



THE RULES COMMITTEE

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Wellington

28 November 1997

Minutes/4/97

CIRCULAR NO 63 OF 1997

Minutes of the Meeting held on Friday 14 November 1997

The meeting called by Agenda/4/97 was held in the Judge's Common Room, High Court, Wellington, on Friday 14 November 1997 commencing at 9.30 am.

1. Preliminary

(a) *In Attendance*

The Hon Justice Doogue (in the Chair)
The Hon Justice Fisher
Mr K McCarron (for the Chief Executive, Department for Courts)
Mr C R Carruthers QC
Mr R S Chambers QC
Mr G E Tanner (Chief Parliamentary Counsel, by invitation)
Miss T L Lamb (Crown Law Office, by invitation)

(b) *Apologies for Absence (Item 1(a) of Agenda)*

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

(c) *Confirmation of Minutes (Item 1(b) of Agenda)*

On the motion of Justice Fisher, seconded by Mr Carruthers, the minutes of the meeting held on Friday 29 August 1997 were taken as an accurate record and were confirmed.

(d) *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.

Papers Tabled at the Meeting*By Justice Doogue:*

- Letter from D F Dugdale, Law Commissioner, to Justice Doogue dated 25 September 1997, memo from Susan Taylor to Justice Doogue dated 11 November 1997 re Habeas Corpus and letter from Justice Doogue to D F Dugdale dated 12 November 1997.

By Mr Tanner

- High Court Amendment Rules 1997, Rule 2: new Rule 66(3A).

By the Secretary

- Interlocutory Matters/3/97 - distinction between interlocutory and final orders.
- General/6/97 - servicing of the Rules Committee.
- Election Petition/3/97 - Election Petition Rules.
- Pleadings/1/97 - Certificate by lawyer responsible.

2. Matters referred to Parliamentary Counsel (Item 2 of Agenda)(a) *High Court Amendment Rules 1997*

Justice Doogue referred to the Chief Justice's memorandum on search of court records circulated under General/5/97. He noted that the Chief Justice thought it odd that the records could be searched between the time of leave being granted and the commencement of the proceedings, but not after the proceedings have been commenced.

Mr Tanner tabled a redraft of r 66(3A) which he said is intended to provide that if leave to bring the proceedings is required a person cannot search the file on the interlocutory application.

Justice Fisher said that the difficulty is that while a person cannot look at the interlocutory application if the proceedings are still live, there is no way of knowing whether or not an action is proceeding because when leave to bring proceedings is granted it is not usual to specify a deadline within which the proceedings must be brought.

Justice Doogue cited as examples the need to have leave to commence proceedings against a company in liquidation, for a company in liquidation to bring proceedings and proceedings which need leave because they are out of time under the Limitation Act. He gave pre proceeding discovery as an example where there would be an interlocutory application in intended proceedings but the leave of the court is not required to commence the proceeding. Justice Doogue said that files on interlocutory applications can include delicate financial information which should not be made public just because an application for leave to bring proceedings has been refused.

After discussion, the Committee agreed that r 66(3A) should come out of the High Court Amendment Rules 1997 in the meantime so as not to hold up the other amendments, and the issues should be discussed more fully at the next meeting.

(b) *Interlocutory and Final Orders*

Justice Doogue drew attention to the paper from Andrew Beck circulated under Appeals/3/97. He said that Mr Beck draws attention to two problems in the leave situation which overlap with the right of appeal. Justice Doogue considered that the Rules Committee should probably look at all of the provisions relating to the District Court which are relevant to appeals to the High Court. He suggested that if Mr Beck is right and there should be appeals as of right the answer may be to abolish the distinction between interlocutory and final orders.

Justice Fisher referred to his paper (Interlocutory Matters/3/97) and said that he had assumed the existing policy in the District Courts Act relating to appeals and had attempted only to tidy up the drafting question. He said it may be possible to bypass the issue by removing the distinction between interlocutory and final orders but that there would be policy implications in assuming an absolute right of appeal from the District Court.

