THE RULES COMMITTEE

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Wellington

18 March 1998

Minutes/1/98

CIRCULAR NO 13 OF 1998

Minutes of the Meeting held on Friday 27 February 1998

The meeting called by Agenda/1/98 was held in the Judges' Common Room, High Court, Wellington, on Friday 27 February 1998 commencing at 9.30 am.

1. **Preliminary**

(a) *In Attendance*

The Chief Justice (The Right Hon Sir Thomas Eichelbaum GBE)
The Hon Justice Doogue (in the Chair)
Chief District Court Judge Young
The Solicitor-General (Mr J J McGrath QC)
Mr K McCarron (for the Chief Executive, Department for Courts)
Mr C R Carruthers QC
Mr R S Chambers QC
Mr G E Tanner (Chief Parliamentary Counsel, by invitation)
Mr C Keating (Secretary for Justice, by invitation)
Dr M Palmer (Deputy Secretary for Justice, by invitation)

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

The Hon Justice Fisher
The Hon Justice Hansen
The Attorney-General (the Hon Douglas Graham MP)

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

On the motion of Mr Chambers, seconded by Mr Carruthers, the minutes of the meeting held on Friday 14 November 1997 were taken as an accurate record and were confirmed, subject to the third to last paragraph on page three

reading, "Justice Fisher disagreed that that was a waste of time and said that there is a plethora of matters for which leave should not be given to appeal from the District Court. This had been established in cases involving judicial review of procedural matters."; on page 6, paragraph 4, the word "uncontroversial" should read "controversial"; page 6, fourth to last paragraph should read, "Justice Fisher said that the genesis of the rule was that Ministers were reluctant to make affidavits at all but that the non-cross examination principles which were devised as a compromise have since had flow-on effects for all other kinds of judicial review. He said that some 95% would probably not involve Ministers."; page 9 last paragraph should have a heading reading "Court of Appeal Civil Rules".

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

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

Papers Tabled at the Meeting

By Justice Doogue:

- Letter from Mandy McDonald, Deputy Secretary of the Ministry of Justice to Chief District Court Judge Young headed "Harassment Act 1997: Rules and Regulations".

By the Secretary

- Summary Judgment/2/98 - revised draft rules from Parliamentary Counsel and comments from Robert Chambers QC.

- Costs/2/98 - comments from Justice Fisher.

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

(a) *Election Petition Rules*

Mr Tanner noted that the matter has been referred to his office for a draft.

(b) *Insolvency Rules*

Mr Tanner said that he was still waiting for input from Justice Hansen's subcommittee.

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

Justice Doogue noted that this item awaits a new Property Law Act when that is passed.

(d) *Summary Judgment Procedure*

Mr Tanner noted that a new draft has been prepared by Parliamentary Counsel and Justice Doogue suggested that members make any suggestions to the Secretary or directly to Mr Tanner.

3. **Matters Referred for Statutory Amendment**

(a) *Expert Advisers*

Mr Tanner advised that this matter is not progressing; there was a proposal to put it on the legislative programme for this year in conjunction with proposed amendments to the Judicature Amendment Act which would effect the merger of the Rules Committee with the District Court Rules Committee. He said that there had been some discussions with the Ministry of Justice on the basis that if the expert advisers amendments were likely to be controversial then they should be separated from the proposals to merge the Rules Committee and the District Court Rules Committee, which latter could be put into the Statutes Amendment Bill for this year.

The Solicitor-General queried why the draft provisions relating to expert advisers were not put in the Statutes Amendment Bill when the amendments relating to the abolition of the right of appeal to the Privy Council were not proceeded with.

Mr Carruthers said that the proposal for expert advisers was contentious with the Law Society because it raised such questions a whether the adviser would be a member of the court, whether the adviser would be obliged to express a view in open court so counsel could make submissions, and whether the adviser would retire with the judges or be available for cross examination by counsel on the views the adviser was expressing.

The Solicitor-General said that this was nevertheless a matter that was approved by Government and that if the Bill relating to the Privy Council is not proceeded with, the measures relating to expert advisers should go into another bill and be debated at the Select Committee.

Mr Tanner said that there is still the problem of getting the measure on to the legislative programme.

The Committee agreed that the Chairman should write to the Ministry of Justice requesting them to pursue this matter, minuting a copy of the letter to the President of the Court of Appeal.

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

Justice Doogue advised that this matter is in the Statutes Amendment Bill which is currently before the Government Administration Select Committee. The Committee is due to report back on 17 March.

(c) *Removal of Proceedings from High Court into Court of Appeal*

Justice Doogue advised that this matter is in the Statutes Amendment Bill which is currently before the Government Administration Select Committee. The Committee is due to report back on 17 March.

