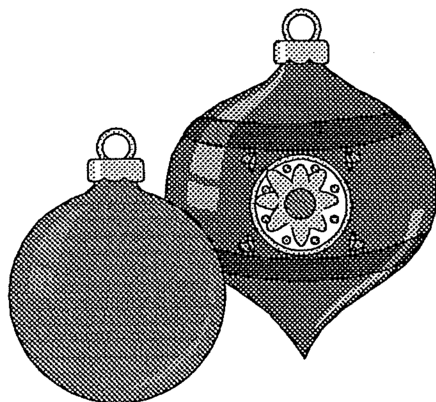

THE RULES COMMITTEE

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1 December 995

Minutes/4/95

CIRCULAR NO 44 OF 1995

Minutes of the Meeting held on Thursday 23 November 1995

1. **Preliminary**

   The meeting called by Agenda/4/95 was held in the Judge's Common Room, High Court, Wellington on Thursday 23 November 1995 commencing at 9.30 am.

2. **In Attendance**

   The Hon Justice Doogue (in the Chair)
   The Hon Justice Fisher
   Mr R F Williams (for the Chief Executive, Department for Courts)
   Mr H Fulton
   Mr W Iles QC CMG (Chief Parliamentary Counsel)

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

   The Chief Justice (the Rt Hon Sir Thomas Eichelbaum GBE)
   The Hon Justice Hansen
   Chief District Court Judge Young
   The Attorney-General (the Hon Paul East MP)
   The Solicitor-General (Mr J J McGrath QC)
   Mr C R Carruthers QC

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

   On the motion of Justice Fisher, seconded by Mr Williams, the minutes of the meeting held on Thursday 11 August 1995 were taken as an accurate record and were confirmed, subject

to the amendment of the reference to Mr R F Williams (for the Secretary for Justice) reading "(for the Chief Executive, Department for Courts)".

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

Matters arising from the minutes were considered under the topics on the Agenda.

6. **Papers Tabled at the Meeting**

By the Secretary:

- Admiralty Rules (Admiralty Rules/1/95).
- Case Management (Directions/6/95).
- Mediation/ADR (Directions/7/95).
- Technical Advisers in the Court of Appeal (Court of Appeal/2/95).

By Mr Iles:

- The High Court Amendment Rules (No 3) 1995 (PCO 221/2).

7. **Admiralty Rules (Admiralty Rules/1/95)**

Justice Doogue mentioned that he had had a report from Brad Giles emanating from the NLAANZ Conference and he flagged this item for discussion at the next meeting.

8. **Appeals (Item 3 of Agenda)**

(a) *R A Batchelor and Others v Tauranga District Council*

Justice Doogue advised that he has both written and spoken to the President of the Court of Appeal and that he is still awaiting a response; given that the impetus for the amendment has come from the President himself Justice Doogue said he did not consider it appropriate to pursue the matter further at this stage.

(b) *Court of Appeal Technical Advisers*

Justice Doogue referred to the paper in support from the Commerce Commission (tabled as Court of Appeal/2/95).

Mr Williams said that he had received a letter from Matthew Palmer from the Ministry of Justice sympathetic to the use of technical advisers in the Court of Appeal. Mr Williams suggested that the Rules Committee recommend to the Department for Courts that the amendment proceed; his understanding was that the policy people from the Department for Courts would abide by the decision of the Committee.

The Committee agreed that the Secretary should write to the Department for Courts mentioning the support from the Ministry of Commerce and the Ministry of Justice for the proposal and suggesting that the amendment now proceed.

9. **Costs (Item 4 of Agenda)**

(a) *Generally*

Mr Fulton said that he would like to see more input from both the profession and the Bar Association.

Justice Fisher recapitulated by saying that the Committee has formed a tentative proposition that costs be presumptively based on two thirds of the actual costs and he referred to a need to receive comments from the profession on that. He referred also to the indicative scale currently under review by Mr Fulton and Mr Carruthers.

Mr Fulton said that the indicative scale was tending more to reflect hourly rates.

Justice Fisher said that there is a need to have a concrete proposition as a basis for inviting comment in order to ensure a more focused response from the profession.

