THE RULES COMMITTEE

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Wellington

12 September 1997

Minutes/3/97

CIRCULAR NO 46 OF 1997

Minutes of the Meeting held on Friday 29 August 1997

The meeting called by Agenda/3/97 was held in the Judge's Common Room, High Court, Wellington, on Friday 29 August 1997 commencing at 9.30 am.

1. **Preliminary**

(a) *In Attendance*

The Hon Justice Doogue (in the Chair)
The Hon Justice Fisher
The Hon Justice Hansen
Chief District Court Judge Young
The Solicitor-General (Mr J J McGrath QC)
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)

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

The Chief Justice (the Rt Hon Sir Thomas Eichelbaum GBE)
The Attorney-General (the Hon Paul East QC MP)
Mr R S Chambers QC (for part of the meeting)

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

On the motion of Justice Hansen, seconded by Justice Fisher, the minutes of the meeting held on Friday 13 June 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:

- Rules Committee meetings 1998 (note amended list enclosed - the meeting dates are **Friday 27 February**, Friday 12 June, Thursday 3 September, and Friday 20 November 1998)

By the Secretary

- Amendments/5/97 (Letter from Robert Chambers QC)
- Letter from Matthew Palmer (Deputy Secretary for Justice) to the Chairman dated 28 August 1997.

2. **Matters referred to Parliamentary Counsel (Item 2 of Agenda)**

(a) *High Court Amendment Rules 1997*

Rule 1 - Title and commencement
This rule was approved.

Rule 2 - Search of Court records generally
Mr Carruthers pointed out that we no longer have proceedings for seduction, enticement and breach of promise, but Mr McCarron said there could still be open files in the courts.

Justice Doogue referred to Mr Chambers point (Amendments/5/97) and commented that the areas of complication are applications for discovery before proceedings have been filed, and interim applications for injunction before the proceedings have been filed.

Mr Carruthers said that one would be an interlocutory application for an interim injunction, while the other would be an interlocutory application for an interlocutory injunction. He noted that a proceeding would have to be filed in respect of the application for an interim injunction but there would not necessarily be a proceeding filed after an application for discovery which was made before the proceedings have been filed. He expressed the view of the Committee that the intention is not to change the current practice.

Justice Doogue suggested that the Committee would not want to make a change that required identification of the peculiar subgroups of applications where there are no proceedings as such.

Mr Carruthers noted that "proceeding" is defined in terms of an application as other than an interlocutory application, and Justice Fisher noted that "interlocutory application" is defined in terms of an application to the court in any proceeding or intended proceeding.

Mr Carruthers suggested that the Rule could make it clear that the interlocutory application cannot be searched until the proceeding has been completed, or in the event that there is no proceeding on the interlocutory application, until the interlocutory application has been determined.

Justice Doogue said that there is another class of case always commenced as an intended proceeding, namely against a company in liquidation where the leave of the court has to be obtained.

Mr Tanner agreed to circulate, through the Secretary, another draft on the basis that if members have any comments they can make those back through the Secretary.

Rule - 3 - Notice to admit facts
This rule was approved.

Rule 4 - Calling of expert witnesses
This rule was approved.

Rule 5 - Arbitration and consent during trial
Justice Doogue commented that this Rule does not go as far as the Arbitration Act did but that it is a good first step all the same. The Committee agreed with the points made by Mr Chambers (Amendments/5/97).

Rule 6 - Directions before setting down
Mr Tanner queried whether rr 6 and 7 should amalgamated into a single rule.

Mr Carruthers said that a distinction is drawn between directions before setting down and directions affecting trial and the two should be dealt with separately.

This rule was approved as drafted in PCO 240/2.

Rule 7 - Directions affecting the trial
This rule was approved.

Rule 8 - Counsel assisting
Justice Doogue noted that the purport of this rule is to provide a general rule to enable an amicus to be appointed, noting that the existing r 724J is confined just to Part XI relating to cases stated.

The Solicitor-General noted the practical advantage that the Department assumes responsibility for the payment of the amicus and said that it also has the effect of passing responsibility for settling proper terms and instructions

to the Government, given that the court or a registrar might not want to be involved in that.

This rule was approved.

Rule 9 - Judge may assist in negotiations for settlement
Mr Tanner queried whether it was desirable in sub rule (2) to state the same concept as in r 442 namely that the Judge should not preside at the trial of the proceeding unless the parties agree.

Justice Doogue said that sub rule (2) provides for the Judge to arrange for a Master or another Judge so that it will automatically be the case that someone other than the trial judge assists in the negotiations for settlement.

Mr Carruthers said that even if the rule technically does not prevent the trial Judge from assisting, it is nevertheless expressed as being with the consent of the parties.

Mr Tanner said that r 442(1) does presently provide that the Judge who assists in negotiations for settlements shall not preside at the trial.

Justice Fisher said that the essence of it is that any mid trial conference should be conducted by another Judge or Master, or the trial Judge, with the consent of the parties, may conduct the conference on the basis that the trial Judge may continue.

Mr Carruthers said that it is undesirable to have two different concepts, one for pretrial and one during trial: r 442 presently provides that the Judge shall not preside unless the parties consent, while proposed r 442(2) provides that the Judge may convene a conference during the trial with the consent of the parties.

Justice Fisher said that the issue is not that the parties consent to the conference but that the parties consent to the conference Judge continuing with the trial.

