THE RULES COMMITTEE

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7 December 1999

Minutes/4/99

CIRCULAR NO 57 OF 1999

Minutes of the Meeting held on Thursday 25 November 1999

The meeting called by Agenda/4/99 was held in the Judge's Common Room, High Court, Auckland, on Thursday 25 November 1999 commencing at 9.30am.

1. **Preliminary**

In attendance

The Chief Justice (The Rt Hon Dame Sian Elias GNZM)
The Hon Justice Doogue (in the Chair)
The Hon Justice Hansen
The Hon Justice Fisher
The Hon Justice Chambers
Judge Doogue
Mr K McCarron (for the Chief Executive, Department for Courts)
Mr C F Finlayson
Mr G E Tanner (Chief Parliamentary Counsel)

(a) *Apologies for absence*

Chief District Court Judge Young
The Attorney-General (the Rt Hon Sir Douglas Graham KNZM)
The Solicitor-General (Mr J J McGrath QC)
Mr T C Weston QC

(c) *Confirmation of Minutes*

On the motion of Justice Chambers, seconded by Mr Finlayson, the minutes of the meeting held on Thursday 2 September 1999 were taken as an accurate record and were confirmed subject to the first paragraph on page 13 being inserted after the seventh paragraph on page 10.

(c) *Matters arising from the Minutes*

Any matters arising from the minutes were dealt with under the matters listed in the agenda.

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Papers tabled at the meeting

By Justice Fisher

- Possible review of Rules Committee

By Mr Tanner

- The High Court Amendment Rules (No 4) 1999 (PCO3053X/4 - Arbitration)

2. **Matters referred to Parliamentary Counsel for drafting**

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

Mr Tanner tabled the High Court Amendment Rules (4) 1999 (PCO 3053X/4) which insert a new Part 17 into the High Court Rules being the rules made under the Arbitration Act 1996.

Justice Chambers said that he, Richard Clark, and Mr Tanner had worked on these rules together. He noted that they have used the term "arbitral tribunal" rather than "arbitrator" to follow the terminology used in the Arbitration Act. He also said that they have changed r 889: originally they had picked up the equivalent rule in Part X and then made exceptions; instead they have reproduced the rules in Part X that apply.

Mr Tanner said that they have inserted a commencement date of 1 February 2000 and queried whether there should be a transitional provision such that the new rules apply to appeals against awards made after the commencement of the rules or whether they should apply to existing awards.

Justice Chambers considered that the new rules could apply to existing awards but queried whether an application already lodged should have to switch to this regime.

By way of example, Mr Tanner queried whether it is desirable for orders to be made at a directions conference relating to the compilation of the record and transcription of evidence when proceedings are already underway.

WR apps have not yet been filed

Justice Fisher said that he saw no difficulties in applying the rules to awards already made but said that it would be difficult to change to the new regime once an appeal has been filed.

Justice Chambers suggested that the parties may agree otherwise and Justice Fisher said that it is open to the Master or Judge to give directions.

Justice Doogue suggested, and the Committee agreed, that there be a brief transitional clause along the lines, "subject to any direction of the court these

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rules shall not apply to any application or appeal commenced prior to the commencement of these rules."

Mr Tanner said that the latest draft picks up the points made by Justice Doogue and Ms France. He said that r 885(5) is new and enables the court to give directions before the hearing without holding a directions conference.

Mr Tanner then referred to r 886(1) and noted that the consequence of a direction will be that the plaintiff has to complete the record within 28 days of the directions conference. He asked whether it will always be the case that r 885(4)(a) will be the rule under which the court gives a direction.

Justice Chambers noted that there will frequently be no order made at all; there will be no need for it because of the restricted nature of appeals under the new Arbitration Act.

Justice Doogue said that the court might be making a direction under rule 885(5) as well as r 885(4)(a).

Mr Tanner said that if the court gives directions only under r 885(4)(a) then there is no need to have r 886(1).

Justice Chambers said that including in r 886 a reference to r 885 would bring in a number of matters that should not be included as part of the ambit of r 886. He suggested that r 886 should apply where the court gives a direction under r 885(4)(a) whether at a Directions Conference or not.

He then noted that there would need to be a consequential change to r 886(2) to provide that the record must be served within 28 days of the direction being given, seeing as how it may not be given at a Directions Conference. He noted that there is another reference to within 28 days of the directions conference in r 887(3).

Mr Tanner said that in the draft rules the originating application **may** be in form 109; he assumed that it was not the intention to give the parties a discretion in the form that is used. The Committee agreed that the direction should be mandatory rather than directory and Justice Doogue pointed out that if need be the form can be adapted.

The Committee agreed to make the commencement date 1 March 2000 so as to give the profession a greater lead time to find out about the new rules.