Mr Fulton noted also that the report from Lord Woolf has some excellent material in it.

In that regard, the Committee flagged the Lord Woolf report as a separate topic for discussion once the final report becomes available.

(b) *Disclosure of Contingency Arrangements and Annual Proceeding Fee*

Justice Fisher said that Christopher Chapman had suggested disclosure of any contingency arrangement on the basis that it could influence the approach of the opposition; in support Mr Chapman drew an analogy with current legal aid disclosure. Justice Fisher said that the analogy was not valid and Mr Fulton agreed that that was because of the rule that an order for costs against a legally aided party is not to exceed the amount of that parties contribution to the costs of the proceedings.

Mr Fulton noticed that there are not just contingency fees but other private arrangements that practitioners might wish to make and he considered it unthinkable that they should be required to disclose those.

Justice Doogue agreed that disclosing private arrangements between a legal practitioner and the client is not a matter for the Rules Committee but rather is more appropriately considered by the Ethics Committee of the Law Society.

In respect of the suggestion that the plaintiff pay an annual fee on the anniversary of the issue of the proceeding until setting down, Mr Fulton said that he did not agree that r 426A is judicially emasculated. He agreed that leave is rarely refused.

Justice Doogue said that that was in any event the tenor of the rule, and especially in the introductory phases where the rule applies to litigation commenced before the rule came into force.

Mr Fulton said also that the type of problem that would be addressed by an annual proceeding fee will be addressed more positively by case management.

Mr Williams said that there is also a jurisdictional difficulty in that the basis on which fees are set is to represent a cost recovery for the department rather than a penalty or fine.

The Committee agreed that the Secretary should respond appropriately to Mr Chapman.

10. **Court of Appeal Rules (Item 5 of Agenda)**

(a) *Security for Costs*

Further consideration of this matter was deferred until Mr Carruthers is able to report.

(b) *Interlocutory and Final Orders*

Justice Fisher explained that the majority of the Court of Appeal had agreed with the need to reclassify interlocutory and final orders for appeal purposes, but that the matter was too encrusted with precedent to be addressed other than by amendment. Having looked at the issues, he advised that an amendment is necessary to the Court of Appeal Rules and the District Courts Act but that it is not necessary to change the High Court Rules. In respect of the High Court Rules the issue arises obliquely in r 260 but there is not necessity to change it.

Mr Fulton said that there is no policy reason as to why a different appeal time should run for an interlocutory as opposed to a final judgment and the situation seems to have arisen as a result of following the English precedent. He considered that the present situation gives rise to real traps for the profession.

The Committee referred the matter to Mr Iles to draft an amendment to the Court of Appeal Rules and the District Courts Act. That would enable the Committee to refer the amendment to the Court of Appeal Rules to the Court of Appeal and seek its approval and similarly to refer the amendment to the District Courts Act to the Chief District Court Judge on the basis that if the proposal receives the support of the District Court judges the Committee could recommend an amendment to the Department for Courts and on to the Minister of Justice.

11. **Directions**

(a) *Case Management*

Justice Doogue advised that the material from the United Kingdom was circulated for information only and that it would be relevant in due course once the pilot study has been completed.

Mr Fulton commented that it is difficult to know how many practitioners do support the Bar Association's protestations. In that context he mentioned that if there are to be limitations on discovery it may be valuable to look at Lord Woolf's categories of discoverable documents. The Committee agreed to look at this issue separately at the next meeting under the Agenda item of "Discovery" with a reference to Mr Fulton's memorandum (Directions/6/95, page 4, item 9, r 295).

(b) *Defamation Act 1992*

Justice Doogue said that letters have gone to Mr Iles, the Law Commission, the Department for Courts, the Ministry of Justice and the Legislation Advisory Committee drawing their attention to the policy that procedural rules should be made as rules rather than enacted in the statute.

Mr Fulton added by way of information that in the Family Court jurisdiction there are rules made under a number of Acts relating to Family Court procedure and that Judge Mahoney has set up a committee chaired by Judge Von Dadelszen to try and harmonise them.

