THE RULES COMMITTEE

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Wellington

11 August 1995

Minutes/3/95

CIRCULAR NO 29 OF 1995

Minutes of the Meeting held on Thursday 3 August 1995

1. **Preliminary**

The meeting called by Agenda/3/95 was held in the Judge's Common Room, High Court, Wellington on Thursday 3 August 1995 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 R F Williams (for the Secretary for Justice)
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 Attorney-General (the Hon Paul East MP)
The Solicitor-General (Mr J J McGrath QC)
Mr C R Carruthers QC

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

On the motion of the Chief Justice, seconded by Justice Hansen, the minutes of the meeting held on Thursday 8 June 1995 were taken as an accurate record and were confirmed.

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

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

6. **Papers Tabled at the Meeting**

By the Secretary:

- Memorandum to Justice Doogue on the discussion from the New Zealand Bar Association Conference in Queenstown in July 1995 on costs.

By Mr Iles:

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

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

Justice Hansen said that he anticipated having a draft set of rules by the end of the year.

Justice Doogue suggested that the matter be taken off the agenda for the November meeting, and entered on the agenda for the first meeting in 1996.

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

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

Justice Doogue advised that he has both written and spoken to the President of the Court of Appeal, who is going to consider the matter further and get back to him.

(b) *Court of Appeal Technical Advisers*

The Chairman advised that the Secretary has had further correspondence with the Minister of Justice. Mr Williams agreed to make enquiries and check to see that the issues is still being actively considered.

9. **Costs (Item 5 of Agenda)**

The Secretary tabled a memorandum to Justice Doogue dated 2 August 1995 which summarises the discussion from the New Zealand Bar Association Conference in Queenstown in July 1995.

Justice Doogue recalled that the Committee had originally been unanimous that costs should be awarded on an actual and reasonable basis. Subsequently there has been some movement away from that proposition and Justice Fisher in his memorandum now suggests something along the lines of the position taken in *Morton v Douglas Holmes Limited* (No 2) [1984] 2 NZLR 620. For himself, Justice Doogue said that he favours actual and reasonable solicitor/client costs. Justice Doogue suggested that the judges have a discretion to move from that point depending on the conduct of the parties.

Justice Hansen said that he was surprised at the Bar Conference that there was no support from the profession for actual and reasonable costs.

Justice Doogue suggested that that is understandable because the *Morton v Douglas Holmes Limited* approach makes it easier to float litigation and that is to the benefit of the bar.

Mr Fulton said that he was more persuaded by the access to justice argument and he thought that that was what the Bar Association were really saying.

Justice Hansen said that his experience of taxing costs was that it was normal for the solicitors to receive approximately two thirds of what they had asked for.

Justice Doogue said that that was not his experience in England but rather was that the solicitors charged the amount that they received on the taxation ie the client was charged the reasonable amount.

Justice Fisher said that the bar would otherwise consistently charge too much.

That comment was borne out by Mr Fulton who said that for taxing of costs and bankruptcies, the solicitors did put in a higher figure so that they would be awarded reasonable costs. Justice Doogue agreed that a person putting in a bill for taxation always padded it, knowing that it would be cut back.

Justice Fisher said that if two thirds or three quarters of actual and reasonable costs is adopted as a starting point, it does leave the court room to award something more than that to mark out those who deserve a penalty in costs. He said that there should be no reward for practitioners for work not done or over-charged. By way of example he cited a case where a plaintiff had sunk their own yacht and then tried to defraud the insurance company.

Mr Fulton noted that at the Bar Association Conference there was criticism of the scale for quickly becoming out of date, while at the same time the idea of an annual meeting between the bench and bar was promoted.

Chief Judge Young expressed concern about awarding costs on an actual and reasonable basis because of the difficulty of determining that, particularly in the District Court.

Justice Fisher suggested that costs should at least be something of the order of twice what the scale presently provides for. He said that in awarding costs he asks practitioners to give him the actual bill of costs and he makes a decision on that basis.

Justice Hansen expressed concern that if the rule is worded as a percentage it will lead on to padded bills.