(d) *Review of Masters Decisions*

Justice Doogue advised that this matter is in the Statutes Amendment Bill which is currently before the Government Administration Select Committee. The Committee is due to report back on 17 March. Mr Tanner noted that, when enacted, this amendment will require further rules.

(e) *Service on Companies*

Justice Doogue advised that this matter is in the Statutes Amendment Bill which is currently before the Government Administration Select Committee. The Committee is due to report back on 17 March.

(f) *Summary Judgment Procedure*

Mr Tanner advised that this has now been incorporated into the Statutes Amendment Bill which is before the Government Administration Select Committee. The Committee is due to report back on 17 March.

(g) *Winding Up*

The Secretary advised that this matter was still under consideration in the Ministry and that the Parliamentary Counsel Office had received no instructions on it. The Committee agreed that the Chairman should write again to the Ministry of Justice.

4. **Admiralty Rules**

(a) *Queries from Registrar at Christchurch*

Justice Doogue referred to the letter from Peter Fantham, the Registrar at Christchurch.

Mr Carruthers agreed to take this matter up with the sub committee of Justice Hansen and Justice Giles, and that the Secretary should write to Mr Fantham advising that that course had been adopted.

5. Appeals

(a) *Appeals from the District Court*

Justice Doogue says that this item has two limbs to it: appeals from the District Court and Appeals from the High Court to the Court of Appeal on interlocutory matters (Interlocutory Matters/4/97).

In respect of appeals from the District Court to the High Court, Chief Judge Young agreed with Mr Beck's proposal that there be consistency between courts in relation to rights of appeal, time limits and procedures.

Mr Chambers said that he did not see any real problem about removing the leave provisions for interlocutory matters on the basis that there will be very few of them. Looking at the issue more broadly he said that judges should perhaps not be giving reasons for interlocutory decisions unless the matter is reviewed. He suggested also that the whole issue of interlocutory applications could be looked at with a view to streamlining the procedure in other ways.

The Solicitor-General expressed himself in agreement with the view of Justice Fisher that there are a plethora of matters for which leave should not be given to appeal. He suggested that the burden on the High Court might be lessened if a real filter were applied and noted that a party for whom the trial is not going well may appeal to the High Court on an interlocutory matter in order to disrupt the proceedings.

Mr Chambers said that the problem is that the leave application is argued in the High Court.

The Solicitor-General said that a District Court Judge who knew leave was required might say "box on".

Mr Carruthers said that historically the jurisdiction of the old Magistrates Court had been extended to bring it into line with the High Court and that therefore there should be appeals on interlocutory matters. He said that with case management there are now very few interlocutory applications.

Chief Judge Young said that it is very rare to have an argument about an interlocutory decision in the District Court.

Justice Doogue said that there may be few appeals but in Wellington at least there is very little civil business in the District Court.

The Chief Justice said that he did not consider a leave application to be an effective filter because it is almost impossible to argue the leave application without getting into the merits.

Mr Chambers suggested that a better filter may be a review system within the court itself.

The Chief Justice said that historically this was what the review rule in the High Court was meant to relate to. He recalled the days when judges sat in chambers and dealt with interlocutory applications without giving written reasons. If the parties wanted a real argument they filed an application for review which meant that a judge would give judgment in court which would give rise to an appeal to the Court of Appeal. He noted that appeals would not be a means of holding up litigation in the main centres, but that can be different in the provincial courts.

Justice Doogue expressed some sympathy for the view that there should not be an appeal from an interlocutory decision unless the decision puts an end to the proceedings. He said there should be a mechanism within the court whereby an interlocutory matter is dealt with by review rather than going to a superior court, because the appeal process is used as a delaying mechanism.

Chief Justice said that the review process had worked well in the past and he suggested that judges may have been more confident in dealing with matters in that way but that in recent years the law has become more complex and practitioners have tended to inflate what ought to be simple arguments.

Mr Carruthers noted also that there has been a change in court business in that there is no longer the huge volume of personal injury cases where there are often applications for particulars and other straightforward applications.

Justice Doogue noted also that there is more timetabling of conferences today. He concluded that the District Court and High Court should have comparable procedures and that the District Courts Act be changed to provide for a right of appeal to the High Court in the same way as the rules have been changed in relation to the High Court and the Court of Appeal, and also to give the same appeal time.

Mr Chambers suggested that the Committee might explore further how the review procedure might work.

Mr Carruthers said that there is a practical issue of how the judge first deals with the interlocutory application and that has a bearing on whether there should be a *de novo* hearing which gives a "second bite at the cherry". He suggested that the Rules Committee should, rather than looking to other jurisdictions, be looking to see how the business of the court should be disposed of.