Justice Fisher recalled s 51E of the Judicature Act 1908 which gives the Rules Committee power to make rules notwithstanding anything to the contrary in any Act.

Justice Doogue said that there is a need to identify other legislation which contains rules with a view to asking the Ministry of Justice to promote an amendment to the statute.

Mr Fulton recalled that when the Defamation Act was passed rr 188 to 190 were revoked, and the Committee would need to look at it very carefully before writing to the Ministry.

Justice Fisher agreed but said that the rules relating to case management are frozen now for defamation cases and in consequence such actions are now denied the beneficial developments available to other litigation. He said that if the Ministry agreed in principle the rules should be brought back into the High Court Rules.

There was some discussion as to whether the judges could use the High Court Rules to supplement the Act in defamation cases given that the Act does not contain anything not in the present rules, and Justice Doogue suggested that because the Act is specific it could be argued that it defines the position for defamation actions.

The Committee agreed to ascertain the personnel on the Legislatory Advisory Committee and send the individual members a letter from the Rules Committee.

Justice Fisher asked whether there is a general statement encapsulating the policy that rules should be made by delegated legislation rather than enacted in the statute, and Mr Fulton said that that proposition was implicit in ss 51C and 51E of the Judicature Act.

The Committee agreed that the Secretary should draft a letter for the Chairman to send to the Ministry of Justice referring to the statutory provisions and formulating a general policy approach for the future. The letter needs to refer to the fragmentation of different procedures being inefficient for the public, court officers and the profession and can lead to anomalies in the procedure.

12. **High Court Amendment Rules (No 3) 1995**

Mr Iles said that he had amended his draft to provide for the rules to come into effect on 1 March 1996, with a commencement date of 1 February for the minor amendments.

Mr Iles said that he had amended r 2 in respect of Calderbank Letters to provide that an offer be not communicated to the court until the question of costs falls to be decided.

He said that new r 441B now includes the words "where a proceeding is set down for trial after the commencement of this rule ...". In addition the expression "written statement" is now expressed in the singular.

Rule 441G(1) contains a new (a) to provide for oral evidence in response to evidence adduced by another party to the proceeding. In addition, r 441G(2)(e) refers to parties who are represented at the hearing.

In r 441J(e) includes the words "before it is given in evidence".

Rule 4 is new and provides for a settlement conference to be called for by the judge if the judge thinks fit.

The Committee agreed that all of these amendments incorporated what was envisaged from the last meeting and that concurrences could be prepared in respect of draft no PCO 221/2.

13. **District Court Rules (Item 7 of Agenda)**

This item was deferred until the Chief District Court Judge is able to be present.

14. **Interrogatories (Item 8 of Agenda)**

The Committee addressed the paper prepared by Brigit Laidler.

Mr Fulton noted the purposes listed in 1.2 and said that a primary purpose is to elicit facts which may not necessarily be admissions.

In respect of the notice procedure, Mr Fulton said that he does not hear complaints about it in practice, although he acknowledged that the procedure is not being over used. He noted in this context that our rules are framed so that a party cannot interrogate by notice a second time and the leave of the court is needed for further interrogatories which has a controlling effect. He said that he did not know whether applications are made to the court to question the delivery of interrogatories or to restrict them.

Justice Doogue suggested that the Committee write to all of the Masters saying that it is considering the topic of interrogatories and would be grateful for any comments on the frequency of applications relating to their use, and whether there are any problems arising from that.

Justice Doogue was interested to note the provision in Ontario (page 2 of the Report) of a right analogous to non party discovery in the examination of non parties.

Justice Fisher questioned the need for such a provision. He noted that at present a party would subpoena the witness at trial and then take the risk of what the evidence will be; on the other hand, as a result of the answers to the interrogatories, a party may decide not to call a witness.

Mr Fulton suggested that a party may need other evidence in preparation for the trial or to decide whether or not to issue the proceedings.

After discussion, the Committee agreed that Mr Fulton should ask the Bar Association and the New Zealand Law Society if they see any need to provide for interrogatories in respect of non parties.