Mr Fulton said that the profession is not confident that all Judges have a feel for the costs of running a practice.

Justice Hansen said that in Hong Kong that problem was overcome by consulting annually with the Law Society and the Bar Association.

Mr Fulton said that the profession has concerns not only that the Judges are out of touch with costs, but also that there is inconsistency of awards of costs.

Justice Fisher said that there is however an opportunity for the parties to make submissions on costs which gives the other side the opportunity to say if attendances have been unjustified or an hourly rate is too high.

Mr Fulton asked whether there were any way of expressing the two thirds or three quarters without having to state a percentage.

Justice Doogue suggested a wording along the lines of "substantial proportion of the order of ...". He recalled also Jack Hodder's suggestion that costs be verified at the commencement of trial - the parties would not then know whether or not they were on the winning or losing side and there would be no temptation at that stage to pad the costs.

Mr Fulton considered it helpful for the rules to set out the criteria governing the exercise of the judge's discretion.

Justice Fisher agreed that a check list is valuable but that it is more likely to operate as a series of reasons for departing from a starting point.

Chief Judge Young said that it was also important for the litigants that there be a degree of predictability.

Justice Doogue suggested that one way of achieving that would be to take a percentage of the average between the parties costs.

Justice Fisher suggested that that might lead in inequities if there is a large firm on one side and a sole practitioner on the other.

Justice Doogue summarised by saying that the majority of the Committee is prepared to see a rule that in the ordinary course the parties should get a substantial proportion of their actual and reasonable costs, with room to move in either direction depending on the merits of the case. The difficulty is in then ascertaining what actual and reasonable costs should be.

Justice Fisher suggested that some provision for notice could be structured in the rules as to the costs that a party will be claiming if successful. He suggested that such notice could be given at various stages of the proceedings.

Mr Fulton noted that the statement of claim or statement of defence currently gives notice of claiming costs. He noted also that the case management scheme makes a similar provision.

Justice Fisher suggested that the degree of particularly could be that currently required under the Law Practitioners Act when charging a client. He noted that some practitioners would be embarrassed to show their costs to anyone other than a client.

Mr Fulton said that he would want to discuss these issues with the Law Society.

Justice Hansen said that he would not want to see costs reserved on interlocutory matters, and that they should follow the event.

Mr Fulton noted that the scale can be more applicable for interlocutory matters, and that the scale may contain a daily rate which would give an indication of actual and reasonable costs.

Justice Fisher said that, on this approach, the Committee would need to justify treating the trial and interlocutories differently.

Justice Doogue said that the outcome of the litigation as a whole has a bearing on the costs that should be awarded on the interlocutory matters.

Justice Hansen said that he may fix costs, but reserve the incidence of them.

Justice Doogue noted that the Committee is agreed that there should be a statement of principle that parties to litigation should receive a substantial proportion of their costs, and that the idea should be floated with the profession in relation to ascertaining actual and reasonable costs. He said that at specific points along the litigation the parties should be able to ascertain the actual and reasonable costs. He noted that the Committee has not reached any consensus in respect of interlocutories although it may still be useful to have an indicative scale. He noted that the problem with a scale is the need for a regular updating mechanism.

Justice Fisher said that there is a need to confer between the judiciary and the bar.

Justice Doogue suggested it may be preferable not to have a scale but rather have an annual statement or memorandum so that no delays are built into the system.

On the issue of whether the criteria for the exercise of the judge's discretion should be included in the rules, the Committee was generally in favour of including them. Mr Iles noted the concern at the Bar Association about the length of the rules and Justice Hansen noted that the New South Wales provisions are very complex.

Justice Doogue said that his experience in England was that determining costs was easier in England where there are more rules on costs, because of the certainty.

Mr Fulton agreed to consult with the profession and come back to the next meeting.

Mr Iles said that in respect of the annual review between the judges and the profession, the government should also have an interest. He suggested in that context the Solicitor-General who would have a detailed knowledge of the Crown Solicitors fees. Justice Doogue noted that the Solicitor-General is of course a member of the Rules Committee.

