THE RULES COMMITTEE

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

15 December 1998

Minutes/4/98

CIRCULAR NO 54 OF 1998

Minutes of the Meeting held on Friday 20 November 1998

The meeting called by Agenda/4/98 was held in the Judges' Common Room, High Court, Wellington, on Friday 20 November 1998 commencing at 9.30 am.

Action By

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
The Solicitor-General (Mr J J McGrath QC)
Mr K McCarron (for the Chief Executive, Department for Courts)
Mr R S Chambers QC
Ms T L Lamb (from the Crown Law Office, by invitation)

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

The Attorney-General (the Rt Hon Douglas Graham MP)
Chief District Court Judge Young
Mr C R Carruthers QC
Mr G E Tanner (Chief Parliamentary Counsel)

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

On the motion of Justice Fisher, seconded by Mr Chambers, the minutes of the meeting held on Thursday 3 September 1998 were taken as an accurate record and were confirmed, subject to the item on Habeas Corpus at page 16, item 8 being noted rather than deferred,

Action By

and on page 5, paragraph 3 the Committee agreed **not** to widen the means of service.

(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.

Papers Tabled at the Meeting

By Mr Chambers:

- Letter from T C Weston, Barrister to Mr Chambers dated 18 November 1998.

By the Secretary:

- Insolvency Rules/2/98 - Insolvency Rules redraft
- Masters/3/98 - Review of Masters' decisions
- Costs/6/98 - Party and Party Costs
- Costs/7/98 - Party and Party Costs - Response from Legal Services Board

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

(a) *Evidence by Affidavit*

Justice Fisher advised that this matter is with the Judges' clerk in Auckland and he hopes to have a paper for the next meeting. Justice Fisher

(b) *Judgment - time and mode of giving*

This matter was deferred until the next meeting.

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

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

(d) *Rule 630*

Justice Doogue noted that this matter is now complete.

(e) *Search of Court Records*

Justice Doogue noted that this matter is now complete.

Action By

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

(a) *Expert Advisers and Merger of High and District Courts Rules Committees*

Justice Doogue said that he has no recent information on the progress of this Bill.

(b) *Winding Up - Masters' Jurisdiction*

Justice Doogue advised that this matter was in the Statutes Amendment Bill No. 5, for which submissions closed on 30 October 1998. He said that he had no more recent information.

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

(a) *Generally*

Justice Hansen advised that he had telephoned Mr Carruthers and suggested he might look at these points but that Mr Carruthers was unable to be at the meeting today. Mr Carruthers has apparently done some preliminary work in respect of which he hopes to come back to the next meeting. — Mr Carruthers

5. **Appeals (Item 5 of Agenda)**

(a) *Appeals from the District Court*

Justice Doogue noted that the Chief District Court Judge is to prepare a paper. — C/Judge Young

(b) *Appeals from the High Court*

This matter was deferred.

(c) *Leave to Appeal from Arbitration Awards*

This matter was dealt with under item 11(a) Judgment/Enforcement of Arbitral Award.

(d) *Procedures and Time Limits for Appeals*

This matter was deferred.

Action By

(e) *Rule 705(1)(c)*

The Chairman then addressed Mr Corry's point which is that r 705(1)(c) should not be able to be used to extend time beyond the maximum envisaged by the statute.

The Chief Justice noted that the enactment conferring the right of appeal is the Arbitration Act, and Justice Doogue noted the extensive power to make rules under s 51E of the Judicature Act.

Justice Fisher said that he understood r 705(1)(c) to be limited to extending the time from one month up to the time conferred by the enactment.

Justice Fisher suggested that r 705 could have an additional sub-clause (4) to provide that any extension may not go beyond the time in the enactment.

Alternatively, Mr Chambers suggested deleting r 705(c) and adding to r 704, "the time for appeal is one month unless a longer period is specified in the enactment". He noted that this would have the effect of removing the discretion to extend the time and making the statute definitive. The Committee agreed that this is the preferable way of dealing with it and agreed to refer the matter to Mr Tanner accordingly. — Mr Tanner

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

Justice Doogue referred to Appeals/8/98 and the problem that there is no provision for interest on a judgment from the District Court on appeal to the High Court as there is for a judgment of the High Court which goes to the Court of Appeal.

