THE RULES COMMITTEE

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15 September 1999

Minutes/3/99

CIRCULAR NO 40 OF 1999

Minutes of the Meeting held on Thursday 2 September 1999

The meeting called by Agenda/3A/99 was held in the Judge's Common Room, High Court, Wellington on Thursday 2 September 1999, commencing at 9.30am.

1. **Preliminary**

In Attendance

The Hon Justice Doogue (in the Chair)
The Hon Justice Hansen
The Hon Justice Chambers
Judge Doogue
Ms E D France (for the Solicitor-General)
Mr K McCarron (for the Chief Executive, Department for Courts)
Mr T C Weston QC
Mr C F Finlayson
Mr G E Tanner (Chief Parliamentary Counsel)

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

The Chief Justice (The Right Hon Sian Elias GNZM)
The Hon Justice Fisher
Chief District Court Judge Young
The Attorney-General (The Right Hon Sir Douglas Graham KNZM)

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

On the motion of Justice Hansen, seconded by Ms France, the minutes of the meeting held on Thursday 17 June 1999 were taken as an accurate record and were confirmed, subject to:

In Item 1 the reference to Justice Doogue (by invitation) to read Judge Doogue

Item 2 page 3 the reference to dissolution of marriage to read liquidation of companies

Action By

Item 2 page 4 paragraph 5 the "he" refers to Mr Tanner

Item 12 page 15 last paragraph s 26(4)(b) to read s 26J(4)(b).

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

Justice Doogue noted that for the first time since September 1994 there are no matters referred for statutory amendment, the legislative amendments having now all been passed.

Membership

Justice Doogue welcomed Mr Weston and Mr Finlayson and said that the Law Society nominees have always made a valuable contribution to the work of the committee.

Justice Doogue also said that it was unfortunate that the Committee had not known at its last meeting that that would be the last attended by Mr Carruthers. Justice Doogue said that whenever Mr Carruthers was able to attend he was a great contributor. The Committee formally passed a vote of thanks to Mr Carruthers for his help over six years as a member of the Committee.

Papers Tabled at the Meeting

By the Secretary:

- Appeals 1/99
- Masters 4/99 - Voidable transactions
- Masters 5/99 - Voidable transactions
- (Through the New Zealand Law Society) amended comments from the Joint Insolvency Committee dated 2 September 1999

By Mr Tanner:

- The High Court Amendment Rules 1999 (PCO 3053a/1 - Arbitration)
- The High Court Amendment Rules 1999 (PCO 3053/11- Costs)
- The High Court Amendment Rules (No 3) 1999 (PCO 3347/3) - Insolvency proceedings
- Memorandum from Jennie Walden to George Tanner of the Parliamentary Counsel Office on the High Court Amendment Rules: Insolvency Part, dated 31 August 1999
- The High Court Amendment Rules (No 4) 1999 (PCO 3386/2)

Action By

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

(a) Amendments (including costs, cost - joint liability, evidence by affidavit, Masters' decisions and Rule 705(1)(c)).

Mr Tanner said that he had prepared a draft which he circulated to Justice Fisher, Justice Chambers and Mr Carruthers. As a result of comments received he had made several minor changes:

- On page 2 rule 47(c) he had replaced the words "not exceed" with "normally be".
- On page 2 rule 47(d) he had inserted a reference to the time actually spent by the solicitor or counsel involved.
- On page 3 rule 48 he had taken the three categories of proceeding out of the second schedule and put them in the body of the rule and has simply referred in the second schedule to the daily recovery rate.
- Rule 48C relating to the power to fix costs in advance has become a subrule of r 48.
- Rule 48B relating to costs being fixed by reference to a single band has been omitted.

Mr Tanner said that he had drafted the costs rules to come into effect on 1 February 2000 and the remaining rules to come into effect on 1 December 1999.

Justice Chambers suggested that the costs rules should come into effect on 1 January 2000 because if a file is dated 2000 there will be no need to check whether it was filed in January, the education for it needs to be done in 1999 anyway and because it is likely that the new case management practice note will come into force on 1 January 2000 as well.

Mr Tanner said that the Civil Aviation Rules need to come into force on 1 December but all of the others could come into force on 1 January 2000. The committee agreed.

Mr Finlayson referred to the decision of the Court of Appeal in *Harley v McDonald* (CA 254/98, CA 33/98 - 11 August 1999) and noted the inherent jurisdiction of the High Court to order barristers and solicitors to pay costs personally. He queried whether those should be reflected in the new rules. (See also "Liability of Barristers", [1999] NZLJ 331.)

Justice Doogue said that that was a matter that should be addressed at a later meeting.