In respect of periodic notices to the other side, Justice Fisher said that the notices would need to be related to the stages of litigation and perhaps chronological periods as well. He said that some proceedings go to trial very quickly while others can go on for years.

The Committee queried whether there were any economic articles of assistance and the Secretary said that she had sent a list of what was available to Mr Carruthers and Mr Fulton. Mr Fulton identified a number of articles which he thought would be useful.

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

(a) *Security for Costs*

Justice Doogue recalled that Mr Carruthers had considered consulting further on this matter, and Mr Fulton said that he had not heard anything more.

11. **Distinction between Interlocutory and Final Orders**

Justice Fisher said that the distinction is significant because it determines whether there is a right to appeal without leave and it affects the time limits for such an appeal. For present purposes the position is governed by r 27 of the Court of Appeal Rules, and Justice Fisher suggested that detailed consideration might be deferred until the Court of Appeal rules are looked at in total.

The Chief Justice noted that appeals from the District Court are dealt with in ss 71 to 78A of the District Courts Act 1947 and that the point does not arise in this context because of the definition of "interlocutory order" in s 71.

Justice Fisher said that the distinction between interlocutory and final orders has become confused over the years but that the reasons for the distinction did point towards the approach of looking at the effect of the decision rather than the form of the original application. He said that the Court of Appeal would take that approach except for the fact that there is so much judicial precedent the matter really needs to be addressed legislatively.

Justice Doogue said that while there may be a need to amend r 27 of the Court of Appeal Rules, it probably also needs a definition of "interlocutory order" inserted into the High Court Rules.

Mr Fulton pointed out that while there is no definition of "interlocutory order" there is a definition of "interlocutory application". The Chief Justice expressed concern that the law can be brought into disrepute by the fact that there is still room for argument at Court of Appeal level on the distinction between an interlocutory and a final order.

Justice Fisher agreed to look at the rules and statutory provisions relating to the Court of Appeal, High Court and District Court and to prepare a short memorandum for the Committee.

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

(a) *Case Management*

Justice Doogue advised that the English Practice Directions were tabled for information.

Mr Fulton said that he is on the Pilot Committee, and that the Committee has reached the stage where it needs to look at the High Court Rules to see if any amendments are needed to accommodate case management.

Justice Doogue referred also to the letter from the Chairman of the Legal Services Board and noted that it was tabled, partly for information and partly to express concern that there be pilot studies on case management in the District Court jurisdiction.

(b) *Defamation Act 1992*

Justice Doogue said that Justice Barker had expressed concern to him that procedural rules continue to be inappropriately enacted in statutory provisions, and without reference to the Rules Committee.

After discussion, the Committee agreed that it is appropriate to write to the Chief Parliamentary Counsel, the Law Commission and the Legislation Advisory Committee reminding them of the policy that rules be passed by delegated legislation rather than enacted in the statute.

(c) *Settlement Conferences (Directions/5/95)*

After discussion, the Committee agreed that it is sensible that a judge should have the power to direct a settlement conference. The matter was referred to Mr Iles accordingly for an amendment to r 442 deleting the words "at the request of all the parties to a proceeding".

13. **District Court Rules (Item 8 of Agenda)**

Chief Judge Young advised that this item on the agenda is promoted by the difficulties that the District Court Rules Committee has in promulgating amendments to the District Court Rules to reflect amendments to the High Court Rules. He said that in the last few years the Department of Justice and the Parliamentary Counsel Office have, for various reasons, not taken any action with the result that the District Court Rules have increasingly diverged from the High Court Rules.

Mr Fulton said that he can see the utility of the District Court Rules being in harmony with the High Court Rules but said that there will be a number of cases where the rules should reflect the different jurisdiction of the District Court. He said that there is some dissatisfaction in the District Court that practitioners should have to follow the High Court Rules for modest litigation such as debt collection, and they consider that they should not need to employ the summary judgment procedure with the formality of the High Court Rules in order to recover money owing on a debt. He suggested that there should be members of the District Court Rules Committee present, at least to deal with special topics.

Chief Judge Young said that if the District Court Rules Committee were to consider an alternative procedure such as the old default summons then there is a better chance of

effecting a change to the rules if it is done through the Rules Committee. He acknowledged the danger of over-managing small cases.

