THE RULES COMMITTEE

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Wellington

13 March 1996

Minutes/1/96

CIRCULAR NO 4 OF 1996

Minutes of the Meeting held on Thursday 29 February 1996

1. **Preliminary**

The meeting called by Agenda/1/96 was held in the Judge's Common Room, High Court, Wellington on Thursday 29 February 1996 commencing at 9.30 am.

2. **In Attendance**

The Hon Justice Doogue (in the Chair)
The Hon Justice Fisher
The Hon Justice Hansen
Mr R F Williams (for the Chief Executive, Department for Courts)
Mr K McCarron (for the Chief Executive, Department for Courts)
Mr C R Carruthers QC
Mr H Fulton
Mr W Iles QC CMG (Chief Parliamentary Counsel)
Miss T L Lamb (from the Crown Law Office, by invitation)

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

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

4. **Personnel**

The Committee welcomed Kieron McCarron from the Department for Courts who will be the future representative of the Chief Executive for the Department for Courts in place of

Mr Williams. The Committee expressed their grateful thanks to Mr Williams for his assistance since 1989.

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

On the motion of Justice Fisher, seconded by Mr Williams, the minutes of the meeting held on Thursday 23 November 1995 were taken as an accurate record and were confirmed, subject to the reference to the Statutes Amendment Bill under Item 15 on page 9 reading "The Law Reform (Miscellaneous Provisions) Bill".

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

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

7. **Papers Tabled at the Meeting**

By the Secretary:

- Service on Companies - questioned conflict between Act and Rules (Parties/1/96).

By Justice Doogue:

- Letter on interrogatories from Master Venning dated 29 January 1996.
- Letter on mediation from the Chief Justice dated 12 October 1995.
- Memorandum from Justice Doogue to Brian Murray on assembly of civil files dated 29 February 1996.
- Letter from Marion Nellor on the National Case Flow Management Committee dated 23 February 1996.

By Justice Hansen:

- Papers on the Admiralty Rules.

By Mr Iles:

- The High Court Amendment Rules 1996 (PCO 79/P).
- The Court of Appeal Rules 1955, Amendment No 5 (PCO 77/1).
- Draft clauses for Statutes Amendment Bill to amend the District Courts Act 1947.

8. **Admiralty Rules (Item 3(a) of Agenda)**

Justice Hansen said that he, Mr Carruthers and Mr Giles met to identify areas in the rules that needed amendment. They then invited responses from the registrars, practitioners and

the Maritime Law Association of Australia and New Zealand which had a conference in November last year. He said that the papers tabled at the meeting include a report from that conference, a letter from Mr Ford, the Registrar at Auckland, comment from the Registrar at Christchurch who is probably the most experienced registrar in admiralty matters, three articles which have been published in the New Zealand Law Journal and a cut-and-paste draft of new rules. Justice Hansen said that the sub-committee need now to meet, but would like the comments of the members of the committee before they reach a final view.

Justice Hansen also commented that the Australian Rules are drafted in much simpler language but he considered it appropriate to follow the existing format in the High Court Rules. He said that he hoped to have a finalised draft for the Committee at its next meeting.

The Committee recorded its gratitude to Mr Giles for his drafting of proposed amendments on the Admiralty Rules.

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

(a) *Removal of Proceedings from High Court into Court of Appeal; Judicature Act 1908, s 64*

Justice Doogue advised that he was still waiting to hear from the President.

(b) *Court of Appeal Technical Advisers*

Justice Doogue said that a recommendation had been made to the Department for Courts that the amendment proceed.

Mr Fulton said that in the correspondence from the Ministry of Commerce the issue was raised as to who should pay for technical advisers.

The Secretary advised that she had written to the Ministry of Commerce pointing out that meeting the costs of judicial officers is not a function of the Crown Law Office and that any proposal from the Ministry of Commerce to divest itself of responsibility should be addressed with the Department for Courts.

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

The Committee noted that a response had been sent to Mr Chapman.

10. **Court of Appeal Rules (Item 6 of Agenda)**

(a) *Security for Costs*

Justice Doogue recapitulated from the last meeting and said that Mr Fulton had wanted more input from the Bar Association and the Law Society, and that the Committee had provisionally reached the view that costs should be awarded on the basis of two thirds of the actual costs.