He noted that the rules would need to state on what basis the inherent jurisdiction is to be exercised; in England for example he said that there are clear rules while the New Zealand rules give more flexibility.

Action By

On the subject of education, Justice Chambers said that he had discussed it with Justice Fisher and identified a clear need for education both for the profession and judicial officers. He suggested that 1½ to 2 hours should be sufficient and that seminars be held in Auckland, Hamilton, Wellington and Christchurch. He said that he and Justice Fisher could prepare a seminar to deliver to Auckland and Hamilton, and that those notes could be made available to Justice Doogue to address Wellington and Justice Hansen to address Christchurch.

Action required by Justice Doogue Justice Fisher and Secretary

The committee also agreed that summaries should appear in the New Zealand Law Journal and "LawTalk" and agreed that the secretary should discuss that with Justice Doogue and Justice Fisher.

(b) *High Court Amendment Rules (2) 1999*

Justice Doogue noted that the Civil Aviation Rules were tabled as rules 10 and 11 of the High Court Amendment Rules 1999 (PCO 3053/11).

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

Justice Doogue referred to Judgment/4/99 and the draft High Court Amendment Rules (No. 4) 1999 (PCO 3390/1) and said that the intention is to simplify the rule to avoid problems of reliance on court staff or advising lawyers when a judgment is ready to pick up.

Mr Weston queried the position when there are two or more judges and also when a judge forgets to date the judgment.

Justice Chambers said that there needed to be a change of practice by judges and that they will need to start dating their judgments. Two or more judges will have to coordinate.

Justice Doogue noted that the rule becomes important in relation to a judge who has died and that in all other cases the judge should have signed and dated it.

Justice Chambers said that subclause (2) does not now accommodate *ex parte* judgments in that they do not need to give a reasonable opportunity to be present. He referred to an earlier formulation that if a judge wishes to give a judgment orally and it is not an *ex parte* matter then the judge must give the interested party or their counsel an opportunity to be present.

Justice Doogue suggested that it just needs a savings provision and suggested "except where the application is "*ex parte*" in front of proposed new rule 540(2).

Justice Chambers then referred to rule 541 and said that there needs to be a consequential amendment to subrule (3) because there will no longer be a date deemed to have been given in terms of rule 540.

Action By

Mr Tanner queried whether there is a conflict if a judge makes an order under rule 541(3) that a judgment be dated at some earlier date or later date.

Justice Doogue also queried whether the proposed amendments to rule 540 make a difference to the time from which time to appeal runs.

Justice Chambers noted that rule 542(1) refers to Rule 28 of the Court of Appeal Rules 1955 when that should now read as a reference to Rule 6 of the Court of Appeal (Civil) Rules 1997.

Justice Chambers referred to rule 542(2) and noted that there is no requirement to serve the sealed judgment. In this context Justice Doogue noted also that in the District Court there is no way of knowing if a judgment has been sealed without searching the register.

Action required by Mr Tanner The Committee noted that these points are covered in Judgment/1/99 and the matters were referred to Mr Tanner. It was agreed that the amendment to Rule 540 should be considered in the context of the other amendments needed to this set of rules and should not go through for concurrences with this set of amendments.

3. **Admiralty Rules**

Action required by Mr Finlayson Justice Hansen (a) *Generally*

Justice Doogue reported that Mr Carruthers had prepared a draft paper that he was going to check with Peter Fantham, the Registrar at Christchurch. Mr Finlayson agreed to check with Mr Carruthers and Justice Hansen with Peter Fantham.

4. **Appeals**

(a) (b) *Appeals from the District Court and the High Court*

Justice Chambers referred to Appeals/1/99 and said that because this is such a big topic he suggested a four stage process. The first stage is to fix principles for appeals for the District Court to the High Court, and from the High Court to the Court of Appeal. He said that he, together with Judge Doogue would prepare a list of principles for the next meeting. Any principles about which the Committee had doubts would be the subject of a further paper listing the pros and cons.

Justice Chambers identified as the second stage of the process as being to turn the principles into legislative form.

The third stage of the process would be a round of consultation with heads of court, the New Zealand Law Society, the New Zealand Bar Association, the Ministry of Justice, the Department for Courts and the Law Commission.

The fourth phase would be to consider submissions. Justice Chambers envisaged this being a task that would take at least a year.

Action By

Judge Doogue said that there needs to be consensus on the principles and identified as issues: restricting rights of appeal at the lower end of the jurisdiction and filtering out unmeritorious appeals.

Ms France queried the appropriateness of the Rules Committee advocating legislative change.

Justice Chambers said that legislative change will be necessary because some procedural matters are in the District Courts Act 1947.

Ms France noted that restricting the rights of appeal would be substantive, and Justice Chambers agreed and said that that was the reason for having consultation.