Mr Tanner — The Committee agreed that the next draft could be circulated for concurrences.

(b) *Judgment*

Justice Doogue referred to Masters/8/99.

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Mr Tanner referred to the High Court Amendment Rules (No. 5) 1999 (PCO3390/3) and said that r 2 amends r 61C of the High Court Rules to provide that notice of every application for leave to appeal must be filed and served within seven days after the decision of the Judge on the application to review the order or the decision of the Master has been given.

Justice Chambers noted in this context that s 4 of the Judicature Amendment Act 1998 has not yet been brought into force.

Justice Doogue noted that Justice Chambers is referring to appeals and review of Masters while r 2 of the High Court Amendment Rules (No. 5) 1999 is a technical point which inserts a time limit for appealing from the decision of the Judge on review or appeal from a Master.

Mr Tanner noted that r 3 preserves the existing position for appeals from a decision given before the coming into force of r 2.

Justice Chambers noted that no provision is made under r 264, but Justice Doogue said that the general right of appeal under the Judicature Act 1908 applies in that case.

Mr Tanner said that r 4 has been amended following on from comments made by Justice Chambers to the effect that the requirement for parties to be given the opportunity to be present or to hear the judgment does not apply where the application is *ex parte*.

Mr Tanner referred also to r 5 which amends r 541(3) by omitting the words "deemed to have been" given. He said that he has not changed the rule relating to the power of the court to order that the judgment be dated at an earlier or later date and he noted the view of Justice Chambers that it was probably unnecessary. Mr Tanner said that he had done some research on the cases but could find no apparent reason why the court would want to ante-date a judgment. He wondered if it had something to do with the death of one of the parties between the date of the hearing and the date of the judgment and said that in New Zealand that would be picked up by our Law Reform Act 1936 which provides for the survival of causes of action after death. He noted that the new English rules do not carry the provision on, and he noted also that the provision came into the High Court Rules following an amendment in 1965 to the English rules. He asked whether it is ever exercised.

Justice Fisher said that a Judge may want to postpone the date on which a judgment is sealed but would never want to ante-date the date on which the judgment itself is given. Justice Fisher said that there is constant confusion between the reasons for the decision and the date the judgment is sealed which is when it comes into force.

Justice Chambers said it should be clear that the written judgment under r 540 should be given when it is signed and dated by the Judge. Under r 541(3),

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however, Justice Chambers suggested that it provide the date of sealing be the date on which it is in fact sealed but that should not prevent the Judge from directing the judgment may not be sealed until a specific date.

Justice Fisher suggested that there now needs to be a different name for the Judge's reasons as distinct from the sealed court order.

Justice Hanson said that he did not think the amendment to r 540 to tidy up the lack of a time period for appeal should be held up by considerations relating to the giving of reasons and the sealing of the judgment.

Justice Fisher

Justice Fisher suggested, and the Committee agreed, that the problems relating to 540 on the reasons for the decision as opposed to the sealing of the judgment should go on the agenda, and that a judge's clerk should look at the issue.

The Committee agreed that the existing amendment to r 540 to provide for a time limit should proceed.

Mr Tanner said that new r 542 picks up the point that the sealed copy of the judgment should be served on the parties. He went on to mention r 7 which is a minor technical amendment to a couple of the forms, picking up the points made by George Mason (Winding Up/1/99).

Justice Chambers said that the explanatory note in relation to r 540 could also usefully refer to the fact that a written judgment is now given when it is dated by the Judge.

Mr Tanner

The Committee agreed that these rules should also come into force on 1 March 2000.

(c) *Masters - voidable transaction procedures*

Justice Chambers referred to Masters/9/99 and the draft High Court Amendment Rules (No. 3) 1999 (PCO3386/4). He said that he had shown this draft to the Auckland Masters, both of whom were happy with it.

Mr Tanner said that r 4 inserts para (db) after r 458D(1)(da). He suggested that it might actually go in after r 458D(1)(a)(v) and (vi) so as to avoid a separate paragraph also containing references to the Companies Acts.

Justice Chambers referred to r 7 and pointed out that the court has power to direct the parties to file a statement of claim and a statement of defence if r 458D(1)(db) applies to the application. He said that if the paragraph drafted as r 458D(1)(db) is inserted within r 458D(1)(a)(v) and (vi) then there are problems with r 7. It is only under ss 268, 269 and 273 of the Companies Act 1955 and ss 294, 295 and 299 of the Companies Act 1993 that the court can order statements of claim and statements of defence. It cannot order statements of claim and statements of defence in the other cases mentioned already in

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r 458D(1)(a)(v) and (vi) namely ss 108, 209R and 264 of the Companies Act 1955 and ss 236 and 290 of the Companies Act 1993.

