THE RULES COMMITTEE

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Wellington

3 March 1995

Minutes/1/95

CIRCULAR NO 5 OF 1995

Minutes of the Meeting held on Thursday 23 February 1995

1. **Preliminary**

The meeting called by Agenda/1/95 was held in the Judge's Common Room, High Court, Wellington on Thursday 23 February 1995 commencing at 9.30 am.

2. **In Attendance**

The Hon Justice Doogue (in the Chair)
The Hon Justice Fisher
Chief District Court Judge Young
The Solicitor-General (Mr J J McGrath QC)
Mr R F Williams (for the Secretary for Justice)
Mr C R Carruthers QC
Mr H Fulton
Mr W Iles QC CMG (Chief Parliamentary Counsel)
Miss T L Lamb (from the Crown Law Office, by invitation)

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

The Chief Justice (the Right Hon Sir Thomas Eichelbaum GBE)
Master Hansen

4. **Welcome and Valedictory**

Justice Doogue welcomed Justice Fisher to the Committee. Justice Doogue also advised the Committee that Dr Barton had decided not to serve for a further term: Dr Barton had joined the Committee in 1986 as a member for special purposes, particularly in relation to

insolvency and company liquidation matters and Justice Doogue said that the Committee had had the benefit of his sage counsel since then. Justice Doogue also recalled that Justice Thomas was first appointed to the Committee as a nominee of the New Zealand Law Society in 1984 and had subsequently served as a judicial member with a special interest in exchange of briefs of evidence and costs.

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

On the motion of Mr Carruthers, seconded by Mr Williams the minutes of the meeting held on Thursday 24 November 1994 were taken as an accurate record and were confirmed subject to the inclusion under "in attendance" of Miss T L Lamb (from the Crown Law Office, by invitation).

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

Matters arising from the minutes were considered under the topics on the Agenda or noted to be considered at a later meeting.

7. Papers Tabled at the Meeting

By the Secretary:

- Circular No 3 of 1995 - Jurisdiction of District Court to make tracing orders under the Administration Act 1969.

By Mr Iles:

- The High Court Amendment Rules 1995 (PCO 60/P)
- High Court Rules - proposed new Rule 703A
- Revised draft of proposed rules in relation to exchange of witnesses' statements.

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

(a) *Exchange of Witness Briefs (Item 2(f) of Agenda)*

Mr Iles tabled a redraft of these rules, amended in the light of the discussion at the last meeting.

In respect of r 441A, Mr Iles advised that what was r 441K in the previous draft now appears as subclause (3). In respect of r 441A(1)(a) Mr Iles advised that he had deleted the word "not" in the first line so as to make more readily understandable what had previously been a double negative.

In r 441B(1), Mr Iles advised that he had deleted the reference to an expert witness so that the rule now applied to all witnesses so that the rule now applies to all witnesses.

Mr Iles advised that he had deleted r 441G(2) in line with the discussion at the last meeting.

In r 441J, Mr Iles advised that subclause (c) is new providing that nothing makes inadmissible evidence into admissible evidence, and that subclause (d) was new which provides that nothing in the rules deprives a party of the right to cross examine on a prior inconsistent statement.

Mr Iles said that he had also added a new r 441K which preserves the Rule in *Browne v Dunn* [1983] 6 R 67 (HL).

In respect of r 441L, Mr Iles advised that he had added the words "all the admissibility of the evidence that may be adduced in relation to an application under that rule".

Mr Carruthers said that he would like to refer the matter back to the Civil Litigation and Tribunals Committee and to the Bar Association and obtain any final comments they might wish to make.

Justice Doogue said that the revised draft should also be referred to Justice Thomas.

(b) *Part X High Court Rules (Item 2(e) of Agenda)*

Mr Iles said that he had prepared a draft Rule No 703A along the lines of s 10 of the Judicature Amendment Act 1972.

