THE RULES COMMITTEE

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Wellington

25 March 1994

Minutes/1/94

CIRCULAR NO 3 OF 1994

Minutes of the Meeting Held on 3 March 1994

1. Preliminary

The meeting called by Agenda/1/94 was held in the Judge's Common Room, High Court, Wellington on Thursday 3 March 1994 commencing at 9.30 am.

2. In Attendance

The Chief Justice (The Right Hon Justice Eichelbaum)
The Hon Justice Doogue (in the Chair)
Master J W Hansen
Dr G P Barton QC
Mr C R Carruthers QC

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

The Hon Justice Thomas
Chief Judge Young
The Attorney-General (The Hon Paul East MP)
Mr R F Williams (for the Secretary for Justice)
The Solicitor-General (Mr J J McGrath QC)
Mr H Fulton
Mr W Iles QC CMG (Chief Parliament Counsel)

4. Chief Parliamentary Counsel

Justice Doogue advised, that because of health reasons, Mr Iles was expected to be absent from work for an indefinite time; he said that he had written to Mr Iles on behalf of the Committee to express their regrets at the misfortune which had befallen him and sent him every best wish for an early recovery.

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

On the motion of Master Hansen, seconded by Mr Carruthers, the minutes of the meeting held on Thursday 25 November 1993 were taken as an accurate record and were confirmed and signed by the Chairman.

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 Justice Doogue:

Page 17 of a Judgment by Hammond J setting out the factors relevant to costs.

8. High Court Amendment Rules 1993

Justice Doogue said that he had written an explanatory note on the amendments to the High Court Rules and that they were published in "Law Talk" issue 407.

9. Appeals

Justice Doogue advised that Justice Thomas had not yet been able to prepare a draft which he could address with the President of the Court of Appeal.

10. Cases Stated (Item 4 of Agenda)

Justice Doogue advised that following the last meeting of the Committee, he had a meeting with Mr Phizacklea from the Department of Inland Revenue and Mr Geoff Harley and it became apparent that they were at cross purposes. It was left to the Department to go back to the Taxation Review Authority, on the basis that if any further assistance was needed from the Rules Committee then the Department could make an approach.

11. Masters (Item 4 of Agenda)

Justice Doogue referred to his memorandum of 15 December 1993 (Masters/4/93) and the relevant portion of the judgment of Hammond J in **Kelly v Case Weston Morgan and Company Limited** (Masters/1/94) in which Hammond J had preferred the view of the Chief Justice in **Lovie v Medical Assurance Society of New Zealand Limited** [1994] 2 NZLR 244 to the decision of Fisher J in **Wilson v Neva Holdings Limited** (High Court, Auckland, CP 1088/89, 10 August 1993, Masters/3/93). Justice Doogue recalled that Justice Fisher thought a review in these cases should be conducted as an appeal and that the Executive Judges agreed with that. Justice Doogue commented however that the issue is not quite so simple having regard to the statutory provisions relating to Masters and to the rules relating to review of other interlocutory decisions.

Mr Carruthers advised that the issue has been referred to the New Zealand Law Society's Civil Litigation and Tribunals Committee which is looking at issues arising in relation to court structures and appeals. He mentioned also that he had referred the matter to the Bar Association but that he had nothing further to report because of the commitments of its president.

The Chief Justice recalled the history of the provision and said that there used to be a chambers day before a Judge where a number of small matters were dealt with quite quickly with no more than twenty minutes argument. There was a procedure for review (now rule 264) which was an exceptional procedure which enabled one Judge to review the decision of another on a coordinate level. That procedure gave the opportunity for something to be argued substantially on some other day, and that argument proceeded de novo. When the legislation for Masters was promulgated the chambers day type hearing was very much what was in mind, and he said that he was conscious of the distinction between review and appeal. In practice however some of the Masters decided that the first chambers hearing would be a substantial one, and the dissatisfied parties have seized on the review procedure when there was already a full argument that should have been the subject of an appeal. At the moment the parties do have an opportunity for two bites at the cherry, but Justice Fisher has gone a step further and interpreted review as appeal. The Chief Justice posed the question as whether they should adhere to the original concept or legislate for Justice Fisher's interpretation on the basis that that is what is wanted.

Master Hansen said that it was anomalous that a substantial striking out application can occupy a one or two day hearing while a quite minor summary judgment can go to the Court of Appeal.