Mr Tanner said that he was concerned that people might be confused in that they would see references to the Companies Acts in r 458D(1)(a)(v) and (vi) and think that they had found them all when there will be others over the page.

Justice Doogue said he thought it should still be possible to put the Companies Acts references together.

The Committee agreed to put all the statutory references to the Companies Act together under r 458D(1)(a)(v) and (vi) and amend r 7 of the High Court Amendment Rules (No. 3) 1999.

Mr Tanner said that the procedure would apply to orders under s 295 of the Companies Act 1993. He noted that the procedure operates only where the transaction or charge is set aside and he queried whether there needs to be an originating application in that case.

Justice Chambers said that there are two different ways the application to have a voidable transaction set aside can come before the court. If the liquidator wishes to have a transaction that is voidable set aside the liquidator can file a notice. Alternatively, a person affected can apply to the court for an order that the transaction not be set aside. A person affected who wants further relief must apply for it under s 295. If the recipient moves to say the order should not be set aside that will be heard at the same time as the application under s 295. If the recipient does nothing and the liquidator applies under s 295 that application ought to be under the same number as the notice.

Mr Tanner said that what this procedure means at the moment is that the application by the liquidator under s 295 will potentially trigger the requirement to file a statement of claim and statement of defence.

Justice Chambers said that his concern is that the application under s 295 will need an originating application. He said that if the rules are now providing that notices have to be filed, there will be a court file opened even if the recipient does nothing. It follows that if the liquidator then wants to make an application under s 295 it will be in the context of an existing file and not an originating application.

Justice Doogue said that the liquidators application will be originating because all the court will have is a notice lodged in court under r 10.

Mr Tanner said that what these rules do is apply the same procedure to a creditor's application and to a liquidator's application under s 295.

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Justice Doogue said that the masters want a common practice as to how these applications are made so that there are no difficulties over some being filed by originating application and some not.

Justice Chambers said that the scheme would be that there is a notice by the liquidator which is filed, an originating application by the recipient seeking not to have the voidable transactions set aside and an originating application by the liquidator for orders under s 295 of the Companies Act 1993. He said that if these are all filed under the same number the court does not need to have an alternative procedure.

Mr Tanner noted that s 299 is affected also because that too is a liquidator's application.

Justice Doogue noted that the originating application will refer to the liquidator's notice so the registry needs to give it the same number.

Justice Chambers queried whether there is any need for a transitional provision.

Justice Doogue said he thought not because there is no other procedure but Justice Chambers suggested the rules should apply to notices given after the commencement date.

Justice Doogue said that this is only a procedural issue not a substantive one in that the new rules just require an application to be in a particular form from a given date. He said that no court is going to hold an application invalid because the wrong form has been used.

Justice Chambers said that it is more than just the nature of the form because the rules potentially alter the registry at which the application is filed.

Justice Chambers & Mr Tanner

The Committee agreed that Justice Chambers and Mr Tanner should confer about about whether a transitional provision is necessary.

The Committee agreeed that these rules should commence on 1 March 2000.

The Committee agreed that the next draft be circulated for concurrences.

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

Justice Doogue noted that this item awaits action when necessary.

(e) *Time within which an application to appeal should be made*

Justice Doogue noted that this point has been picked up by the draft High Court Amendment Rules (No. 5) 1999 in item 2(b) above.

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3. **Admiralty Rules**

(a) *Generally*

Justice Hansen said that he raised this matter again with the Registrar at Christchurch who said that his concerns were not occasioning any further difficulties.

Mr Finlayson said that he mentioned it to Mr Carruthers. His view was that there were no real problems with rules as drafted.

Secretary — The Committee agreed that the matter could come off the agenda.

(b) *Joint Committee with Australia*

Mr Finlayson said that the Federal Court Rules Committee has appointed a subcommittee chaired by Justice Cooper from Queensland. They are looking to New Zealand involvement to achieve standardisation.

Justice Fisher said that he hesitates only because, while standardisation is a worthy aim, there is a resources issue relating to time and travel costs.

Justice Doogue said that a lot of communication can be done by other means including e-mail.

Mr Finlayson noted that John Gresson and Mark Perkins are also involved in the Maritime Law Association.

Justice Fisher said that the Rules Committee needs access to admiralty expertise and mentioned in that context also Tom Broadmore.

Mr Finlayson — Mr Finlayson agreed to establish communication channels with Australia and to explore who was available to provide input from New Zealand.

Justice Fisher — Justice Fisher agreed to write to Justice Black from the Federal Court of New South Wales to assure him of our interest in this matter.

Mr Finlayson agreed to get an update from Tom Broadmore and report to Justice Fisher.