Justice Fisher asked whether there should be a general power for the Judge to give directions as to the mode of hearing. He noted that subclause 2(a) relates only to consequential directions, and he queried whether there should be some general power to give such directions as may be necessary to properly determine the appeal.

Mr Iles noted that s 10 of the Judicature Amendment Act 1972 does give a general power to a Judge to exercise any powers of direction or appointment vested in the court or a Judge by its rules of court in respect of originating applications.

Mr Fulton suggested that subclause (2) should be cross referenced to r 713 relating to transcription of evidence.

Justice Doogue recalled that that rule had originally been introduced because of problems in the Planning Tribunal in particular in providing the transcript of a long hearing. After discussion the Committee agreed to defer further consideration of this matter until the next meeting.

9. **Admiralty Rules (Item 3 of Agenda)**

Mr Carruthers said that he had arranged a meeting with Master Hansen and that they had sought information from interested parties on any problems that might be apparent.

10. **Appeals**

(a) *R A Batchelor and Others v Tauranga District Council (Item 4(a) of Agenda)*

Justice Doogue said that Justice Thomas had asked him to take up this question of removal of proceedings from the High Court into the Court of Appeal with the President of the Court of Appeal, but that he had not yet been able to do so.

(b) *Court of Appeal Technical Advisers (Item 4(b) of Agenda)*

Mr Williams advised that he had met with the Law Reform Division of the Department of Justice and that they in turn had met with the Minister of Justice and provided him with further advice together with a draft response for the Minister to send to the Secretary. The Secretary advised that she had not received it, and Mr Williams said that he would raise it with the Minister.

11. **Costs (Item 5 of Agenda)**

Mr Carruthers said that there had been no response to the publicity on the Rules Committee's proposed changes to the rules relating to costs and he said that at the last meeting of the Civil Litigation and Tribunals Committee it had been decided to publish another note in "LawTalk" to give the profession a last opportunity to make submissions.

Justice Doogue said that at the Judges' Conference next month they are going to discuss the issue of whether the present reasonable contribution to costs should be replaced by a general indemnity rule.

Mr Fulton said that in his paper he had tried to follow indications from the profession that a schedule should be maintained but that costs should be dealt with on a more realistic basis. Mr Fulton acknowledged that there is a reluctance to get into a taxing industry, and said the view of the profession is also that some reasonable contribution should be made rather than moving into full solicitor/client costs. He said that the accessibility of justice is part of the philosophy that flows through that.

Justice Doogue recalled that at the earlier discussions the Committee had favoured an indemnity basis for costs ie reasonable solicitor/client costs.

Mr Fulton said that one of the reasons for having a schedule is the number of cases where costs are payable in default.

Mr Carruthers considered it undesirable to have provisions within a "up to" figure and said that he considered a scale desirable for default or routine matters where a figure can be specified. For other matters however Mr Carruthers considered that costs should be awarded on the basis of daily rates set by reference to experience, seniority and the difficulty involved. He felt that proceeding in this way would remove the uncertainty of the present scale.

Mr Fulton said that there is still a need for the rules to contain some precedent on how costs should be fixed and he noted that it is unsatisfactory to have a global ruling at the end of the case.

Mr Carruthers said that fixing costs on a per day basis can enable a practitioner to give a client a reasonably accurate estimate of what the costs are likely to be because the hearing time can be estimated fairly accurately and the preparation time is normally twice that.

Justice Fisher identified a need to clarify the philosophy, and to decide whether there should be an indemnity of reasonable costs (or a proportion thereof) or whether costs should start with presumptive arbitrary figures from which the courts can depart if sufficient case is shown. He noted that the over-litigiousness displayed in America partly comes about because the losing party does not have to pay the costs of the successful litigant and has therefore nothing to loose by commencing proceedings. He suggested further that it may be possible to have arbitrary presumptive figures for many of the steps in the proceedings but then make a value judgement in areas that are subject to big variables such as preparation for trial.