Justice Doogue summed up the views of the meeting by saying that the procedures and time limits for appeals should be consistent between the District Court and the High Court and that the Committee should flag for its discussion on interlocutory matters the issue of whether they should be dealt

with by a review or appeal within the court of origin. He said that in the High Court most of them are dealt with by Masters with an application for review following whereas if they are dealt with by a judge then they must be the subject of an appeal to the Court of Appeal which he regarded as unsatisfactory. He then referred to the Commerce Commission approach; the Commission is concerned about delays from appeals from interlocutory matters and considers there should be no right of appeal except where the interlocutory application disposes of the proceeding. He noted that a lot of the appeals in this area relate to discovery matters in particular. He noted that interlocutory matters are now dealt with very quickly by the Court of Appeal.

Mr Carruthers agreed that delay can rest in the hands of the litigants themselves.

Justice Doogue said that the answer to the concerns expressed by the Commerce Commission is that changes in the practice in the Court of Appeal now mean that there is very little delay on hearing appeals on interlocutory matters. The Committee agreed that Justice Doogue should convey these sentiments to the Commerce Commission.

6. Costs

(a) *Generally*

Justice Doogue welcomed Mr Keating, the Secretary for Justice, and Dr Palmer, the Deputy Secretary for Justice. Justice Doogue said that he had hoped to know the position of the Ministry before today so that the philosophy of costs could be discussed and the Committee could deal with matters arising out of the paper.

Mr Keating apologised for any misunderstanding over the arrangements promulgated by the Solicitor-General and said that the Ministry had interpreted those arrangements as meaning that there would be a circulation of the proposal to wider interest groups in the community and once those views had been obtained the Ministry would express its own views. He said that the Ministry does wish to avoid the policy issues delaying the Committee, but said that the Minister does not want to see the issues in the abstract and likes to see concrete proposals.

The Chief Justice asked if Mr Keating would envisage the Ministry separately obtaining the views of the external community.

Mr Keating said that he envisaged the Ministry would have input once the Rules Committee received responses back from others, but that he has not been able to have discussions with the Ministry and others that he would like to.

Mr Keating said that he envisaged the Committee putting forward draft rules at this stage for consideration by Ministers.

Justice Doogue said that that is not the process that he understood from the arrangements made a year ago.

Dr Palmer said that if clear policy principles were voiced by the Rules Committee, the Ministry of Justice could consider that.

Justice Doogue said that it was proposed to review the policy contained in Justice Fisher's paper in the light of submissions received, which submissions he had expected to include the Ministry. He referred to the solution promulgated by the Solicitor-General as avoiding that roundabout.

Dr Palmer said that it is difficult for a department to give a view on policy unless the matter is referred to the Minister first. He said that he would be happy to consult with Ministers on the position that has been reached so far but the issue is what he can consult with the Minister about.

Mr Carruthers said that the Committee needs assistance from the Ministry on what they would be looking for on a policy basis.

Mr Keating said that that assumes departments are more independent than they are and they do not have the ability to give the independent view that the Committee is seeking.

Mr Carruthers asked whether the suggestion is that the policy input would come from the Ministers involved and Mr Keating said no.

Mr Carruthers said that the Committee wants a proposal that covers the ground and that the Committee does not want to put up something that does not get a favourable reaction from Ministers when the Ministry could have given the Committee a steer.

Mr Keating said that he saw the phase the Committee is at at the moment as being one whereby the Ministry would look at the comment received from non-government sources to see if there are factors that should be taken into account.

Mr Carruthers said that the evaluation of the comments is something that the Rules Committee is set up to do for itself. He said that the Committee needs now to formulate a comprehensive proposal that has the benefit of input from the Ministry.

Justice Doogue said that he understood the matter was to be dealt with in the way put forward by the Solicitor-General in his letter to him of 28 January 1997, a copy of which was minuted to Dr Palmer. He said that the arrangement was that the Ministry would have the agenda papers together with the minutes, a standing invitation to attend any part of the meetings likely to raise policy issues so any input of a policy kind would come before the Committee at the first possible opportunity, and that Ministers would be

informed of such matters at an early stage. In reliance on that procedure Justice Doogue said that he had expected that officials from the Ministry would be present at this meeting to give the Ministry's policy input to the discussion on costs.

Mr Keating said that the timetable needs to be more clearly agreed for the future.

Justice Doogue said that unless there is some sensible approach to this the Judges will be forced to avoid the executive process which would be undesirable.

The Solicitor-General said that the Ministry needs to look at the correspondence and, in particular, his letter of 13 March 1997 to Justice Doogue and his letter of 25 November 1997 to Dr Palmer to ensure that the process envisaged does represent an acceptable way to resolve matters. He said that what was envisaged is not the normal Cabinet Committee process and that the Ministry should act to assist the Committee.

Mr Keating said that the Prime Minister has recently changed what was the normal Cabinet Committee process but that ultimately it will be the Minister's prerogative as to how they want the interests of the executive branch of Government to be identified.

