**THE RULES COMMITTEE**

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Wellington


29 July 1996

Minutes/3/96

**CIRCULAR NO 24 OF 1996**

**Minutes of the Meeting held on Friday 26 July 1996**

1. **Preliminary**

The meeting called by Agenda/3/96 was held in the Judge's Common Room, High Court, Wellington on Friday 26 July 1996 commencing at 9.30 am.

2. **In Attendance**

The Chief Justice (the Rt Hon Sir Thomas Eichelbaum GBE)
The Hon Justice Doogue (in the Chair)
The Hon Justice Fisher
The Hon Justice Hansen
Chief District Court Judge Young
Mr K McCarron (for the Chief Executive, Department for Courts)
Mr H Fulton (by invitation)
Ms M Nixon (from the Parliamentary Counsel Office, by invitation)

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

The Attorney-General (the Hon Paul East MP)
The Solicitor-General (Mr J J McGrath QC)
Mr C R Carruthers QC

4. **Personnel**

Justice Doogue noted that Mr Fulton attends this meeting by invitation, having now completed six years on the Committee which is the maximum the New Zealand Law Society will allow members to hold office on its nomination. Justice Doogue said that the Committee has had exceptional service from Mr Fulton who had applied more skill and

given more input than the Society could ever have expected. He noted that Mr Fulton's work and time has been very much appreciated by every member of the Committee and said that Mr Fulton's input has been as great as anyone in recent years has given.

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

On the motion of Mr Fulton, seconded by Justice Fisher, the minutes of the meeting held on Thursday 6 June 1996 were taken as an accurate record and were confirmed.

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

Justice Doogue noted that matters of any substance are on the agenda for the meeting

Mr Fulton noted that the issue of expert advisers in the Court of Appeal has indeed been picked up in the legislation to abolish the right of appeal to the Privy Council.

7. **Papers Tabled at the Meeting**

*By the Secretary:*

- Agenda/3/96 (revised)

*By Ms Nixon:*

- The Election Petition Rules 1996 (PCO 220/6) (with hand written amendments).
- The Election Petition Rules 1996 (PCO 220/7).

8. **Matters referred to Parliamentary Counsel**

Ms Nixon advised that she was present primarily to assist with the Election Petition Rules and that addressing the other matters referred to the Parliamentary Counsel Office awaits the appointment of a new Chief Executive, who will make a decision on who will be allocated the drafting work for the Rules Committee.

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

Justice Hansen said that he had advised Mr Giles of the matters raised at the last meeting and that Mr Giles had taken account of all of those matters in his latest draft. Justice Hansen suggested that the matter could now be referred to the Parliamentary Counsel Office.

Mr Fulton noted that there will still some anachronisms such as references to a "writ", which he hoped would be picked up by Parliamentary Counsel.

Justice Fisher suggested that Parliamentary Council should be alerted to the need to ensure that the Admiralty Rules conform with the language of the High Court Rules. The Chief Justice agreed that he was happy for the draft rules to now go forward and the

Committee decided to refer the draft to the Parliamentary Counsel Office accordingly. In this context the Committee recorded its grateful thanks for the enormous amount of work which had been undertaken by Mr Giles.

10. **Costs (item 4 of agenda)**

The Committee had agreed at its last meeting to defer further consideration until the report from Lord Woolf was available. The Secretary advised that it is due to be published that day and that a copy is on order through the Crown Law Office Library.

11. **Court of Appeal Rules (item 5 of agenda)**

(a) *Security for Costs*

The Committee noted that nothing required discussion at the meeting pending a review of the Court of Appeal Rules.

(b) *Removal of proceeding from High Court into Court of Appeal*

Justice Doogue noted that the issue of a statutory amendment has been addressed with the Minister of Justice.

(c) *Expert Advisers*

Justice Doogue noted that this issue which will require a statutory amendment has been included in the New Zealand Courts Structure Bill (to abolish the right of appeal to the Privy Council)

12. **Directions (item 6 of agenda)**

(a) *Mediation/ADR*

Justice Doogue queried whether there is anything the Committee wants to do without running across the work being done in respect of the case management pilot studies in Auckland and Napier.

The Chief Justice said that there was little he could add to the minutes of the Courts Consultative Committee meeting and noted that the Courts Consultative Committee next meets on 9 August. He said that Mr Goodall, a policy adviser from the Department for Courts is to provide a draft issues paper which is due on 11 October.