Mr Chambers said that applications for leave to appeal from the District Court tend to effectively argue the issue which is the subject of the appeal.

Justice Fisher disagreed that that was a waste of time and said that there is a plethora of matters for which leave should not be given to appeal from the District Court such as judicial review of procedural matters.

Justice Doogue said that in any event a statutory amendment would be required. While the issue is largely one for the High Court the Committee agreed it would be helpful to have the assistance of the Chief District Court Judge.

Justice Fisher referred also to the District Court Committee, and Mr Carruthers said that the Civil Litigation Committee largely covers the District Court material.

Mr Chambers queried why there should not be an automatic right of appeal on interlocutory applications from the District Court to the High Court.

Justice Doogue said that in the High Court there is a right of review from a Master in chambers to a Judge and then the appeal can proceed only with leave. He also expressed the view that the Rules should not encourage litigation without merit.

After discussion, the Committee agreed that the issue should be looked at globally in relation to the District Court right of appeal and that the issue should be discussed with the Chief District Court Judge to reach agreement on how best to proceed.

(c) *Summary Judgment Procedure*

Mr Tanner said that this matter is not proceeding until the statutory amendment has been passed through the House.

(d) *Election Petition Rules*

Justice Doogue noted that this is for drafting by the end of 1998 and referred to Justice Fisher's memorandum for Mr Tanner.

3. **Matters Referred for Statutory Amendment**

(a) *Appeals from the District Court (Appeals/3/97)*

Justice Doogue referred to the paper prepared by Andrew Beck and said that Rules on how Masters' decisions be reviewed await the passage of the legislation.

Mr Chambers noted that the distinction between a Masters' decision in chambers and in court and said that it is an artificial distinction with quite wide ranging consequences and gives rise to numerous difficulties in practice.

Justice Doogue said that the distinction is already made in s 26P of the Judicature Act.

Justice Fisher explained that Judges used not to give reasons for a judgment in a matter heard in chambers which is why there is a review rather than an appeal from the decision of a Master in chambers.

(b) *Expert Advisers*

Mr Tanner advised that it is not in the Statutes Amendment Bill for this year and that it was in the Judicature Amendment Bill but it is doubtful whether that will now proceed.

Mr McCarron said that some of the provisions in the Courts Structure Bill may be promoted through another route, and Mr Tanner said that the Courts and Criminal Matters Bill is on the legislative programme.

Justice Doogue said that the issue was of concern to the Court of Appeal and agreed to write to the President advising that there is little the Rules Committee can do to advance matters further although the Committee could take the issue up again with the Minister if the President would like to adopt that course of action.

(c) *Review of Masters' Decisions*

Mr Tanner advised that this is in the Statutes Amendment Bill.

(d) *Removal of Proceedings from High Court into Court of Appeal*

Mr Tanner advised that this matter is in the Statutes Amendment Bill.

(e) *Winding Up*

The Secretary agreed to check with the Ministry of Justice on progress with this amendment.

(f) *Grant of Probate or Letters of Administration to an Attorney*

Mr Tanner advised that this matter is within the Statutes Amendment Bill.

(g) *Summary Judgment Procedure*

Mr Tanner advised that this matter is in the Statutes Amendment Bill.

(h) *Service on Companies*

Mr Tanner said that this item is not in the Statutes Amendment bill because the consent of the political parties was not obtained. The Secretary said that the advice she had received from the Ministry of Commerce was that this item could be included as a supplementary order paper.

Mr Tanner said that a letter to the Ministry of Justice under the signature of either Justice Doogue or the Chief Justice drawing attention to the practical implications could well help to advance matters.

4. **Costs**

Justice Doogue referred to the letter from Matthew Palmer (Costs/5/97) and expressed his concern at the second to last paragraph. He said that he thought the consultation with Government Agencies should take place now so that by the time the Rules are referred to Cabinet issues of policy had been settled.

Justice Doogue said that the Committee needs to be advised of the Government Policy on the general question of Access to Justice.

Justice Fisher agreed that that view should be communicated to the Rules Committee as soon as possible so that the Rules Committee can address any modifications to what is proposed.