The Solicitor-General said that Mr Keating needs to decide whether he is sticking with what was agreed in 1997 and, if he no longer feels able to do it, he should let the Committee know. He pointed out that the Rules Committee is not just a quango outside, it represents the judicial branch of Government. He said that Mr Keating needs to indicate whether the spirit of the arrangements that was entered into still stands or not.

Dr Palmer said that he had not considered how consultation with other parties would fit into the sequence of events and he had not provided for that in the previous procedure.

He said that it would be a problem if it were envisaged that the Ministry would not put up a paper to Ministers.

The Solicitor-General said that he was not totally ruling out the Cabinet process but that the Ministry needs to be the critical champion of the Rules Committee. He said that if what is proposed in his two letters goes too far then they needed to tell the Rules Committee that.

Justice Doogue reminded the Ministry officials that the Rules Committee deadline for submissions on costs was 30 November and that while there were a few late papers all of them were sent out before Christmas with the result that they have had two months to consider them.

Mr Keating said that the way officials use their time is determined by the Minister and, given the priorities at present, the Minister would not have accorded priority to put time into costs.

The Solicitor-General said that if the issue is actually one of deferral then they needed to tell the Committee that.

Dr Palmer queried the process by which the Ministry could attend and Justice Doogue said that they have a standing invitation which has been extended and all they need to do is let either him or the Secretary know.

Justice Doogue moved on to deal with the philosophy of costs issues and said that none of the commentators have supported the American view. He said that the Commerce Commission supports the full costs regime of the English model. Consumer, the New Zealand Law Society, Justices Penlington and Baragwanath all support the proportional system that we currently have. He noted that the Legal Services Board and the Securities Commission expressed views that did not classify quite as simply.

Dr Palmer said that with policy issues the interests of the Ministry lie in respect of the philosophy of costs rather than the mechanics and that there is substantial academic literature on the incentive effects of costs in relation to litigation. He said that almost no one is in favour of the American model (including the Americans) and that the balance lies between a full costs approach and a proportional approach.

Justice Doogue said that initially the Committee had favoured a full costs approach but came round to a proportional view because access was seen as a political issue.

Mr Chambers mentioned the dangers of getting into a taxation system with full costs, and Justice Doogue said that can be avoided with a scale to determine what full costs would be.

Dr Palmer said that if there was a move towards a proportional system because full costs would impose equity problems on some litigants, it raises directly the relationship with legal aid policy and recovery of court costs. One argument is that full costs of the court system should be recovered through those who use it and any equity issues should be redressed through legal aid.

The Solicitor-General queried whether the policy issues would preclude the Committee moving to at least catch up on inflation, given that what is proposed is no departure from the proportional costs model that we currently have.

Dr Palmer said that there is some anxiety around legal aid and court costs recovery issues and that these are related. Any reform in this area would still

be regarded by the Minister as a policy call and the Minister would want to look at the underlying issues.

The Chief Justice said that full costs would only exacerbate the legal aid difficulties and Mr Keating said that there were some who held the view that the United States approach can alleviate the legal aid problem.

Mr Chambers said that presumably the United States approach would relieve the legal aid budget because of contingency fees, but that in New Zealand legal aid goes on family law and criminal law where contingency fees are inappropriate. He went on to say that recovery of court costs and legal aid are huge issues which are presumably some way off being resolved and asked why a proposal that is essentially updating the status quo can't go forward now.

Dr Palmer said that Ministers are anxious for action by officials and they are expected to report this year. He said that he could put forward an interim proposal now but he would be surprised if some agencies did not flag the issue with their Minister.

The Solicitor-General said that none of them have replied.

Dr Palmer said that The Treasury had replied to him at Deputy Secretary level to say that they regarded this as a key issue of public policy and that they were looking forward to a strenuous law and economic approach by the Ministry.

Mr Keating said that he could get the view of the Minister of Justice and see if he would be willing to progress these draft Rules now. He said that the Minister would need to consult with his colleagues so that he does not get ambushed on the day that he puts the cover-sheet to the Governor-General.

The Chief Justice asked what research is available on the economic impact.

Dr Palmer said that the Ministry has not engaged consultants itself and that he is not aware of anyone else doing it. He said that the Treasury is likely to confine themselves to existing theoretical literature.

Mr Carruthers asked whether the paper could be improved to make it more attractive.

Dr Palmer said that if he were circulating a paper to other departments he would start by questioning the purpose of a cost regime and outlining the options, and discussing the incentive effects and advantages and disadvantages of each option.

Mr Carruthers asked whether, if the Committee were to consider a full costs regime that would necessarily relegate the amendments to the Rules on costs to the slow track rather than the fast one. Mr Carruthers said that this is still

just a numbers game and that the losing party pays and it is just a question of how much.