Justice Doogue said that in Auckland and Napier the topic of alternative dispute resolution comes up at the first judicial conference. He noted that in Wellington the profession is organising a mediation week for later in the year.

Justice Fisher said that he was aware of an example recently where the judge presiding over a trial set down for four weeks hearing formed the view after a few days that a settlement conference would be desirable. The matter was adjourned and

another judge spent a day with the parties in what was a true mediation with the parties in separate rooms. A settlement resulted and saved a lengthy trial. Justice Fisher noted that it is not uncommon for the parties to get a good feel for the strength and weaknesses of their respective cases only after the trial has begun.

Mr Fulton said that the same thing happens at the Employment Tribunal as well in that the Tribunal may refer the matter to a mediator member.

Justice Hansen said that the other judges need to be made aware of that possibility, and Chief Judge Young agreed that the possibility was not generally recognised in the District Court.

Justice Fisher agreed that he could ask Justices Tompkins and Elias to do a short note on how the procedure operated.

Mr Fulton noted that under r 442 (which has only just been amended) the judge may convene a settlement conference only before the trial commences.

Justice Doogue said that it would be worthwhile promoting an amendment to the Rules only if the issue is not going to be finalised by the Courts Consultative Committee in the not too far distant future.

The Chief Justice said that the Courts Consultative Committee could oversee a lengthy process because of the need for consultation and he agreed that a delay of two years is quite likely.

In respect of the Case Management Committee, Mr Fulton said that an attempt has been made to extend it to the whole country at the beginning of next year but it is more likely to be late next year at the earliest.

Justice Doogue said that there could be an amendment to r 438 to provide for mediation or a mini trial. He noted that r 442 gives the court power to make an order but that this would be inappropriate in the mediation context. As an interim measure he suggested that the rules could acknowledge mediation as a way of promoting it.

Mr Fulton said that if the parties must consent to it there would be no need for any directions from the court.

Justice Doogue gave the example of a case where the respective counsel agreed the matter should be the subject of a mediation but the parties would not agree and asked for the court to order a settlement conference to take effect if mediation did not occur. He considered that if mediation were recognised in the rules that would promote it. So as not to preempt the work being done elsewhere he said that the Rule needs to be permissive rather than directive.

Justice Fisher said that it is desirable not to have too many small amendments but he agreed that if the substantive issue is unlikely to be addressed within two years an interim measure now would be desirable.

The Committee agreed to leave the matter on the Agenda for the next meeting, and it can be discussed again in the light of the minutes of the next Courts Consultative Committee meeting, so that the Committee does not promote an amendment to the rules that is inconsistent with the way the Courts Consultative Committee is going.

13. **Discovery (item 7 of agenda)**

Mr Fulton advised that he was pursuing the issue of promoting the matter in "LawTalk" and the Committee agreed to remove the item from the agenda.

14. **District Court Rules (item 8 of agenda)**

Justice Doogue said that at the last meeting the Solicitor-General had suggested that Dr Palmer be invited to attend, and Judge Jaine agreed to follow the issue up. It transpired that Dr Palmer's concerns were actually about the relationship between the Rules Committee and the Executive and the Legislature. Justice Doogue said that he did not consider it appropriate for the Rules Committee to have to lecture Dr Palmer on something that could be ascertained by looking up the statutory provisions which set out the membership of the Rules Committee, and the invitation to attend was withdrawn.

Chief Judge Young said that the issue of amalgamating the District Court Rules Committee with the Rules Committee is one of continuing frustration. He said that the Ministry of Justice is to prepare a briefing paper on the legislative changes that would be required and that that is to be prepared by 8 August. The issue can come back to the Committee after then.

15. **Election Petition Rules (item 9 of agenda)**

Justice Doogue explained that at the Sub Committee meeting it was considered the Rules should be part of the High Court Rules and agreed that the amendments to be promulgated are done by way of an interim measure. He explained that they are expressed to expire in November 1997 to enable time for the Rules to be amended so that they can be inserted as a new part in the High Court Rules.

Ms Nixon went through the changes that had been made since the draft had been considered by the Committee. Most of the changes were of an editorial nature to ensure consistency with other Rules, consistency of language or to make the Rules read more easily.

Justice Fisher explained that the Committee had made more extensive changes to the Rules but that addressing the archaic language and the duplication with the High Court Rules needs more time than currently available. He explained that the major changes to the Election Petition Rules are to accommodate constituency and list petitions which go to the High Court and Court of Appeal respectively.

