THE RULES COMMITTEE

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Wellington

27 June 1995

Minutes/2/95

CIRCULAR NO 21 OF 1995

Minutes of the Meeting held on Thursday 8 June 1995

1. **Preliminary**

The meeting called by Agenda/2/95 was held in the Judge's Common Room, High Court, Wellington on Thursday 8 June 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
Mr R F Williams (for the Secretary for Justice)
Mr C R Carruthers QC
Mr H Fulton
Mr W Iles QC CMG (Chief Parliamentary Counsel)

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

Chief District Court Judge Young
The Attorney-General (the Hon Paul East MP)
The Solicitor-General (Mr J J McGrath QC)

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

On the motion of Justice Fisher, seconded by Mr Fulton the minutes of the meeting held on Thursday 23 February 1995 were taken as an accurate record and were confirmed subject to:

- Page 1 item 4, to read "Welcome and Valedictories".
- Page 2 item 4, "The Committee agreed to send letters of thanks to Dr Barton and Justice Thomas for their services to the Committee".

- Page 3 item 8, third paragraph, the reference to *Browne v Dunn* to read [1893] 6 R 57 (HL).

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 Mr Iles:

- The High Court Amendment Rules (No 2) 1995 (PCO 162/1)

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

Justice Hansen said that he and Mr Carruthers had had a meeting with Mr B H Giles QC and as a result had identified a number of rules needing review and some which are unnecessary. He said that Mr Giles is contacting the practitioners who have the most experience in this area and that Mr Giles is also on an Australian committee looking at the Australian Rules with a view to harmonising the procedure between Australia and New Zealand. Justice Hansen said that once Mr Giles has completed that exercise, he and Mr Carruthers can have another meeting with a view to drafting a set of rules to bring back to the committee.

Justice Doogue asked whether any feedback had been received from centres such as Tauranga and Nelson where there is a port industry, and Justice Hansen said that, surprisingly, there had not been.

8. **Appeals**

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

Justice Doogue said that he has not yet been able to speak to the President of the Court of Appeal about this matter.

(b) *Court of Appeal Technical Advisers*

Through the Secretary, the Solicitor-General advised that the Government is likely to make provision for technical advisers in the Court of Appeal, as part of a package in the event that the right of appeal to the Privy Council is abolished. He expressed concern that if the Government moves quickly on this issue, the Committee may find that some control is lost over the nature of the jurisdiction which is put in place.

Mr Williams advised that the Law Reform Division of the Department of Justice is still awaiting some clarification from the Minister, and that the matter is currently being handled by Mr Hoffman of that office.

The Committee agreed that the Secretary should pursue the matter with Mr Hoffman, noting that the Committee can say only that it supports the proposal, given that it will require a legislative change to be implemented.

9. Court of Appeal Rules

(a) *Security for Costs*

Mr Fulton recalled that some unsatisfactory aspects of the rules relating to security for costs were highlighted by Justice Tipping in *Robert Jones Investments Ltd v Gardner* (High Court, Christchurch, CP 30/88, 10 June 1994, Tipping J). The question had then arisen as to whether the provision in the Court of Appeal Rules should also be revised. He recalled that the question of revising the Court of Appeal Rules had been brought up, but that the President of the Court of Appeal was happy with the way the rules were working in practice. Mr Fulton suggested that given there is to be a major review of the court structure the rules should not be amended until that is in place.

Justice Doogue recalled that Mr Carruthers was to discuss this with the Civil Litigation and Tribunals Committee and with the Bar Association to see if any of the rules are causing particular difficulty with the profession.

Mr Fulton advised that he was not aware of any real complaints from the Civil Litigation and Tribunals Committee.

10. Execution Against Chattels and Land (Execution/1/95)

Justice Fisher explained that if both land and chattels are taken in execution, the chattels must be sold first. He considered that the court needs some flexibility to depart from that but at present there is no jurisdiction for it.

Mr Iles noted that subclause (2) provides that if the chattels are sold first and the amount is insufficient then the chattels should be sold. He explained that if the order is reversed in some cases it may be that the land will be insufficient and there will be a need to go on and sell the chattels. Another possibility is that the court may not consider it appropriate to make an order in line with the wishes of the debtor.