The Committee addressed the points for consideration on page four of the paper and Justice Fisher noted that the scheme is self policing in that a notice will generally be complied with voluntarily and if not an order can be obtained from the court.

Mr Fulton noted that if a party wishes to obtain evidence from a person after the proceedings have been commenced there is provision for an order for the examination of witnesses or for letters of request (r 369).

After discussion, the Committee could see no need to amend any of the present rules as a result of the points for consideration on page four of the paper.

The Committee then considered court control of the questioning process under paragraph 2.2.3 of the paper. In this context Justice Fisher said that interrogatories can be used very effectively to demonstrate the dishonesty of the other party. He gave an example of a man who had deliberately sunk his own boat in order to claim the insurance. The insurance company knew (and the man did not) that the keys had been left on the boat and a series of interrogatories were asked which elicited answers incompatible with the evidence. The insurance company were able to use the answers to the interrogatories to prove its case.

Overall, the Committee noted that the control of the court is already there in the rules as framed because if a party does not respond to a notice the interrogatories would need to be issued with the leave of the court.

In respect of part three Answers, Justice Fisher noted the requirement in r 283(3) for the question to be repeated when the answer is given.

On the related issue of the amount of documentation on the court file that needs to be before the judge at the hearing, Mr Williams agreed to investigate the administrative problems of addressing that issue. In that context Mr Williams noted that computerisation may make the problem of storage more manageable. On the issue of computerisation Justice Doogue suggested that Mr Williams might gain some benefit from making enquiries about computerisation in the Australian jurisdictions.

Justice Fisher noted that the New Zealand rules presently provide for a party to put in only part of the answers to the interrogatories as evidence and said that he could see no reason in principle why the practice in respect of interrogatories should differ from that in respect of subpoenaing a witness to give oral evidence.

Nevertheless, Mr Fulton noted that a party is not barred from calling contradictory evidence and in this context he drew the attention of the Committee to the commentary in Sim's Court Practice to r 290 and following.

With reference to the requirements for answers in paragraph 3.2.1 on page 10 of the paper, Mr Fulton asked whether the time for answering interrogatories should be extended given that the rules have recently been amended in respect of the time for responding to a notice for discovery. After discussion, the Committee agreed that there was no need to make any amendment to the time limits, but that that would be subject to any comments that might be made by the Masters.

In respect of page 11 of the paper and the points for consideration in relation to verification, Justice Fisher noted that it is rare to see unverified lists these days but that there is no harm in leaving the option for answers without verification.

In respect of objections in paragraph 3.2.3 on page 12 of the paper, the Committee noted the apparent conflict between r 284(1) which sets out the grounds on which a party may object to answer any interrogatory and limits them by use of the words "but no other" and the cases referred to in McGechan on Procedure paragraph (h) (r) 284.04. The matter was referred to Mr Iles to add a new subrule (e) to the effect that interrogatories may also be objected to on any other grounds recognised in law.

In respect of further interrogatories in part four of the paper Justice Fisher noted that unless a party applies under r 282 and obtains the leave of the court, it is voluntary to answer second and subsequent notices. He noted that it appears to be implicit in r 278 that a notice can be served only once. The Committee therefore referred the matter to Mr Iles to draft an amendment to rr 278(1) by referring in the third line to a multiplicity of notices rather than in the singular, and to amend r 279 so it applies only to the first notice under r 278,

leaving a person who is served any later notice to apply to the court under r 282 in that there is no voluntary compliance with the later notice.

Mr Iles queried whether a person answering interrogatories should be put in the difficult position of deciding whether or not to, given that the answering of the interrogatories may be voluntary and given also that the person may find at the hearing that the answers have been very much to their detriment.

Justice Fisher considered it appropriate to put to people in that dilemma.

Mr Iles said that if a party is asked for a second set of interrogatories, and to answer them is voluntary, a failure to answer does not necessarily give the game away because the other side cannot necessarily infer that answering the interrogatories will destroy that party's case.

The Committee then addressed insufficient answers under paragraph 4.2.2 of the paper and, after discussion, decided that r 287 adequately addresses the position.

In respect of paragraph 4.2.3 on sanctions, after discussion the Committee considered that the New Zealand rules adequately cover the position.