Mr Chambers said that there might be jurisdictional problems with addressing this issue by way of an amendment to the rules because of the wording of s 77 of the District Courts Act 1947. He suggested the issue might be dealt with as part of the Chief District Court Judge's report.

Justice Fisher said that the merger between the District Court Rules Committee and the Rules Committee needs to be expedited and if need be severed from the amendment relating to technical advisers in the Court of Appeal so that the merger of the two Committees can proceed. The Committee agreed that the Secretary should write to Mr Tanner to see if the amendment merging the two Rules Committees can go ahead on its own. — Secretary

Action By

6. **Costs (Item 6 of Agenda)**

(a) *Generally*

Justice Fisher said that his latest draft could be the subject of consideration by the Committee, but that Mr Tanner could be asked to consider the draft now. He said also that there is still a need to coordinate responses in respect of the daily right and come back to the Committee with recommendations on that, although that need not hold up approving the draft. Mr Tanner

Mr Chambers said that he had a number of points from Mr Weston and began by referring to paragraph 9 of Mr Weston's letter in respect of r 47 and also r 48, namely that these rules should be widened to include not only Calderbank letters and payments into court but also any reasonable offer of settlement. The Committee did not agree to widening these rules any further.

Mr Chambers then referred to Mr Weston's next point which is to query whether r 48A, which provides that costs on opposed interlocutory matters should be fixed when the matter is determined, should apply to summary judgment applications. He had discussed this with Justice Fisher and agreed that it should.

Justice Doogue said that there is a Court of Appeal decision to the contrary and Justice Hansen said that the practice is that costs are awarded to the defendant in a summary judgment application only in respect of a case that is totally without merit, and that otherwise costs are awarded in the cause.

Justice Fisher said that he did not agree with that position as a matter of policy and said that in respect of every defended interlocutory matter, a party should not be running the argument unless they are entitled to the order that they seek, and that if the party is wrong in that view costs should follow.

Mr Chambers noted that under r 48A(3) it is proposed that a judge be able to reverse a costs order once the proceedings are finally determined.

Justice Hansen said that he would be wary of reversing a long established practice in respect of costs without referring it to the Law Society.

Justice Fisher said that the new philosophy in England, lead by Lord Woolf, is to look at the responsibility of the parties along the way and to judge the individual battles, not just the war.

Action By

Justice Hansen said that one of the practical effects of summary judgment is that few go on to trial, because the procedure has had almost a case management role in defining issues. He suggested that if people are to be discouraged from bringing summary judgment applications because of the danger of having costs awarded against them if they loose there could well be a marked down-stream effect on the number of trials. He said that there will be huge resource implication if even twenty percent of summary judgment applications turn into trials and suggested that the rules should exempt the summary judgment procedure which is that if the plaintiff could never have succeeded costs go to the defendant but otherwise costs are awarded in the cause.

Justice Fisher suggested an exception might be made for summary judgment, but Mr Chambers said that if summary judgment applications have a defining effect even though they fail then he would prefer to see that incorporated in the rules in some way.

Justice Fisher suggested that Mr Tanner insert at the end of the second line in sub-clause (1), "with the exception of summary judgment applications".

Justice Doogue said that that leaves the successful party out in the cold because there will be applications for the defence for costs as well.

Mr Chambers suggested that the rules could provide that for the purposes of this rule summary judgment is not an interlocutory application and Justice Hansen said that that works in other areas because they are not treated as interlocutory applications for appeals. The point is that the court does want to award costs if the summary judgment application is successful and that can be achieved by providing that for the purposes of this rule a summary judgment application is not an interlocutory matter.

Mr Chambers then referred to his third point which is that in the second schedule he has doubled the times and made some minor alterations to 2(a) to (d). He asked the Committee whether it was happy with the time allocations of 1.6 days, three days and 10 days for the commencement of the proceedings, because the New Zealand Law Society had come back saying that this was generous. Mr Chambers commented that the Committee is trying to encourage responsible counsel to find out what the case is about, and the time allocation is not just for the drafting of pleadings.

Mr Chambers then referred to 3(l) and (m) and (n) on page 8 and said that in the light of the decision of draft r 48A, summary judgment applications should be excluded from these rules as well. He

Action By

suggested there be a new paragraph dealing with summary judgment, but with the allowances the same. The Committee agreed.