Justice Doogue said that value judgement can be very difficult to make where the amount in dispute is very large and the solicitor's costs, even if large in themselves, represent only a tiny proportion of the amount in dispute, as can happen in tax cases. Thus while the actual costs incurred may have been reasonable, he did not feel he had a discretion to award anything like that amount because that would have been out of step with other awards.

The Solicitor-General said that he thought the tax area merited slightly different considerations because the Commissioner makes an assessment which can then be tested before the courts. In civil litigation however the Solicitor-General considered that if it is reasonable to dispute a case then both parties should take some of the consequences of that even if they are successful. He queried whether the community as a whole would welcome a move to greater awards of costs.

Mr Carruthers considered that there is more criticism by those who succeed in litigation than by those who allege that they are excluded from the judicial process because of the level of costs involved. Those who succeed are often bitter about the costs to them of recovering on their claim. In respect of that latter he said that more realistic awards of costs would not shut them out but should serve to make them think more carefully on the wisdom of issuing proceedings.

The Solicitor-General referred to the English experience and the Committee headed by Lord Woolf and suggested that the ultimate problems may be with the expense of litigation. He noted that it is difficult to predict the result of litigation and that, at what ever level of appeal, at least thirty percent of cases will be reversed.

Mr Carruthers suggested that there should be some indicative figures in any scale of what is a reasonable daily rate.

The Solicitor-General accepted that there can be abberations in the absence of any standard reasonable approach. He did however express some doubts about imposing a reasonable

costs figure on the unsuccessful litigant because it may act as a barrier to litigation and queried whether that would be healthy for society. He considered that if parties enter into litigation generally each party is responsible for that and he considered that an approach to costs which falls short of actual and reasonable fairly passes some of the burden back onto the looser.

Mr Carruthers acknowledged that costs are matters between the parties and they may agree before trial as for example with a test case or a case involving the definition of some principle.

Chief Judge Young said that one of the research projects the Department of Justice is looking at at the moment is access to Justice for people with disputes of between five and $50,000; there is a concern that they have the potential to be excluded from the court system. He said that one of the issues being considered is what alternative system should be provided for those who do not want to take the risks on costs. He suggested that if costs are to be awarded on a more representative basis in future then something that should also be considered is resolution of disputes outside of the court system.

The Solicitor-General noted that one reason so few appeals are lodged with the Privy Council is the expense, and Justice Doogue noted also that there are more appeals from Wellington to the Court of Appeal than there are from other centres simply because the appeal is more easily filed.

The Solicitor-General identified that the awarding costs has the effect of spreading the risks within the system.

Justice Doogue stated the proposition at its extreme that any litigant, no matter how unmeritous the case, can have their day in court without the risk of incurring the costs of the successful litigant.

The Solicitor-General preferred to word it that the risk spreading should have the effect that no one will be totally exposed if they lose but equally they will not be totally recompensed if they win.

Justice Doogue said that that has been of great advantage to debtor companies who have found that litigation is cheaper than paying interest on the sums owing. In that case the Solicitor-General suggested that the solution lies with the discretion of the Judges.

Mr Carruthers said that if a case really has a public interest element to it then it is always open to the Judge to order that costs lie where they fall.

The Solicitor-General said that he did not necessarily agree that New Zealand now operates on the principle that costs follow the event because of the effects of inflation on the scale of costs now being awarded. Having said that he noted that in the judicial review area it is in the public interest that citizens should be able to challenge government decisions in court, and that the government should be able to bear some of the cost of that.

Justice Fisher said that a community rather than an individual response to the issue of access to justice implies that the state will provide services at least to the extent of providing courts and judicial systems; the approach of the government in recent times has however been quite the reverse because it has been raising its own fees. He said that a socialistic approach to access to justice does not rest comfortably with current government policy for that reason. He drew a distinction between a community approach to justice and justice as between two individual litigants.

Mr Williams asked whether there would be any flow on to the District Court because he saw that as impacting even more significantly on access to the courts. He suggested that the Legal Services Board be consulted.