Justice Doogue said that the Chief Justice has power to appoint members of the Rules Committee for special purposes.

The Chief Justice said that membership of the Committee would need some consideration. He said that any combined committee is likely to be orientated towards the High Court Rules, and practitioners will not want to see any over-complex procedure in the District Court. If the idea of the Rules Committee being responsible for the procedure in the District Court is to be promoted then the profession will need to know who is going to be making the relevant rules. The Chief Justice suggested that the Chief District Court Judge, another District Court Judge and a practitioner who practises in the District Court should become members of the Rules Committee.

Mr Fulton said that there are some practitioners who do debt collection and insurance work who practise almost exclusively in the District Court.

The Chief Justice noted that at present the Rules Committee is structured such that the High Court Judges have ultimate control over the High Court Rules, and that that would need to be borne in mind in relation to the District Court.

Chief Judge Young said that he would bring the issue back to the Rules Committee once the matter has been referred to the Minister of Justice, noting that amendments would be required to ss 51B and 51C of the Judicature Act 1908.

14. **Exchange of Witness Briefs (Item 2(d) of Agenda)**

Mr Iles tabled the High Court Amendment Rules (No 3) 1995 PCO221/P. In respect of the commencement date he explained that he had left that blank but noted that they would need a reasonable lead time for people to become acquainted with them. He said that the rules could go to the Cabinet Committee by the end of August.

Mr Fulton said that there may be a problem for cases which have already been set down.

Mr Iles said that if the rules are given a commencement date they could provide that they will come into force in respect of proceedings set down for trial after then.

Justice Doogue suggested that a commencement date of 1 February next year would give adequate time.

If Mr Iles were able to include any other straight forward amendments in this draft, they would not need the same lead time.

Rule 441A - Application of Rules 441B to 441I

Mr Iles explained that he has expressed r 441A(1)(a) disjunctively. He said that he has also added r 441A(1)(e) to provide that one of the exceptions be a proceeding in which evidence

is to be given by affidavit. On the question of linking the provisions about whether the court can order that the procedure is not to apply, by linking it to r 4, Mr Iles said that he has added r 441A(4).

Rule 441B - Service by Plaintiff of Written Statements of Proposed Evidence in Chief

Mr Iles said that he had made provision for the exchange of briefs to be sequential instead of simultaneous such that the plaintiff should serve first within twenty one days after the precipe or a direction is giving that the proceeding be set down for trial.

Rule 441C - Service by Other Parties of Written Statements of Proposed Evidence in Chief

Mr Iles said that the previous drafts spoke of a party filing a statement of evidence in response; Mr Iles said that he had eliminated that and the rule now refers just to the evidence of the other parties.

Rule 441D - Requirements in Relation to Written Statements

Mr Iles said that this is much the same as the previous draft but has been broken down into two statements to refer to two rules instead of one.

Rule 441E - Supplementary Written Statements

Mr Iles said that because the Committee did not want supplementary written statements to amount to further statements of defence, he had inserted the words "not being evidence in response to any matter contained in that written statement".

The Chief Justice queried how evidence in response is to be given.

Mr Fulton said the object was to prevent supplementary briefs just being argumentative.

Justice Doogue said that there is however an issue about how a party is to answer a point once it has been led in evidence.

The Chief Justice said that once the plaintiff has given a statement, and the defendant has included answers to the plaintiff's points, the plaintiff who wishes to respond cannot do so under r 441E. Then under r 441G(1) evidence can be given at trial only by leave. He then noted that the plaintiff would not necessarily be entitled to leave because the evidence does not relate to evidence in response, it is evidence in response.

Justice Hansen considered that the right to respond should be absolute.

Justice Doogue suggested that r 441G(1) could be redrafted to provide that evidence may be given if it is evidence in response or by leave.

After discussion, the Committee agreed with that proposition.

Justice Fisher asked what there is to prevent a party from reserving a substantial part of their evidence to a supplementary statement which is served late ie holding the best punches back. Mr Fulton considered that that scenario would be accommodated by the requirement for leave.

