 3053/2.

Rule 1: Title and Commencement - Mr Chambers said that he and Justice Fisher consider that the lead-in time should be three months rather than 28 days because the Rules make a significant change and there will need to be a process for getting information to the profession.

Mr Tanner said that it would be easier to have a fixed commencement date and said that it would be no problem to have two different commencement dates in the event that the Costs Rules are amalgamated with the other amendments to the High Court Rules.

Rule 2: New Rules Substituted -

Rule 46: Costs at Discretion of Court - there was no discussion of this rule.

Rule 47: Principles Applying to Determination of Costs - Mr McCarron queried the use of the word "must" in sub-rule (a) and the Committee noted that the word "should" has been used elsewhere.

Ms France asked to make sure in sub-rule (e) that the qualification "special reasons to the contrary" applied to both "predictable" and "expeditious".

Rule 48: Determination of Appropriate Daily Rate - there was no discussion of this rule.

Rule 48A: Determination of Reasonable Time - there was no discussion of this rule.

Rule 48B: Costs May be Fixed by Reference to Single Band - there was no discussion of this rule.

Rule 48C: Fixing of Costs in Advance - Mr Chambers queried the marginal note and said that it is not actually costs which are being fixed in advance and Mr Tanner suggested the term "basis of costs". The Committee agreed.

Rule 48D: Increased Costs and Indemnity Costs - Chief Judge Young suggested that sub-rule 48D(3)(b)(iii) should be qualified with the words "without reasonable justification", and the Committee agreed.

Rule 48E: Refusal of, or Reduction in, Costs - Chief Judge Young said that Rule 48E(1)(e)(iii) should be qualified by inserting the words "without reasonable justification", and the Committee agreed.

Rule 48F: Costs in Interlocutory Applications - there was no discussion of this rule.

Rule 48G: Costs may be Determined by a Different Judge or Master - there was no discussion of this rule.

Rule 48H: Written Offers "Without Prejudice Save as to Costs" - there was no discussion of this rule.

Rule 3: Joint and Several Liability for Costs - Justice Doogue explained that this is a quite separate point relating to the liability of joint parties to a proceeding; he noted that the present rule relates only to defendants and not to plaintiffs. The Committee agreed.

Rule 4: New Second Schedule Substituted - there was no discussion of this rule.

Rule 5: Transitional Provision - Mr Chambers said that he had thought further about the implications of this rule and said that he had identified four different categories of case where the new regime should, in his view, apply:

1: Proceedings commenced after the coming into force of these Rules;

2: Interlocutory applications heard in whole or in part after the coming into force of these Rules;

3: Any steps other than an interlocutory application taken in whole or in part after the coming into force of these Rules (by way of example he mentioned commencing the defence, receiving instructions, researching the facts and law, preparation and filing of statement of defence); and

4: Any trial heard in whole or in part after the coming into force of these Rules.

Justice Fisher noted that costs are discretionary so the problems can always be overcome, but Mr Chambers said that the purpose of introducing these rules on costs is to make the rules predictable.

Mr Carruthers noted that the parties will have three months to re-evaluate what course is taken once they are aware of the new costs regime so the new rules should be able to be applied.

Chief Judge Young said that the alternative is to have litigation, which may drag on for years, continuing to be subject to costs being assessed under the old regime.

Mr Carruthers queried whether the expression "trial" as used in Mr Chambers' fourth category was wide enough to cover such things as originating applications. Mr Chambers said that he had used the word "trial", following clause 8 in the second schedule.

Mr Carruthers noted that the term "trial of proceedings" has been used and suggested it should read "trial of proceedings or an application other than an interlocutory application"; Justice Doogue noted that that is how the term "proceeding" is defined.

Justice Fisher said that including trials which are part-heard in the new regime has a retrospective element in it, as for example when a trial is adjourned part-heard.

Mr Chambers said that he thought the part-heard trials should fall into one regime or the other; Justice Fisher said that an alternative is to give the Judge a general discretion to cover cases which straddle the two regimes.

Mr Chambers said it would be helpful to the profession for the Rules Committee to signal prima facie what the position will be.

Justice Doogue suggested that the old regime should apply to work done before the new rules come into force and the new regime apply after.