Mr Carruthers said that Mr Fulton had reported to the Civil Litigation and Tribunals Committee and the Bar Association but that the Civil Litigation and Tribunals Committee has not met since then. Mr Carruthers said that he had tried to get comment by circulating the paper but nothing has so far been received.

Mr Fulton said that the Bar Association is in a similar position and has not yet been able to respond.

The Committee noted that there has already been a long period allowed for input from the profession and Justice Fisher suggested that the Rules Committee ought now to adopt a concrete proposal which would provide a focus for others to comment on.

Justice Doogue suggested that Mr Carruthers and Mr Fulton ensure that such a draft is available for the next meeting.

Justice Fisher said that he had prepared a specific proposition in his memorandum of 27 July 1995. Since then he had read Lord Woolf's papers and said that it would introduce no change to the basic structure but would include extra discretionary considerations when it came to modifying the two thirds presumption. Mr Carruthers agreed that Mr Fulton and himself would ensure that a paper is circulated ready for discussion at the next meeting.

Mr Fulton expressed concern at re-consulting with the Bar Association which essentially reached agreement at its conference at Queenstown in 1995.

11. **Directions (Item 7 of Agenda)**

(a) *Defamation Act 1992*

Justice Doogue said that a letter had been sent to all those who have input into the drafting of legislation to inform them that Rules should be enacted as delegated legislation. He asked the Secretary to bring this matter up on to the agenda in two years time to check on the situation.

(b) *Mediation - ADR*

Justice Doogue said that the High Court Review Committee, of which he is the convenor, has made a recommendation to the Chief Justice that provision for mediation would require a statutory amendment. As a first step that Committee has suggested the Chief Justice obtain the approval of the judges to that being perused. In addition, Justice Doogue advised that the Judge's Clerk at Wellington has been asked to identify all the statutory provisions that may require amendment in order to implement alternative dispute resolution. Justice Doogue said further that it would be helpful for the Chief Justice to hear the views of the Rules Committee on whether mediation should be compulsory or voluntary, whether the mediator should be part of the court structure or a member of LEADR and who should pay. Justice Doogue

said that a statutory regime is envisaged because it will be difficult to provide in the rules for compulsory mediation.

Justice Fisher drew a distinction between the conduct of a mediation and a conduct of a settlement conference, and Mr Carruthers agreed that the judge has a statutory authority to deal with the parties separately. In that context, Justice Doogue said that the judge can sometimes express a view which would not normally occur in a mediation.

Justice Doogue said that in Western Australia where there is provision for compulsory mediation, the registrar is the mediator and the judge will never be.

Justice Hansen asked if a statutory amendment were made to facilitate mediation whether mediation would be conducted by Masters.

Mr Fulton expressed the hesitation that under case management the parties are being persuaded towards ADR; he considered however that that will not be productive if it is genuinely opposed by one party.

Justice Hansen agreed that there may be valid reasons why the parties do not wish to subject themselves to mediation.

Justice Doogue said that the experience in Western Australia was that when the parties were forced into mediation they did in fact communicate.

Mr Fulton agreed that that happens also in respect of case management in that a party does not want to be seen to be obstinate.

Mr Carruthers noted that compulsory mediation is something of a contradiction. However, he said that he would not exclude judges from that process, given that the training and the role taken require substantially the same skills. In the end he considered that an individual judge can conduct a successful process because of the authority of the judge when leading a mediation.

Justice Doogue recalled that in the Family Court there was resentment on the part of the parties that the judge was making orders when the parties had refused to consent to them.

Justice Doogue noted that the courts cannot compulsorily direct a mediation unless there is a mechanism by which that can be carried out. Mediation may or may not form part of the court structure, and an issue then arises as to whether the mediator should be a judge or an officer of the Department for Courts.

Mr Carruthers noted the analogy with arbitration in that a statutory scheme then takes over.

Justice Doogue asked whether the parties to the litigation should engage in a private mediation or whether it should be part of the court system. In Western Australia it was the latter that was favoured.

Justice Fisher suggested that it would be desirable to have discrete legislation on it. He noted that the rules already provide for a judge to delegate functions to other people such as an aspect of a dispute to a specialist or costs to a registrar. He suggested that the rules could structures something for mediation. In that context arrangements about private fees would be no different from the situation where all or part of a dispute is referred to another delegate. The parties would then consult as to who they consider suitable. The requirement then is that the result of that exercise be reported back to the court. If provision is made in the rules it would be easier for everyone to follow.