Dr Palmer said that the proportion of costs paid by the losing party does have an effect on incentives to litigate and this would make the process for amending the Rules more complicated although it would not necessarily be unattractive to the Minister.

The Chief Justice said that a proposition to tidy up the regime for the award of costs has a logic and attractiveness to it and he asked whether the Minister would be helped by knowing the need for an interim solution.

Dr Palmer said that the Minister is already well aware of it.

Justice Doogue said that the Minister has only to see when the Scale was last fixed and said that this is a topic of embarrassment to the Committee because the scale has been out of date since the early 1980's and that updating the Scale was not satisfactory because of the need to do it so often. He said that the Scale and the Rules Committee are held in contempt on this topic.

Dr Palmer said that when they raised this issue with the Minister it would be helpful to have a letter from the Rules Committee so that it is very clear what the Rules Committee's view on this issue is. The Secretary agreed to draft a letter for the Chairman.

Justice Doogue concluded the discussion on the philosophy by saying that the Committee does not want constant conflict between the judicial and executive branches of Government. He said that it is only historical chance that this Committee exists and that the Judges do not make their own rules as is the case in other jurisdictions. He noted that this Committee is unusual in that the executive, the judiciary and the profession are all well represented on it.

The Committee agreed to set aside the philosophical issue and promulgate an interim solution of updating the award for costs on a proportional basis.

Justice Doogue turned to the issue of fixing costs. He turned to page three of Justice Fisher's paper and said that the Consumers Institute and Justice Paterson had made a plea for a nationwide daily rate and there was no opposition to that proposal.

Mr Tanner raised the issue which he had alluded to last year about whether the setting of the rate by the Chief Justice involved a subdelegation by the Rules Committee. He said that the power in the Rules Committee is to determine the scale of costs and there may need to be some legislative underpinning. He said that this is not an infrequent occurrence when fees are set to ensure that there can be no challenge to them.

Justice Doogue suggested that in the first instance the Committee could fix the scale of costs and then pursue a legislative amendment to enable them to determine the means by which the scale be fixed so the final determination of rates could be by the Chief Justice.

Mr Chambers queried how third party costs would work and Justice Doogue said he considered that the general discretion should cover that.

Mr Chambers then referred to Rules 47(4) and 48, a point made by the Securities Commission, and another instance where increased costs may be justified where the costs claiming party is acting in the public interest. He said that as a consequential change to Rule 48, a ground for refusing costs may be where the costs-resisting party is acting in the public interest.

Chief Judge Young suggested that this might be covered by 4(d) (top of page 3 of Justice Fisher's draft), and Justice Doogue said that it is in any event covered by Rule 5(c).

Mr Chambers then referred to Rule 48A and suggested that the Committee might expressly provide that where costs have been fixed on an opposed interlocutory matter there should be reserved to the court the power to reverse the costs order in the final costs order.

Justice Doogue said that that is commonly done now, but Mr Chambers said that Justice Fisher's draft envisages that what will be determined at the time is who pays the costs and that they be fixed later. Justice Doogue said that the catch is that if an order for costs is made on an interlocutory application it is a judgment capable of enforcement.

Mr Chambers said that in the existing Rules a party can claim costs for not only inspecting but also for producing their own documents to the other side, and he considered that this should be carried through in Justice Fisher's draft.

Mr Chambers said that in respect of the daily rate he was attracted to the idea of banding of counsel or complexity of proceedings.

Justice Doogue raised the issue of sub-delegation and Mr Tanner said that the Parliamentary Counsel Office has to certify as to the validity of any Rules that are made.

Justice Doogue suggested that the Committee initially have a scale with the daily rate fixed but then promote the legislative amendment to enable the amounts to be determined by the Chief Justice.

Mr Tanner agreed that that would be acceptable and noted that to proceed otherwise means that it may be raised at the Regulations Review Committee.

The Solicitor-General expressed some hesitation over proposed Rule 47(3) which is the power to order costs at any stage in the proceedings. He said that when that is read with proposed Rule 47(5)(c) which is aimed at public bodies and the Crown it may be that a costs application may be made, possibly on an indemnity basis, where the proceedings are underway.

Justice Doogue suggested that if the power were taken out of sub-rule (5) and put in sub-rule (4)(c) it then becomes a discretionary matter that the Judge takes into account.

Chief Judge Young said that he thought the power would rest more easily under sub-rule (4) than under sub-rule (5) on the basis that the awarding of indemnity costs is not essential under sub-rule (4).

The Solicitor-General referred also to the trusts area where the trust fund bears the costs of litigation.

Justice Doogue referred to Justice Paterson's point that where a party fails on the interlocutory applications but succeeds at the substantive hearing, costs could be revised to that effect.

Justice Doogue referred to Justice Paterson's suggestion in paragraph (d) of his letter of 26 September 1997 that discovery and bundles of documents should be included in Rules 47(4)(c) and 48(d).