In the light of those comments, Mr Iles tabled the draft High Court Amendment Rules (No 2) 1995 and referred to rule 4. The Committee agreed with the wording of that provision.

11. The High Court Amendment Rules (No 2) 1995

- *Rule 2 - References to Secretary for Justice*

Mr Iles explained that this Rule replaces the existing references in the High Court Rules to the Secretary for Justice with reference to the Chief Executive of the Department for Courts, consequent upon the Department of Justice (Restructuring)

Act 1995. Mr Iles explained that the Department of Justice (Restructuring) Bill is still before the House but that it would probably be assented to the following week and the Committee would then be able to concur in the amendments.

In respect of the Court of Appeal Rules, Mr Iles explained that the Bill before the House contains some consequential amendments. He said that there are in fact a number of out of date references in the Court of Appeal Rules which also need to be attended to, but that those should be addressed by the Committee at a later time.

- *Rule 3 - Compliance with Notice*

Mr Iles explained that this Rule extends the minimum time for compliance with a notice for discovery.

- *Rule 5 - Power of Judge to Call Conference and give Directions*

Mr Iles explained that this draft is the same as one previously presented to the Committee, but that it had been referred to Mr Mangos who had suggested that r 707(4) be revoked as being superfluous.

Justice Doogue recalled that Evidence/3/95 referred to two other possible amendments to this Rule: in particular Justice Fisher had drafted a suggested r 703A, and Mr Fulton had suggested there be a cross-reference to r 713 to include any order under r 703.

Justice Fisher said that in respect of these conferences the Judge needs to have a freer hand to direct whatever is needed to dispose of the appeal. The Committee agreed and agreed also to cross-reference this Rule to r 713.

- *Rule 6 - Place for Filing Notice of Appeal*

Mr Iles explained that this Rule does away with the requirement that where an appeal from a decision of the Land Valuation Tribunal is filed in the office of a District Court, the Registrar of that District Court must send a copy of the notice of appeal to the Registrar of the High Court at Wellington.

12. **Exchange of Witness Briefs (Item 2(f) of Agenda)**

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

The Committee considered the revised draft of the proposed rules in relation to the exchange of witnesses' statements dated 22 February 1994 (should read 1995).

Justice Doogue noted that r 441A(1)(a) should be expressed disjunctively rather than conjunctively.

Mr Fulton queried whether there should be a further exception for cases where there is affidavit evidence as in Part IV applications and in particular matrimonial property and family protection matters.

Justice Doogue agreed that where evidence is led by affidavit the rule should not apply, but said that there may be exchanges of affidavits on summary judgment and, if the summary judgment is unsuccessful, there may be further briefs rather than affidavits.

The Chief Justice noted that the Judge will need to be alert, in making an order, to those cases where r 441A will apply automatically and those cases where r 441A will not apply.

Justice Fisher pointed out that the Judge would only want to opt out of an exchange of briefs of evidence if the evidence is going to be given other than orally. In other words, if there is a direction that the evidence be given orally then the Judge must make an order as to exchange of briefs of evidence otherwise r 441A will not apply.

Justice Doogue noted that r 441A applies in the absence of any other direction, and that directions made at a conference would normally cover the situation.

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

Mr Fulton noted that there is a reference to an address for service which is not a document which stands alone under the present rules but rather is appended to the originating document. He suggested that exchange of briefs should be confined to those parties actively involved in the proceedings and who will take part in the hearing.

Mr Carruthers said that a party will have given an address for service for the purpose of receiving all the material in the proceedings.

Mr Fulton said that nevertheless a party may file only an appearance or want to be heard only on the question of costs. In those circumstances he considered that there is no need for briefs of evidence to be served on them.

Justice Doogue considered that it would be difficult to define the class of persons who should receive briefs of evidence without referring to the address for service.

Mr Fulton suggested that the briefs might be served on every party who has filed a statement of claim or statement of defence.

Justice Doogue raised the issue of parties who are denying the jurisdiction of the court, and Justice Fisher said that the point of filing an appearance may be so that the party is aware of what is happening and can decide whether or not to appear.

Mr Fulton referred to the example of trust actions or disputes over a will and said that briefs of evidence may be distributed but not used at the trial with the result that parties who have no direct interest in the case have received them.