4. **Appeals**

(a) *Appeals for the District Court and the High Court;* and

(b) *Interest on judgment from the District Court*

Justice Chambers & Judge Doogue — Justice Chambers asked that this matter be deferred. The Committee noted that that Justice Chambers and Judge Doogue are to follow-up on these items.

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5. **Costs**

(a) *Costs against barristers and solicitors*

Secretary

The Committee agreed that this item be deferred for a year to see how the new costs rules "bed in", acknowledging that there will need to be some amendment to the costs rules and they can all be addressed together.

Mr Finlayson said that the case of *Harley v McDonald* (Court of Appeal, CA238/98, 11 August 1999) is going to the Privy Council so there is some reason to defer consideration of the issue for that reason as well.

(b) *"Unless orders" on interlocutory costs awards*

Justice Doogue said that there should perhaps be something in the rules to give effect to that concept, but that it too could be considered in a year's time along with any other amendments to the costs rules.

Justice Fisher alerted the Committee to the need to have a structure for reviewing the daily rates each year, and also to have a general review as to how the regime is operating.

The Committee agreed to reconsider the matter early next year so that something is in place for the end of the year.

6. **District Courts Rules**

Secretary

(a) *Charging order against property*

Justice Doogue referred also to District Court Rules/2/99 and said that he thought these points are better picked up in the context of a general review of the District Court Rules.

Judge Doogue said that one of the problems is picking up the costs along the way such as obtaining charging orders and getting those built into the final amount for which the charging order is issued. He referred to the equivalent rule in the High Court Rules, r 592, and said that he was not sure how those figures were calculated. He queried whether there is any judicial intervention or whether they are just scheduled amounts in the rules.

Justice Hansen said that the solicitor concerned would file a claim for expenses with the Registrar which would also cover legal costs, and interest and the like. He noted that interest runs from the day of satisfaction in terms of the order that would be made on the judgment and is a matter that can be approved by the Registrar.

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Justice Hansen queried whether there is an equivalent to r 592 in the District Court Rules, and Judge Doogue said that the District Court has no power to order sale.

Justice Chambers queried where there was a jurisdictional issue in the District Courts Act 1947 and Justice Doogue noted that it is largely an historical accident that the District Court has no power to deal with land.

Mr McCarron noted in this context the new powers for the District Court under the Summary Proceedings Act 1957 for the enforcement of fines and also the charging order regime under the District Courts Act.

Justice Chambers said that if there is specific statutory provision for charging orders but no equivalent provision for writs of sale there may be a jurisdictional problem.

Justice Doogue said now that the Rules Committee has responsibility for the District Court Rules it needs to address the problem that the District Court Rules have not been amended for many years and are urgently in need of review.

Judge Doogue said that there had been a meeting in the previous week of the Civil Committee of the District Court which expressed the view that there should be a systematic review of the rules. The Committee acknowledged however that that would take some time and that in the meantime specific rules should be the subject of specific amendments. In that context he mentioned including in the District Rules the changes made to the High Court Rules such as bringing in the summary judgment procedure.

Judge Doogue

The Committee agreed that District Court Rules/1/99 and District Court Rules/2/99 be referred to the Civil Committee of the District Court, and Judge Doogue agreed to arrange that.

7. **Evidence**

(a) *Expert witnesses*

Justice Fisher referred to Matthew King's helpful background paper and said that what it now needs is for a member of the Committee to lead the project and develop a draft set of principles and specific proposals.

Justice Doogue said that the Federal Court of Australia Rules do provide a helpful draft. He noted that the Federal Court Judges are all very positive about those rules. It has even reached the point where one expert witness may question the other expert witness and have a dialogue at the end of which they reach some agreement.

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Justice Hansen suggested that the representatives of the profession on the Committee might see if the profession has any objection to the Australian rules or have any specific additions they would want to see included.

Mr Weston or Mr Finlayson

Justice Fisher suggested that the Committee invite one of the two practitioner members to take responsibility for the project, starting with the Australian position. Justice Doogue said that some of the State courts have passed similar rules. He noted also that the issue has been addressed in the Woolf Report. He referred also to the Law Commission's paper on the code of evidence.

8. **Execution**

(a) *Charging orders - writs of sale*

Mr Finlayson

Mr Finlayson agreed to address this issue with Mr Chapman to see how common the problem is, and to also mention it to the New Zealand Law Society.

9. **General**

(a) *Servicing of the Rules Committee*

Justice Doogue referred to General/5/99 and the minutes of the High Court Human Resources and Administration Consultative Committee meeting held on 8 October. He noted that the Committee supports in principle the Rules Committee having a Judge's clerk available to it. The minutes also record that the geographical location of the clerk is not at issue although there is a preference to be co-located with the Chair of the Rules Committee. The minutes further record that Peter Batchelor will work with Justice Goddard to identify the resources.

