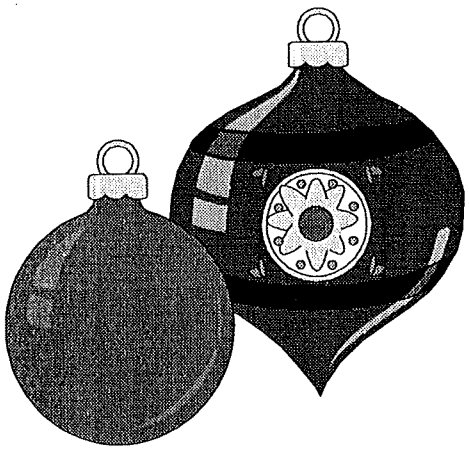


THE RULES COMMITTEE

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16 December 1996

Minutes/4/96

**CIRCULAR NO 38 OF 1996**

**Minutes of the Meeting held on Thursday 28 November 1996**

1. **Preliminary**

The meeting called by Agenda/4/96 was held in the Judge's Common Room, High Court, Wellington on Thursday 28 November 1996 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 K McCarron (for the Chief Executive, Department for Courts)
Mr C R Carruthers QC
Mr R S Chambers QC
Ms 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 QC MP)
The Solicitor-General (Mr J J McGrath QC)
Mr G E Tanner (Chief Parliamentary Counsel)

4. **Personnel**

Justice Doogue welcomed Mr Chambers as a member of the Committee on the nomination of the New Zealand Law Society and also representing the New Zealand Bar Association, and also welcomed Mr Carruthers as a member on the nomination of the New Zealand Law Society rather than a member for special purposes.

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

On the motion of Justice Fisher, seconded by Justice Hansen, the minutes of the meeting held on Friday 26 July 1996 were taken as an accurate record and were confirmed.

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

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

7. **Papers Tabled at the Meeting**

*By the Secretary:*

- General/1/96 (being a copy of "Access to Justice", the final report by Lord Woolf to the Lord Chancellor).

*By Justice Doogue:*

- Proposed meeting dates for 1997.
- Memorandum from Master Thomson to Justice Doogue dated 26 November 1996.

8. **Costs (Item 3 of Agenda)**

Justice Doogue recalled that Mr Carruthers was to prepare some material with Mr Fulton but that that exercise was overtaken by the need to receive the Woolf Report.

Justice Fisher said that he would be prepared to put together a short summary of the principles and general objectives.

Justice Doogue noted that Lord Woolf takes for granted that the indemnity principle is the guiding one and there is therefore no discussion of that as a policy issue in relation to costs. In respect of the Criminal Appeal Rules, Justice Doogue advised that the Court of Appeal has a sub-committee addressing the issue of costs.

Justice Fisher wondered whether it might be advantageous to address the issue of costs in two stages, first by settling the principles and then addressing the detail in a second paper.

Justice Doogue said that he considered that the Committee should revise the rules about costs as soon as possible because these rules are seen by the profession and others as seriously out of date.

9. **Criminal Appeal Rules (Item 4 of Agenda)**

Justice Doogue noted that Justices Henry and Blanchard from the Court of Appeal have referred these rules to the Committee. He identified a need to consult with the Criminal Practice Committee and the Criminal Bar Association as well as the Legal Services Board, and the Committee agreed that the Secretary should refer the paper to them.

Justice Fisher alluded to r 14 and the possibility that legal aid be governed by the Legal Services Board. He noted that at present the Court of Appeal acts as a filter and that this seems to be a major policy matter which may or may not be the function of the Rules Committee to decide. He said that he would hesitate to hand the matter over to the Legal Services Board.

The Chief Justice noted in this context that the basis of the procedure can also be challenged by judicial review.

Justice Doogue recorded that applications for legal aid currently go to three judges of the Court of Appeal independently and that legal aid will be granted if any one of those judges considers there is a valid point in the appeal. The decision is conveyed by the Registrar, which decision can be challenged.

Justice Fisher drew attention also to r 35 which involves the power to dismiss an appeal where the appellant fails to appear. He said that in the High Court, if there is a reasonable excuse for not being there, most judges will de facto reinstate the appeal and hear it. Some judges however say there is no jurisdiction to reinstate the appeal and he considered that this jurisdiction needs to be considered.

10. **Mediation (Item 6(a) of Agenda)**

Justice Doogue noted that the Courts Consultative Committee has a draft issues paper to be considered at their meeting the following day.