Mr Chambers said that preparation for trial is one item that cannot easily be apportioned between the two regimes because they are calculated on different bases. He noted that the current rule is $1,600 plus 3% of the total judgment sum, while under the proposed new second schedule the preparation time is twice that occupied by the hearing.

Justice Fisher said that the alternative is to put cases which straddle the two regimes under the old regime, noting that the Judge will be aware of the new regime.

Chief Judge Young said that there is no provision which deems when preparation has started and a trial which commences just after the new regime comes into force would probably have its preparation under the old regime. It then becomes very difficult to decide how long after the commencement of the new regime does the trial need to commence in order to bring the preparation under the new regime.

Chief Judge Young said that clarity is most important and Mr Chambers said that that was why he had taken the hearing date as the defining moment, so that as soon as any part of the hearing fell under the new regime the new regime would apply to the preparation time before it.

Justice Fisher expressed concern about a possible adverse public reaction to retroactive legislation, and Mr Chambers said that there is a long lead-in time which gives the parties time to re-think their strategy and decide if they want to go on to a hearing.

Ms France said that if the case is part-heard the parties will have already incurred the cost.

Mr Chambers said that there would be very few matters where the hearing had commenced at the time when the parties got notice of the new rules and was still being heard three months later.

Justice Fisher suggested that preparation could be taken from the date that proceedings are filed to determine whether preparation time comes under the new regime or the old one.

Mr Carruthers suggests that if any part of any step is taken before the new regime the old regime applies.

Mr Chambers said that while that gets over the certainty and retroactive legislation problems, the old regime will linger for five or six years. He said that it will also mean going back to the old regime for preparation for trial for any proceedings that are filed before the new regime comes into force, even although the interlocutory steps may come under the new regime.

Justice Fisher suggested that in practice people are more likely to claim under the new regime.

Mr Tanner said that he is more comfortable with the suggestion that steps taken before the new regime comes into force are dealt with under the old regime and Justice Doogue said that that could be expressed along the lines that the new Rules will not apply to any step or action taken prior to the commencement of these Rules. The Chief Justice suggested that the new regime should apply to any step wholly taken after the commencement of the new regime. The committe agreed.

Costs - (Draft) High Court Rules Costs Practice Note

Justice Fisher said that there are two subjects: the nature of the practice note and the precise figures to be arrived at. He said that the use of the three categories of proceedings is convenient for both Judges and counsel and he stressed the need to focus on the nature of the proceedings rather than the seniority of the particular counsel involved.

Mr Chambers corrected an error in his memorandum and said that he had heard from the Bar Association and the Legal Services Board. He also suggested changing the wording "1 January 1999 to 31 December 1999" to avoid any element of retroactivity, and proposed inserting "from the commencement of these Rules to 31 December 1999". The Committee agreed.

Mr Tanner suggested that instead of using the wording "two comments are added for the removal of doubt" it would be better to say "two matters are emphasised" and the Committee agreed.

The Chief Justice queried the relationship between the figures in the practice note and the "two-thirds" rule, and Justice Fisher said that practitioners will need to take two-thirds of these figures as the basis for the new regime.

The Chief Justice suggested that the practice note should promulgate just the two-thirds figure because the real point of the practice note is to fix the rate of recovery.

Justice Fisher said that the figures themselves are arrived at by surveying for the median market rate.

Mr Chambers said that the advantage of pinning the system onto the median current market rate is that it obviates the need for a complex and expensive taxing regime which can add significantly to costs and other jurisdictions.

Mr Carruthers considered it more logical to put the two-thirds figure in the practice note and explained that these figures are two-thirds of the current market rates.

Justice Doogue agreed that the practice note is a guide to the multiplier and should not promulgate a figure that then has to be calculated. The Committee agreed.

Mr Chambers suggested introducing some definition of "recovery rate" as meaning two-thirds of the daily rates currently charged by solicitors with appropriate skills for the proceedings. He said that Rules 47, 48 and 48C would need to be amended to accommodate that approach.

Justice Fisher suggested that it may be more appropriate to put the description of the three bands of proceedings in the Rules and reduce the practice note to just the figures. The Committee agreed.