Justice Hansen said that with the increasing use of pre-trial conferences it is less likely that such issues will fall through the cracks.

Justice Fisher said that the Judges' view is that simultaneous exchange of briefs is inappropriate. He said that the defence evidence on technical matters may be voluminous in an attempt to guess what the plaintiff's evidence will be. He noted that the rule is only a default rule but said that in practice it has significant force because of the jurisprudence that develops from it.

Mr Fulton said that with simultaneous exchange there are generally more briefs of evidence in reply.

Mr Carruthers said that the only argument in favour of simultaneous exchange may be some cases where there are opportunities for the defence to taylor its evidence.

Justice Doogue said that it is nevertheless useful for the defence to have simultaneous exchange because then there can be no suggestion that the defence has tailored its evidence to meet the plaintiff's briefs, with a concomitant effect on the credibility of the defence.

Mr Fulton said that the discussions have focused on simultaneous exchange because the rules in England and Australia have concentrated on a simultaneous exchange. The Chief Justice said that the majority of the profession are in favour of sequential briefs, although he noted that the whole system will have a profound effect on the assessment of credibility.

Justice Doogue asked what time limits should be set if the exchange of briefs of evidence is to be sequential.

Mr Fulton said that the last reply needs to be at least seven days before the trial and perhaps fourteen.

Justice Fisher expressed the view that the calculations should be from the date of the filing of the precipe and said that calculating from the date of trial gives the parties an excuse for not adhering to the timetable in the event that the trial date is changed.

Justice Hansen said that the American experience is that the earlier briefs of evidence are exchanged, the higher the chance the case will not go to trial.

Mr Carruthers suggested that the Committee look therefore at requiring the parties to disclose the evidentiary basis of their case right at the outset.

Mr Fulton said that the cost factors need also to be balanced in the Committee's consideration. As against that, Mr Carruthers said that the earlier briefs are

exchanged the higher the likelihood of settlement, and suggested that case management could introduce certainty to the fixtures system.

Mr Fulton noted that, because of long delays with obtaining fixtures, the precipe is being filed in order to place the proceedings into the queue, and the precipe does not necessarily indicated that the case is ready to go to trial.

Mr Williams said that he favoured calculating from the date of precipe on the basis that calculating from the date of trial would be less likely to promote settlement.

The Chief Justice said that he believed calculating from setting down is the correct starting point, but he accepted that this has some undesirable consequences in an era where there is a long lead-in time before a trial date.

Justice Hansen suggested that the plaintiff should deliver briefs of evidence 28 days after setting down and the defendant 14 days after the plaintiff's briefs.

Justice Fisher queried whether the rule should assume that the hearing will be at least two months between setting down and the fixture. He noted that the exchange of briefs may precipitate amendments to the pleading and further discovery.

After discussions, the Committee agreed that the plaintiff's briefs should be filed 21 days after filing of the precipe and the defendants 21 days thereafter, on the basis that the plaintiff should in any event be ready for trial, and the defendant is more likely to need the extra time to reply. Justice Doogue said that in Auckland and in Napier where there is no precipe, the position is accommodated automatically by the holding of conferences.

Mr Fulton said that there could be a case where no precipe is filed and no conference is held and suggested that the time be calculated either from the filing of the precipe or from the making of a direction for setting down for trial, whichever is the earlier.

The Chief Justice noted that there is a definition of setting down in r 431(9), namely that a proceeding entered on the appropriate ready list is deemed to have been set down for trial, but he said that the parties would not know when that entry has been made.

After the discussion, the Committee agreed that the calculation for the time of filing of briefs of evidence should be from the earlier of filing a precipe or a direction that there be a fixture.

- *Rule 441C - Evidence in Response*

Mr Carruthers said that there may be a difficulty with exchanging briefs of evidence to evidence which is proposed to be lead by the plaintiff at trial; he expressed some concern about reading evidence in response at the trial to evidence which has not been given.

Justice Doogue noted that both Mr Carruthers and Mr Fulton were of the view that there should not be opportunities to enter into debates in relation to briefs of evidence.

Mr Carruthers said that the method of addressing evidence from supplementary briefs can be dealt with by order at trial.