Justice Fisher

Justice Fisher agreed to pursue the matter with Justice Goddard. He also expressed on behalf of the Committee enthusiastic support that a clerk be allocated to the Committee whose time can be shared with the District Court aspect of the Committee's work. He suggested the clerk be in Auckland where there is more physical space and noted that funding needs to be confirmed as soon as possible so that the Committee can move on with its work.

Mr McCarron

Mr McCarron agreed to follow-up with Peter Batchelor (who works in the Department's Commercial Affairs Division) whether the hiring of an extra clerk for the Rules Committee can proceed now independently from extra clerks for the Judges.

Justice Hansen mentioned that the High Court Human Resources and the Administration Consultative Committee had being going to meet in November but that meeting was cancelled and he had not heard whether there was another meeting scheduled for December.

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Justice Doogue & Secretary

Justice Doogue suggested, and the Committee agreed, that he should write to the chief executive of the Department for Courts saying that the Committee is grateful in principle for the indications that a clerk can be appointed to service the Rules Committee. The letter needs to go on and ask that a Judge's clerk be appointed immediately, noting that there is a particular need now that the District Court Rules Committee is amalgamated with the High Court Rules Committee to bring the District Court Rules up to date. The letter should also express concern that the appointment of a clerk to support the Rules Committee should not be sidetracked while awaiting a review of judicial support services.

(b) *Copies of rules without annotations*

Mr Tanner said that there were two options available. One was a compilation of the rules produced by GP Print. He said that this is the unofficial version and it does not list recent amendments. He considered it not worth distributing for that reason.

Mr Tanner said that an official compilation of the Judicature Act and the High Court Rules is due to come out shortly. He said that the Parliamentary Counsel Office decided to defer publication of it so as to include the costs and insolvency rules. He queried whether it is appropriate to defer the compilation again to include the amendments agreed to in relation to arbitration and voidable transactions and other amendments.

Justice Fisher said that ideally there should be a loose leaf update.

Mr Tanner said that the official version is bound because that is the standard format that goes into the volumes of reprints.

Mr Tanner said that if the latest amendments were included in the compilation it could come out probably late January.

On a related matter, Mr Tanner tabled the Defamation Act 1992 and the Animal Welfare Export Certificate Regulations 1999 as examples of the new form of statutes and regulations. He said that the new form goes back to work and recommendations of the Law Commission. Mr Tanner said that the Law Commission had three initiatives to make legislation more understandable and accessible. The other two comprise recommendations on a drafting manual on structure and style and the new Interpretation Act 1999.

There was a working group from the Parliamentary Counsel Office, the Law Commission and the Office of the Clerk established to implement the recommendations on the form of statutes and regulations. The working group sent out a survey to the judiciary, the universities, the profession and librarians seeking comments on the Law Commission's recommendations on the font in particular. He said there was an overwhelming response in favour of Times New Roman. He said that as from 1 January 2000, acts, bills, regulations, notices and orders in council will all be printed in the new type face. He said that definitions

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will no longer have inverted commas around them but, instead, will be printed in bold. There will be a greater use of lower case rather than capitals as an aid to readability and, therefore, intelligibility. Mr Tanner noted also that the date of commencement will appear at the front of the statute in order to avoid confusion. He said the changes bring New Zealand more into line with Australia and other countries overall with a view to making legislation more accessible and understandable.

(c) *Butterworths' submissions to the Rules Committee*

Justice Doogue

Justice Doogue noted that items 1 and 2 are suggestions that the summary judgment procedure and the Calderbank letters procedure be the same in both the High and District Court Rules. He suggested that these points be taken up when the District Court Rules are reviewed.

He said that items 3 and 4, and 6 to 9 all identify drafting matters that could be referred to the Parliamentary Counsel Office.

Mr Tanner said that the Interpretation Act 1999 addresses these issues and that unless a rule required specific updating the practice would be to rely on the Interpretation Act.

Justice Fisher

Justice Doogue then referred to point 3 which is that the dollar values under Rule 549 have not been updated since 1987. The rule contains a reference to tools of trade not exceeding $500 and personal effects not exceeding $2,000. The Committee agreed to refer the matter to Justice Fisher.

Secretary

The Committee agreed that the Secretary should reply explaining that the District Court Rules are in the course of review and his points will be addressed in the course of that. That will cover the point about the summary judgment procedure in particular. The Interpretation Act 1999 covers most of the other points, but the rules will be updated in due course as other amendments are made.

(d) *Form of agenda now that District Courts Rules within the purview of the Committee*

After discussion, the Committee formed the preliminary view that it was probably easier to consider both District and High Court Rules together under each subject heading.