Rule 441F - Evidence in Chief at Trial

Mr Iles said that he had added a new r 441F(1)(c) to provide for the statement to be endorsed by the Registrar "given in evidence on [date]". Sub-clause (2) provides for the endorsement to be signed and dated by or on behalf of the Registrar.

Rule 441G - Oral Evidence in Chief

Mr Iles explained that he has added r 441G(2)(e) to provide that leave may be granted where every party to the proceeding who has given an address for service consents. Mr Iles also explained that he has clarified the question of whose evidence is given by inserting in r 441G(1) the words "whether a person who has given a written statement served under r 441(b) or r 441(c) or r 441E or a person who has not given such a statement".

Rule 441H - References to Written Statements on Opening of Case

Mr Iles said that this rule is the same as in the previous draft.

Rule 441I - Cross Examination in Relation to Written Statements

Mr Iles said that this rule is the same as in the previous draft.

Rule 441J - Privilege and Admissibility

In respect of the concern about the use of written statements, Mr Iles said that he has inserted a new r 441J(e) to provide that nothing in rr 441A to 441I allows a statement served under r 441B or r 441C or r 441E to be made available for use for any other purpose or any other proceeding.

Justice Fisher suggested that in r 441J(e) the words "until given in evidence" should be added, because as presently drafted the statement cannot be used for any other purpose or in any other proceeding, but he thought that the intention was that that rule would operate only until the statement is read out in court.

Mr Fulton said that the Committee was motivated in previous discussions by the possibility that a signed brief might constitute a note or memorandum for the purposes of the Contracts Enforcement Act.

The Chief Justice said that if the statement forms part of the record he saw no reason why there should not at least be cross-examination on it in subsequent proceedings.

Justice Fisher said that he saw no reason why a statement that has been confirmed in evidence should not be able to be used as a memorandum under the Contracts Enforcement Act.

Mr Fulton however said that it would be dangerous to use court proceedings to overturn established principles. He noted that the object of this rule is to facilitate the hearing of the case and that the usual privileges of giving evidence should remain.

Justice Fisher said that the court could direct at any time evidence to be given by affidavit. He noted that the whole point of the Contracts Enforcement Act is that until the statement is in writing and signed there is factual doubt as to whether or not the person has agreed to it. He considered that if someone gives evidence on oath they should be committed to that.

After discussion the Committee agreed that a statement which has been given in evidence may be used as evidence in chief as if it has been given orally but not for other purposes.

In respect of the point about the Contracts Enforcement Act Justice Fisher said that to make a special distinction so as to preclude the use of the statement for the purposes of the Contracts Enforcement Act would be to draw a distinction between affidavits and written briefs. He queried what policy reason there could be for drawing that distinction.

Mr Iles queried to what extent the rule does in fact impinge on the Contracts Enforcement Act and also queried whether it should, given that the Contracts Enforcement Act can enable people to resile from contracts to which they have agreed.

Justice Fisher suggested that r 441J(e) might be deleted altogether.

Mr Fulton said that in England even questions of privilege disappear when the statement is exchanged, which he imagined would impact on a litigant's ability not to call a witness once a statement is exchanged. He considered that the flexibility available to a party to call or not call a witness should be maintained, and that the rule should facilitate the hearing of cases rather than create evidence for that or some other occasion. He noted that the protection may be important for both the parties and the witnesses.

Chief Judge Young agreed that the Committee should not deal with this issue on the basis that people know and understand the risks - a non party witness may not be getting that advice and may inadvertently commit themselves.

Mr Iles also raised the possibility of a witness resiling from a statement after having heard other evidence, and he noted that no perjury is committed until the evidence is given in court.

Justice Doogue suggested that (e) be retained but with the addition of the words "until given in evidence".

The Chief Justice said that he thought the rule makes an artificial distinction between before and after the evidence is given.

On the issue of the importance to be attached to the signing of the brief, Mr Fulton suggested that it be available for cross-examination on an inconsistent statement.