The Chief Justice said that the Courts Consultative Committee is likely to approve the issue of the paper to a list of people and that the Rules Committee should be among bodies to be consulted. He noted that the process is slow because of the controversial subject matter.

Justice Doogue said that the options of mediation or a mini trial could be addressed at a directions conference and recalls that Mr Fulton had noted that settlement conferences can be ordered only before the trial commences but that the issue could be the subject of an agreement between the parties in the course of the hearing.

Justice Fisher considered it premature for the Rules Committee to do anything at this point, given that the Courts Consultative Committee is coming up with proposals.

The Chief Justice said that he favoured giving mediation and alternative dispute resolution some prominence in an enabling way because it could be a while before anything concrete emerges from the Courts Consultative Committee. He considered that a reference to the subject in the High Court Rules would be a helpful reminder for people to consider

alternative dispute resolution. He said that he shares reservations and concerns that have been expressed about the judicial role in the process of mediation and that he has spoken strongly against judges in the Family Court exercising that function on the basis that mediation and the judicial functions should not be confused. He also referred to an editorial comment by Sir Laurence Street from the Australian Dispute Resolution Journal for November 1996:

> "A court that makes available a judge or a registrar to conduct a true mediation is forsaking a fundamental concept upon which public confidence in the integrity and impartiality of the court system is founded. Private access to a representative of the court by one party, in which the dispute is discussed and views are expressed in the absence of the other party, is a repudiation of basic principles of fairness and absence of hidden influence that the community rightly expects and demands that the courts observe."

Mr Carruthers reminded the Committee of the need to draw the distinction between that and a settlement conference in the course of hearing.

Justice Doogue suggested that mediation and alternative dispute resolution might be added to the list of matters for a directions conference. He noted that if the Rule is purely enabling then there is no need to define those terms.

Mr Chambers said that if the Rule is to give the judge power to direct rather than just inviting the parties to consider that course then that would be a major change.

Justice Doogue noted that no problems arise if mediation or alternative dispute resolution is adopted with the consent of the parties.

Mr Carruthers noted that it is contrary to the concept of mediation to direct the parties to submit to it.

The Chief Justice said that one of the issues is whether the court has power to direct the parties to go to mediation.

11. **Judicial Settlement Conferences in course of Hearing (Item 6(b) of Agenda)**

Justice Doogue said that at present our rule enables the judge to direct a settlement conference and said that the rules could either provide for the trial judge to direct a settlement conference in the course of a trial or alternatively only where the parties consent.

Justice Fisher said that the parties may want a settlement conference but may see it as an expression of weakness if they seek it.

Justice Doogue said that different considerations apply whether the conference is held pre-trial or during the trial.

Mr Carruthers said that it can be apparent during the trial whether the matter would be assisted by intervention by a judge other than a trial judge. He noted that the parties may express a view about settlement but not necessarily be prepared to take the initiative.

Mr Chambers expressed reservations about ordering a judicial settlement conference other than by consent once the trial has commenced on the basis that if the conference is unsuccessful the parties may be concerned at what may have passed between the trial judge and the settlement judge. He considered that without consent the parties may not freely express their views to a judicial officer.

Justice Doogue noted that it is open to the parties to appeal the judge's direction on a settlement conference.

Mr Carruthers suggested that the power to order a settlement conference would be exercised very sparingly and if there is no real prospect of settlement the instinct would be not to make an order. He considered it unlikely therefore that the difficulties would arise in practice.

Mr Chambers said that the parties may have already attended judicial conferences with mediation having been considered, and if that option has not worked by the time the matter comes to trial, he did not consider that a party should be made to go to mediation. He considered that at that stage the parties have a right to have the matter adjudicated upon.

Mr Carruthers considered that the judge would be unlikely to make a direction in those circumstances, but he considered that the power should be there to facilitate settlement in those cases that lend themselves to it.

Justice Fisher expressed concerns about the point about the judges discussing the case between themselves. Mr Carruthers agreed that that should not happen but Justice Hansen said that it is a perception and not necessarily that of counsels but may be a perception of the litigants.

Justice Doogue suggested that the power to order mediation could be by consent initially to see how it works in practice.

12. **District Court Rules (Item 7 of Agenda)**

Chief Judge Young said that he had had a meeting with Mr Belgrave (the Secretary for Justice) and Dr Palmer (the Deputy Secretary) and that they are happy to pursue changes to combine the District Court Rules Committee with the Rules Committee by amendment to the Judicature Act. He said that the policy matters which need to be referred to government look like they are on track for the new year. He said that the issue of the composition of the Committee has still to be settled, but the new government needs to commit itself to the change in principle. He suggested that the Committee should not be unwieldy and that there needs to be a Law Society representative with some experience of practice in the District Court. One possibility is to have that expertise combined from the current nominees. For judicial representation he considered it would be adequate to have the Chief District Court Judge or a nominee and possibly one other judge.