Mr Carruthers asked whether the difficulty is to define what is a considered argument before the Master, and the Chief Justice said that the review procedure was not often used from a chambers hearing, and generally only for a

jurisdictional error of some kind. Ideally, he considered that both procedures are necessary; a right of review is needed for the small matter which is turned over quickly and where some point may have been missed but review is not appropriate for those cases that have been argued fully and are the subject of a long judgment. In this context, Justice Doogue recalled the distinction between chambers and court.

Master Hansen agreed that he would discuss the matter with the other Masters.

The Chief Justice noted that any legislative amendment could take some time and suggested an alternative might be a practice note with the object of advising the profession that the Judges would not entertain an application for review when the matter had already been the subject of due consideration. Equally, he noted that there can be no suggestion of depriving the parties of the right to appeal to the Court of Appeal.

Dr Barton noted that under rule 264(4) the court may remove any application for review into the Court of Appeal, but that this is not the rule relating to the review of Masters decisions, which is rule 61C. He made the further suggestion of a sitting of a full court when the issue next arises.

Justice Doogue suggested the alternative of revoking rule 61C and inserting the provision relating to review of Masters into rule 264 to enable something to be reviewed by the Court of Appeal.

Master Hansen said that that would still not solve the problem of there being far too many de novo hearings on reviews. He made the suggestion that Masters could deliver some chambers decisions in court so that the right of review would not lie. Master Hansen pointed out that a Master has the powers of a Judge in chambers and a Judge in having heard a matter in chambers can give a decision in court.

Mr Carruthers queried whether it was appropriate to issue a practice note in respect of something that required the resolution of conflicting views of Judges of the High Court, and Dr Barton said that that was why he had suggested a full court for the next time the issue came up.

The Chief Justice said however that he did not see why the Judges should not issue a statement saying that notwithstanding the conflicting views the following is the line that the Judges will follow.

Dr Barton asked whether there could be unanimity among the Judges in drafting the practice note, and Justice Doogue said that the Judges do see the need to clarify the issue to avoid arguments about it.

Justice Doogue suggested redefining "review" in some way, and Mr Carruthers agreed that review is appropriate only in those cases where there is not a considered judgment. Justice Doogue said it would be possible to define review for the purposes of rule 61C and rule 264.

The Chief Justice mentioned that the term "review" originates in s 26B of the Judicature Act.

Justice Doogue queried whether it might be possible to make a rule that distinguished review or enabled the Masters to exercise part of their jurisdiction in court without breach of the statute.

12. Pleadings

(a) Proper Office of the Court for Filing Urgent Matters

Mr Carruthers said that he had referred the matter to his Committee but that the members experience was that there was no practical problem. It was simply a question of filing in the proper office of the court, and then making the appropriate administrative arrangements for the case to be heard.

Dr Barton mentioned also that the rules contain the machinery for overcoming any problems and he referred to rule 4 that the rules be construed as to secure the just, speedy and inexpensive determination of any proceeding, and rule 5 relating to non compliance with rules. He recalled that there have been cases where applications have been made orally to a Judge on an undertaking that documents will later be filed.

Mr Carruthers suggested the solution of reenacting rule 1 of the code which had provided that a write of summons may be issued out of any office of the court.

Justice Doogue said there was nothing to stop the papers being filed in a circuit registry and faxed to the metropolitan one with a request for the executive Judge to ensure the appropriate disposal of the proceedings.

The Committee agreed to respond to Mr Katz along those lines.

(b) Definition of Pleadings and Close of Pleadings (Item 8(b) of Agenda)

Justice Doogue recalled that Mr Iles had pointed out that he had not dealt with these in his amending rules on the basis that he did not think extending the definition of pleadings would add much except to make the rules longer. Justice Doogue referred to the discussion paper

(Pleadings/3/92) page 5, paragraphs 2.31 and 2.34 relating to the definition of pleadings and when pleadings should be regarded as closed.

Dr Barton said that he would not want the concept of pleadings to be narrowly confined and he referred to paras 1.3 and 1.4 in the discussion paper.

Justice Doogue noted that pleadings are presently defined in rule 3 as including a statement of claim, statement of defence, a reply, and a counter-claim. He noted that McGeehan on Procedure mentions the close of pleadings not being defined.

Master Hansen recalled that Mr Iles had had a real concern about whether the close of pleadings should be defined and noted that a number of overseas rules make provision for consequences following on from the close of pleadings.