Justice Doogue suggested, and the Committee agreed, that Items 4(a) and (b) on the agenda relating to appeals from the District Court and appeals from the High Court respectively, be combined on future agendas.

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

Action required by Justice Chambers

Justice Doogue noted that the issue here is whether an amendment is necessary to the District Courts Act. Justice Chambers agreed to look at the matter and see if an amendment can go through with the other rules relating to appeals, or whether it needs to be dealt with separately.

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

Justice Doogue said that except by leave of a judge, no appeal should lie from a decision of a judge in relation to a review of a decision of a master and there is no time limit in respect of which an application for leave has to be brought. It means that if there is a decision of the master and a decision of the judge the matter can lie in limbo, notwithstanding that the application for review has to have been made within seven days.

Action required by Mr Tanner

The matter was referred to Mr Tanner to look at an amendment along the lines of a seven day time limit, the same as for a review of a master. He suggested an amendment to rule 61C(6) accordingly.

5. **Arbitration**

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

Mr Tanner referred to the High Court Amendment Rules (PCO 3053a/1).

Action required by Justice Chambers, all members and Mr Tanner

The Committee agreed that Justice Chambers would liaise with Mr Tanner, and that members of the Committee should have 14 days to make comments to Mr Tanner. After that Mr Tanner would produce a draft for concurrences.

Action By

Mr Weston asked about consultation with the Law Society and Justice Chambers said that he had sought comments from the Arbitrator's Institute which has a committee including David Williams QC, the Hon Ian McKay, Sir Ian Barker and Paul Heath QC.

6. **Court of Appeal**

(a) *Procedure and Rules relating to Technical Advisors*

Justice Doogue advised that the amendment to the Judicature Act has been referred to the President of the Court of Appeal, and that the President has been advised that the Committee is happy to assist if he wants to make rules under this section.

7. **Evidence**

(a) *Expert Witnesses*

Action required by Justice Doogue Justice Doogue said that he hoped to have a paper from a judges clerk for the next meeting.

Judge Doogue said that the Environment Court is about to adopt a practice note and he gave a copy of that to Justice Doogue to pass on to his clerk.

8. **Execution**

(a) *Charging Orders - Writs of Sale*

Action required by Mr Finlayson Mr Finlayson agreed to follow this up with the New Zealand Law Society and ascertained how widespread the problem is.

9. **General**

(a) *Servicing of the Rules Committee*

Justice Doogue noted that this matter is on the agenda for the committee looking at the High Court review, but that the issue is broader now that the District Court is represented on the Rules Committee. He noted that the Rules Committee is off the mainstream of judicial servicing.

Action required by Mr Carron Mr McCarron said that servicing of the Rules Committee is a departmental responsibility in the first instance through the judicial support area. He noted in this context that there is also review of the District Court Rules. Mr McCarron said that he would prepare a paper for the Department and come back to the committee at the next meeting, and inform Judge Doogue also of the outcome.

Action By

(b) *Search of Court Records*

Justice Doogue noted that this was largely a criminal practice matter and that in the absence of any response from the Criminal Practice Committee the mater could come off the agenda.

(c) *Copies of Rules without Annotations*

Mr Tanner said that the Government Printer has produced a compilation of the rules which has not been compiled in the Parliamentary Counsel Office and not, therefore, official. He said that there is also an official reprint of the Judicature Act and the High Court Rules to be available probably on Wednesday 8 September 1999 which will also have the compiler's notes. The availability of the official reprint raises the issue of how often it should be produced - every time there is an amendment or less frequently.

Action required by Mr Tanner Mr Tanner agreed to look at obtaining copies of both publications for members of the Committee.

10. **Insolvency rules**

(a) *Redraft (including Debtors Petitions and Statutory Holidays)*

Mr Tanner referred to the High Court Amendment Rules (No 3) (PCO 3347/3) and the note from Jennie Walden. He said that Ms Walden had met Master Venning and Mr Guest and had redrafted the rules, taking into account also the comments made by Marian Hinde.

Mr Tanner said that a couple of the forms are not linked to a rule - there is a certificate by the Public Trustee and the Maori Trustee where an election is made to administer an insolvent estate which they may do under the Insolvency Act 1967. He said that it is desirable to link into a rule but it need not be specific to the form and can be a general one.

Justice Chambers recalled that there were examples of that in the Election Petition Rules 1996.

Mr Tanner noted also that some of the language is necessarily archaic because it follows the wording of the statute and he cited form 97 relating to the warrant for the arrest of a debtor as an example.

Action required by all members and Mr Tanner The Committee agreed that members should have 14 days to pass comments on to Mr Tanner who could then prepare a copy for concurrences.