Mr Carruthers identified a need to have a definite proposal before there could be any meaningful consultation. He referred to item 6 of the proposed second schedule in the "Costs; Rules and Schedule" prepared by Mr Fulton (Costs/1/95) and expressed himself in favour of applying that concept to the various steps in the proceeding. He acknowledged that that in effect provided for an hourly rate and said that the other possibility is to put a cap on each of those steps as has already been provided in 1(d) and 3(d). Having said that, he said he had no difficulty in fixing costs by reference to the time taken and noted that that is in effect done now by the profession.

Justice Fisher said that the philosophical basis of the scale is not to reimburse for full reasonable costs except in very unusual cases.

Mr Fulton said that if there is a move to setting costs by reference to hourly rates then what will be at issue is how many hours are reasonable which brings in a taxing regime, and Chief Judge Young identified that as the essential conflict of principle: that of trying to nominate a figure whilst at the same time providing for reasonable indemnity.

Justice Fisher suggested that costs might be awarded on an arbitrary basis in some areas but flexible in others. He suggested there may be presumptive finite figures for the issue of proceedings and the issuing of interlocutory steps, but that there be variability for costs relating to the preparation for trial and hearing.

Mr Carruthers pointed out that there is in fact a finite element in item 6 of Mr Fulton's second schedule in that it allows for two days preparation for each day of hearing and Justice Fisher agreed that that seemed to be a reasonable compromise.

Mr Carruthers said that he would like to see a daily rate and he cited as an example in support of that view page four of Mr Fulton's schedule, items (j) to (p) where the circumstances can vary so much that the scales are unhelpful.

Justice Fisher suggested that in respect of items (j) to (p) the impact of the scale could be softened by the rules recognising in some way that there may be large variations of time involved with these items and that the court will be disposed to depart from those figures.

Mr Carruthers suggested that an item such as "answers to interrogatories" could set a figure for answers involving no more than half a days preparation, but then provide for a discretion where there were a large number of interrogatories.

In respect of interrogatories, Mr Fulton suggested that the parties may give an indication at the time of what the likely costs are going to be. He acknowledged that that would be inappropriate for discovery where there is a duty to list the documents.

Justice Fisher said that the Judges will be considering the question of costs at their conference.

Mr Carruthers said that the issue has also been with the Law Society and Bar Association for some time and that he would have a discussion with Mr Fulton to look at issues relating to the second schedule with a view to putting an amended schedule to the Law Society and Bar Association. That referral would be to obtain comments at Committee level. He envisaged that when the Judges and the Rules Committee have a proposal that they are happy with, he would send that back to the Law Society and the Bar Association just for distribution and any comment. Mr Carruthers said that he would like to go through the second schedule in the light of the preceding discussion.

The Solicitor-General said that he would be quite happy to simply try another system and see how it works in practice and Justice Doogue agreed that the old system has broken down anyway.

Justice Doogue said that as a basis for the award of costs a default rule needs to be spelt out in terms of the underlying philosophy.

Justice Fisher referred to clause 6 on page 2 of the schedule drafted by Mr Fulton, and suggested there be some mechanism for reviewing the figures of $1,500 and $2,000 which had been arrived at, in an attempt to keep pace with market rates.

Mr Carruthers suggested that there could perhaps be an administrative schedule subject to review by the Chief Justice.

The Solicitor-General queried whether that could lawfully be done and noted that we are not currently in inflationary times so that the matter could fall to be addressed at a subsequent date.

The Secretary referred to the formula in the Crown Solicitors Regulations 1994 and the Solicitor-General explained that the rates of remuneration are determined on the basis of Sheffield Surveys of Income and Expenditure ie data based on actual market rates. He noted that for the present exercise in relation to costs the need is to relate it to a reasonable fee in the market place rather than a cost related item.