Justice Doogue said that he was not aware of any problems in this area.

Dr Barton said that he thought the definition of pleading in rule 3 was so obvious it hardly needed to be stated.

Mr Carruthers said that there is an issue in relation to the way in which a joined third party can proceed against another third party: whether that should be done by cross notice or by fourth party notice against a third party who is already a party. He suspected that it was an attempt to deal with issues other than those that conventionally arise between a plaintiff and defendant.

After discussion, the Committee decided that there was no need to make any amendment to the rules relating to the definition of pleadings and the close of pleadings.

13. Winding Up Rules (Item 9 of Agenda)

Justice Doogue recalled that this was a concern that Master Gambrill had in respect of representation.

Mr Carruthers said that he had raised this matter with the Secretary of the Civil Litigation and Tribunals Committee and that he had referred it also to the Corporate Lawyers Association from which he had received no reply.

The matter was deferred pending a response from the Corporate Lawyers Association.

14. General Business

(a) Video Conferencing

Justice Doogue advised that he had received information from Justice Barker about video conferencing (enclosed as Directions/1/94).

The Chief Justice advised that the proposals are dependant on the passage of the Law Reform (Miscellaneous Provisions) Bill.

(b) Mini Trials

Justice Doogue advised that Justice Barker had sent him some information about mini trials with reference to Canada (Alberta and other provinces). He said that there did not seem any necessity to send this material to every member of the Committee since provisions relating to mini trials could be accommodated within the existing settlement conference rule. He added that if the profession wished to see new rules specially dealing with mini trials then the Committee would need to see something suggested by the profession.

Mr Carruthers said that he would like to refer that to the Dispute Resolution Committee of the Law Society and Justice Doogue agreed to pass the papers on to him.

15. Costs (Item 5 of Agenda)

Justice Doogue introduced the discussion by reference to the basis on which the successful party would normally recover costs. He identified a number of approaches:

(i) Party and party costs (the English system of costs reasonably incurred in the litigation)

(ii) Solicitor-client costs

(iii) indemnity

(iv) Nothing (the American approach to encourage people to bring litigation).

Dr Barton expressed the views of the Committee when he said that it is generally accepted that the successful party is entitled to costs on some basis, and that there is no support for the American system.

Master Hansen expressed concern that at present the costs awarded are quite out of touch with the actual costs incurred and that in his view the successful party is entitled to costs which reasonably reimburse that party for the actual costs of the litigation. He noted however that this is not a view shared by all of the Judges and for that reason he made the suggestion that the issue be referred to the Executive Judges.

Mr Carruthers said that the nature of the dispute also has a bearing on the principles to be applied; he saw no reason why a creditor should not receive payment in full free of any costs while in respect of a damages claim there may be many shades of argument which cast a different light on the question of costs.

Justice Doogue said that he had discussed this matter with Justice Thomas and they were generally in agreement that in the ordinary course the successful party should recover the costs reasonably incurred in the litigation. He acknowledged that there may be cases where the successful party would recover solicitor-client costs which may be slightly more or slightly less depending on the case. Overall however he considered that there should be something more than just a reasonable contribution and something that comes close to reasonable solicitor-client costs. He noted that there can be quite a wide divergence in terms of actual solicitor-client costs.

The Chief Justice advised that under the English system party and party costs were interpreted as meaning actual costs calculated on an objective basis and there would not be full recovery for example for having gone to a leader at the bar in the field when the matter could have been handled perfectly adequately by someone less senior.

Master Hansen said that the English interpretation of party and party costs is applied virtually every where else except New Zealand, and he noted that in some judicial quarters the New Zealand approach is perceived as adequate. He recalled that when he had been in Hong Kong the taxing Master there used to meet annually with the Law Society and, on the basis of the information supplied, would work out a reasonable basis for charge out rates for practitioners and support staff at all levels. Having said that, he acknowledged that he would not like to see the Masters doing taxations.

The Chief Justice commented that this is at the heart of the problem in that New Zealand's present system avoids the need for a professional class of people involved in taxing costs; he considered it not a good use of Judge's time.

Justice Doogue pointed out also that the existing scale gives a fair return for those cases where the litigation involves a large amount.

Mr Carruthers said that another advantage of the present scale is that it gives a reasonably reliable guide for advising clients on the amount it will cost them in the event that they loose.