Justice Fisher said that in transferring the description of the categories to the Rules there still needs to be a mechanism to link the figures from the practice note so that they can be applied by the Judges. He said that on the basis of a seven hour day the recovery rate is $850, $1,300 and $1,900 for the three bands respectively.

In the light of the discussions with the Law Society, the Bar Association and the Legal Services Board, the Committee settled on these figures as being appropriate to recommend to the Chief Justice for inclusion in the practice note.

Justice Hansen said that long-term there needs to be a mechanism in place to update these figures. He cited the example of Hong Kong where the judiciary meet annually with the profession for that purpose, although in Hong Kong the situation is complicated by the fact that costs are subject to a taxing regime.

Mr Carruthers said that the figures are a conservative market level, and Mr Chambers said that they would be conservative probably only for Auckland, Wellington and perhaps Christchurch but that for other parts of the country they would be tending to be more liberal.

Action required by Justice Fisher, Mr Carruthers and Mr Chambers

Justice Fisher, Mr Carruthers and Mr Chambers agreed to redraft the practice note and in due course to circulate it to the Committee through the secretary.

Costs - High Court Amendment Rules (No2) 1999 - Second Schedule

Mr Carruthers said that items 7 and 8 , which refer to "trial" needs to refer to "hearing of proceeding" to pick up the definition of "proceeding" in the Rules. He also noted that there is also some inconsistency between the term "proceedings" and the term "proceeding". In this regard he mentioned particularly item 1 and item 3.

Mr Chambers said that the words "where no contrary order under Rule 48F" do not need to be in item 4.

(b) *Costs - Joint Liability*

This matter was considered under item 2(a), Rule 3: Joint and several liability for costs.

(c) *Evidence by Affidavit, (e) Masters' Decisions and (g) Rule 705(1)(c)*

The Committee considered the High Court Amendment Rules 1999, PCO 3124/1, which was circulated under Amendments/1/99.

Justice Doogue noted the marginal notes to Rules 4 and 5 which read "Who may swear affidavits" and "Who may swear affidavit" respectively.

While the two Rules would appear in different parts of the High Court Rules, Mr Tanner said that they could be distinguished by being entitled "Affidavit verifying statement of claim and answers to interrogatories" and "Affidavit verifying list of documents" respectively.

Rule 1: Title and Commencement - there was no discussion of this rule.

Rule 2: Review of Decisions of Masters - the Committee agreed that a transitional provision is required to clarify that Rule 61C, as amended by this rule, does apply to applications for review filed before the commencement of these Rules, but that it does not apply to reviews that are part-heard at that commencement.

Rule 3: Application of Summary Judgment Procedure - Justice Doogue noted that there may be a further amendment to this rule depending on the Committee's decision on Item 4(b) of the agenda relating to summary judgment and admiralty.

Rule 4: Who May Swear Affidavits - There was no discussion of this rule.

Rule 5: Who May Swear Affidavit - Mr Chambers picked up some stylistic variations and noted that the term "filed and served under an order" is used in Rule 5(2) whereas in Rule 4(2) the expression used is "filed and served in accordance with an order", and that Rule 5(2)(a) finishes "affidavit; or" while Rule 4(2)(a) finishes "affidavit:".

Mr Chambers also noted the practice of commencing subsequent subclauses with the word "despite" instead of commencing the first clause with the words "subject to". Mr Tanner said the initiative for the change had come from the Law Commission which wanted the main proposition stated first and the qualifications afterwards.

Rule 6: Affidavits Made on Behalf of Corporation - there was no discussion of this rule.

Rule 7: Notice of Proceeding and Verifying Affidavit - there was no discussion of this rule.

Rule 8: Time for Appeal - Mr Tanner said that he has drafted Rule 704(a) differently from the terms in which it was discussed, in order to make it clear that if the Act that confers the right of appeal itself specifies the period within which the appeal must be brought then the provision in the Act prevails. Mr Tanner noted that there are a number of statutes that limit the time for appealing to 28 days, while Rule 704 currently refers to a period of one month. He said that it should be clear that there is no scope to enlarge the time for appealing beyond the statutory limit.