Mr Fulton noted that the National Case Management Committee may have some thoughts on this matter also.

Justice Hansen suggested that provision for mediation would need to be part of the court structure, although not necessarily a settlement conference.

Justice Fisher considered however that the difference between a settlement conference and mediation is that mediation is not a directed thing, although Justice Hansen said that the LEADR view is not necessarily representative of the way mediation works in practice.

Mr Carruthers said that in mediation the mediator does eventually bring their own judgment to what is possible for the parties.

Justice Fisher noted that the court can have a discretion at a directions conference as to who should be the mediator.

Mr Fulton referred to Justice Barker's paper presented at the LEADR Conference in Melbourne and noted that in a number of areas of the law including family law, children and young persons, residential tenancies, employment, bill of rights, disputes tribunal, resource management, human rights and Treaty of Waitangi all have general powers relating to mediation.

Justice Doogue noted that in general the Committee had no opposition to provision being made for court directed mediation in some way.

In this context, Mr Fulton noted that there may need to be some guidance on how the discretion is to be exercised.

Justice Doogue said that he would ask his judge's clerk to find out how these matters are conducted in Western Australia and other Australian jurisdictions. He said that the Committee may then be able to deal with this as a rules matter.

The Secretary is to provide the Clerk with a copy of the relevant papers from the Rules Committee files.

12. **Discovery (Item 8 of Agenda)**

Mr Fulton referred to his memo to the Pilot Case Management Committee of 20 November 1995 (Directions/6/95) and said that the next meeting of that Committee was not scheduled until 22 March 1996.

Mr Fulton referred to Item 9 on page 4 and suggested the Committee might consider directions that limit discovery in respect of the party's own documents relied on in support and documents known to a party which adversely affect that party's own case. He referred to overseas papers such as the Lord Woolf Report that directions can be given to that effect -at for example a directions conference.

Justice Doogue said that Lord Woolf identified this as one of the areas as causing the most trouble in the United Kingdom and he said that the issue causes sufficient trouble in New Zealand to look at it independently.

Mr Fulton said that he had no knowledge of overseas cases of deliberately not giving full and frank disclosure, but he said that in New Zealand the problem is the time and expense, especially in respect of relevant documents that may not be necessary for the fair disposal of the case and train of inquiry documents ("fishing" discovery).

Justice Fisher said that it is feasible under the case management system at a directions conference for the judge to make a direction in respect of the party's own documents and adverse documents known to a party, but for full discovery to follow later. Mr Fulton said that that is called "discovery in waves".

Justice Doogue said that it is not proposed to extend the pilot study until it has been simplified and improved.

Mr Carruthers expressed concern about the attitude of the profession to making full discovery and said that he would not like to see the distinction made between the categories of documents provide an opportunity for documents that adversely affect the party's case not being initially disclosed.

Justice Doogue suggested, and the Committee agreed that paragraphs 9 and 10 of Mr Fulton's memorandum of 20 November 1995 to the Pilot Case Management Committee be promoted to the Masters, Judges and the profession to give consideration to them being applied in the case management pilot as an available option.

13. **District Court Rules (Item 9 of Agenda)**

The Chairman advised that the Chief District Court Judge had followed this matter up with the Ministry of Justice but has still to receive a response.

14. **General (Item 10 of Agenda)**

(a) *Rule 66: Search of Court Records Generally*

Justice Doogue said that the late Justice Williamson had picked up on the words "in any cause or matter" in r 66 and suggested that the language, in the context of the current rules, should refer to the terms "proceeding" and "interlocutory application".

The Committee agreed that the amendment was sensible and the matter was referred to Mr Iles to draft appropriately.

15. **Interlocutory and Final Orders (Item 2(d) of Agenda)**

Mr Iles said that he had drafted an amendment to the Court of Appeal Rules 1955.

Justice Fisher suggested that it may be worth including that any judgment or order which is not interlocutory is defined as a final order. Justice Fisher said that one definition needs to be the residue of the other in case the two definitions do not quite mesh.

Mr Iles referred to the definitions of interlocutory order and final order in the District Courts Act 1947, s 71 and said that a definition could be similarly added.