Justice Doogue suggested, and the Committee agreed, that the Solicitor-General should be asked to look at the question and perhaps address it with Dr Palmer.

5. Evidence/Cross Examination in Review Proceedings

Justice Fisher referred to the extract from the New Zealand Law Journal (Evidence/1/97) and said that the point about evidence by affidavit is uncontroversial.

Justice Doogue noted the references in the Article to applications being brought under Part II of the High Court Rules and referred to r 496 that evidence be given orally. He noted however that r 628(6) which sets out the procedure for applications for review, provides that every proceeding continue as provided in Part IV. Part IV provides in r 455 for evidence to be by means of an agreed statement of facts or by affidavit so it would seem that in fact the Rules do make it clear that in an application for review evidence will be by affidavit unless otherwise ordered.

Mr Carruthers referred to the wider issue relating to cross-examination under r 508 and noted that this will be permitted subject to any directions from the Court and he referred to s 10 of the Judicature Amendment Act.

Justice Fisher said that the genesis of the rule was that Ministers were reluctant to make affidavits at all ^{but X/M principles} and that the Rules that were as a result devised have flow on effects for all other kinds of judicial review. He said that some ninety five percent would probably not involve Ministers.

Mr Carruthers said that even under r 508 if the deponent is not produced the affidavit can still be read by special leave.

The Committee agreed that the wider issue of cross-examination in review proceedings needs to be considered further.

6. General

(a) Access to Justice

Justice Doogue asked members of the Committee to highlight any points in the Woolf Report for discussion at the next meeting, and to bring those to the attention of the Secretary.

(b) *Servicing of the Rules Committee*

Justice Fisher referred to his paper (General/6/97) and suggested he would like to see a research person who can sit in on Rules Committee meetings.

dedicated to RC work

Justice Doogue said that the research that has been done in the past by Judges' Clerks has been very time consuming.

Mr McCarron referred to the issue of funding, and the Secretary advised that the existing arrangement is for Department for Courts to meet the costs of the Committee, although the Crown Law Office provides a Secretary and a number of costs are picked up where they fall.

Mr Tanner gave the example of the Legislation Advisory Committee which is resourced through the Law Commission.

Justice Fisher said that he would be cautious about having someone from the Ministry of Justice for constitutional reasons: the judiciary and the profession need to maintain independence from the Executive.

After discussion, Mr McCarron agreed to present a memorandum to the Department with a proposals for someone who is legally qualified, perhaps as a Judges' Clerk or Law Commission background, with an independence of outlook.

7. **Habeas Corpus**

Justice Doogue advised that he had tabled the further material from Mr Dugdale for information.

8. **Interlocutory Matters**

This matter was deferred until the next meeting.

9. **Pleadings**(a) *Certificate by Lawyer Responsible for Document*

Justice Fisher said that some of the Australian States do have certification rules but that this issue needs to be looked at in more detail by someone else in the Committee. Mr Carruthers agreed to take the matter over.

Justice Doogue said that more information is need on Rules in other jurisdictions and said that he would see if a Judges' Clerk is available to do that.

The Secretary agreed to follow up with the Bar Association to see if they had any views on the matter.

(b) *General (Service of Essential Evidence and Documents at Time of Pleadings)*

Justice Doogue said that he had tabled this item for discussion because of problems of late information. He said there should be disclosure of the evidence essential to the case and the documents the party intends to rely on, in a manner similar to commencing by summary judgment.

Mr Carruthers said that this is an issue that he would be happy to develop and come back to the Committee on.

Justice Doogue said that such a procedure may remove some of the arguments relating to discovery and exchange of briefs.

Mr Carruthers said that there is a similar precedent with the concept of preliminary Acts in the Admiralty jurisdiction where there is a requirement to set out the essential features of the case. Justice Doogue referred also to the rules in South Australia relating to pleadings which assume that a matter is denied unless the defendant is raising a positive matter.

Mr Chambers expressed some concern about the concept of serving essential evidence and documents at the time of pleadings, in case it may lead to more expensive rather than less expensive litigation.