Mr Chambers then dealt with the next point from Mr Weston which is to query whether, when dealing with a summary judgment application counsel should also get the statement of claim allocation. Mr Chambers said that he and Justice Fisher thought that they should and the Committee agreed. By way of example Mr Chambers said that on a band "B" case counsel would get three days for preparation of the statement of claim, point six for preparation of the interlocutory application and the appearance in court measured in quarter days. He said that this would in practice amount to approximately $8,000.00. Justice Hansen said that the Master's rule of thumb in summary judgment applications was $1,500.00 and that while he has been out of touch with costs movements in recent times, he did not think it would have gone up that much.

Justice Doogue said that r 46(3) of the High Court Rules seems not to have been replicated in this draft and suggested that it should be. The Committee agreed.

Mr Chambers said that summary judgment on a guarantee would be a band "A" case with an allocation of .3 of a day for preparing the affidavit and 1.6 for receiving instructions and preparing the statement of claim, giving a total of 1.9.

Justice Doogue expressed the agreement of the Committee that the table be reconstituted to provide specifically for summary judgment, and that the allocations for summary judgment appear in front of interlocutory matters rather than after them.

The Solicitor-General asked about input from the Ministry of Justice and Justice Doogue expressed the understanding the Committee when he said that he believed input from the Ministry of Justice and from other Government departments was now complete.

Mr Chambers queried whether the rates should be inclusive or exclusive of GST and he pointed out that some litigants can claim back their GST while some cannot.

The Secretary noted that legal aid rates are inclusive and Justice Fisher said the rates should be inclusive because that addresses the situation for the majority of litigants, although he acknowledged that some commercial organisations will get an advantage.

Justice Fisher queried how the Committee should translate the current hourly rate into a daily rate and said that practitioners try to work to

Action By

a chargeable day of seven hours although in practice those hours can be much longer when the case comes on for hearing.

Justice Doogue said that the Legal Services Board operates on a seven hour day.

Mr Chambers noted that the rates in the High Court Rules will probably be above the legal aid rates, and the Secretary said that from discussions with Dave Smith from the Legal Services Board he had agreed that that would probably be the case but that the Rules Committee should come to a decision having regard to the legal aid rates.

Mr Chambers noted that costs against legally aided persons are limited by the Act anyway to the extent of their contribution.

Justice Doogue noted that that rule works both ways and also applies in respect of costs for legal aided persons.

Mr Chambers said that legal aided persons could well wind up getting indemnity costs.

(b) *Joint Liability*

Justice Doogue said that this is Mr Henderson's point which is that the rule relates only to defendants and no other classes of litigants.

The Committee agreed to refer r 50 to Mr Tanner to re-draft to include any class of litigants. — Mr Tanner

7. **General (Item 7 of Agenda)**

(a) *Servicing of the Rules Committee*

Justice Doogue said that this matter had been referred to Mr McCarron and also to those conducting the review of judicial services. In respect of the latter he advised that nothing had emerged that would assist the Committee.

Mr McCarron said that so far as the Department is concerned there are some more people in the Department who could be called upon on an ad hoc basis, but there is no proposal for any dedicated research counsel. He suggested it may be appropriate for the Committee to write directly to the Chief Executive.

Justice Fisher suggested that the Committee seek a judge's clerk dedicated to the Rules Committee who would attend every meeting and take responsibility for providing continuing research support.

Action By

Justice Doogue queried whether it needs to be a judge's clerk and suggested it could be a person in the Department because most of the Committee's work is politically neutral.

Justice Fisher said that he thought it would need to be a judge's clerk responsible to a judge because it is not satisfactory to be responsible in employment terms to the Department.

Mr Chambers suggested that at the beginning at least a part time person, say one-fifth or one-quarter may be sufficient.

Justice Fisher said that a clerk could be accommodated in Auckland and that in Auckland they would like to get a fifth clerk; half of that time could perhaps be made available to the Rules Committee.

The Solicitor-General suggested that the clerk should be located in the same place as the Chairman.