Secretary

Justice Chambers said that the District Court Subcommittee and any High Court Subcommittee could both feed into the same topic.

(e) *Possible review of the Rules Committee*

recent inclusion of

Justice Fisher tabled his paper entitled "Possible Review of Rules Committee" and said that he was motivated by the ~~need to update~~ the District Court Rules as well as a need to record what it is that the Rules Committee does. He referred

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to the topics that need to be addressed and said that some of it is simply a matter of recording what the Rules Committee is and what it does. He suggested that a handbook should record the processes of the Committee. He suggested that the Committee might look to the Law Society and the Bar Association for ideas on how it might operate in future. He mentioned also the rule-making process and suggested it would be desirable to record the procedures involved once concurrences have been obtained and the rules go from the Parliamentary Counsel Office, to Cabinet and to the Governor-General.

Justice Doogue noted that it may be more convenient to have matters for the agenda come to the Committee with an issues paper pre-prepared.

Justice Fisher suggested that a Committee member might take responsibility and lead the discussion.

Alternatively Justice Doogue suggested that a clerk can prepare an issues paper.

Justice Doogue said that as a matter of practice and policy the Committee should consider whether the District Court Rules and the High Court Rules should be merged into the one set of rules. That would give a common part with common rules for both courts and separate parts where specific rules were needed for each jurisdiction. Justice Doogue further noted that the existing agenda is structured alphabetically around the "catch lines" for the Procedure Reports of New Zealand.

Justice Doogue said that it has been traditional to have just four meetings a year with subcommittees operating in between. He thought it might be difficult to have more meetings than that each year because of members' commitments.

Justice Doogue further noted that he considered the Committee is overloaded in favour of the High Court as opposed to the District Court and he noted that all the problems are in the District Court at the moment. He said that when he started as Chairman he embarked on the exercise of reviewing all of the High Court Rules because they had been in place for some six years and that the Committee has now got as far as interlocutory applications. He said that the volume of work for the Committee has not enabled it to get through all of the rules in the last eight years. He said that that highlights the need to have High Court and District Court subcommittees in particular. He suggested that subcommittees could pick up a subject once there is a paper from the Judge's clerk. He said that on some subjects, such as admiralty, it would probably be useful to have a standing committee. Alternatively for something like admiralty it may be sufficient to have someone keep in touch with the Maritime Law Association. He noted that the Committee has had outside persons on subcommittees from time to time and that has worked well in the past.

Justice Hansen said that he agreed with the points made by Justice Doogue and said that it will become essential to work through subcommittees.

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The Chief Justice asked what consultation is routinely undertaken.

Justice Doogue said that there is consultation with interest groups such as the Commerce Commission and the Arbitrators Institute. The profession is consulted through the representatives of the profession on the Committee. Justice Doogue noted that in respect of costs, consultation was very broad and copies of the proposals were circulated to some 70 individuals and bodies including the Consumers Institute.

Mr Finlayson said that Tom Weston reports to the Bar Association and that he reports to the New Zealand Law Society. Mr Finlayson went on to say that after the last meeting of the Committee he was invited to attend the Civil Litigation and Tribunals Committee meeting and it was agreed that following each meeting of the Rules Committee he will provide the Civil Litigation and Tribunals Committee with a report and to act as a conduit between it and the Rules Committee.

The Chief Justice suggested that the Committee might publish a draft in "Lawtalk" and Justice Hansen said that in respect of the companies winding up rules there was much broader consultation than there might be with other more technical matters.

Justice Chambers said that the Masters have been consulted about voidable transaction procedures at three different stages of the Committee's work.

Justice Fisher noted that the Committee does contrast with a body like the Law Commission which has a formal public consultation process. He agreed that it can be appropriate to have a general broadcast rather than specifically target interest groups.

The Chief Justice noted that arbitration provides an example of an issue that can be of interest to more than just the legal profession.

Justice Doogue referred to the problem of the District Courts Rules and said that it would be asking too much of Judge Doogue's subcommittee to take responsibility for that. So far as the agenda is concerned, Justice Doogue said that the Committee needs to decide whether to address the District Court Rules at the same time as the High Court Rules so that the agenda items stay in their alphabetical headings, or whether it would be better to have the agenda in two parts and deal with the High Court Rules and the District Court Rules separately.

Justice Fisher said that he had in mind a District Court Subcommittee which would have two members from the Rules Committee on it and some other members. He envisaged it meeting three-monthly, six weeks after Rules Committee meetings. He said that proposals could then come forward. For this to work he said that there would need to be another District Court Judge, and that the Chief District Court Judge needs to attend by an alternate.

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Justice Doogue recalled an earlier exercise when Sir Ian Barker and Judge Margaret Lee last brought the District Court Rules into line with the High Court Rules and he said that the exercise was targeted so that people were assigned to the task and taken off judicial duties until the task was done.