Justice Doogue expressed the thanks of the Committee to Mr Tanner and to Jennie Walden for the work that they have done.

The Committee also expressed its thanks to Marian Hinde for taking such an interest in the subject.

Action By

11. **Interlocutory matters**

(a) *Generally*

Justice Doogue referred to item 11(a) on pages 13 and 14 of Minutes/2/99. He also noted that the rules will need to accommodate in due course the case management of interlocutories.

Justice Doogue referred to the definition of "interlocutory application" and noted that it overlaps with the definition of "proceeding". He said that an appeal is arguably not an application to the court in its civil jurisdiction but instead an application under the statutory jurisdiction. He said that an interlocutory application may be the best method of bringing an intended appeal such as under the Arbitration Act before the court. He said that a litigant should not have to commence a proceeding for leave to commence a statutory process which has its own procedure. He said that an arbitration appeal should be treated as akin to an intended proceeding but it is not in the definition of "interlocutory application". The Committee noted that "intended proceeding" covers pre-litigation discovery and cases where leave is necessary to issue proceedings as, for example, against a company in liquidation.

Judge Doogue recalled that s 10 of the Investment Advisors (Disclosure) Act 1996 requires the leave of the Court to sue an investment advisor for negligent advice.

Justice Doogue said that the issue is whether the definition of "interlocutory application" should be extended to cover an application for leave to appeal. He noted that the appellate jurisdiction is statutory and not part of the civil jurisdiction and that an appeal is not a proceeding.

Justice Chambers noted that an application to strike out an appeal should also come within the definition.

Justice Doogue said that if the matter before the court is a "proceeding" then the rules require a statement of claim which is inappropriate for an appeal.

Justice Chambers said that Rule 106 suggests that an appeal is a proceeding because it provides that every proceeding other than an appeal should be commenced by statement of claim.

Ms France queried how that fits with Part X of the High Court Rules.

Justice Doogue said that an alternative is to amend the definition of "proceeding" to include civil or appellate jurisdiction.

Justice Chambers noted that the definition of "civil proceedings" in the Crown Proceedings Act 1950 does not include criminal proceedings, *habeas corpus*, the extraordinary remedies and remedies under the Judicature Amendment Act 1972.

Action By

Justice Doogue noted that the reason for that definition is that such relief is not available against the Crown.

The Committee agreed to return to this matter for further discussion at the next meeting.

The Committee then addressed applications under Part 2 of the paper. Justice Chambers suggested that there needs to be a change as to when notices of opposition can be filed. He suggested 14 days from service or 1pm on the working day before the hearing whichever is the earlier.

Justice Hansen said that most jurisdictions calculate by reference to the date of hearing.

Justice Chambers said that with case management and conferences, applications can be filed just before the conference and can be dealt with altogether. He noted however that the respondent can stymie the fixture by filing a notice of opposition just before the hearing so that the applicant does not have time to respond to affidavits and the hearing is then adjourned.

Justice Hansen said that applicants also tend to serve very late and considered that if time limits are to be imposed on one they should be imposed on the other.

Justice Chambers noted that there is a huge range of interlocutory applications, from those that can be dealt with orally through to significant applications where the parties need notice.

Justice Hansen said that in practice applications are given a conference date or go on a list. He said that substantial arguments are seldom dealt with in the list anyway and the list is really to cover the matters which can be dealt with orally. He queried why interlocutory applications should be any different from summary judgment which is in essence an interlocutory application and which has a fixed hearing date and a time frame for service.

Justice Chambers said that under rule 399 of the old Code of Civil Procedure, the parties had to give three days notice of any intended motion.

Ms France said that the Crown can be late with notices of opposition because it is served late, and it can also have difficulties being ready in time for a hearing because of the restricted time available for filing affidavits.

Justice Hansen said that that happens because the applicant files, gets a hearing date and then is tardy about serving. He said there is no excuse for it because most matters are not set down for earlier than three to four weeks after filing and indeed the caseflow standard time line is proposed to be three or five weeks. Equally he noted that if the application is served promptly he did not see why the respondent should have up until 1pm the day before the hearing to file a notice of opposition.

Action By

Mr Weston said that he would be reluctant to go back to a fixed time rule because a timetable is now imposed at a conference hearing.

Justice Hansen said that a volume is still going to the chambers list. He suggested a requirement to serve a fixed number of days before the hearing, and that a notice of opposition should be filed either a fixed number of days before the hearing or when the court directs.

Mr Finlayson noted that rule 127 requires service as soon as practicable after filing in respect of statements of claim and notices of proceeding.