The Committee agreed that the Chairman should write to the Chief Executive of the Department for Courts with a proposal that there be a judge's clerk allocated to the Rules Committee or at least a judge's clerk shared equally between the Committee and the Wellington High Court Judges. In this context, Justice Doogue noted that there are currently two clerks in Wellington, half of one allocated to the Chief Justice and the remaining one and a half for the nine Wellington Judges. In this context Justice Fisher noted that in Auckland there are four judge's clerks. The Secretary agreed to prepare a draft. — Secretary

(b) *Combined District and High Court Rules Committees*

This matter was deferred as being dependent on the passing of the statutory amendment.

8. **Habeas Corpus (Item 8 of Agenda)**

(a) *Law Commission Report*

No further action was required on this item.

9. **Insolvency Rules (Item 9 of Agenda)**

(a) *Debtors Petitions and Statutory Holidays*

Justice Hansen agreed to refer Master Gambrill's letter to Master Venning. — Justice Hansen

Action By

(b) *Insolvency Rules Redraft*

Justice Doogue referred to the re-draft of the Insolvency Rules contained in the memorandum from Master Venning to Justice Hansen (tabled under Insolvency Rules/2/98).

Justice Hansen said that Paul Heath had been consulted in the preparation of this redraft. He raised the issue of the review being done by the Ministry of Commerce and asked whether there was any further information on developments in respect of it.

The Committee agreed that the Secretary should write to the Ministry of Commerce enclosing a copy of Master Venning's memorandum and advising that the Committee is not seeking substantive changes but rather only those in accordance with the original arrangement. — Secretary

The Committee agreed that Mr Chambers should show the memorandum to the Law Society and the Bar Association for their comments. — Mr Chambers

10. **Interlocutory Matters (Item 10 of Agenda)**

(a) *Generally*

This matter was deferred.

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

This matter was deferred.

11. **Judgment (Item 11 of Agenda)**

(a) *Enforcement of Arbitral Award and Leave to Appeal from Arbitration Awards (Items 11 & 5(c) of Agenda)*

Justice Fisher said that arbitral awards come before the High Court by way of both appeal and judicial review. The issue that commonly arises is whether a judge who has heard the application for leave to appeal should then be disqualified from hearing the appeal itself. By way of background he said that there is an issue as to whether the matter be dealt with by amendment to the rules or by a judicial practice note. He said that in some ways a judicial practice note might be a better way to address the issues, but as a general rule it is preferable to have matters in the rules. He then raised the policy question of whether an application for leave to appeal should follow the English practice and be decided on the papers or whether there should be a hearing. He suggested that the leave application should be dealt with on the papers if the leave is going to be granted, and should go to a

Action By

hearing only if on the papers the judge's initial view is not to grant leave.

Mr Chambers said that if that principle is going to apply for applications for leave to appeal from the decision of an arbitrator then it should apply in other contexts as well.

Justice Hansen said that the English practice reflects the sheer volume of applications for leave.

The Solicitor-General suggested it may be better to have a hearing and to make the efficiencies down stream.

Justice Fisher said that on his approach there will always be a hearing because if leave is granted the appellant will then get a hearing on the merits.

Justice Hansen said that it is always possible the respondent may wish to be heard on the leave application.

Mr Chambers said that it is usual to get into the merits of the argument at the time when leave is sought. He suggested that any rules regulating the seeking of leave in an arbitration context should apply across the board.

The Solicitor-General said that he felt uncomfortable about a process that gave a hearing to the appellant and not the respondent because the respondent feels strongly that they have gone into arbitration as a process that would produce a final answer. He suggested the hearing could be curtailed at the leave stage by restricting the time available for counsel to present submissions to say twenty minutes.

Justice Doogue agreed with Mr Chamber's suggestion that the hearing could be controlled by a practice note.

The Chief Justice suggested that there should be a regime that *prima facie* leave applications should be dealt with on written memoranda from each side. He noted that leave applications are being argued quite elaborately when they used to be a five minute job and he considered that trend ought to be discouraged.

The Solicitor-General agreed that the principles for leave applications should be the same across the board but suggested that the Committee could make a start on this problem in the arbitration context in the first instance.

Justice Fisher said that the English practice does set a precedent and this is the first time New Zealand has had appeals from arbitral awards.