Secretary,Mr Tanner & Mr McCarron

Justice Fisher also said it would be helpful if the Secretary, Mr McCarron, and and the Parliamentary Counsel Office could prepare a position paper on their respective roles.

Justice Doogue said that Sir Ian Barker and others had support from the Department of Justice at the time and he suggested that any review of the District Court Rules needs support from Department for Courts.

Judge Doogue said there is indeed a resources problem and he said that the District Court Civil Committee has acknowledged that a review of the District Court Rules is beyond its resources. He said that he considered the membership of the subcommittee of the Rules Committee to be critical and suggested there should be a representative from the High Court on that subcommittee. He suggested that in addition there could be two District Court Judges and members of the profession. He suggested also that there may need to be some formal understanding of what the relationship is between the Rules Committee and the Law Commission. By way of example he said that the District Court Civil Committee had discussed at a recent meeting whether there should be a separate category of small claims with a separate regime for them; he said that some of the members of the Committee considered that this goes beyond rule-making and moves into the area of policy.

Justice Chambers suggested that the District Court Civil Committee should be able to address policy issues and draw the Department's attention to any matters that require legislative change.

Justice Doogue said that there could well be common rules from ordinary proceedings in the District Court and then have a special part for small claims with its own discreet procedure.

Judge Doogue said that there may be a problem with merging the District Court and High Court Rules because the District Court has no inherent jurisdiction and the rules may need to be more comprehensive.

Justice Doogue said that there are some cases on this point and that if the matter is a supplementary procedural one there may be a jurisdiction inherent in the Act or implied by the statute.

The Chief Justice said that she has some concerns about how far the Committee should go in areas of policy which impact on questions of jurisdiction which are governed by legislation. She said that there are a lot of sensitivities at the moment and the Ministry of Justice is concerned that Judges should not take on too much in this area. She said there needs to be some clear understandings on

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what is the proper function of the Committee. She acknowledged it is proper for the Committee to have an interest that procedural rules should not be in statutes. If however there are wider issues that come up then she considered the Committee needs to work out better ways of advancing those with a wider constituency is represented at the Rules Committee. She said there is some suggestion of a process for establishing better dialogue between the Department for Courts, the Ministry of Justice and the Law Commission.

Judge Doogue said that the District Court covers small claims right up to the border of the High Court jurisdiction. He said that if there is to be any abridgement of procedure for litigants at the bottom end then this raises policy issues.

The Chief Justice said that provided the Rules Committee acknowledges that there are wider perspectives there should be no problems.

Mr Tanner said that the Law Commission made submissions to the Justice and Law Reform Select Committee about the need to review District Court procedures for small claims. For that reason the Law Commission were not enthusiastic about the composition of the Rules Committee when the two Committees were amalgamated.

Justice Fisher said that the District Court Rules Committee had been unable to get any amendments through and Justice Doogue reminded the Committee that that was the impetus for the desire to merge with the Rules Committee.

Justice Doogue said there is no reason why there should not be a separate regime for small claims and noted that in England Lord Woolf recognised that in the High Court.

Judge Doogue

Judge Doogue said that the Chief District Court Judge would be the ideal person to be the Chair of the new subcommittee to look at the District Court Rules but that he would need to be consulted because of his existing workload.

Mr McCarron said that when the Family Court Rules were reviewed the Ministry of Justice liaised with the Parliamentary Counsel Office to produce drafts. He said that that not only provided valuable support but it also solved the problem of rules of procedure impinging on policy matters. He said that the Ministry may be similarly interested in the District Court Rules.

10. **Interlocutory Matters**

(a) *Generally*

Justice Doogue referred to Interlocutory Matters/3/99 and said that Mr Weston raised two points. The first is whether there is a need for both Rules 61C and 264.

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Justice Doogue noted that Rule 61C refers just to orders made in chambers while Rule 264 is interlocutory matters generally. He noted that Rule 700B, which deals with interlocutory matters in winding up, provides that they must be heard in court and not in chambers. These can be reviewed only under Rule 264. He noted also that sometimes the order will be made by a judge and other times by a master so that 61C will apply. He said that it seems to him there is a need for both rules.

Justice Fisher said that he thought Masters could be reviewed under Rule 64 as well as Rule 61C, but only in respect of court matters.

Justice Doogue noted also that if it is a chambers matter under Rule 61C there is a right of review but if it is a court matter under Rule 264 that can lead to an appeal to the Court of Appeal.

On Mr Weston's second point, Justice Chambers agreed that where there are time limits in the rules in relation to filing and service and agreed that they ought to be the same.

Mr Tanner — The Committee agreed to refer to Mr Tanner the suggestion made by Mr Weston that Rules 61C and 264 should be consistent in requiring service within 7 days.