Justice Chambers identified the requirements as being that service be effected forthwith, that the date of hearing be x days after service unless the court otherwise directs, and that the notice of opposition be filed and served y days before the hearing date.

Mr Weston noted that rule 235(2) addresses the problem in part by giving the court a power to adjourn if the party who wishes to oppose has had insufficient time to do so.

Justice Doogue said that rule 235(2) was designed to avoid the problem where, because of urgency, the parties could not comply with the three day rule. He noted that parties should not have to apply for leave in that situation.

Justice Chambers said that the reason for it is the small interlocutory matters which a party thinks of just before the hearing and wants it dealt with at the same time. For small matters there is no need to give the other side time to prepare a response.

Mr Weston referred to rule 241 which deals with service where an application has to be made within a limited time. He noted that that is, in effect, a requirement for the application to be served forthwith. He said that the courts can have some measure of control over litigants who deliberately use delaying tactics.

Ms France said that that can depend on the circumstances. She noted that in the immigration area where there can be human rights issues it is unfair to prejudice a party because the lawyer has been dilatory.

Mr Weston said that the Committee does need to be careful not to lose the benefit of flexibility just in order to deal with those few practitioners who abuse the system.

Ms France said that she did not regard the problems as being sufficiently significant to warrant changing the existing scheme in order to deal with it. She said that *ex parte* applications are not usually a problem, but that interim orders can be.

Justice Doogue noted that the rules cannot address the issue until after the application is filed.

Mr Finlayson noted that rule 127 provides for service "as soon as practicable" but he considered that service "forthwith" is more appropriate for interlocutory applications.

Action By

Justice Doogue noted that when interlocutory applications come to be filed there will always be an address for service and there is no excuse for not serving forthwith. Mr Weston agreed that the exceptions to that would be very limited.

The Committee agreed to insert a provision requiring service forthwith of an interlocutory application.

In respect of notices of opposition, Justice Chambers suggested that the notice be filed three days after service or 1pm the day before the hearing whichever is the earlier.

In respect of affidavits the Committee referred to rule 253(1)(b) which requires affidavits in opposition to an interlocutory application to be filed and served not later than 1pm the day before the hearing.

Justice Chambers said that he thought three days too tight a timeframe for filing and serving affidavits. Justice Hansen said that the hearing date is normally 14 or 21 days after filing and Justice Chambers suggested that the rule could then provide for seven days after service to file and serve the notice of opposition and the affidavits.

Ms France said that in Wellington it is common to have a hearing date which is the chambers list for the following Monday.

Mr Weston said that in Christchurch the first call is literally that and the judge will allocate a hearing date usually for two weeks time.

Justice Chambers noted that the applicant may want to reply to a notice of opposition even if the matter is a simple one and the hearing may have to be adjourned if documents are served late.

Mr Weston said that the backstop of one day before the hearing still does not solve that problem.

Justice Doogue said that most interlocutory matters are now handled through case management and that the problems arise only in respect of one off applications filed pre-proceedings or urgent matters such as interlocutory injunctions. Justice Doogue said that he saw no reason why a party should be able to sit on the notice of opposition until the day before the hearing if the papers may have been served a week or more earlier.

Mr Weston said that a three day response time can be too short particularly, for example, if there is an application for further and better particulars against a large corporate client.

After discussion the Committee agreed that a notice of opposition should be filed and served, something in the order of five working days after service of the application and, in any event, no later than 1pm two days before the hearing.

Action By

Mr Weston said that the Committee should also not lose sight of the fact that case law is divided on whether an application for leave under s 4 of the Limitation Act 1950 is an interlocutory application to be heard in chambers.

The Committee then addressed page five of the paper, the solicitor's certification of *ex parte* applications. Justice Chambers said that he would be reluctant to say that Rule 41 relating to the authority of a solicitor to file documents covers the issues addressed by Rule 237 relating to the certificate of a solicitor or counsel on an *ex parte* application. He said that Rule 237 is designed to impress on the solicitor or counsel the seriousness of filing *ex parte*.

Justice Hansen recalled that the probate exception in Rule 237(4) is designed to cover solicitors in the Public Trust Office.

Justice Doogue said that the certification "pursuant to the rules of court to be correct" could be more meaningful so that solicitors understand what is required of them. He suggested that the solicitor should certify that the application complies with the High Court Rules and the statute (if any) under which it is made.

Ms France noted that that appears now in Rule 237(5), but Justice Doogue said that typically solicitors do not read that far. Justice Chambers said that the wording should be on the certificate that the solicitor signs so that the solicitor will see it.

Mr Weston made the suggestion that the certificate contain a requirement that the solicitor has explained it to the client and have the client sign as well.

Justice Chambers thought it unfair to put that on the client when the responsibility is that of the lawyer's.