Master Hansen suggested that a system of taxation of costs was not essential in order to arrive at a reasonable estimate of what the costs should be.

Justice Doogue agreed that it is possible to have a reasonable feel for solicitor-client costs he said that after his meeting with Justice Thomas they had agreed that it would be possible to have a rule providing for the successful party to get costs reasonably and necessarily incurred, and to establish criteria on how such costs should be arrived at. He then went on to suggest that it should be possible to enable some definition of those cases where greater or lesser costs should be awarded. He suggested that it will assist the Judge in the exercise of the Judge's discretion.

Mr Carruthers said that the Civil Litigation and Tribunals Committee had looked at this issue by looking at a revision of the scale such that the scale was not geared to the amount in issue in litigation. Rather, the Committee looked at trial on the basis of indicative daily rates which would mean that the scale would need to be revisited on a regular basis. He suggested that that could be used administratively by the Judges in fixing costs. Mr Carruthers said that there is quite a lot of division about the extent to which a party should recover costs and the view does still prevail that even though a party has been unsuccessful they should not carry the whole of even the reasonable costs, having regard to some concept of access to justice. Mr Carruthers said that for his part he did not agree with that view and felt that if a party wishes to take litigation then one of the risks of that is that reasonable costs of the other litigant will be paid in the event that the party loses. He did identify however a need for there to be an objective guide on the basis of fixing costs. He suggested that the way to ascertain reasonable costs is to establish a scale which fixes the costs at indicative stages.

The Chief Justice remarked that the present scale was developed at a time when every case was about money and the scale did in fact set out to establish the reasonable costs at indicative stages.

Mr Carruthers said that the Courts and Tribunals Committee had supported the concept of a reasonable contribution which would be something between forty percent and seventy-five percent of the actual costs incurred.

Mr Carruthers said that he could not understand why there should be resistance to the concept of meeting reasonable costs given that lawyers still have to make an assessment of the case and the client has to make a decision on that.

After discussion, the Committee agreed in principle that costs should be awarded on the basis of reasonable expenses but that there were concerns about how that might be achieved. It was noted that an estimate of the actual costs does not provide a solution and that it is undesirable to create a taxing industry.

Justice Doogue said that given the award of costs would remain a discretionary matter it is possible to establish a number of criteria to assist in the exercise of that discretion. He referred to a decision of Justice Hammond where the Judge had awarded $1.5 million (the largest award other than by the direct scale) where he conveniently set out a number of the factors. Justice Doogue suggested it would be helpful to have within the rules a set of factors or criteria along these lines.

The Chief Justice noted that the factors in fact comprise a mix of matters relevant to quantum and matters relevant to liability. He suggested also that any criteria might set out occasions when costs should not follow the event.

Dr Barton agreed that the question of whether costs should be awarded at all includes a consideration of whether a party should not be entitled to any award of costs because of their conduct or some other factor.

The Chief Justice recalled an occasion where the plaintiff had been successful but where one head of damage claimed was little short of fraudulent. He said that he had added up the witnesses and evidence relating to this issue and found that it amounted to nearly half of the total time. He queried however whether it would be advantageous to list such factors.

Master Hansen advised that in Hong Kong a factor to that effect is included in the legal aid ordinances.

Justice Doogue suggested that the meeting was coming to the view that it did not want to codify matters relating to the discretion and Dr Barton and the Chief Justice agreed that leaving it would enable the court to make a decision on the facts of a particular case.

Master Hansen agreed that the range of circumstances is so wide that the list would need to be endless.

Justice Doogue suggested a formula along the lines of costs reasonably incurred without limiting the Judge's discretion in an individual case. He referred to rule 46 as essentially providing for that and then referred to rule 48 relating to the scale.

Master Hansen noted that the scale was developed long before multi-million dollar litigation.

Justice Doogue suggested a different type of scale and Mr Carruthers said he was attracted to resolving costs disputes by inviting submissions on solicitor-client costs and working from there.

Justice Doogue considered there was much to be said for not reserving judgments, and discussing costs at the time on the basis that once memoranda are filed there can be many hearings with the result that the issue of costs can take hours to resolve.

The Chief Justice asked how the principle of reasonable costs could be accommodated if a leading and expensive counsel has been instructed.

Justice Doogue gave the example of a case where the solicitor-client costs for roughly equal amounts of work were respectively $11,000, $21,000 and $32,000 and he awarded $11,000 on the basis that that was the figure for which the job could be done.