Mr Fulton queried whether the words "final order" are used in r 27 of the Court of Appeal Rules 1955. He drew the attention of the Committee also to the wording of r 27 which refers to a reason being given and otherwise perfected.

Given that the term "final order" is not used in the Court of Appeal Rules, the Committee agreed that there was no need to go on and define "final order".

The Committee agreed that the draft could be referred to the Court of Appeal for them to consider.

Mr Iles referred to his draft amendment to the District Courts Act for inclusion into what would be the Law Reform (Miscellaneous Provisions) Bill. He noted that s 71A of the District Courts Act has been amended to insert a reference to any order being sealed and he suggested that his definition of "interlocutory order" should also refer to an order which is sealed rather than an order which is made.

Mr Fulton said that if a proceeding is dismissed in the District Court it has to be sealed before the unsuccessful plaintiff has time running against them, which is different situation from the Court of Appeal where the three months runs from the date of the decision.

Mr Carruthers suggested that that situation had come about because of the short time period which could necessitate sealing the order before costs had been settled.

Justice Doogue queried whether Mr Iles' definition would widen the class of cases in which an appeal may be brought and, after discussion, the Committee acknowledged that the new definition would extent to strike-out applications.

The Committee agreed to refer the draft to the Chief District Court Judge.

Mr Iles noted that similar difficulties arise in respect of the Privy Council Rules but that that problem should probably be addressed once the issue of whether or not to abolish the right of appeal to the Privy Council has been settled.

16. **Interrogatories**

Mr Iles referred to the draft High Court Amendment Rules 1996 and said that he had amended r 278 to make it clear that a notice can be issued on more than one occasion. In respect of the amendment to r 279 Mr Iles said that while there may be more than one notice the party responding is required to comply only with the first one; it is in any event open to a party to make an application to the court for an order under r 282. Mr Iles further advised that r 284(1) has been amended to extend the grounds of objection to answer so that matters such as irrelevance can be raised.

The Committee then addressed the letter from Master Venning of 29 January 1996 in which he suggested that the rules should provide for interrogatories as of right in originating applications.

After discussion, the Committee decided not to extend the rules and considered that in most cases where there is an originating application there should be an application for leave to issue interrogatories. The Committee was of the view that if interrogatories are necessary one would expect the statement of claim procedure would be required.

Mr Fulton then referred to the minutes of the last meeting, page 7 and said that he still had to receive a response from the profession on the question of non party discovery.

In respect of the time for answering interrogatories being extended from 28 to 42 days, Mr Fulton expressed a preference for a rule change.

Justice Hansen suggested that it might be timely to look at time frames in general over the whole rules so that time frames are reasonable and are coupled with an automatic sanction if they are not complied with.

Justice Doogue agreed that there could be sanctions, but that consideration of the issue overlaps with the case management pilot study. The Committee agreed that r 279(a) should be amended to provide that interrogatories be answered in twenty eight and forty two days, rather than fourteen and twenty eight as presently specified, and the matter was referred to Mr Iles accordingly.

Mr Fulton said that he had flagged with the Law Society and the Bar Association a question of whether there is a need to allow interrogatories before commencement in respect of a person not intended to be a party and whether there is a need to permit interrogatories to a non party after commencement of the proceedings. He said that he has yet to receive an answer on those issues. Mr Fulton also queried whether the Committee wishes to retain the rule of practice that interrogatories are to be answered as to facts rather than evidence.

Justice Hansen said that there are New Zealand decisions to indicate that interrogatories may be wider than that, but said that there are so few of them the issue is not causing any problems.

17. **Parties**

(a) *Service on companies - questioned conflict between Act and Rules (Parties/1/96)*

Mr Fulton said that the Companies Act contains rules about service of legal proceedings which raise the issue as to whether service at an address for service in terms of the High Court Rules complies with the sections in the Companies Act. He said that r 112 allows for service at an address for service while the Companies Act lists the means by which service may be effected concluding with service in accordance with an agreement made with the company. It raises the issue as to whether service at the office of the solicitor acting constitutes service in accordance with an agreement made with the company. The rules concerned are rr 192, 198 and 209, and Mr Fulton said that the point has been picked up by the authors of Sim's Court Practice.

Justice Doogue referred to r 210 and suggested that that rule expressly provides for a means of service by agreement which would comply with s 460 of the Companies Act. He suggested that alternative arrangements as to service may therefore not qualify in terms of the Companies Act criteria.