12. **Court of Appeal Rules - Security for Costs (Item 6(a) of Agenda)**

Mr Carruthers said that he had pursued the matter with the Civil Litigation and Tribunals Committee and that he had referred the matter also to the Bar Association which will not have had a chance to look at it, but which has a conference coming up in March.

Justice Doogue said that there is a real perceived need to amend the rule relating to security for costs, and Justice Fisher also recalled a decision where the court had indicated that the distinction between a final and an interlocutory judgment for the purposes of the time for appealing needs to be clarified by a rule change because it is so entrenched in precedent.

Chief Judge Young said that similar problems arise in the District Court jurisdiction.

13. **Interrogatories (Item 7 of Agenda)**

Detailed discussion on this matter was deferred until a later meeting.

14. **Masters - Review of Masters' Decisions (Item 8(a) of Agenda)**

Justice Doogue said that at the Executive Judges' meeting there was opposition to the practice note based on the wording prepared by Mr Carruthers and floated by the Chief Justice. However, those Judges who were prepared to do so adopted a proposal that generally followed the wording of the draft practice note, but reiterated the recommendation that there should be a statutory amendment given that no rule change is possible.

15. **Jurisdiction of District Court to make Tracing Orders under the Administration Act 1969 (General/1/95)**

Justice Doogue explained that in this case a claim under the Law Reform (Testamentary Promises) Act 1949 had been commenced in the High Court but transferred to the District Court. It subsequently transpired that the District Court has no jurisdiction to make a tracing order under s 49 of the Administration Act 1969 with the consequence that that parties had to recommence proceedings in the High Court. Justice Barker brought the matter to the attention of the Department of Justice and the Chief Justice who was consulted suggested the matter be referred to the Committee.

Justice Fisher said that he did not agree with the view of the Law Reform Division that tracing is essentially a probate matter. Rather, he considered it to be a power to grant a remedy which flows directly from the jurisdiction that has been conferred on the District Court. He considered that if the District Court has been given the Family Protection and Testamentary Promises jurisdiction then it should also have jurisdiction to make consequential orders so that its substantive judgments can be implemented.

Mr Fulton noted that the District Court's jurisdiction under the Matrimonial Property Act (both the 1963 and 1975 Acts) is also affected.

The Committee agreed unanimously that the District Court should have the powers under s 49 of the Administration Act to make tracing orders so that it can enforce judgments given in respect of any matters within its jurisdiction.

16. **High Court Amendment Rules 1995**

Mr Iles tabled the High Court Amendment Rules 1995 and explained that these rules have been drafted, consequent upon the Evidence Amendment Act 1994, to provide for the issue of subpoenas in Australia. He said that agreement had been reached with the Australians for the rules to come into force on 1 April 1995 and, with the Cabinet requirement that any rules be made twenty eight days before they are to come into force, there is a tight timetable to be met.

After discussion, it was agreed that members would make their comments available to the Secretary or to Miss Lamb who would in turn advise Mr Tanner of the Parliamentary Counsel Office who was responsible for the drafting. Mr Iles said that there may be some redrafting also as a result of comments from the Department of Justice.

The Chairman provided copies of the draft rules for the Federal Court of Australia, and also copies of the Australian legislation (circulated as Evidence/1/95).

The meeting closed at 12.20 pm.

Secretary

ADDENDUM TO THE MINUTES OF THE MEETING HELD ON 23 FEBRUARY 1995

ACTION REQUIRED BY:

All:

Comments to the Secretary or to Miss Lamb on the High Court Amendment Rules 1995.

Justice Doogue:

R A Batchelor v Tauranga District Council - speak to President of the Court of Appeal.

Master Hansen:

Admiralty Rules.

Mr Carruthers:

Refer back to the Civil Litigation and Tribunals Committee and to the Bar Association and obtain any final comments on exchange of witness briefs.

Discuss, with Mr Fulton, issues relating to the second schedule with a view to putting an amended schedule to the Law Society and Bar Association on costs.

Admiralty Rules.

Mr Williams:

Technical Advisers in the Court of Appeal.