In respect of oral examination in part five of the paper, Justice Fisher said that he would not like to see that introduced in New Zealand after the United States experience.

Justice Doogue noted that the power is presently there in r 287(b) in the case of an insufficient answer which is in itself a form of sanction.

The Committee expressed their gratitude to Bridget Laidlar for her work in preparing such a thorough discussion paper and asked the Secretary to convey their thanks to her.

15. Masters

(a) *Review of Masters' Decisions*

Justice Doogue advised that he had signed a letter to the Minister of Justice suggesting an amendment to the Act to regulate the jurisdiction of Masters in respect of review proceedings. He explained that after a discussion with Mr Iles it was decided that the appropriate course to adopt, instead of endeavouring to promote a particular statutory amendment, was to amend the statute to enable the Rules Committee to spell out the nature of the review.

Mr Iles said that the Statutes Amendment Bill will be closing off on 7 December and that he hoped to have an amendment this year.

16. **Pleadings (Item 10 of Agenda)**

(a) *Certificate by Lawyer responsible for Document*

Justice Doogue advised that this suggestion came from a judge in Western Australia. It provides in effect that a practitioner signing a document will be certifying that the document is not being presented for an improper purpose, there are legal grounds for any claim, the allegations have some evidentiary support and the contentions are reasonably based. Sanctions would include striking out, reprimand, reference to a disciplinary authority or an order for costs against the practitioner personally.

Justice Fisher said that there would be vociferous opposition from the profession.

The Committee agreed that Mr Fulton should refer the matter to the Law Society and the Bar Association for comment.

17. **Probate (Item 11 of Agenda)**

(a) *Grant of Probate or Letters of Administration to an Attorney*

This suggestion from Mr Justice Barker is that the recipient of an enduring power of attorney should be able to apply for probate on behalf of an executor who does not have full mental capacity.

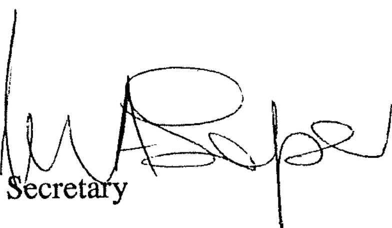
Justice Fisher said that the proposal seems a sensible one.

Mr Fulton agreed but queried whether it needs any statutory amendment to the Administration Act or the Protection of Personal and Property Rights Act.

After discussion, the Committee agreed to refer the matter to Mr Iles to look at whether any statutory amendment is required. In this context, Mr Iles noted also that any promulgation of an enabling rule would need to confine it to incapacity specially affecting performance of duty.

The meeting closed at 1.25 pm.

The next meeting will be held on Thursday 29 February 1996



Secretary

MAS:91902

ADDENDUM TO THE MINUTES OF THE MEETING

HELD ON THURSDAY 23 NOVEMBER 1995

ACTION REQUIRED BY:

Mr Williams:

Administration of Court Files
Make enquiries about computerisation in the Australian jurisdictions.

Mr Fulton:

Pleadings- Certificate by Lawyer responsible for Document
Refer the matter to the Law Society and the Bar Association for comment.

Interrogatories
Ask the Bar Association and the New Zealand Law Society if they see any need to provide for interrogatories in respect of non parties.

Mr Carruthers:

Security for Costs
Mr Carruthers to report to the Committee.

Miss Soper:

Court of Appeal Technical Advisers
Write to the Department for Courts mentioning the support from the Ministry of Commerce and the Ministry of Justice for the proposal and suggesting that the amendment now proceed.

Disclosure of Contingency Arrangements and Annual Proceeding Fee
Respond to Mr Chapman.

Defamation Act 1992
Draft a letter for the Chairman to send to the Ministry of Justice referring to the statutory provisions and formulating a general policy approach for the future.

Interrogatories
Convey the Committee's thanks to Brigit Laidler for her work in preparing such a thorough discussion paper.

Masters
Write to all of the Masters saying that it is considering the topic of interrogatories and would be grateful for any comments on the frequency of applications relating to their use, and whether there are any problems arising from that.