In that context Mr Fulton noted that when the Rules are incorporated into the High Court Rules, the Rules relating to the list petition will go to the Court of Appeal Rules and the Rules relating to the constituency petition will go into the High Court Rules.

Justice Doogue said that helpful papers were prepared by the judges' clerks in Auckland and the Ministry of Justice and these will provide valuable background material when the Rules are incorporated into the High Court Rules.

The Chief Justice expressed the Committee's appreciation for those who had worked on the Rules before the meeting.

Ms Nixon explained that the Rules are due to go before Cabinet at its meeting on Monday 5 August, and that the papers need to be lodged with the Cabinet Office by 10.00 am on Thursday 1 August.

The Committee agreed that concurrences could now be given to the draft before them (PCO 220/7).

16. **Parties (item 10 of agenda)**

The Secretary advised that she had again written to the Ministry of Commerce but has not received a reply.

17. **Pleadings (item 11 of agenda)**

Mr Fulton advised that the Law Society does not support the Rule and is not considering any ethical Rule to accommodate the point. He said that he had not heard separately from the Bar Association but would expect that they would hold the same views as the Law Society given the overlapping membership.

Justice Fisher said that as the United States Rule stands he considered it would be unjust for the individual lawyer although highly desirable from the stand point of judges and litigants. He said that to expect a practitioner to take responsibility for the factual foundation is a heavy burden but that a less onerous certificate might be appropriate such as that required by the Land Transfer Act. He suggested that lawyers might certify that the document is to the best of their knowledge based on reasonably arguable legal grounds and that they are unaware of anything which would render the proceeding untenable.

Mr Fulton suggested that the certificate might be formulated by reference to the terms "vexatious or frivolous".

Justice Fisher said that a certificate would cope with such tactics as a gagging writ when there is no evidence to support it.

Justice Hansen queried how broad the problem is in New Zealand and said that he was not aware of it posing any significant problem in the High Court.

Chief Judge Young agreed that he was not aware of issues of that nature causing problems in the District Court either.

Justice Hansen said that the true position may be known to the plaintiff and not to the lawyer, and Mr Fulton said that a defect may become apparent only once the case commences.

Justice Fisher did not consider it reasonable to expect a practitioner to make enquiries but that a Rule could preclude filing pleadings where the practitioner knows there is no factual foundation.

Chief Judge Young said that this sort of thing is exposed now in summary judgment proceedings.

Mr Fulton said that members of the profession are officers of the court, and counsel's duty to the court ought not to need a special Rule to underline it.

Justice Fisher said that he thought not every member of the profession would be aware of the extent of counsel's duty to the court and that a rule addressing the issue would help to remove any doubt. He raised the example of whether a practitioner should refuse to file a statement of defence if the client admits to having no defence but simply wishes to defer meeting liability for a few months.

The Chief Justice drew the analogy with a criminal trial and noted that counsel should not put up a defence known to be false - counsel may put the Crown to proof but should not run a defence such as an alibi. He suggested that the form of undertaking be worded along the lines that counsel should not knowingly be party to a false defence or to issuing frivolous or vexatious proceedings.

Justice Fisher suggested that the matter be remitted back to the Law Society and Bar Association on the limited basis suggested by the Chief Justice and suggested that the profession could hardly oppose it.

Chief Judge Young suggested that there might be a formal response by the defendant that the defence was putting the plaintiff to proof. This would be different from the pleading that the defence has no knowledge of the matter and therefore denies it because the defence does have knowledge.

Justice Fisher considered that the court processes should not be structured so that people can evade getting to the truth - he suggested that all that is required is that people not knowingly rely on false assertions.

Justice Doogue asked whether there is anything in paragraphs (a) or (b) of the United States precedent that could be regarded as unreasonable, and Mr Fulton said that the United States rule is objective rather that subjective.

Mr Fulton queried also who should give the certificate, the solicitor or counsel, given that counsel may have settled the pleadings.

Justice Fisher considered it to be analogous to certifying a motion which is duty that falls on principals only.

The Committee agreed that Mr Fulton take the matter back to the Law Society and Bar Association as an undertaking along the lines suggested by the Chief Justice, with the wording reflecting that the undertaking is a subjective rather than an objective one.