Chief District Court Judge Young said that Rule 47(4)(c) suffers from the risk that it tries to nominate everything.

Justice Doogue said that the words "due to" in Rule 47(4)(c) needs to be reworded.

The Committee agreed that they did not want to add any more elements to the exercise of discretion in Rule 47(4)(c).

Justice Doogue referred to the submission from the Legal Research Foundation and the comment made in respect of Rule 47(4)(a) and suggests that the rule begin with the words "having regard to" instead of "where" on the basis that it is not specified what the costs are high in relation to.

Justice Doogue said that he would adopt the Legal Research Foundation's suggestions in relation to proposed Rules 44(a), 47(4), 47(5)(c) and 48. In respect of Rule 48 he noted that Justices Baragwanath and Paterson have made the same comment.

Justice Doogue referred to the Treasury comment that the Government is singled out in some way.

The Solicitor-General said that there is a perception there that the Courts are more hesitant to grant costs in favour of the Crown if the Crown wins, but that it was not an issue he wished to push.

Justice Doogue said that if the general framework is right the Crown has no more problem than anyone else although he acknowledged that the Crown will have more test cases and more public interest cases.

Justice Doogue referred to the submission from the Legal Services Board and the question of reference to ss 86 and 87 of the Legal Services Act. He said that he did not see how this could be provided in the Rules and that it was really a matter for the publishers to include in annotations. He noted that these sections are quite often overlooked.

Justice Doogue refered next to Justice Giles' submissions about disbursements and said that he did not understand the Committee to be looking at that issue at this stage.

Justice Doogue then referred to the New Zealand Law Society's submission in respect of witnesses' expenses and said that it is a matter for the Department.

Mr McCarron said that witnesses' expenses are under review.

The Secretary agreed to write to the Law Society to advise that the Department for Courts is looking at these regulations.

Justice Doogue referred to the Woolf Report and the proposals for fixing costs in stages during case management, the discussion on costs to date and what estimated costs were, and said that there should be some thought given to determining a proper budget for the costs in the proceedings. He said that if a Judge could order what the party and party costs in the proceedings are to be at any stage in the proceeding the Judge could then cap the costs of the proceeding. He said that this controls the litigant with unlimited means from imposing their will on the litigant with limited means.

Interlocutory discovery
Reduced costs.

Justice Doogue also referred to the suggestion based on the German model that benchmark costs be established, but said that in New Zealand we are already doing that with our scale.

Justice Doogue summed up by saying that to progress this we need to respond to the Ministry on the points of policy and then to ask Justice Fisher to prepare a redraft in the light of the comments on it.

7. Evidence

(a) *Cross Examination in Review Proceedings*

Justice Doogue noted that review proceedings cover more deponents than just Ministers of the Crown and queried whether there should be a paper for the Committee to consider on it.

Mr Chambers said that the recent decision of the Court of Appeal in *Russel Uclaf Australia Pty Limited v Pharmaceutical Management Agency Limited* [1997] 1 NZLR 650 which held that there is no right to cross-examine Ministers in review proceedings and that this is generally inappropriate is a decision of a full court of five and he queried whether it is open to the Rules Committee to now separately consider the matter.

The Solicitor-General said that the Court of Appeal ruling was applied in a case where the deponent was a Minister, but was really about simplicity in judicial review proceedings. He quoted from the judgement: "We consider however in order to fulfill the purposes of judicial review as a relatively simple, untechnical and proper procedure, it is desirable that s 10(b) of the Judicature Amendment Act be amended to make it explicit that the judges have all necessary or appropriate preliminary directions about procedure including directions as to the mode in which any evidence is to be given (affidavit or *viva voce*) and if by affidavit requiring leave for cross examination, leave to be granted only if sufficient grounds are shown".

The Chief Justice asked whether the committee thought there should be a freer right of cross examination.

Mr Chambers said that while he shared the Court of Appeal's approach about objectivity and simplicity, he said that there are numerous review proceedings where cross examination may be necessary.

The Solicitor-General said that it is likely the issue will need to be addressed by legislation and that the issue of impeding due process will need to be weighed against the simplicity principle.

Mr Chambers and Mr Carruthers agreed to prepare a short paper discussing the issues for the consideration of the Committee at the next meeting.

8. General

(a) *Access to Justice*

There were no further items arising out of the Woolf report for further discussion.

(b) *Rules in Legislation*

The Chairman says that this was a matter the Committee had looked at two years ago and is on the agenda again to remind those responsible for legislative matters that rules of procedure should not be contained within the statutes. He noted that in recent times the issue has arisen in respect of taxation, *habeas corpus* and the Companies Act. The Committee agreed that the Secretary should write again to those involved with the legislative process.