Justice Fisher agreed that there ought to be another District Court judge.

Mr Carruthers said that the District Court practice is not significantly different but agreed that care should be given to the selection of the Law Society member. He noted that the Law Society member already consults with the Bar Association and the Civil Litigation and Tribunals Committee and he saw no reason why they should not consult with a committee on District Court matters.

As an interim measure Justice Doogue suggested that it was open to appoint a member for special purposes to save enlarging the Committee generally.

13. **Rule Making Procedure (Item 8 of Agenda)**

Justice Doogue said that Dr Palmer's letter of 23 October 1996 indicates that anything in a rule change which raises a matter of policy requires approval by Cabinet. He said that Mr Belgrave would like to meet the Committee and suggested the first meeting in 1997. The Committee agreed with that suggestion.

Justice Doogue suggested it may be helpful to have a short paper prepared by the Secretary on how the present system came into existence, and containing some detail on the current process.

Chief Judge Young said that his sense after discussion with Dr Palmer is that Dr Palmer has a firm view that whenever he believes a rule change involves a policy issue the matter will be referred to Cabinet. Apparently Dr Palmer sees it as a failure on the part of the Ministry that this has not occurred in the past.

Justice Doogue noted that the Department does not have a representative on the Committee and Justice Fisher expressed concerns for the efficiency of the Committee if the membership gets too high.

Chief Judge Young raised the issue of what the process is in Australia and the United Kingdom.

Justice Fisher suggested that the issue could be dealt with on the basis of a practice note, effectively meaning that the judiciary decides its own procedure.

Justice Doogue said that Mr Belgrave is not necessarily of that view.

Chief Judge Young said that Mr Belgrave has particular concerns about the costs issue because that has ramifications for government.

Justice Fisher said that the Committee has always recognised that something like costs can spill over into matters of policy and that the practice of the Committee has been to get input from everyone including government. He agreed that an issue like this goes beyond a simple matter of the courts deciding their own procedure.

Mr Carruthers agreed that the issue of costs could be a legislative and not a rule making issue.

Justice Doogue said that the awarding of costs is in fact determined by the judges in their discretion and is not prescribed by the rules.

Chief Judge Young raised the issue of non party discovery, and Mr Carruthers asked about the position of non party discovery against the government.

Justice Fisher said that Mr McCarron is here to ensure that there is consultation.

Mr McCarron said that the Ministry has not been in consultation with the Department of Justice on this issue but said that it is part of his role to maintain a watching brief and provide input from the Executive.

Justice Doogue noted that the Attorney-General and Solicitor-General are also members of the Committee.

Mr Chambers said that Dr Palmer's has merit to the extent that the rules are made by the Governor-General and Council, and that the Governor-General is therefore entitled to have Cabinet endorsement. He referred in this context to the Cabinet Office Manual.

Justice Doogue noted that the legislature saw fit to see the Department for Courts take over the function of the Ministry of Justice. Mr McCarron said that the Ministry is taking an interest because of issues of policy rather than operational issues may arise.

14. **Meeting Dates for Next Year (Item 8 of Agenda)**

Justice Doogue said that the meetings scheduled for next year are Friday 14 March, Friday 13 June, Friday 29 August, and Friday 14 November.

15. **Parliamentary Counsel Office (Item 8 of Agenda)**

Justice Doogue advised that an apology had been received from Mr Tanner, the Chief Parliamentary Counsel. He said that Mr Tanner had discussed with him how the Parliamentary Counsel Office should provide drafting resources for the Committee. The suggestion was made that either the office allocate an individual to be responsible for the Rules Committee work or adopt a team approach. Justice Doogue said that the Committee is primarily concerned to ensure that the Rules are drafted and that a team approach might provide better support. Justice Doogue said that it was Mr Tanner's intention to do less of the drafting work himself and to delegate to a greater degree, although Justice Doogue expressed the view that that was a matter for Mr Tanner and his office.

Justice Doogue mentioned also the issue of style and said that he would like to see a more plain english style adopted. He cited the example of the rules drafted by Lord Woolf and noted also that it may be possible for the Rules to deal with matters generally and for the detail to be contained in practice notes.