Mr Carruthers suggested that the parties could come to a hearing with information on the hourly rates and possibly also some indications of the method of recording time.

Master Hansen acknowledged also that a lot of it is judgment based on experience and impression. He also said that in a taxation system only a small proportion are actually taxed or at least that was the situation in Hong Kong.

Justice Doogue said that that was not his experience in England where almost all costs went to the taxing master.

Mr Carruthers suspected that where a judgment is reserved and there is provision for costs to be fixed, that costs are disposed of by agreement between the parties using the scale as a starting point and then examining those areas where the scale does not fairly reflect the work that was done.

The Chief Justice identified the issue as whether the quantum should be fixed by ascertaining the actual costs or whether the scale (which could be by practice note and updated) should fix counsel's fee on a per hour basis.

Master Hansen agreed and said that of necessity there would need to be a complicated scale that would recognise the different complexity of cases and the rates charged by senior counsel as appropriate.

Mr Carruthers said however that he believed it should be possible to develop an indicative scale as to what level of fee is appropriate to be charged for any particular type of case.

Master Hansen pointed out however that if hourly rates for practitioners are to be established there needs to be some adjustment for the differences between Auckland and Invercargill with different rent structures and overheads.

Mr Carruthers said that as a rule of thumb two days of preparation was usually required for one day of hearing.

The Chief Justice thought that there were dangers in using the actual costs as a starting point; he foresaw it as an invitation to employ expensive counsel and numerous expert witnesses.

Master Hansen agreed that it would also be an invitation to pad out a bill. He noted however that the Judges have no real mechanism other than a general impression as to what amounts to reasonable costs and he noted that the Judges can quickly get out of touch with solicitor-client costs.

Mr Carruthers said that what he had in mind for the administrative scale was to extrapolate the concept used in the form for pool claims.

Justice Doogue agreed that it is useful to have some sort of yard stick and that there is a need for some consistency of approach among the Judges.

Justice Doogue suggested that Mr Carruthers might obtain some more material from his Committee on the content of a scale so that the Rules Committee could consider it further.

The Chief Justice suggested also that some information on the English approach might be helpful, and Justice Doogue said that there was some material in Butterworths Taxation, and Master Hansen said that the notes to Order 62 in the "White Book" were also quite comprehensive.

Dr Barton suggested, given that the subject of costs is a sensitive one, that the Committee should consult more widely than simply within the profession, and Justice Doogue suggested that the Legal Services Board would have an interest. The Committee agreed that wider consultation was premature at this stage, until there was something by way of a proposal or working paper on which others could comment.

The Chief Justice identified a need to seek comments from both successful and unsuccessful litigants.

Justice Doogue noted that all the legal aid committees have scales of some kind or another, and Mr Carruthers noted that those rates are fixed by the Board now.

Justice Doogue summed up by saying that the Committee would consider the question of costs further after Mr Carruthers had consulted with his Committee

and after taking into consideration the amount paid by legal aid and also the system in the United Kingdom.

Master Hansen recorded also that there is currently no provision to award costs against a non-party. He gave an example of a company in receivership where the directors ran the litigation for their own benefit; the BNZ was left with huge costs which the company was unable to pay.

Dr Barton recalled a judgment of Lord Goff's in the House of Lords where the wording of the rule referred to "by whom the costs should be paid" and it was held that that was not restricted to litigants before the court.

The Chief Justice assumed that the court would need to hear any non party on the question of costs.

Justice Doogue recalled also that there was a reference in the paper prepared by his clerk to costs being award against solicitors personally.

16. Discovery (Item 6 of Agenda)

(a) General Procedure for Discovery (Part 2 of Discussion Paper, Discovery/2/93)

Dr Barton suggested that the Civil Litigation and Tribunals Committee might provide some feedback on this issue. Mr Carruthers said that the area of concern for his committee was not so much provisions in the rules but with the way parts of the profession regard their professional obligations, and the extent to which complaints about that largely fall on deaf ears. He said that in the area of professional obligation the Committee is trying to persuade the courts that a hard line needs to be taken on assessments of the some of the professionals.

Dr Barton said that there is also a genuine concern among practitioners about the way in which they should fulfil that obligation; discovery is either too hard or takes too long and for that reason tends to be shelved or given to junior staff members.