Justice Doogue noted that Tom Weston's third point relating to whether a review of a master's decision should be appellate or *de novo* is addressed by r 6 of the High Court Amendment Rules 1999.

Mr Tanner — Justice Doogue then referred to Interlocutory Matters/2/99 and the suggestion by Chris Medlicott that it should appear on the face of Rule 264 that it does not apply to a decision of a Master in chambers. The Committee agreed to refer this to Mr Tanner for an amendment to the rules.

The Committee agreed to ask Master Venning to look at the interlocutory proceedings paper as it is, by and large, in the jurisdiction of the Masters.

Secretary — On interlocutory matters generally, Justice Doogue referred to Interlocutory Matters/1/99 and said that the Committee had also decided to "beef up" the certificate by the solicitor on an ex parte application. Further discussion on this matter was deferred.

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

This matter was deferred

12. **Masters**

(a) *Jurisdiction*

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Justice Doogue noted that a letter recommending an amendment had gone from the Chief Justice and himself to the Minister of Justice drawing his attention to the need for an amendment to the Judicature Act 1908 to clarify the Masters' jurisdiction. The Committee agreed that this item can now be listed for statutory amendment. The Committee agreed that there should be a follow up after the election.

(b) *Voidable transaction procedures*

This item was dealt with under Item 2(c).

13. **Pleadings**

(a) *Certificate by lawyer responsible for document.*

This matter was deferred until Mr Weston is available.

(b) *Earlier disclosure of essential evidence - oral and documentary*

This matter was deferred.

14. **Summary Judgment**

(a) *Whether summary judgment by defendant for a particular cause of action should be possible*

Mr Finlayson

The Committee noted that Mr Finlayson is to report back with the views of the professional bodies.

Mr Tanner said that there was a note in the November issue of the New Zealand Law Journal by Andrew Beck on summary judgment for defendants (1999 NZLJ 411) and single causes of action.

Justice Doogue reminded the Committee that it had decided not to allow summary judgment on single causes of action on the basis that summary judgment should be reserved for applications that will bring the proceedings to an end. He said that there can be problems for the masters in respect of summary judgment because the masters may reach the view that the claim should not proceed in respect of specific causes of action. He noted that in the United Kingdom it is possible to obtain judgment on individual causes of action for the defendant and that narrows the issues and removes any surplusage.

Justice Fisher noted that it would be possible to provide that a defendant cannot apply to strike out a single cause of action but that if a defendant applies to strikeout the whole proceedings, individual causes of action could be struck out.

Justice Chambers noted that that steers litigants to apply for strike out. He noted that some causes of action in a statement of claim may be "make weights" but

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they will not necessarily involve more evidence. On the other hand, a summary judgment application on an individual cause of action can be a relatively substantive hearing. He said he thought the Committee should not lightly depart from the view it had earlier reached.

Justice Fisher said that while the rules might provide a facility for something it does not mean that the procedure will be used inappropriately.

Justice Hansen noted that while there may be no jurisdiction to strike out some of the issues, there may be jurisdiction to apply summary judgment to narrow them.

15. **General Business**

(a) *Case management practice note*

Justice Doogue said that as a result of the case management practice note, some rule changes are necessary, especially in relation to setting down.

Justice Hansen said that Master Venning has already looked at this issue.

Secretary — The Committee agreed to ask Master Venning to look at the case management practice rule on the basis that that is by and large within the jurisdiction of the Masters.

(b) *The practice note on appeals in civil contested matters*

Secretary — Justice Doogue said that this practice note needs to be updated to include standard directions such as bundles of documents and that the practice note should be kept under review by the Rules Committee. He noted that some parts of the practice note could be incorporated into the rules at a later date.

(c) *Amended pleadings*

Justice Doogue made the suggestion that amendments to pleadings should appear in the latest version of the document.

Secretary — Justice Hansen said that in England the amendments are different colours for successive amendments.

(d) *Documents which do not need to be filed*

Secretary — Justice Doogue said that a number of documents, such as lists of documents, are filed but they are of no interest to the court, only to the parties. He considered that they do not need to be on the court files. He said that the reason for it was that if the list of documents is filed then it may bring home to counsel the importance of the procedure.

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The Committee recorded its appreciation to Justice Doogue for his valuable contribution as a member since 1985 and chairman since 1982. In that time he had overseen the review of a number of Parts of the High Court Rules and instituted a number of initiatives to make procedural matters function more effectively. The Committee also recorded its appreciation to Justice Hansen for his membership of the Committee and for his special expertise in admiralty, insolvency and winding-up.

The meeting closed at 3pm.

The next meeting will be held on Friday 25 February 2000.

Secretary