The Chief Justice said that while he had no personal experience in this area, he had heard of instances where the plaintiff has gone through the entire defence evidence and answered every statement made. He considered that such a process obfuscates rather than crystallises.

After discussion, the Committee agreed that r 441C should be deleted.

- *Rule 441D - Supplementary Written Statements*

Justice Doogue said that such statements should not be seen as a response and Mr Fulton suggested that the end of the second line of the draft rule should refer to matters arising from those contained in that written statement.

The Chief Justice raised the possibility of the defence pleading a positive case, and Mr Carruthers said that in that instance a supplementary statement should be exchanged.

Mr Carruthers noted that a supplementary statement may be adduced only with the leave of the court under r 441D(3) and he considered that it would be hard to lay down rules in advance on how any rebuttal evidence should be dealt with, and suggested that it should be the subject of a direction at trial. After discussion, the Committee agreed that no change was necessary to the wording of r 441D(3).

- *Rule 441E - Evidence in Chief at Trial*

The Committee agreed that the only change needed to this draft rule is the deletion of the reference to any statement in response.

- *Rule 441F - Oral Evidence in Chief*

Mr Fulton queried whether this rule is too restrictively framed and whether there should be a more generous allowance for calling oral evidence.

Justice Fisher said that he saw no harm in the rules acting in a presumptive way.

Justice Hansen said that he thought the rules were already very broad and that it is hard to envisage any situation that would not have been covered in a judicial conference and, in any event, the granting of leave to the admission of oral evidence being required in the interests of justice is worded very broadly.

After discussion, the Committee decided to leave the wording of this rule as presently drafted.

- *Rule 441G - Restrictions on Adduction of Evidence*

Mr Fulton queried whether r 441G achieves anything different from r 441F.

Justice Doogue said that r 441G clearly identifies the position of the person whose statement of evidence has not been served.

Justice Fisher suggested that r 441F might be expanded by referring after the reference to oral evidence, oral evidence in chief whether by way of supplement to exchange of brief or in respect of a witness who has not given any brief.

Mr Iles said that it seemed to him that r 441G is directed to a different situation, in particular the extraneous witness from whom the court may wish to hear.

Justice Doogue noted that in some respects r 441G is a qualification on r 441F, and suggested that Mr Iles examine the possibility of running the two rules together. In doing so, the Committee agreed that the rules should retain the position in respect of a surprise witness to enable that witness to be heard, if the parties agree, without the leave of the court.

Justice Fisher said that the question of consent applies in principle to the whole of r 441F, and the Committee agreed.

The Chief Justice queried whether it was necessary to have a provision of this kind, because generally if the parties consent the court will give leave.

Justice Fisher said that the Judge may have a different view to the parties, and Mr Carruthers agreed that it is not normal to have a provision for consent in procedural rules.

After discussion, the Committee agreed to delete r 441G and leave those issues to be dealt with under rr 441D and 441F.

Justice Fisher said that r 441F will then need to make clear that it applies to both people who have given a written brief and those who have not. The Committee agreed that r 441F(1) be expanded to make it clear that it applies to both witnesses whose statements have been served and those who have not.

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

The Committee agreed with the wording of this rule as drafted.

- *Rule 441I - Cross Examination in Relation to Witness Statements*

The Committee agreed with the wording of this rule as drafted.

- *Rule 441J - Privilege and Admissibility*

  Mr Fulton said that these statements are intended to be an aid to the conduct of proceedings, and that any privilege should be maintained until the brief is read.

  Justice Fisher said that he could not see any policy reasons why a witness should be protected against a statement that has been signed and served.

- *Rule 441K - Rule in Browne v Dunn*

  Mr Fulton suggested that the rule should state what the rule in *Browne v Dunn* actually is namely that each party must put to their opponent the essence of that party's own case.

  The Committee agreed that the Rule is difficult to articulate, but Mr Iles suggested that that be attempted, whilst also retaining the reference to the case, given that the decision is not readily available. He noted that something similar occurs in s 22 of the Property Law Act 1952 in that it abolishes the rule in Shelley's Case.

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

  Justice Doogue said that he would like the rules to reflect the proposition that the effort that goes into a case should be commensurate with the value of the subject matter of the dispute.