Master Hansen suggested as a starting point that the Committee needs to decide whether to continue with the process of discovery or to move to some form of disclosure. He considered that if the committee is going to stick with discovery then he does not see why it should not be automatic rather than having to request it.

Dr Barton said that he was not sure he could see the distinction between discovery and disclosure given that discovery is simply compulsory disclosure and that a rule about disclosure would be essentially the same.

Master Hansen said that the suggestion had been made in the paper on discovery that disclosure might be more effective.

Justice Doogue said that on the other side is the additional costs that discovery puts the parties to.

Master Hansen suggested that a lot of the costs are probably incurred in the inspection process with the time taking up wading through large volumes of material that have not been properly assessed for relevance.

Mr Carruthers said that it is a difficult practical point as to who should make the decision on relevance and he noted that the plaintiff and the defendant may take differing views. He considered it inescapable that there would be a mass of material not relevant in terms of evidence at the trial, but relevant for discovery in terms of a line of inquiry.

Justice Doogue agreed that the two areas of most concern are failing to list relevant documents, or claiming privilege on documents which should be disclosed.

Master Hansen asked whether discovery should be automatic, but Mr Carruthers said that the parties should still have the facility to decide whether or not they want discovery. He agreed that in most cases that will be so, but that the parties should still be able to decide whether they want discovery. He went on to identify the problem that arises in relation to the time for compliance and suggested that that should be fixed as part of the timetabling for the case. He noted that it may take twelve months to do discovery in a major case and that a notice requesting discovery in fourteen days is quite unrealistic.

Dr Barton suggested that the parties can always apply to the court if need be, and Justice Doogue noted that even in the scenario where discovery was automatic, the parties could seek a waiver from the opponent.

Master Hansen said that in his view the time limits for compliance should be more realistic but that the consequences of failing to do so should be draconian.

Justice Doogue advised that the case flow management project will be touching on the issue of discovery because it will be discussed at the first conference and he suggested that the Committee consider at some later stage whether there should be a rule providing for automatic discovery.

Master Hansen asked whether there was any reason why verification by affidavit should not be automatic.

Justice Doogue advised that that used to be the position under the rules but that the process was changed to try and simplify it so that the notice could be issued direct but that when it comes before the court everyone in practice asks for a verified list.

Mr Carruthers said that a verified list is necessary to be effective for cross-examination.

(b) Time Limits (Part 3.3 of Discussion Paper)

Mr Carruthers suggested that no time limit should be fixed initially and that the time limit should then be fixed at a subsequent conference.

Master Hansen agreed that the present provision of fourteen days is impossible to comply with in most cases.

Dr Barton said that the parties normally complete discovery by agreement and it is only when the parties default on that agreement that an application is made to the court for an order.

Justice Doogue noted that if the notice were to have no period specified within it for compliance then there would be no means of enforcing it in the event that a party defaulted.

Master Hansen replied that the notice would simply be a notice that would trigger a right to come to the court for an order.

Justice Doogue noted that rule 294A requires a party to comply with a notice for discovery within fourteen days or such time as may be specified in the notice.

Mr Carruthers suggested that the defendant might rejoin with a period of two years, but Justice Doogue said that if the plaintiff wishes to see the litigation advanced without delay then the plaintiff can comply with the notice in a shorter time frame.

Justice Doogue went on to suggest that the fourteen day period might be extended and, after discussion, the Committee agreed that Mr Carruthers would go back to the Civil Litigation and Tribunals Committee with a suggestion that the time limits be 28 and 42 days rather than 14 and 28 as at present.

(c) Continuing Obligation to Disclose (Part 3.4 of Discussion Paper)

Dr Barton pointed out that there can be no sanctions unless it becomes known to the other side that a document which was discoverable was not in fact discovered.

Master Hansen suggested there might be an explicitly worded obligation on the parties to disclose, and Dr Barton suggested that the rules might be explicit in specifying that the obligation is a continuing one.

After the discussion the Committee agreed that it was satisfied with rule 308 as it stands.

Justice Doogue noted that rule 305 goes only so far, and Dr Barton said that it does not deal with the situation where the document in question would be favourable to the party in question.

The Committee noted that there are frequently cases where documents are discovered later in the piece for quite genuine reasons.