Justice Doogue said that he often sees *ex parte* applications which do not refer to the rules and statues on which the applicant is relying and do not have any memorandum of counsel, yet are still signed correct.

Justice Chambers said that it is crucial on an *ex parte* application to disclose any case for the other side.

Justice Hansen noted further that many *ex parte* applications should actually be brought *inter partes*.

Action required by the Secretary

The Committee agreed that the Secretary should separately collate decisions taken by the Committee on interlocutory matters, and also other decisions taken by the Committee.

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

Justice Doogue said that these rules do not form a coherent group at the moment and that the Committee need to look at them as a whole. He noted that summary judgment

Action By

by defendants also should be included and that case management impinges on rule 426A.

12. **Judgments**

(a) *Sealing of Judgments - Notification Requirements*

Justice Doogue said there is no provision in the District Courts Act or in the District Courts Rules requiring a sealed judgment to be served.

Action required by Justice Chambers Justice Chambers agreed to look at this issue as part of the exercise of reviewing the rules relating to appeals.

Action required by the Secretary The Committee agreed to respond to the New Zealand Law Society advising that the point has been noted but that it will be dealt with when the rules relating to appeals are reviewed. The Committee also agreed to place this matter on the agenda along with the items on appeals.

13. **Masters**

(a) *Jurisdiction*

Justice Doogue referred to Minutes/2/99, page 15 item 12(a). He noted that s 26J(4)(b) and (c) of the Judicature Act exclude the Master from granting relief on an application for review or in respect of special remedies. He said that if the section were amended so that it applied only to substantive proceedings, the Masters would have jurisdiction to grant relief on all interlocutory matters.

Action required by the Secretary The Committee agreed that the Secretary should prepare a letter to go jointly from the Committee and the Chief Justice to the Minister of Justice commending an amendment to the Judicature Act so that masters have jurisdiction to grant relief in all interlocutory proceedings.

(b) *Voidable Transaction Procedures*

Justice Chambers referred to Masters/3-5/99. In respect of Masters/3/99, Justice Chambers referred to the four issues set out in his memorandum. He said that the Joint Insolvency Committee of the Institute of Chartered Accountants of New Zealand and the New Zealand Law Society accepted that these provisions should be a subpart to Part IXA of the High Court Rules. Justice Chambers queried whether there is any need to refer to the Companies Act 1955, but Mr Tanner said that there may still be uncompleted liquidations from the old regime. Justice Doogue said that the last one he had dealt with was under the 1955 Act.

In respect of the second issue, Justice Chambers said that because notices will be drafted by liquidators and not lawyers, there should be two separate forms: one for voidable transactions and one for voidable charges.

Action By

Mr Tanner agreed and said that the liquidator would not necessarily seek legal advice at this stage and Justice Hansen said that the liquidator would not necessarily seek legal advice at all in the interests of saving costs.

Action required by Mr Tanner

Justice Chambers said that the other suggestions from the Joint Insolvency Committee relating to the form of the form are non-controversial and they were referred to Mr Tanner.

Justice Chambers then addressed issue (b) which is whether a statement of claim is required if the recipient of the notice wishes to challenge it. He said that the draft rules provide for an originating application and no statement of claim. Justice Chambers said that he had since been persuaded that it is probably better to have a statement of claim. He noted that the Joint Insolvency Committee takes a different view, but that that Committee does not realise that the procedure in Part IV of the High Court Rules provides for a statement of claim with affidavits.

Justice Doogue suggested an originating application procedure because many of the claims are for just a few hundred dollars but to give the court a discretion to accept a statement of claim.

The Committee agreed that a challenge should be by way of originating application but with a discretion in the court to order a statement of claim where appropriate.

Justice Chambers then addressed issue (d) and said that the draft rule provides that all transactions relating to a company should go under the same company file. The Joint Insolvency Committee suggests separate files for each challenge because of confidentiality; the right to search the court file gives a right to search everyone else's transactions.

Mr Weston said that having separate numbers for each challenge would make it very difficult to find all the matters relating to the one company.

Justice Doogue said that it is difficult to see the confidentiality interest in practice anyway; if a number of creditors sue the same company he did not see why, for example, one should be able to get away with fraud and another not be able to disclose that.

Action required by the Secretary

The Committee agreed that the Secretary should write to the Joint Insolvency Secretary Committee thanking them for their very helpful comments but saying that it is not clear what issues of confidentiality would arise out of a single file for the one liquidation, given the public nature of a company winding up.

Justice Chambers said that the Joint Insolvency Committee had identified a question about the wording of the form in relation to time limits. Apparently two decisions lead to two different conclusions and reflect differences under the two statutes. One trap which is made clear in the table is that if the 20th or 28th working day falls on the 3rd of January the last day for the filing of the notice is the 23rd of December.