Action By

Justice Doogue suggested that a practice note in the first instance might be appropriate so the regime for leave applications for appeal from an arbitral award could be commenced as a trial and reassessed later.

The Chief Justice agreed but considered that the ultimate place for it is in the rules.

After discussion the Committee agreed that applications for leave to appeal from an arbitral award should be by memorandum for each side. The length of the memorandum was discussed and the Committee agreed that the description "succinct" was too subjective and there is a need to give counsel guidance on the number of pages.

Justice Doogue noted in that context that if the appellant has a good point it can usually be stated in one page, although Justice Fisher noted that the exceptional case is where there is a large number of issues in a big arbitration.

The Committee also noted that the Court of Appeal limits full submissions to 40 pages.

Mr Chambers said that he had some concern about the combination of the restriction on the number of pages, any hearing being at the discretion of the judge and limits on the time for argument and suggested that that regime be inadequate for a "Clyde dam" type arbitration for example. He suggested adopting the Court of Appeal wording that argument be restricted to ten pages, "unless otherwise approved by the court in advance of filing".

The Solicitor-General said that there will be no change in culture unless there are firm rules, and Justice Hansen said that practitioners approach the Court of Appeal with more trepidation than they do the High Court and there could be a lot of applications for leave if such a provision were incorporated.

The Committee agreed to restrict applications for leave to ten pages and, in the event that there is an oral hearing, to 30 minutes argument from each side.

Justice Fisher said that in paragraph 9 of his memorandum he had suggested that the judge determining the application should not give reasons for the decision unless leave is rejected, on the basis that there is a right of appeal against the refusal to grant leave but no right of appeal if leave is given.

Mr Chambers queried whether there might be a right of appeal under the Judicature Act 1908 even if there is not one under the Arbitration

Act on the basis that an application for leave to appeal from an arbitral award would be decided by a judge on an interlocutory application and subject to an appeal under ss 66 and 67 of the Judicature Act.

Justice Fisher suggested that the Arbitration Act provides a code, and the Solicitor-General queried whether there has ever been an appeal against a successful leave application.

The Committee agreed that the instance of an appeal against the granting of leave would be so rare so that it should not influence any decision about reasons for the granting of leave.

Justice Fisher said that his third issue is whether New Zealand should follow the English practice of using a different judge to hear the substantive appeal from the judge who had heard the leave application. His initial view was that that was too precious for New Zealand but he said that Justice Elias and the Chief Justice tended to lean the other way.

Justice Doogue said that one circumstance where you might want the same judge to deal with both would arise if the judge were on circuit and there is no other judge available to hear the substantive appeal.

Justice Hansen suggested some guidance might be obtained from the settlement conference context and noted that a judge can hear the trial by consent.

The Solicitor-General said that the settlement conference differs because the parties are disclosing their hands at the settlement conference.

Mr Chambers said that if the issue were left to counsel there would be virtually no cases where a respondent would agree to the judge who has given leave hearing the substantive application.

The Solicitor-General suggested that it could be left to the judge to decide whether or not they should hear the substantive appeal in the same way that the judge may disqualify themselves because of some personal association with the case.

Mr Chambers said that he foresaw difficulties if the general rule were that the same judge should not hear the substantive application and he noted that in the Court of Appeal that would commonly be the case. He suggested it should be left to counsel to raise the issue if it were considered that the judge, having granted leave, should not hear the substantive application.

Action By

The Solicitor-General said that he was uneasy about having too much scope for judges to be disqualified and queried what the practice is in respect of interim injunctions. Justice Doogue said that there is no bar on the judge hearing the interim injunction from hearing the substantive application.

The Chief Justice said he thought there should be different judges and he based this view on the fact that he had had two complaints in the last year in the leave to appeal situation. In both the litigant was aggrieved that the same judge had sat and he said that while the judges might be cognisant of the different thresholds the person in the street sees it as the judge in effect sitting on appeal from their own decision.

Justice Hansen suggested the rule should be that there is a different judge unless by consent and that would then address the circuit situation where the parties want the matter heard.

The Solicitor-General suggested that the matter might be addressed by the judges themselves, but Mr Chambers said that he thought solicitors from the provinces need to understand from the practice note what the expected norm is.

Justice Doogue said that there will always be complaints from unsuccessful litigants.