16. **"Access to Justice", the Final Report of Lord Woolf to the Lord Chancellor (Item 8 of Agenda)**

Leaving aside the issue of costs, Justice Doogue suggested that the Committee should work through the Woolf Report to see how much of the material in it is relevant for New Zealand. Justice Doogue said that he had spoken to Lord Woolf when he was in England and that at the moment implementation of the report is dependent on secretarial assistance and funding, but he has arranged for information on implementation to be conveyed to him. He suggested that the matter be placed on the agenda for the first meeting next year.

17. **Service on Companies (Item 9 of Agenda)**

The Secretary advised that nothing further has been heard from the Ministry of Commerce.

18. **Certificate by Lawyer Responsible for Document (Item 10 of Agenda)**

Mr Chambers said that the issue has been considered by the New Zealand Law Society's Ethics Committee who do not see that any rule change is required because the problem is already covered by two or three of the current ethical rules. He said that if there were instances of wrong doing the matter could be referred to the Law Society and could also be dealt with by the court.

Mr Carruthers said that the Civil Litigation and Tribunals Committee has not reported back on the matter.

Justice Fisher said that some practitioners can file pleadings which they know are groundless in fact when, for example the defendant needs time to pay; a pro forma statement of defence may be filed.

Mr Chambers said that the Ethics Committee would consider it a breach of the Rules of Professional Conduct to file a document known to be false.

Justice Doogue said that there is a distinction to be drawn between a document which is false and one that has no basis, and Mr Carruthers said that if the defendant wishes to put the plaintiff to proof it is open to deny the pleadings in the statement of claim, but he doubted that this amounted to false or unethical conduct.

Justice Fisher said that a number of pleadings are filed where the practitioner knows that the facts do not support what is alleged.

Mr Chambers considered that the court would have sanctions available to it and mentioned in this context summary judgement by defence.

Mr Carruthers expressed himself in favour of a certificate along the lines promulgated.

Justice Fisher noted that it was the American Bar Association that was the genesis of this certificate and not the judiciary.

Mr Chambers said that he considered the defence is entitled to put the plaintiff to proof but that if something is known to be true the defendant should admit it. He expressed concerns about a certificate from solicitors because the truthfulness will not necessarily be known to the solicitor. The highest the solicitor can certify is that the pleading is not knowingly false.

Justice Fisher said that from the previous discussions at Rules Committee meetings it was not the intention that the solicitors should underwrite the truth of the facts; he noted however that it goes this far in the United States.

Mr Carruthers said that there is a difference between pleadings that admit or deny and pleadings that go on to assert say for example fraud when there may be no basis for it.

Justice Doogue summed up the matter by saying that it should be referred to Parliamentary Counsel for a draft for discussion, and that the draft be then referred to the New Zealand Law Society and the Bar Association for comment.

19. **Winding Up Applications Subsequent to Liquidation (Item 12 of Agenda)**

Justice Doogue referred to the memorandum from Master Thomson which he said seemed to support the point.

Justice Fisher said that Master Gambrill had referred to him in draft a paper on it and the issue does seem to be a matter of significance in Auckland. He said that the legal position is that there ought to be an interlocutory application in the context of a liquidation, but whether that should convert to a separate set of proceedings with a statement of claim is another matter.

Justice Doogue said that there is an issue about how to deal with separate proceedings because unless they are heard in chambers they have to be dealt with by a judge.

Justice Hansen said that the intention was to refer all winding up matters to Masters. He explained that the merit of having separate proceedings is that where there is a voluntary liquidation there is otherwise nothing before the court.

Justice Hansen said that the hearings should be in open court and that the Masters are assuming jurisdiction through the back door by the interlocutory procedure.

Justice Fisher said that Justice Barker and Justice Tipping had both in separate decisions called for pleadings. If that is so he asked whether the matter should be dealt with as an interlocutory matter simply in order to bring it within the Masters' jurisdiction. He suggested that the starting point should be to ascertain what kind of litigation it is, and then move on to address the form of the pleadings. He noted that there is confusion in the Masters' lists in the context of a court ordered winding up where there is a challenge to the avoidance of voidable preferences; the issue is whether these should be dealt with by interlocutory application in the context of the general liquidation file or should be the subject of separate proceedings.

Mr Carruthers said that if the winding up is ordered by the court it makes sense for it to be an interlocutory matter so that it is dealt with as part of the same proceeding.

Justice Hansen said that there is nothing to prevent filing a statement of claim and statement of defence within the existing proceedings anyway.