(c) *Search of Court Records*

Justice Doogue said that this was with the proposed amendment to Rule 66 which was dropped from the 1997 Amendment Rules when the Chief Justice queried whether it was intended that if an order is made granting leave to commence intended proceedings, that in the interval between the granting of leave and the actual commencement of the proceedings, the application is open to search by anyone whereas once the proceedings have commenced there are restrictions.

The Chief Justice referred to the comments made by Justice Fisher at the last meeting, namely that the difficulty is that while a person cannot look at the interlocutory application if the proceedings are still live, there is no way of knowing whether or not an action is proceeding because when leave to bring proceedings is granted it is not usual to specify a deadline within which the proceedings must be brought.

Justice Doogue said that if Rule 66(3) were extended to include a proceeding or an intended proceeding the point raised by the Chief Justice would be met. He said that is so because the definition of "proceeding" means any application to the court for the exercise of the civil jurisdiction of the court other than an interlocutory application. The definition of "interlocutory application" means an application to the court and any proceeding or intended proceeding for an order or a direction relating to a matter of procedure for some relief ancillary to that claimed in a pleading. He said that there cannot be an interlocutory application unless there is a proceeding or an intended proceeding. If the proceeding has been determined under Rule 66(3) then a person is allowed to search it. If the Committee wants to extend the right to search to an application in respect of an intended proceeding which has been determined, then the Committee merely needs to extend sub rule (3) to cover a proceeding or an intended proceeding. In other words, in the case of proceedings, the court records can be searched only if they are determined. In the case of intended proceedings there is a right of search if they have been determined and not if the proceedings have not been determined. He said that an intended proceeding can be determined only when the proceedings are determined.

Mr Chambers said that if leave to bring proceedings is granted there may be a gap before the new proceedings are commenced. That gap should be treated as if a proceeding were underway and undetermined.

The Chief Justice referred to Justice Fisher's point that the procee never be commenced because they are settled.

Justice Doogue said that the issue would be solved if the instance where leave has not been granted is treated as an intended proceeding, so that sub rule (3) would refer to a right to search a file relating to a proceeding which has been determined or an intended proceeding where leave has not been granted.

Mr Tanner agreed to prepare a revised draft.

(d) *Servicing of the Rules Committee*

Mr McCarron said that he had raised this matter with the Department and that the Department had floated a suggestion about allocating time from someone from their policy division, although this raises issues about the independence of any help that might be accorded to the Committee.

Justice Doogue said that the existing help from the Crown Law Office and from Judges clerks, while not technically independent is in fact so.

The Solicitor-General said that the Judges clerks model is probably the best in terms of independence and said that a clerk could be allocated part time to the Chairman of the Rules Committee. He noted that the servicing of judges is currently being looked at.

Mr McCarron said that from the Department's point of view there is some benefit in having a policy analyst who can also contribute to the Department.

Mr McCarron agreed to get further feedback back to the Department, and Justice Doogue said that he would refer it to the judicial services review group as well.

(e) *Stand Alone Rules*

Justice Doogue referred to the letter from Mandy McDonald to Chief District Court Judge Young which was tabled at the meeting for information.

9. **Habeas Corpus**

(a) *Law Commission Report*

Justice Doogue asked whether the Committee wished to do anything more about this matter or to wait until the Law Commission Report is picked up politically. He said that he would like to see the Rules Committee promote rules that would meet both the Law Commission's approach and the Rules Committee one.

Mr Chambers said that that should not be a big exercise because it simply involves removing from the bill matters that should be in rules.

The Solicitor-General suggested that the Chairman should write to the Minister to say that the Committee is doing that because the Law Commission report is currently being considered and there is correspondence with various people being consulted. He said that *habeas corpus* is a small matter which could move very quickly. Justice Doogue agreed and suggested that members bring the Law Commission report on *habeas corpus*.

10. Interlocutory Matters

(a) *Generally*

This matter was deferred until the next meeting.

11. Pleadings

(a) *Certificate by Lawyer Responsible for Document*

Mr Carruthers advised that he is putting a paper together. He said that he proposes to mention the matter in a pleadings seminar which he is about to present to see if he can get some feedback on it, saying that the Rules Committee is dealing with it.

(b) *General*

Mr Carruthers said that he is preparing something on this in relation to the written briefs rules. He added that unless there are any objections he proposes to mention this matter in a pleadings seminar which he is about to present to see if he can get some feedback, saying that the Rules Committee is dealing with it.