Justice Fisher suggested that judges should not feel disqualified but that in practice they should normally avoid hearing the substantive appeal unless there is some reason to the contrary.

The Solicitor-General expressed concern about extending the disqualification industry to judges.

The Chief Justice did not consider it an answer to leave the matter to the judges because the judges themselves have a wide spectrum of views on when they should or should not hear the substantive application after an earlier involvement.

Justice Doogue suggested that the solution is to have a rule that the substantive hearing be before another judge unless the parties consent or there are reasons to the contrary.

Justice Fisher suggested that the Committee should also consider whether a precedent is being established here because it could be argued from the rule which applies to the substantive hearing after a leave application that judges should not hear subsequent proceedings after an interlocutory application or an interim injunction, and that in time the disqualification rule could flow right across the whole range of applications that lead on to substantive hearings. Having said that

Action By

he noted that he has heard some twenty applications in the Clear and Telecom litigation and so far without any objection.

The Chief Justice noted however that the leave application is central to the ultimate issue.

The Solicitor-General pointed out that some counsel will play this game in order to get rid of a judge they happen not to want.

Justice Fisher adopted in substance the Hong Kong Practice Note annexed to his paper, paragraphs 1 to 4. He said that at the moment the parties file a notice of proceeding and statement of claim and the relief sought is the reversal of the award on grounds of error or law.

Justice Doogue suggested that an application for leave might be made by originating application, but Justice Fisher said that an application for leave is usually combined with a challenge to the arbitration on natural justice grounds as well. He noted also that the leave to appeal is only a preliminary step and that the error of law alleged in the appeal will be set out in the statement of claim.

Justice Doogue said that it seemed odd to have an appeal by way of statement of claim and said that under the Arbitration Act it is described as an appeal on a question of law arising out of the award which would come under r 701 in Part X of the High Court Rules relating to miscellaneous appeals.

Justice Fisher said that the word "appeal" is perhaps misleading because the proceedings are more like a judicial review than an appeal as that term is normally understood.

Mr Chambers said that if it is an appeal a private arbitrator would not be pleased about not getting paid for putting a case together. He suggested that there needs to be a new part in the High Court Rules to cover matters under the Arbitration Act.

Justice Fisher agreed that appeals under the Arbitration Act are really a combination of an appeal on question of law with natural justice grounds.

The Solicitor-General said that judicial review applications used to be combined with appeals by way of case stated, and the courts have confined litigants to the case stated procedure. He suggested that the Committee should consult the Institute of Arbitrators.

Justice Doogue suggested that Justice Barker could be asked to comment and the Solicitor-General suggested a group including people such as Philip Green could also be approached. Mr Chambers said that

Mr Chambers

Action By

he would be happy to coordinate a consultative group and suggested that the Law Society, through people such as David Williams and Gerard Curry could also be approached to give a perspective from the point of view of the parties. The Committee agreed.

The Committee also agreed that the Secretary should submit a draft practice note to the Committee. — Secretary

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

(a) *Review of Masters decisions*

Justice Doogue said that the issue is whether an appeal should be by way of rehearing or confined to questions of law.

Justice Fisher said that the Committee needs to accept the invitation to impose a legislative solution where there has been common law differences of approach. He said that what is proposed is a compromise position which treats it as an appeal if there is a reasoned judgment of the Master but otherwise by way of re-hearing, reserving a discretionary right to the Judge to give such weight to the Master's decision as the Judge thinks appropriate.

Justice Doogue said that there may be variations in what amounts to a recording of a judgment, and there may be only a few brief words hand written on the application.

Justice Fisher said that if this rule was passed Masters would need to be conscious of what they are doing, and Mr Chambers suggested that the Masters might adopt a set formula of words if the decision is intended to be within 5A.

Justice Doogue suggested that the word "considered" should be used in place of the word "recorded".

Justice Fisher said that there could also be oral expressions of reasons and it would be very common to make a few remarks in giving a decision.

The Chief Justice noted that there are two concepts involved: there needs to be a record (about which there can be no argument) and secondly a definition of the term "reasons" and he noted at a few scribbled words might be reasons but not sufficient to attract 5A. He suggested however that it would be unusual in a defended hearing if there were to be argument about whether the reasons given in a case like that constitute reasons or not.