Justice Fisher referred to the personal commitment of a signed statement and said that the other side can act on that when considering matters relating to settlement and planning the case. Otherwise, he considered that the statement is just something that may be prepared in the solicitors office and may not accurately reflect the evidence of the witness. He considered it would be extraordinary if a signed statement could not be used for say a commission of inquiry or a prosecution matter.

Rule 441K - Rule in Browne v Dunn

Mr Iles said that the Committee had asked him to insert some explanation of the rule in *Brown v Dunn* and he had inserted the words "(which provides that if the court is to be asked to disbelieve a witness, the witness should be cross-examined)".

Rule 441L - Election as to Evidence in Relation to Non Suit

Mr Iles said that this rule is the same as in the previous draft.

15. **Masters (Item 10 of Agenda)**

(a) *Review of Masters' Decisions*

The Committee noted that this requires a statutory amendment and is to be followed up by the Secretary.

16. **Payments into Court (Item 11 of Agenda)**

(a) *Calderbank Letters*

Justice Doogue said that this matter has been raised in the Bar Association newsletter which suggests a similar rule to those in England which make it clear that Calderbank letters can be used.

Justice Fisher supported the proposal and said that parties should be encouraged to take a responsible attitude in respect of settlement; he considered that if one party has acted responsibly in promoting a settlement and the other has not, the latter should be penalised with costs.

Mr Fulton said that in his draft rule 48(5)(d) (Costs/1/95) he had given the court a discretion to order indemnity costs where the party liable to pay costs has unreasonably or vexatiously refused a payment into court or an offer of settlement.

Justice Fisher noted that the English rule goes further such that the judge can take into account, in awarding costs, any offer that is made.

The Chief Justice noted that putting up the money constitutes an act of good faith, and Mr Fulton said that that should be no hardship because in the event that the offer is refused, the money can be returned.

Justice Fisher said that because costs are discretionary, a Calderbank letter would be one of a number of considerations. He said that if there were grounds for thinking that the offeror was impecunious, then the Calderbank letter may be disregarded. He also noted that the issue in respect of the award of costs is wider than just potential payment into court matters - the court can also take into account whether the plaintiff has taken a reasonable position and the defendant not.

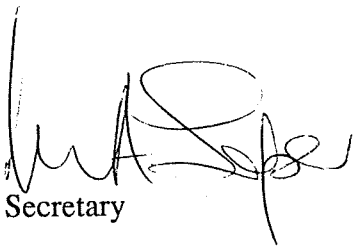
After discussion, the Committee agreed that it would be useful to amend the rules now to introduce a rule about Calderbank letters along the lines of the English rule, and not to wait and do it as part of the overall amendments on costs.

Justice Fisher noted that the English rule does not spell out the effect of the offer and he suggested that there should be a third sub-rule along the lines that the effect of the offer on party and party costs will be in the discretion of the judge. Justice Fisher went on to say that unless the rule adverts to the fact that the judge has a discretion there is a danger of it being automatically treated like a payment into court.

The Committee agreed that a rule along the lines of Order 22, Rule 14 of the English Rules being inserted to associate with r 46 of the High Court Rules, preserving the discretion of the judge.

The meeting closed at 12.50 pm.

The next meeting will be held on Thursday 23 November 1995, and is scheduled to last a half day



Secretary

MAS:80901

ADDENDUM TO THE MINUTES OF THE MEETING

HELD ON THURSDAY 8 JUNE 1995

ACTION REQUIRED BY:

Justice Fisher:

Distinction between Interlocutory and Final Orders
Look at the rules and statutory provisions relating to the Court of Appeal, High Court and District Court and to prepare a short memorandum for the Committee.

Mr Williams:

Court of Appeal Technical Advisers
Agreed to make enquiries with the Minister of Justice and check to see that the issues are still being actively considered.

Mr Fulton:

Costs
Consult with the profession and come back to the next meeting.

Miss Soper:

Defamation Act 1992
Write to the Chief Parliamentary Counsel, the Law Commission and the Legislation Advisory Committee reminding them of the policy that rules be passed by delegated legislation rather than enacted in the statute.

Review of Masters' Decisions
Follow up on a statutory amendment.