Action By

Justice Doogue queried what happens on a day that falls between the 24th of December and the 3rd of January. Justice Chambers said that in those areas the definition of "working day" in the Companies Act has the same effect as "working day" under the High Court Rules. Justice Chambers said that the problem comes because the definitions of "working day" are different in the High Court Rules than under the Companies Acts.

Justice Chambers said that when a person is adding up the working days under the Companies Act they will never get an answer that the 20th working day falls on the 25th of December to the 2nd of January. They may, however, get an answer that the 20th working day falls on the 24th of December or the 3rd of January. They cannot file in the High Court on 24 December or 3 January.

Justice Doogue suggested that the reference to dates in December should specify whether that is the previous year or the same year.

Mr Tanner suggested having two sections, one for the 1955 Act and one for the 1993 Act, together with an explanatory note which points out that some working days in the Companies Acts are court holidays.

The Committee also agreed that there should be no need to apply for directions as to service.

Action required by the Secretary The Committee also recorded their thanks to Andrew Beck for his letter and asked the Secretary to write accordingly.

14. **Pleadings (Item 14 of Agenda)**

(a) *Certificate by Lawyer Responsible for Document*

Action required by Mr Weston Justice Doogue said that this is a matter that was with Mr Carruthers and came from a suggestion made by Sir Ivor Richardson. He said that the objective of the Committee is to develop a practice that the profession could live with but which would emphasis the responsibility lawyers have for documents that they file. Mr Weston agreed to look at this issue.

(b) *Written Briefs Rules (Earlier Disclosure of Evidence)*

Justice Doogue said that the suggestion is that if the proceedings are not commenced by summary judgment they should be filed and served with disclosure of the essential evidence, whether oral or written, on which the litigant intends to rely. He said that the aim is to encourage constructive discussion and possibly settlement. He noted the tactic of not disclosing evidence until the latest possible stage, and that some litigants thwart that tactic by applying for summary judgment.

Action required by Mr Weston Mr Weston agreed to look at this issue.

Action By

15. **Summary judgment (item 15 of agenda)**

(a) *Rule 138(2) - Whether leave required to bring Summary Judgment Proceedings after the commencement of the Substantive Proceeding*

Justice Doogue said that this rule appears to be causing no problems and the Committee had decided to make no change in the meantime. He noted that it can come off the agenda.

(b) *Whether Summary Judgment by Defendant for a Particular Cause of Action should be possible*

Justice Doogue said that the defendant can apply for judgment in a claim generally but not in respect of particular causes of action. He said that in the United Kingdom as a result of the Woolf Report summary judgment for the defendant is now available in particular causes of action and it works well.

Mr Weston noted that in the "strikeout" context it also works well.

Justice Doogue said that he would not want to encourage a strikeout of an irrelevant cause of action.

Justice Chambers noted that the summary judgment procedure brings the proceedings to an end in their entirety and it was not originally meant to get rid of just part of the claim.

Mr Weston said that allowing summary judgment by the defence on particular causes of action may facilitate settlement and he noted also that there may be insurance issues. For example, a party may insure against negligence but not necessarily breach of statutory duty.

Justice Hansen noted that from the plaintiff's point of view very few unsuccessful summary judgment applications ever get to trial.

Justice Doogue referred to rule 136(2) that the court may give judgment against a plaintiff if the defendant satisfies the court that none of the causes of action in the plaintiff's statement of claim can proceed.

Justice Chambers said that what the Committee is considering now is the possibility of giving judgment against a plaintiff on a particular cause of action when, at the moment, the defendant has to show that none of the causes of action can succeed. He noted that the theory behind it is that summary judgment, if successful, brings the proceedings to an end.

Mr Weston pointed out, however, that a plaintiff, in order to win, needs to succeed on only one cause of action.

Action By

Justice Hansen referred to the history of the rule and said that originally if fraud were alleged, summary judgment was not available at all. The rule was then amended so that summary judgment was available and finally the fraud distinction itself was abolished.

Justice Chambers noted that summary judgment is not the same as a strike out because on a strike out the defendant has to accept that the allegations in the statement of claim are true whereas on summary judgment the defendant can call evidence to show that the allegations in the statement of claim are not true.

Justice Doogue noted that the judge does not actually enter judgment on a strikeout but instead rules that the plaintiff cannot succeed on a particular cause of action.

Action required by Mr Finlayson Mr Finlayson agreed to look at the issue and come back to the next meeting.