Action By

Mr Chambers queried whether there is any need for a rule at all because if there are no reasons the judge will have to start *de novo*, but Justice Doogue said that unless there is an express rule the judges will be bombarded by a jurisdictional argument as to the basis on which the Judges can deal with them.

Justice Fisher said that there could still be just a scribbled minute on the front of the file even if there had been a defended hearing.

Mr Chambers said that the emphasis should be on the record rather than the reasons given the wide spectrum in the Master's practice, because the inference is that if the Master has not given reasons, the Master has not thought the issue through.

Voidable Transaction Procedures

Justice Doogue referred to Master Gambrill's point that there should be one simplified procedure applying to all voluntary court ordered liquidations. He noted that she suggests that the liquidators notice be dealt with in the rules (although it is a statutory matter), and she makes recommendations as to how proceedings should be dealt with in the High Court.

Justice Doogue queried whether there needs to be some more research done on this and Mr Chambers suggested some draft rules.

Justice Doogue said that so far as he was aware these applications proceed by way of originating application and are quite straight forward and Justice Hansen said that the concerns about the procedure are being expressed only in Auckland.

Justice Fisher stated the issue as being whether to deal with a liquidation by way of an interlocutory application or a separate set of proceedings. Justice Doogue said that this is the difference between a court ordered or a voluntary liquidation and Justice Doogue said that what is proposed is a common procedure for both types.

Justice Hansen said that there is also an issue about whether the liquidation should be in the name of the liquidator or the name of the company in liquidation.

Mr Chambers suggested the matter might be referred to the appropriate New Zealand Law Society Committee with a view to obtaining some draft rules.

Justice Doogue said that he thought the matter could be addressed by enabling the application to be made by originating application under Part IVA.

Action By

Justice Hansen said that he thought the matter should be referred to the Law Society with the suggestion that all that is necessary is to specify that the application be made by originating application.

Justice Hansen said that there is not a uniform practice but this does not seem to have caused problems anywhere.

Mr Chambers agreed to refer the matter to the Law Society and Justice Doogue said that if Mr Chambers is to be discussing it with Mr Weston he should make the point that what is being suggested is making rules to have to file the liquidators notice in the High Court. Justice Doogue noted that that is a statutory requirement and that unless the creditor seeks to set aside the notice there is no need for it to be filed in the High Court because only if the creditor seeks to set aside the notice will there be any need for a court proceeding. In that eventuality a simple originating application with affidavits should be all that is necessary and there is no need for a statement of claim because the issues are already defined by the notice in the application to set aside the notice. Mr Chambers

Justice Doogue noted that there is downstream problem in that there can be discovery in one area and not another, but he considered that this could be remedied later if necessary by an amendment to the discovery rules.

(b) *Companies Act - Masters' Jurisdiction*

Justice Doogue said that he did not think the Committee needed to be concerned about this item which will hopefully correct itself in due course.

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

(a) *Certificate by Lawyer Responsible for Document*

Justice Doogue noted that this matter is with Mr Carruthers.

(b) *General - Written Briefs Rules*

Justice Doogue said that this is the proposal that a summary of the essential briefs of evidence relied on in support of the pleading be filed at the outset, by analogy with the summary judgment procedure. He noted that this matter too is with Mr Carruthers.

Justice Hansen said that this may slot in to the nationwide case management practice note.

Action By

14. **General Business**

Justice Doogue noted that the next meeting to be held on Friday 19 March 1999 is the last meeting at which the Chief Justice will be present and that what is proposed is that the meeting be held in the Chief Justice's Chambers and adjourn for lunch between 12.00 noon and 1.30pm, noting that the Chief Justice has another meeting at 1.30pm. Justice Doogue said that the Department for Courts has kindly agreed to pay for the lunch, to be a simple light buffet. The Chairman noted that the Chief Justice was first appointed to the Committee in 1969 so that his association with it goes back 30 years. He suggested also that the Attorney-General may wish to be present for at least part of the meeting and that an invitation could be extended, subject to their availability, to Justice Barker, Justice Quilliam, Mr Iles and Mr Cornford.

The meeting closed at 12.45 pm.
The next meeting will be held on Friday 19 March 1999

Secretary