Rule 9: Extension of Time for Appeal - Mr Chambers noted that the revocation of paragraph (c) will leave an "or" hanging at the end of paragraph (b); Mr Tanner said that it is not the practice to specifically delete the "or".

Rule 10: Form 64E Amended - Mr Chambers said that under the old form the deponent had to specify that he or she was a director or secretary of the company, but all that is now required is a knowledge of the relevant facts. He suggested the form might be strengthened to require the deponent to say that they have knowledge of the facts stated in the affidavit and are duly authorised by the plaintiff.

Justice Fisher suggested using the term "personal knowledge", but Justice Doogue said that in practice the knowledge would not be personal knowledge as such, but would be knowledge gained from documents within the deponent's office.

The Committee therefore agreed with Mr Chambers' suggestion in its original form, namely that the deponent have knowledge of the facts and be duly authorised by the plaintiff.

Justice Doogue said that the next draft of the High Court Amendment Rules 1999 could be the concurrence copy; Mr Tanner suggested that, depending on the discussion on costs, it might be able to be amalgamated with the High Court Amendment Rules (No.2) 1999.

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

Justice Fisher referred to the Judges Clerks' paper which his office distributed by fax on 16 March 1999. Page two of that document records a proposal to substitute the mode and time of giving judgment rule and, on page three, an associated change to the address for service provision. These are consequential changes to amending the giving of judgment rule to ensure that the registrar is in a position to tell people that a judgment is available, and that the judgment becomes operative at that point.

Justice Fisher said that the principle is that Judges can give a judgment from anywhere and can either convey that to the parties simultaneously (as in an oral judgment) or (as in the case of a reserved judgment) the Registrar can advise the parties that the judgment is available for collection. He said there is a need also to

amend the Address for Service Rules so that it is easier for the registrar to tell the parties the judgment is available for collection.

Mr Chambers said that he was not in agreement with the proposition because he considered that a distinction needs to be drawn between judgments on proceedings and judgments on interlocutory matters. He said that judgments on substantive matters should be given in open court or deemed to be given when the record of the judgment is entered in the High Court records. He said that there may be difficulty in establishing exactly when the parties have been telephoned and advised the judgment is available for collection.

Justice Hansen said that there is no entry made as such in any High Court records and the more significant date for the court would be the date when the judgment is sealed. He said that in the South Island a judgment will be uplifted and signed for on behalf of the firm, and the registry will note the date and time. The Committee agreed with Justice Fisher's approach.

(e) *Masters decisions - rules relating to the review of*

This matter was discussed under item 2 (c) above.

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

Justice Doogue noted that this item is for action when necessary.

(g) *Rule 705 (1) (c)*

This matter was discussed under item 2 (c) above.

3. **Matters Referred for Statutory Amendment**

(a) *Expert Advisors*

Mr Tanner advised that both the provision enabling expert advisors for the Court of Appeal and the provision enabling the merger of the High Court and District Court Rules Committees are in the same bill. He said that the Select Committee is in a position to report and the report could be tabled at any time. He said that if the matter is passed quite soon, which it could well be, the Committee will need to address the appointments to the enlarged Committee.

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

This matter was discussed under item 3(a) above.

(c) *Winding-up - Masters' Jurisdiction*

Mr Tanner advised that this provision is now in the Statutes Amendment Bill No.5 and that the Select Committee met on Wednesday to address it. He said that the Select Committee could report back to the House quite soon.

5. **Admiralty Rules**

(a) *Generally*

Mr Carruthers said that there are two concepts in Mr Corry's letter and he referred also to the letter from Justice Giles (Admiralty Rules/1/99). He said that there are two types of caveat, one against arrest and one against release. He said that when a person caveats against arrest they do not know which registry is going to issue the warrant. There is therefore a central registry in which a caveat against arrest is filed. Before a warrant of arrest can be issued there needs to be a search of the central registry. When it comes time to release property under arrest, the arrest has occurred in a particular registry. A caveat against release would not therefore be filed in the central registry. Justice Giles had alluded to the fact that there may be a technical possibility that there may not be knowledge of the arrest of the ship. Mr Carruthers said that it is very hard to envisage that occurring in practice because all those with an interest in the ship find out about the arrest very quickly.