(d) Enforcement and Sanctions (Part 3.5 of the Discussion Paper)

Mr Carruthers identified a problem with practitioners appreciating their professional obligations, and he identified some lack of appreciation of that on the part of the judiciary. Having said that, he acknowledged that the Judge is in a difficult position given that there is no easy answer and steps such as stopping the trial and simply not appropriate. He advised that his committee was putting together a paper which collects a number of anecdotal horror stories to highlight the nature and extent of the obligation in an attempt to re-educate the profession.

Mr Carruthers noted that both rules 277 and 297 are available to enforce compliance with the rules for discovery.

Dr Barton noted also the use of an "unless" order but said that he had never been able to persuade a Judge to make one.

Master Hansen expressed the view that an "unless" order should be made after the party has been given one chance to comply, although he acknowledged there may be genuine problems of compliance.

Justice Doogue sighted an example of the substantive proceedings being delayed by the necessity for adjournments as new statements of claim were filed. He considered that this is a matter of education of the profession, and he considered that costs come into the same category; the

Judge has a discretion and there is not really any need for an additional rule.

Justice Doogue summed up by saying that it was really a matter for Mr Carruthers to take up with his committee and not for the Rules Committee to enter a programme of education of the profession.

(e) Use of Documents Obtained on Discovery (Part 3.6 of Discussion Paper)

Mr Carruthers said that his committee are diametrically opposed to the cessation of the implied undertaking that a person who obtains documents in discovery will not use them for purposes other than those proceedings, and he considered that the fact that the documents are read in open court should not mean that they are generally available or can be released to other people.

Dr Barton said that the basis for the rule is not so much the undertaking but that of using the document for a purpose other than that for which it was originally discovered.

Mr Carruthers said that as a matter of course he makes provision for copies produced on inspection to be returned at the conclusion of the proceedings. Dr Barton noted that to some extent that point is covered in 3.6.1(b) of the discussion paper.

Mr Carruthers noted that if an order is made to provide a legible copy, the copy may be marked as being provided for the purposes of inspection only and further conditions may be attached relating to the number of copies that may be made and who may have access to them.

Dr Barton queried whether there was any view as to whether the implied undertaking should also apply where voluntary disclosure had been made in anticipation of an order for discovery.

Justice Doogue noted that rule 309 applies only where there has been a notice to produce and he suggested that the party would need to specifically make the documents available on discovery conditions.

Dr Barton recalled an occasion when documents had been made available on "informal discovery" and when they were used for ulterior purposes the party making discovery had been unable to restrain them.

The Committee agreed that there was no need to amend rule 309.

Justice Doogue asked whether there was a need for any more specific rules, and Dr Barton said that there was potential to go into a great deal of detail.

Mr Carruthers said that it is the parties litigation and it is really up to them to decide how they are going to protect themselves.

Justice Doogue said that the Rules Committee would want to facilitate co-operation between the parties; the rule here applies when a party is being difficult about disclosing documents while the party who makes the disclosure has no protection unless they make specific provision for themselves.

Dr Barton said that the problems he had experienced arose only where the documents had been made available not subject to the coercive procedures and he expressed the view that the rules should be confined to the situation where discovery is made pursuant to the rules.

Justice Doogue noted that there would be numerous practitioners who would be unaware of the implied undertaking, but Mr Carruthers did not see that much more could be said beyond what is already in rule 309(4).

Master Hansen advanced the idea of extending the provisions in rule 309 to voluntary discovery, but Mr Carruthers queried whether it was appropriate to then be able to get an order in the event that one of the parties defaulted on an informal agreement for discovery.

Dr Barton said that there may nevertheless be a need, in relation to documents obtained on discovery, to codify the rule relating to the use to which the documents be put in the list of documents itself.

Mr Carruthers said that the rule relating to the use to which the documents can be put really only comes into play once a copy of the documents has been provided, but Dr Barton said that what he had in mind was a warning on the list.

Mr Carruthers saw that as an educational process rather than a rule making one, and Justice Doogue pointed out that McGechan on Procedure, under the topic on misuse of documents obtained on discovery, sets out the relevant provisions in the introduction, although he acknowledged that there would probably be few in the profession who have read it.

Justice Doogue said that he would like to note this issue for further consideration and suggested that Mr Carruthers consult the Civil Litigation and Tribunals Committee.