12. Summary Judgment

(a) *New Summary Judgment Rules*

Justice Doogue advised that this matter is related also to the issue of affidavits, and that Justice Hansen referred to the Committee a judgment of Hammond J on the issue of how a corporate plaintiff should make affidavits for the purposes of the Corporation. He says that in some jurisdictions affidavits can be made on behalf of corporations by employees and this could be effected by an amendment to Rule 517. In respect of summary judgments in other jurisdictions, the affidavits are not made by the plaintiff and simply contain the belief of the deponent; this could be effected by substituting the term "deponent" for "plaintiff" in Rule 138(5)(b). Mr Chambers said that the Law Society had agreed with the approach of widening the class of persons who can make affidavits on behalf of the Corporation. He referred to the

uniform Civil Procedures Rules of Australia which refer to the plaintiff or another responsible person (which term has been judicially determined). He also referred to the Canadian approach which widened it to include an employee. He noted that the difficulty with employee is that the person with the knowledge of the matters in issue may be an architect or an accountant who is not an employee.

The Committee agreed that the problem can be overcome in the draft circulated under Summary Judgment/2/98 by substituting "deponent" for "plaintiff" in Rule 138(5)(b).

Mr Carruthers questioned whether that amendment would capture the need for the deponent to be a responsible person closely connected with the application.

Chief Judge Young said that there are two separate concepts here, one that the affidavit should be from someone who can bind the company, and the other that the evidence has to be admissible ie that the affidavit be made by the person with best knowledge.

Mr Chambers suggested that draft Rule 138(5)(a) could be extended to include the person making the application or a responsible person.

Justice Doogue said that he would not want to open the door to arguments about who is responsible.

The Committee also noted that it is implicit in the making of any affidavit that the deponent is in the position to attest to the contents of it, and the Committee agreed that the only change needed is to draft Rule 138(5)(b).

Justice Doogue then turned to the aspect relating to Rule 517 which provides how affidavits may be made on behalf of a corporation.

Mr Chambers suggested that Rule 517 would need to be deleted because otherwise the principles in it would apply to proposed Rule 138(5)(a).

The Chief Justice suggested the problem might be solved if Rule 138(5) were to begin with the words "not withstanding anything in Rule 517".

Justice Doogue said that rules along the lines of Rule 517 are not common in other jurisdictions and he was aware only of Ontario that has it.

Chief Judge Young said that if Rule 517 is to be removed the Committee would need to know whether there are any consequences for other rules.

The Solicitor-General suggested that the wording "deponent for the plaintiff" is the simplest and the best.

Mr Carruthers said that there need be no requirement to bind the company at all and that the only matters of interest are whether the deponent can give evidence that is relevant and admissible.

The Chief Justice agreed however that the Committee does not at this stage know how many instances there are where a rule requires an affidavit by a party and the party may be a company.

Justice Doogue expressed the agreement of the Committee that the Committee needs to see if Rule 517 has any other application other than to the summary judgment provisions. He considered it peculiar that under Rule 517 the company itself cannot authorise someone to make an affidavit for it and he said that he would ask his clerk who prepared the paper on summary judgment to follow that aspect of it up. The Parliamentary Counsel Office agreed to look at it also and in particular the point about whether Rule 517 has any other consequences outside of summary judgment (including possibly the Judicature Amendment Act 1972).

13. Tax

(a) *Proposed New Rules of Procedure*

Justice Doogue said that the Department has once again changed its position and withdrawn the proposal that there be special rules for taxation cases. There was still however the issue about the address for service being the director of litigation management. He explained that the Department receives documents all over the country and wants to centralise it.

Mr Carruthers said that the Rules currently require service on the Commissioner, and the Department has created this problem for itself by accepting documents at its offices all over the country.

The Solicitor-General said that some administrative structure ought to be workable and drew a parallel with the Cabinet Office Manual which provides for service on Ministers to be effected at the Crown Law Office.

The Committee agreed that the Secretary should write to the Department encapsulating matters discussed.

The Solicitor-General said that he hoped the Attorney-General would be able to attend the costs discussion at next meeting.

The meeting closed at 2.50 pm.
The next meeting is to be held on Friday 12 June 1998

Secretary

ADDENDUM TO THE MINUTES OF THE MEETING

HELD ON FRIDAY 27 FEBRUARY 1998

ACTION REQUIRED BY:

Justice Doogue:	Write to Ministry of Justice expert advisors and winding up.
	Write to Commerce Commission re Appeals.
	Write to Minister of Justice re costs and habeas corpus.
Justice Fisher:	Redraft paper on Costs.
Mr Carruthers:	Take up Admiralty Rules queries from Mr Fantham with sub committee of Justice Hansen and Justice Giles.
	Prepare paper on cross examination in review proceedings.
Mr Chambers:	Prepare paper on cross examination in review proceedings.
Mr McCarron:	Get further feedback from Department for Courts on servicing of the Rules Committee.
Miss Soper:	Write to Mr Fantham re Admiralty Rules.
	Write to Law Society re costs (witnesses expenses).
	Write to those involved in legislative process re rules in legislation.
	Write to Department of Inland Revenue re tax rules of procedure.