10. **Summary Judgment**(a) *Evidence by Affidavit*

Justice Doogue referred to Justice Hansen's letter of 31 October (Summary Judgment/4/97), and the decision of Justice Hammond not to accept an affidavit from an employee of the Company with full knowledge of the relevant matters.

Mr Carruthers referred to r 517 which provides that evidence may be made on behalf of a corporation by any officer or member thereof, and Mr Chambers suggested that the word "employee" could be added in there for the avoidance of doubt.

Justice Doogue said that r 517 is discretionary anyway.

Justice Fisher made the point that evidence is always given by people who attest to matters within their personal knowledge and that the corporation itself does not give evidence in that sense. An alternative is to provide for a rule so that a company can certify but then that would not be evidence.

Justice Doogue agreed with Justice Hansen that there have been thousands of affidavits filed on behalf of a company over the years and that if more is required of the company it would make the process very difficult.

Justice Fisher suggested r 517 be revoked and delete in r 138(2) the words "by or on behalf of the plaintiff".

Mr Chambers said that the Committee would need to be careful to check other legislation to make sure there are not other references to evidence from a company.

Mr Carruthers identified the issue as being how companies bind themselves and the Committee agreed that an affidavit is the only vehicle by which a company can give evidence.

After discussion, the Committee agreed to look at it more detail at the next meeting.

Mr Chambers agreed to refer the matter to the New Zealand Law Society and the Bar Association.

Justice Doogue said that he would see if one of the Judge's Clerks can assist with overseas jurisdictions.

11. Tax

(a) *Proposed New Rules of Procedure*

The Committee noted that the Department does not wish to proceed with the amendments in the meantime.

Mr Tanner advised that the Department draft their own legislation, and Mr Chambers suggested that the Committee could signal to Law Society Tax Committees to look out for anything in legislation that might give rise to difficulties about service.

The Committee affirmed the response sent by the Secretary and asked the Secretary to ask Warren Cole to inform the Committee if there is a move to amend the legislation so that the Committee has an opportunity to comment on it.

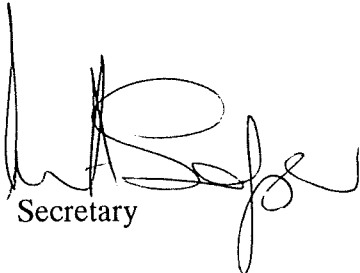
Mr Chambers raised the issue about where the rules currently require service, and the Secretary advised that at present it is the Commissioner of Inland Revenue that is the party to the proceedings.

Not tax

Justice Doogue referred to the article by Andrew Beck in the October Law Journal on the Court of Appeal Civil Rules and said that he had drawn the criticism of them to the attention of the President, who says he is content with the new rules.

Justice Doogue thanked Mr Tanner and his staff for their work during the year and expressed his appreciation also to staff of the Crown Law Office through the Secretary.

**The meeting closed at 1.00 pm.
The next meeting is to be held on Friday 27 February 1998**



Secretary

ADDENDUM TO THE MINUTES OF THE MEETING

HELD ON FRIDAY 14 NOVEMBER 1997

ACTION REQUIRED BY:

All: *Access to Justice*

Highlight points in Woolf report for next Agenda.

Justice Doogue: *Expert Advisers*

Write to the President of the Court of Appeal.

Solicitor-General: *Costs*

Look at the question of costs and address it with Dr Matthew Palmer.

Mr Carruthers: *Certificate by Lawyer Responsible for Document*

Look at the issue of certification rules of Australian States.

Disclosure of Essential Evidence

Report to the Committee.

Mr Chambers: *Evidence by Affidavit in Summary Judgment*

Refer to New Zealand Law Society and Bar Association.

Miss Soper: *Winding Up*

Check with the Ministry of Justice on progress with this amendment.

Certificate by Lawyer Responsible for Document

Follow up with the Bar Association.

Proposed New Rules of Procedure

Ask Warren Cole to inform the Committee if there is a move to amend the legislation so that the Committee has an opportunity to comment on it.