(f) Inspection of Documents (para 4 of Discussion Paper)

Mr Carruthers said that there can be a lot of practical problems where the litigation is in different places. He cited an example where the proceedings had been commenced in Wellington but the documents were in Hamilton and, at the insistence of the other side, they had hired a truck to bring the documents down and hired a room on the basis that the documents would be available for inspection for a month. The documents were not in fact inspected in that time, and were returned to Hamilton at the end of it. Similarly, he recalled that in the Equiticorp proceedings they had hired their own photocopier, because of difficulties obtaining copies.

Dr Barton suggested that the rule might provide that a party could ask for a copy at a reasonable cost. He said that he would like to see a rule that makes it easy for a litigant who complains about of lack of co-operation to get before a Master or a Judge quickly and get directions on the point.

Justice Doogue said that rule 437 accommodates that now in a general way, and Dr Barton agreed that there may be no need for a special body of rules specifically relating to discovery and inspection.

Mr Carruthers said that he thought the existing rules were adequate and noted there is presently a discretion in the court.

In the light of the discussion the Committee decided to make no amendments to those rules.

(g) Procedure for Particular Discovery (Part 5 of Discussion paper)

Master Hansen said that this is not a common procedure and both he and Mr Carruthers agreed that they had not experienced any practical problems about it.

Mr Carruthers raised the issue of the procedure where documents are provided on the basis that only counsel sees them; in his view that is wrong.

Justice Doogue said that he understood Mr Carruthers' misgivings about that but said that sometimes it is the only protection.

Master Hansen said that sometimes the party will agree to that in the first instance and then come back with requests for other people to see it, so that counsel can assess that. He said that in most of these an application is made to the court, and the documents involved commercially sensitive material; he noted that the issue is usually settled between counsel.

The Committee agreed that there was no need to make any amendments to the rules.

Generally on the issue of discovery Justice Doogue said that he would like Mr Carruthers to address with his committee the issue of whether it is necessary for the discovery documents to be on the court file.

Mr Carruthers suggested that the discovery documents could simply stay in the registry and need not come to the Judge as part of the court file.

Justice Doogue agreed and the Committee noted that in both England and Scotland that is in fact what happens. He noted also that filing the discovery documents with the court creates much unnecessary paper and compounds the costs of the litigation.

Justice Doogue, with the agreement of the Committee, agreed that the subject of necessary documents for filing in court should be considered at a future meeting.

17. Interrogatories

Justice Doogue noted that the paper on discovery had not dealt with interrogatories and he suggested that the Committee might look at this as a separate topic at some stage.

Dr Barton queried their value, and Master Hansen said that they have been largely overtaken by exchange of briefs of evidence.

Justice Doogue said however that they may be used where the cost of proof is going to be high or where a party does not want to call a particular witness unless that is absolutely necessary.

Justice Doogue said that he would ask the Judge's clerk to prepare another discussion paper.

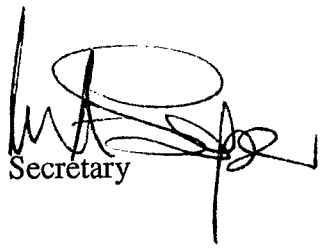
18. Admiralty Rules

Master Hansen raised the issue of the Admiralty Rules and said that in all other jurisdictions they form part of the High Court Rules.

After discussion, it was agreed that Master Hansen and Mr Carruthers would look at this issue.

The meeting closed at 3.15 pm.

The next meeting will be held on Thursday 16 June and the following meetings on Thursday 11 August and Thursday 24 November 1994.



Secretary

MAS:5829

ADDENDUM TO THE MINUTES OF THE MEETING HELD ON 3 MARCH 1994

Action required by:

Justice Doogue

1. Refer costs issue to Executive Judges.

Justice Thomas

1. Refer re-draft of rule on removal of proceedings in High Court to Court of Appeal to the President.

Master Hansen

1. Discuss review of Master's decisions with other Masters.

2. Admiralty Rules (with Mr Carruthers)

Mr Carruthers

1. Awaiting responses from New Zealand Law Society's Civil Litigation and Tribunals Committee and New Zealand Bar Association re review of Master's decisions.

2. Winding up rules - representation - awaiting response from Corporate Lawyers Association.

3. Refer mini trials issue to Dispute Resolution Committee of the New Zealand Law Society.

4. Obtain information from Civil Litigation and Tribunals Committee on scale of costs (legal aid and United Kingdom).

5. Obtain feedback from Civil Litigation and Tribunals Committee on discovery (time limits, professional obligations, court file).

6. Admiralty Rules (with Master Hansen).