18. **Summary Judgment Procedure (Item 12 of Agenda)**

Justice Doogue spoke to his memorandum and suggested that litigation could proceed faster and cheaper if matters could be timetabled by reference to the commencement date. He suggested that parties should go to alternative dispute resolution at an early stage and noted that most of the delay and costs are caused by people putting things off until the last moment. He said that if the summary judgment procedure is generally available at an earlier stage to both plaintiff and defendant it would enable cases to be clarified and resolved. He said that he had voiced this idea at the law conference at Easter and not received any negative response to it and that Master Thompson also saw some merit in it.

The Chief Justice asked what categories of claim, not included at the moment, would be admitted under the revised rule and Justice Doogue said that his draft would admit cases under Part IV and the special proceedings in r 135(1)(a) (being defamation, malicious prosecution and false imprisonment).

Justice Hansen asked, if the Rule were going to extend to injunctions, if it is envisaged that Masters should have jurisdiction. He noted that if an injunction is genuinely urgent the summary judgment procedure with its 21 days time frame is no quicker. He noted also that very few unsuccessful summary judgements go to trial. He questioned whether Justice Doogue's proposed amendment undermines the underlying philosophy of summary judgment by using the procedure to obtain a speedy resolution when the procedure is in fact designed to apply where there is no arguable defence.

Justice Fisher considered that any amendment which disposes of or clarifies claims should be pursued.

Justice Fisher raised the position of parties seeking judgment or strike out and alerted the Committee to the possibility of some unintended consequences of any amendment.

Chief Judge Young considered the key would be to achieve the expeditious disposal of proceedings without affecting the integrity of the summary judgement process.

Mr Fulton raised the issue of the relief to be granted and Justice Doogue said that the intention of the Rule is to resolve liability rather than damages.

Justice Fisher considered that the procedure should also be able to be applied to matrimonial property matters because if a recalcitrant spouse has no tenable defence they should not fail to respond to the claim. He supported Justice Doogue's proposal in its present form.

Justice Doogue said that his intention is to make the process available generally except in respect of those cases where it patently does not apply.

Mr Fulton referred to Justice Doogue's second proposal and noted that, in a broad sense of the word, it is like a strike out application, although the Chief Justice noted that it would in this instance be with evidence.

Justice Fisher suggested that Parliamentary Counsel may be able to clarify Justice Hansen's point about the Masters' jurisdiction and also about the procedure to be followed if the defendant is applying.

Justice Hansen referred to s 26J(4) of the Judicature Act 1908 and noted that Masters are expressly precluded from having power to grant injunctions among other matters. He said that in South Australia the Masters have jurisdiction to order injunctions and the jurisdiction is working well.

Justice Doogue said that a majority of the judges are opposed to the Masters having a general injunction jurisdiction on the grounds that it would extend the Masters' role outside of interlocutory and procedural matters.

Mr Fulton agreed that it is desirable not to have any arguments about whether a Master has jurisdiction, and the Committee agreed that the Parliamentary Counsel Office needs to draft the rule change so as not to alter the existing jurisdiction of Masters.

Mr Fulton said that the Law Society and Bar Association did not want to see Masters' powers extended to include injunctions.

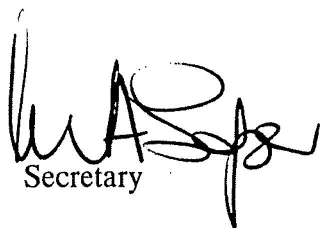
Justice Doogue pointed out that the difference between summary judgment and an ordinary proceeding is that the summary judgment has no defence to it.

In that context Mr Fulton noted that injunctions are still discretionary.

The Committee agreed to refer Justice Doogue's proposals to the Parliamentary Counsel Office for drafting.

The meeting closed at 12.10 pm.

**The next meeting will be held on Thursday 28 November 1996**



Secretary

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# ADDENDUM TO THE MINUTES OF THE MEETING

# HELD ON FRIDAY 26 JULY 1996

## ACTION REQUIRED BY:

**Justice Fisher:**

*Mediation/ADR*
Ask Justices Tompkins and Elias to do a short note on how the procedure operated in the individual case where a judge mediated after the trial had begun.

**Mr Fulton:**

*Discovery*
Promote the matter in "LawTalk".

*Pleadings*
Take the matter back to the Law Society and Bar Association as an undertaking along the lines suggested by the Chief Justice, with the wording reflecting that the undertaking is a subjective rather than an objective one.