Justice Fisher noted that the desirable outcome so far as the Rules Committee is concerned is for the provisions in the Companies Act to be repealed, leaving the rules relating to service to be prescribed by the High Court Rules.

Mr Fulton suggested that s 460 of the Companies Act could be amended to insert a subclause (f) to provide for service subject to the rules of court.

Mr Fulton said that there may also be occasions when it is necessary to serve the company rather than the solicitor as for example an interlocutory order which the company must comply with.

Mr Fulton suggested that an alternative amendment to s 460 is to insert in subclause (d) after the word "directions" the words "or rules".

The Committee agreed that the Secretary should write to the Ministry of Commerce suggesting an amendment to s 460 of the Companies Act, minuting a copy of that letter to Mr Iles.

18. **Pleadings (Item 11 of Agenda)**

(a) *Certificate by Lawyer responsible for document*

Mr Fulton said that he has reported to both the Law Society and the Bar Association but that those bodies have not yet had an opportunity to consider the matter.

Mr Fulton suggested there would not be any attraction for a change to the rules, and Justice Fisher suggested that there is perhaps room for a compromise by deleting the obligation to make reasonable enquiry and also deleting the requirement to certify that the allegations and factual contentions have evidentiary support and that the denials of factual contentions are warranted on the evidence.

Mr Fulton suggested that that is the effect of filing a pleading at the moment in that if there is a breach then the court has sanctions it can impose. If the breach is intentional then that becomes a disciplinary matter.

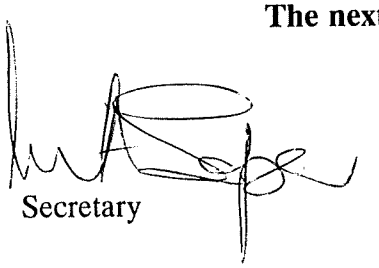
Mr Carruthers said that the suggestion has some attraction for him because it would focus the profession on their obligations. He noted however that the Civil Litigation and Tribunals Committee meets at the end of March and he would take the matter up with them then.

Justice Doogue suggested that a next general topic for consideration, moving through the rules, would be interlocutory applications in rr 234 to 269 and he agreed that he would arrange for the judge's clerk to prepare a discussion paper.

Justice Doogue referred to the report by Lord Woolf and suggested that if any members see anything in it that should be considered by the Committee they arrange with the Secretary for the item to be put on the Agenda.

The meeting closed at 12.40 pm.

The next meeting will be held on Thursday 6 June 1996



Secretary

MAS:100587

ADDENDUM TO THE MINUTES OF THE MEETING

HELD ON THURSDAY 29 FEBRUARY 1996

ACTION REQUIRED BY:

Justice Doogue:

Mediation/ADR
Ask his Judge's Clerk to find out how these matters are conducted in Western Australia and other Australian jurisdictions.

Interlocutory and Final Orders
Write to Court of Appeal referring draft of Court of Appeal Rules.

Refer the draft to the Chief District Court Judge.

Arrange for the judge's clerk to prepare a discussion paper on interlocutory applications.

Interrogatories
Write to Master Venning on interrogatories.

Admiralty Rules
Write to Mr B H Giles re Admiralty Rules.

Master Hansen:

Admiralty Rules
Submit a finalised draft for the Committee at its next meeting.

Mr Carruthers:

Pleadings
Certificate by Lawyer responsible for document
Take this matter up with the Civil Litigation and Tribunals Committee when it meets at the end of March.

Security for Costs
In conjunction with Mr Fulton ensure that a paper is circulated ready for discussion at the next meeting.

Mr Fulton:

Discovery
That paragraphs 9 and 10 of his memorandum of 20 November 1995 to the Pilot Case Management Committee be promoted to the Masters, Judges and the profession to give consideration to them being applied in the case management pilot as an available option.

Security for Costs
In conjunction with Mr Carruthers ensure that a paper is circulated ready for discussion at the next meeting.

Miss Soper:

Mediation/ADR
The Secretary is to provide the Clerk with a copy of the relevant papers from the Rules Committee files.

Parties
Write to the Ministry of Commerce suggesting an amendment to s 460 of the Companies Act, minuting a copy of that letter to Mr Iles.

All:

Admiralty Rules
Give comments on Admiralty Rules to Justice Hansen.