Mr Chambers said that it would be anomalous to end up with a different procedure for a voluntary liquidation as opposed to a court ordered one. He noted also that quite often the sums of money are quite small and the technicalities of the procedure can be out of proportion to the amounts involved.

Mr Carruthers suggested the issue might be resolved whereby a voluntary winding up be lodged as the commencement of a proceeding for the purposes of applications in a voluntary winding up, in other words so that applications of this kind could be treated as being interlocutory.

Justice Fisher referred to the power of the liquidator to apply for directions, and Justice Doogue noted that McGechan on Procedure paragraph HR 700 ZH.08 says that r 458D(1)(bb) which permits an application for directions by a liquidator to be made by originating application is in conflict with r 700 ZH(1) which requires such applications to be brought as interlocutory applications.

Justice Fisher said that the confusion arises as to how the interlocutory application should be dealt with and noted that Justice Tipping's view is that there should be an exchange of pleadings.

Justice Hansen said that if the proceedings are brought as interlocutory application, they come on to the Master's list and there is then a requirement for a statement of claim and statement of defence to be filed in situations where the sums involved are quite substantial. He considered the procedure warranted in that case but where the sums involved are $1,000 to $1,500 that is not the case.

Mr Carruthers said that he had nevertheless dealt with a sum of approximately $1 million on an interlocutory application.

Justice Fisher suggested that the Rule is adequate as it stands because the wording is "unless the court otherwise directs".

Justice Doogue said that the problem comes with the voluntary liquidation and Justice Fisher said that Master Gambrill would like to see the matter resolved because of judicial differences.

Justice Hansen said that very few voluntary liquidations come before the court and that the Masters should therefore have jurisdiction so the matter can be dealt with in open court.

Mr Carruthers said that in winding up applications the procedure under the Winding Up Rules was to make an interlocutory application and they were heard in open court.

Justice Fisher said that if Masters have jurisdiction under s 26I of the Judicature Act then under s 268 of the Companies Act 1955 a liquidator gives notice setting aside and the person affected applies to the court for an order not to be set aside. Otherwise it would be an application to the court for an order and would be an originating application.

Mr Chambers thought it unusual to have an originating application and a statement of claim and also asked, if a second or third person wanted to challenge would they join on to the first originating application or bring a separate one.

Justice Fisher suggested that second or subsequent persons should latch on to the first originating application in the same way as is done with family protection proceedings.

Mr Chambers queried which is the ideal process and asked whether judicial officers need pleadings to properly determine these matters.

Justice Fisher suggested that no amendment to r 448 is needed but just need to give Masters jurisdiction to allow them to deal with preferential and voidable transactions under the Companies Act.

After discussion the Committee agreed to seek an amendment to the Judicature Act to ensure that Masters have this jurisdiction, but not to amend any of the Rules.

20. **Tax Litigation: Proposed New Rules of Procedure (Tax/1/96)**

Mr McCarron advised that the Tax Administration (No 2) Amendment Act came into force in July and the issue is whether the existing rules should govern the procedure, or whether a new part to the High Court Rules is necessary.

Justice Doogue recalled that the profession, through Brendan Brown and Geoff Harley had been involved with the resolution of this process last year. He said that the legislation had brought the tax disputes resolution process back under the High Court Rules and now Inland Revenue want their own rules again. He said that the Act had been changed so that special rules would not be necessary.

Mr Carruthers expressed a desire to have more time to deal with the matter and read it properly.

Justice Fisher noted that proposed Rule 900C does not specify the relief which is being sought, and Mr Chambers expressed concern that it also contains fetters on what issues can be raised.

Justice Doogue agreed that there should be a statutory basis for that.

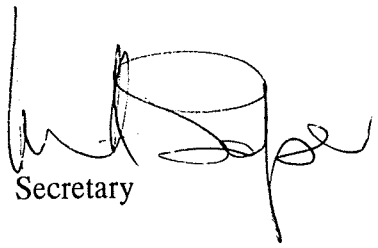
Mr Carruthers expressed concern that proposed Rule 900L precludes, once the matter comes on for hearing, any evidence which has not been put before the Department.

Justice Fisher suggested that the Secretary should write to Inland Revenue asking for a paper from them which would point out the inadequacies perceived in relation to the rules for tax

litigation and making a case for varying or adding to them. The Committee agreed, and agreed also that the matter should be referred to the New Zealand Law Society and the Bar Association for their comment.

The meeting closed at 12.30 pm.

**The next meeting will be held on Friday 14 March 1997 and is scheduled to last a full day in order to consider the topic of costs.**



Secretary