  Mr Carruthers said that the requirements of exchanging briefs of evidence will nevertheless apply to all cases. Justice Doogue suggested that once the rules are promulgated a brief summary could be prepared for "LawTalk", and that the authors of McGechan on Procedure and Sims' Court Practice be invited to cross-reference this Rule to r 4.

  Justice Fisher suggested that, in relation to the rules on costs, there could be a reference to the link between the amount at stake and the elaborateness of the procedures that had been followed, and indeed list some of the rules and note whether the procedures have been inappropriately pursued.

  Mr Williams referred to r 66 and queried whether the reference to the record of evidence for search purposes adequately covers the statements which would become evidence in chief.

  Justice Doogue said that his practise was to have briefs produced as exhibits on the basis that that identifies them, given that there may be a number of copies in different forms. Nevertheless, he noted that it is rare for the parties to seek to have an agreed bundle produced as an exhibit.

  Justice Fisher said that there ought to be some uniformity in how the court receives briefs of evidence and suggested that the brief should be endorsed so as to

distinguish it from the official transcript. Justice Hansen said that normally the brief which is produced in court in the witness box is the one that is signed.

Justice Fisher said that he was not in favour of the brief of evidence becoming an exhibit, but considered that it should be endorsed in some way so that there is only one official copy.

After discussion, the Committee agreed that the brief should be endorsed "given in evidence" and signed and dated on behalf of the Registrar.

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

Justice Fisher expressed concern that if the current system is reformed on an interim basis then the momentum for a comprehensive reform may be lost and the public may be exposed to constant tinkering.

Justice Hansen reminded the Committee that there is a session on costs at the Bar Association Conference at Queenstown in July.

Mr Carruthers said that this issue has been the subject of debate for some time now: it has been the subject of a paper prepared by the Civil Litigation and Tribunals Committee and been addressed with the profession through "LawTalk". He noted that that prompted no real discussion. He suggested that the Committee should formulate a rule and a schedule on the basis that, until there is a proposal, people will not focus on it or make any progress.

Mr Fulton said that a view was expressed at the Judges' Conference that costs might be awarded on an entirely new basis but that that would entail an economic study. In the interim, he acknowledged that the rules as presently drafted are unsatisfactory and need to be addressed now, while at the same time keeping an open mind on an alternative policy some time in the future.

Justice Fisher suggested that there may be an intermediate path, and said that a major exercise need not be years down the track, but rather someone could bring together the work that has been done both here and overseas, summarise it and place a paper before the Committee.

Mr Carruthers said that he would be prepared to undertake the exercise of looking at the papers on costs.

The Secretary agreed to list all of the references to the previous papers on costs which have been referred to the Committee, and also to ask the Crown Law Office Librarian to research the issue of costs in respect of economic analysis and also in respect of access to Justice.

Mr Fulton agreed to assist with the analysis.

Justice Fisher said that there is not only a need to inform the Committee but also it may be advisable for the Rules Committee to justify to the profession how it has arrived at a result;

he suggested that a base document something along the lines of those prepared by the Law Commission would serve that purpose also.

The meeting closed at 1.20 pm.

The next meeting will be held on Thursday 3 August 1995

Secretary

MAS:75649

ADDENDUM TO THE MINUTES OF THE MEETING

HELD ON THURSDAY 8 JUNE 1995

ACTION REQUIRED BY:

Justice Doogue:

R A Batchelor and Others v Tauranga District Council

Speak to the President of the Court of Appeal.

Justice Hansen:

Admiralty Rules

With Mr Carruthers meet with Mr B H Giles QC with a view to drafting a set of rules to bring back to the Committee.

Mr Carruthers:

Admiralty Rules

With Justice Hansen meet with Mr B H Giles QC with a view to drafting a set of rules to bring back to the Committee.

Costs (Item 5 of Agenda)

Undertake the exercise of looking at the papers on costs.

Mr Fulton:

Costs (Item 5 of Agenda)

Undertake the exercise of looking at the papers on costs.

Miss Soper:

Costs (Item 5 of Agenda)

List all of the references to the previous papers on costs which have been referred to the Committee.

Ask the Crown Law Office Librarian to research the issue of costs in respect of economic analysis and also in respect of Access to Justice.