16. **General Business (Item 16 of Agenda)**

(a) *Winding up*

Action required by Mr Tanner The Chairman referred to Winding Up/1/99 and the Committee agreed to refer the matter to Mr Tanner.

(b) *Transnational Rules of Civil Procedure*

Justice Chambers produced a copy of the "Transnational Rules of Civil Procedure" from the American Law Institute. He said that the Chief Justice had asked him if the judiciary should be involved and his response had been that while it would be interesting to see how the project develops, he did not see it necessary to contribute directly. He considered it very unlikely to ever come into being and that it will be very cumbersome if it ever did. He said that what is envisaged is a uniform code of procedure which countries would adopt so that lawyers would find it easy to litigate anywhere in the world. He said that the Americans regarded the federal set of rules as a precedent.

(c) *Arbitrator's Institute*

Justice Chambers said that Sir David Tompkins is preparing a seminar for the Arbitrator's Institute and had inquired whether the Rules Committee is doing any work on court ordered mediation. Members of the Committee advised that this issue is being considered by the Courts Executive Council and the Courts Consultative Committee.

(d) *District Court Rules*

Justice Chambers asked whether the Committee has any plan to review the District Court Rules.

Action By

Judge Doogue said that there is a civil committee in the District Court responsible for rules and caseflow management, but it has no plan for any systematic review of the rules. He said that the Rules Committee needs to decide if there should be full convergence between the District Court and High Court Rules or whether the District Court rules need their own procedures because of special features in the District Court's jurisdiction.

Mr Weston said that he understood the Department is considering a scheme to have magistrates in the District Court deal with minor matters.

Justice Chambers said that there cannot be full convergence between the District Court and High Court rules. He noted that in 1977 there were 17,000 civil claims in the District Court under $3,000, another 3,000 under $7,500 and 1,000 under $12,000. He said that that makes a total of 23,000 claims under $12,000 and only 3,000 above that figure. In other words there is a huge mass of small claims in the District Court for which the procedures in the High Court are too complex.

Judge Doogue said that under the English reforms the case management tracks are embodied in the rules so that on the small claims track for example there is no discovery or interrogatories. He also said that with the use of case management and consent orders, a lot of small claims are being heard by the Small Claims Tribunal.

Action required by Justice Chambers

Judge Doogue said that the last update to the District Court Rules was 1992 with the summary judgment procedure. He said that the initiative for change needs to come from the District Court Judges but it would be useful to liaise with a High Court Judge from the Rules Committee. Justice Chambers agreed to undertake that role.

Justice Doogue said that Judge Willy from the old committee would be able to provide assistance.

Action required by Mr Finlayson

Mr Finlayson agreed to contact members of the old District Courts Committee and ascertain what areas need immediate attention.

(e) *Briefs of Evidence in Reply*

Mr Weston said that it can be standard practice for briefs of evidence in reply to be filed, thus giving the plaintiff a second opportunity. He noted that there is no provision for it in the High Court Rules and he said that the difficulty is the status of a reply to evidence which has yet to be given.

Justice Doogue noted that the rules make provision for supplementary briefs of evidence to be filed with the leave of the court.

Justice Chambers noted that briefs of evidence can get long, repetitive and argumentative. He noted that the affidavit rule is slightly different because there is no cross examination and he said that the reply brief ought to come out in cross examination.

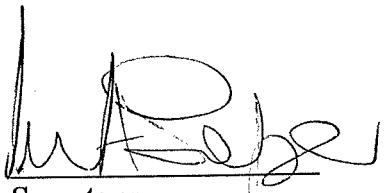
Action By

Justice Doogue noted that affidavits comprise evidence on oath while a brief which has yet to be read might not be proffered in evidence.

Justice Doogue noted that the rules are clear and defence counsel can object if they wish. He said that in practice there have been cases where the parties have known a brief of evidence in reply is coming and have accepted it while in other cases it has been excluded because it has been filed at the last minute.

The meeting closed at 3.30pm

The next meeting will be held on Thursday 25 November 1999



Secretary

Addendum to the Minutes of the Meeting held on Thursday 2 September 1999

Action Required By

Action required by Justice Doogue	Costs - articles for New Zealand Law Journal and "LawTalk". Evidence - clerk's paper on expert witness.
Justice Hausen	Admiralty rules.
Justice Fisher	Costs - articles for New Zealand Law Journal and "LawTalk".
Justice Chambers	Interest on judgment from the District Court Rules under Arbitration Act Sealing of judgments District Courts Rules
Mr Westson	Certificate by lawyer responsible for document Written briefs rules
Mr Finlayson	Admiralty Rules Execution - changing orders Summary judgment by defendant, District Court rules
Mr McCarron	Servicing of the Rules Committee.
All	Arbitration Insolvency rules.