Justice Doogue referred to Justice Giles' letter of 14 September 1998 (Admiralty Rules/1/99), page two paragraph two, that Mr Corry is right and that Rule 779 should refer to the filing of a caveat against release in either the central registry or the registry in which an admiralty proceeding has actually been issued.

Mr Carruthers acknowledged that the Rule does refer to the Registry without specifying which one, but said that it appears in the section of the Rules which deal with the issue of arrest. He agreed that an amendment would put the matter beyond doubt.

Action required by Mr Carruthers Mr Carruthers also mentioned that Mr Fantham, the registrar at Christchurch, had a number of issues on the Rules and Mr Carruthers said that he would like to sort all of these items out in one paper.

(b) *Summary Judgment Procedure*

Justice Hansen said that the issue arises in the context of the decision of Justice Potter in *International Factors Marine (Singapore) Pte Ltd v The Ship "Komtek II"* (1998) 11 PRNZ 466. That decision was given before admiralty was excluded from the summary judgment procedure. Justice Potter had noted that there were provisions under the Admiralty Rules allowing for a default judgment but that where a defendant has filed an appearance or a statement of defence default judgment is not available, even if there is no arguable defence. She then concluded, under the provisions of the (then) summary judgment regime, that summary judgment was available in admiralty. Justice Hansen said that there is an interesting discussion about the stage at which summary judgment is sought because when it was introduced to New Zealand the Rules made it clear that it is an initiating

procedure. Justice Potter, however, concluded that that was different in admiralty and allowed the parties to apply for summary judgment further down the track.

Justice Hansen said that he thought summary judgment should be available in admiralty and he noted that New Zealand is the only country that has summary judgment by way of an initiating proceeding. Given how the jurisdiction has expanded to include summary judgment for the defence, Justice Hansen said that he saw nothing wrong with allowing it further down the track. He cited by way of example a plaintiff who finds out after filing as a result of the discovery process that there is no defence, and he said that he considered summary judgment should be available to that plaintiff at that stage. He said that he issue of initiation raised by Justice Potter needs to be considered outside of the admiralty context as well.

Justice Doogue said that Rule 138(2) does enable summary judgment to be applied for at a later time with the leave of the court.

Mr Chambers queried why summary judgment is not available in the admiralty jurisdiction.

Justice Doogue noted that the Rules in any event exclude it, and Mr Carruthers said also that it arises *in rem*.

Justice Hansen said that Hong Kong and most of the Australian states preclude summary judgment from *in rem* proceedings. He noted that Singapore allows it butsaid that it would be hard to see how summary judgment could be appropriate for *in rem* proceedings, until the filing of a statement of defence or an appearance changes the character of the proceedings.

Justice Doogue said that the amendment could be effected relatively easily by deleting from Rule 135(a) the reference to Part 14. That would mean that summary judgment would be available in admiralty after the proceedings have been commenced with the leave of the Court under Rule 138(2). The Committee agreed.

Justice Doogue noted that the commentary in McGechan on Procedure at paragraph 138.04 states that it appears to be permissible for a plaintiff to commence proceedings by the ordinary procedure and to later issue summary judgment proceedings for the same claim provided the earlier proceedings are discontinued, and noted that the commentary has not picked up on the amendment to Rule 138(2).

The Committee agreed to put on the agenda for the next meeting the question of whether, under Rule 138(2), it should be necessary to seek leave to bring summary judgment proceedings after the commencement of the substantive proceeding.

5. Appeals

(a) *Appeals from the District Court*

The Committee noted that the Chief District Court Judge is asking a Judge's Clerk to do a paper.

(b) *Appeals from the High Court*

This matter was deferred.

(c) *Time Within Which an Application to Appeal Should be Made*

Justice Doogue said that under Rule 61C(6) there is no time limit for filing an application for leave to appeal from the decision of a Judge on review from a Master in chambers, and no time limit is specified in s 67 of the Judicature Act 1908.

Justice Hansen assumed that Justice Doogue envisaged a shorter period for the application for leave than is prescribed for the application to appeal, and Justice Doogue said that most applications for leave to appeal from the review of a Master's decision occur in the summary judgment or interlocutory application context where there should be no further delays.

The Chief Justice suggested that the Summary Proceedings Act 1957 might provide assistance by way of a precedent, and Justice Fisher referred also to interlocutory appeals in the commercial list.

Action required by Justice Hansen

Justice Hansen agreed to make available a Judge's Clerk to look at the issue.

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

This matter was deferred.

6. **Arbitration**

(a) *Enforcement of Arbitral Award*

This matter was discussed under item 6 (c) below.

(b) *Leave to Appeal Arbitration Awards*

This matter was discussed under item 6 (c) below.

(c) *Rules Under S 16(a) of the Arbitration Act 1996*

Mr Chambers said that there are four points:

(i) How should applications come to the High Court as a matter of procedure, and he referred to his paper circulated under Arbitration/1/99. He came to the conclusion that the appropriate procedure is the originating application procedure which would necessitate an amendment to Rule 458D, and that

once there was one application under the Act the same court proceeding should be used for any future applications. He said that the Arbitrators and Mediators Institute agrees with this;

(ii) Whether applications for leave to appeal should be considered on the papers. This was the tentative view of the Committee at the last meeting with the general agreement of the Arbitrator's Institute;

(iii) Whether the Judge should give reasons. The tentative view of the Committee at the last meeting was that no reasons should be given if leave is granted but that reasons should be given if leave is refused. Mr Chambers said that the Arbitrators Institute agreed with that proposal; and

(iv) Whether a different Judge should hear the appeal. Mr Chambers said that the Arbitrators Institute did not reach a unanimous view on that. All members of their sub-committee considered it desirable that a different Judge should hear the appeal, and most but not all thought that that should be mandatory. The Rules Committee had considered at the last meeting that the substantive hearing should be before a different Judge unless the parties consent.

Justice Doogue noted that Justice Fisher had expressed concern at the last meeting that such a rule may give an undesirable precedent in other areas where for example the Judge may hear the interlocutory applications before hearing the trial of the proceedings themselves. He recalled that the Solicitor-General had been of the view that it is undesirable to encourage a "disqualification industry".

Justice Fisher suggested the point might be more appropriately dealt with in a practice note to the effect that it is desirable to avoid having the same Judge where practicable. The Committee agreed.

Mr Carruthers assumed that the underlying concern is that because the Judge has found there is a question of law that the Judge has therefore formed a view on the nature of the outcome.

Justice Fisher said that similar considerations arise in the situation where leave to appeal is granted by the Privy Council; the appellant can be surprised if the Privy Council then does not allow the appeal.

Justice Doogue cited another example of the interlocutory injunction and then the Judge refusing to grant the substantive relief. Justice Doogue noted that the Chief Justice had been very concerned about the public perception, and Justice Hansen said that the situation is also quite different from a settlement conference where the Judge who presides over that hears information which may not be given during the course of the trial.

Mr Chambers said that some of the problems of perception are addressed by the fact that the Judge does not give reasons if leave is granted.

Mr Carruthers said that there are some efficiencies in having a single Judge in charge of the file who knows what the case is about. He suggested that if a Judge, having heard the leave application feels compromised about hearing the substantive appeal it is always open to that Judge to disqualify themselves.

Justice Hansen said that it is open to the parties to bring an application for the matter to be heard by another Judge.

Mr Chambers pointed out that in many cases the parties will not see the Judge because the matter will be dealt with on the papers.

Justice Doogue said that the Chief Justice's concern is that the majority of complaints that he receives occur when the same Judge has dealt with both legs of something. There is a perception of bias.

Mr Carruthers cited the example of the Judge who hears the criminal trial later passing sentence as an example of a case where only the judge who presided over the trial should decide the matter.

Draft Practice Note

The Committee agreed that the introduction could be shorter and deleted the third and fourth sentences of the introduction. They agreed that the second sentence should refer to "such appeals".

Mr Chambers said that he would prefer to see numbered paragraphs providing that the applicant, in addition to any documents required under the Rules, must file by (a date to be specified) a written memorandum setting out (and here follow the wording of paragraph one of the English practice note of Justice Bingham) such memorandum to be no more than 10 pages unless previously approved by the court. He suggested that paragraph two provide that the respondent must file a memorandum by (a date to be specified). He suggested the third paragraph provide that the application be considered and determined on the papers. He suggested paragraph four provide that if the Judge orders an oral hearing counsel for the applicant will be restricted to 30 minutes, counsel for the respondent to 30 minutes with counsel for the applicant having a 10 minute right of reply unless otherwise ordered by the Judge.

Justice Doogue suggested that paragraph five read that no reasons will be given in the event of the application being upheld. In the event of the application being dismissed brief reasons will be given in writing.

Justice Doogue suggested that paragraph three of the English practice note could be adopted with appropriate amendments to provide that specific references to any authorities relied on and a copy of such authorities be provided.

Mr Chambers noted that the originating application procedure provides for a hearing date, but if the application is to be decided on the papers there will be no hearing date.

Justice Fisher said that this application is more like an application for grant of probate in solemn form and that there needs to be a timetable either in the practice note or in the Rules, specifying also the time limit within which the appeal must be brought. Justice Fisher then addressed the issue of the record of the arbitration and suggested that one solution is to require it to be filed by the appellant at the time the appeal is filed.

Mr Chambers queried whether it is appropriate to apply Rule 458G which provides that the date on notice of application as the date for the hearing shall be that allocated by the Rules when the application is filed, to these applications. The Committee agreed that this Rule is inappropriate for appeals under the Arbitration Act.

Justice Doogue noted that Rules 458H through to 458M are also inappropriate for appeals under the Arbitration Act. He queried whether it might be more appropriate to deal with these as miscellaneous appeals under Part X of the High Court Rules.

Justice Fisher said that there would still need to be an affidavit, but Justice Hansen suggested that this could be covered in the practice note.

Justice Fisher said that appeals from the decision of an arbitrator differ from a state tribunal in that there is no judicial authority to bring the record forward for the High Court.

Mr Chambers said that there are a number of other applications under the Arbitration Act where the originating application procedure would be desirable.

Justice Fisher suggested that it may be preferable to go back to the originating application procedure on the basis that other applications may stem from the appeal.

Mr Chambers said that that would necessitate exempting most of the Originating Application Rules just for an appeal from the decision of an arbitrator.

Mr Chambers suggested that a sensible approach may be to tabulate the steps that would need to be taken in respect of an appeal from the decision of an arbitrator and then address the rule changes and practice note necessary.

Mr Carruthers suggested that Form 19 could be specified which is the one used for ex parte applications and does not have a hearing date in it.

Justice Hansen suggested excluding Rule 458D(a)(ii), so that the procedure could remain in Part IVA.

Mr Carruthers said that a practitioner looking for the rules relating to an appeal from the decision of an arbitrator would naturally go to the rules relating to appeal, but Justice Doogue said that that issue could be dealt with by a cross-reference if necessary.

Action required by Mr Chambers

Mr Chambers agreed to look at the issues again and to set them out in a memorandum.

7. Extraordinary Remedies

(a) *Judicial Review*

Justice Doogue referred to the draft report of the Law Commission, and the proposal that the substantive provisions in the Judicature Amendment Act 1972 go into the Judicature Act 1908 while the procedural provisions in the Judicature Amendment Act go into the High Court Rules.

Mr Tanner queried whether s 4 of the Judicature Amendment Act 1972, which provides for an application for review, is a procedural matter or a substantive remedy. He noted that the power under s 51C of the Judicature Act 1908 is to make rules regulating that the practice and procedure of the High Court and of the Court of Appeal, and he said there should be no doubt about the competence to make any rules which replace the statutory provision. Mr Tanner said that he had looked at the Public and Administrative Law Reform Committee's report of 1972, and the Report of the Ontario Royal Commission into Civil Rights (The McRuer Report) which preceded it. He said that they had both made recommendations for a statutory enactment.

Justice Doogue said that Justice Baragwanath's address to the Administrative Law Conference on 24 February 1999 differs slightly from the Law Commission Report in that it recommends that there should be a Judicature Amendment Act 1999 to set out the powers of the High Court on judicial review of any public function.

Justice Fisher noted that the Draft Rules which are attached to the Law Commission Paper are the equivalent of s 4 of the Judicature Amendment Act 1972. To the extent that they define the scope of the new review power they should stay in the statute and he referred in particular to Rule 3(1).

Justice Doogue said that rules such as the ones relating to interim orders, procedure or the power to call conferences are unnecessary because they are already in the High Court Rules.

Mr Carruthers referred to ss 6 and 7 of the Judicature Amendment Act 1972 and said that the power to treat proceedings in the nature of *mandamus* etc as a judicial review raise the same constitutional argument. He noted that they appear as Rules 5 and 6 in the Law Commission's draft and queried whether they too should be in the statute.

Justice Doogue expressed the agreement of the Committee that it should respond to the Law Commission, saying that it is sympathetic to revisiting the Judicature Amendment Act 1972 and putting procedural matters in the Rules. The Committee should however query whether the amendments to the Act could go as far as proposed. It seems to the Committee that at least some of the provisions intended to be in the Rules need to remain in the statute, and in particular the remedy of review of the exercise of a public power and the treatment of extraordinary relief as a remedy in respect of the exercise of a public power are examples. Justice Doogue said that the Committee would be happy to look further at any suggestions that the Law Commission wished to make in respect of the Rules and to discuss it with them. He noted for example that Rule 437 relating to conferences may just need a minor amendment to that rule rather than a totally new rule to deal with a Judges' Conference.

Justice Fisher said that he thought Rule 7(2) relating to interim orders against the Crown has a substantive element to it as well and also should be in the statute.

8. **General**

(a) *Servicing of the Rules Committee*

Mr McCarron advised that this matter is on the agenda for the High Court Human Resources/Administration Consultative Committee which next meets on 31 March 1999. Mr Carruthers advised that Justice Goddard is a member of it and Mr McCarron and the secretary agreed to supply Justice Doogue with copies of the relevant papers.

9. **Insolvency Rules**

(a) *Redraft*

Justice Hansen said that he has a report from Master Venning and the Rules have been redrafted. Separately the Law Society is redrafting the forms which they hope to have ready by April.

Mr Tanner said that one of his staff has already looked at the redraft of the Rules and he made a request for the forms to be referred to the Parliamentary Counsel Office as soon as possible so that they can be looked at together.

Justice Doogue said that there are no policy issues involved because it is an exercise of incorporating the Insolvency Rules into the High Court Rules.

Mr Tanner said that the Ministry of Commerce will be submitting a paper to the Government in the next two or three weeks seeking its agreement to a two-staged review of insolvency law. The first stage focuses on avoidable preferences and statutory preferences, and the Law Commission have been asked to look at the whole question of statutory preferences in the context of insolvency. Liquidation into company groups and the use of liquidation to avoid obligations are also topics

to be focussed on in the first stage. The second stage focusses on broader issues relating to alternatives to bankruptcy and the role of the state in insolvency. The intention is to have a discussion paper on the stage one issues by July or August with a view to getting some legislation into Parliament next year. He said that the early indications are that this review will not affect the incorporation of the Insolvency Rules into the High Court Rules.

10. **Interlocutory Matters**

(a) *Generally*

This matter was deferred.

(b) *Rules Which Bring Proceedings to an End*

This matter was deferred.

11. **Masters**

(a) *Voidable Transaction Procedures*

Action required by Mr Chambers The Chairman noted that Mr Chambers is to consult with the Law Society on this issue.

12. **Pleadings**

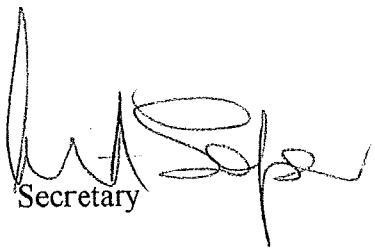
(a) *Certificate by Lawyer Responsible for Document*

Action required by Mr Carruthers The Chairman noted that this matter awaits consideration by Mr Carruthers.

(b) *Written Briefs Rules*

Action required by Mr Carruthers The Chairman noted that this matter awaits consideration by Mr Carruthers.

The meeting closed at 3.30 pm.
The next meeting is to be held on Thursday 17 June 1999
and is scheduled to last a full day.



Secretary