Justice Doogue said that a pre-trial judge can order a conference but there is no suggestion of that during the trial. Justice Fisher said that during the trial there may, with the consent of the parties, be a conference either conducted before another Judge or Master or before the trial Judge on the basis that the trial Judge may continue with the trial.

Justice Doogue suggested that the rule be worded such that the Judge may convene a conference before a Master or another Judge or before the trial Judge if the parties agree.

Rule 10 - Authority to take affidavits in New Zealand

Justice Doogue referred to the point made by Mr Chambers that the wording "of the court" are surplusage and the Committee agreed.

As to the second point, the Solicitor-General queried whether the definition of "solicitor" should be extended to include partners and said that the interpretation will include employees of a firm.

Mr Carruthers queried whether barristers can take affidavits, and Justice Fisher said that that is the issue which this rule is designed to resolve.

The rule was approved.

Rule 11 - Property that may be charged
This rule was approved.

Rule 12 - Order nisi in first instance
This rule was approved.

Rule 13 - Mandamus etc
Justice Fisher said that effectively these rules provide that when an order for mandamus can be made but agreed that it removes the doubt.

The Solicitor-General noted that the prerogative writs tend to be little considered because of the Judicature Amendment Act 1972.

Rule 14 - Contents of notice of appeal
This rule was approved.

Rule 15 - Admiralty Rules
Mr Tanner suggested that some subheadings could be inserted to beak up the large amount of text and the Committee agreed. Any queries are to be resolved with Justice Hansen Justice Giles and Mr Carruthers.

Justice Doogue expressed the thanks of the Committee to Mr Tanner and his team for the work that they had done on this substantial set of amendments.

The Committee agreed that the subheadings should be settled with the original sub-Committee.

Rule 16 - New forms inserted
These rules were approved.

Rule 17 - Revocations
This rule was approved.

(b) *Rule 183 and proposed new Property Law Act*

Justice Doogue noted that this item is listed for action when necessary.

(c) *Insolvency Rules*

Master Hansen advised that Master Venning has just completed a draft and the sub Committee is arranging to meet with Law Society representatives.

Mr Tanner said that the Minister of Commerce, in answer to a recent question in the House, had said that the Ministry is preparing an issues paper on reform of insolvency law by the end of 1997 with a view to more detailed work being completed in about three years time. He queried whether there should be any major revision of the insolvency rules pending that reform.

Justice Hansen said that all the Rules Committee is proposing is to incorporate the insolvency rules into the High Court Rules.

Mr McCarron said that the Ministry of Commerce had given advice to the Department for Courts that even minor proposals should be tied in with the review.

Mr Tanner said that any amendments of a narrow and technical nature may not be a problem but queried whether it is worth doing any more than that.

(d) *Distinction between interlocutory and final orders*

Justice Doogue said that the Committee had not addressed the issue in relation to appeals under the District Courts Act to the High Court. He said that there can be no appeal on an interlocutory matter without the leave of the Court so the issue is not answered in the same way as it has been with the Court of Appeal by providing for a standard 28 days for appeal.

The item was left on the agenda for further consideration, and Justice Fisher agreed to do a proposal for the next meeting.

(e) *Summary judgment procedure*

Justice Doogue said that there were two items raised for discussion in respect of a summary judgment procedure. The first is whether there should be summary judgment for fraud and the Committee agreed that there should be. The second is the test that should be applied if summary judgment is to be obtained by the defendant. He said that the Judge's clerk has prepared documents reviewing the position in other jurisdictions (Summary Judgment/3/97). He said that the test in the American states is "no genuine issue as to any material fact" or "no triable issue". In Canada the test is "no genuine issue for trial". In Victoria, the Northern Territories, the Australian

Capital Territories, Tasmania and Western Australia all apply the test that the defendant has a good defence on the merits.

Mr Carruthers queried whether all the Australian jurisdictions have a striking out procedure as well and Justice Hansen said that at least Western Australia does on the grounds of "frivolous and vexatious".

Justice Fisher said that most defendants already have de facto summary judgment in New Zealand in that what used to be a striking out on the pleadings now includes incontrovertible facts with supplementary affidavits. He said that he favours the US Federal System of "no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law". He said that that wording sums up both the strike out application and also the incontrovertible fact aspect of the proceedings.

Justice Doogue said that that wording is more like our "no cause of action" rule and he suggested there is some merit in following the Australian example because the legal systems are closer and there are more likely to be cases that would assist the New Zealand Courts.

Mr Carruthers expressed a preference for the West Australia wording of "good defence on the merits or that the action should be disposed of summarily"; he said that the wording of "frivolous and vexatious" is more like a strike-out.

Justice Fisher expressed concern about whether there would be any difficulties interpreting the test, but Justice Hansen said that the arguments when summary judgment were introduced settled down quite quickly.

Mr Carruthers said that it may pay to spell out the jurisdiction rather than have summary judgment for the plaintiff satisfied with a test of no defence; he suggested the concept that the action be disposed of summarily because on incontrovertible facts the defendant has a good defence on the merits.

Chief Judge Young said that this is the advantage of the United States wording of "no genuine issue as to material facts".

Justice Hansen said that it was not spelt out in summary judgment procedure that controversy over the facts meant summary judgment could not be ordered, but the jurisdiction quickly developed.

Justice Fisher said that the "no defence" concept is different from saying that the plaintiff must show that it has a good case on the merits; he considered that that would be opening doors for the defendant in a way that does not occur for the plaintiff.

Justice Doogue said that he thought that would not be the case in practice because if the plaintiff puts up a case to show that there is no defence the onus

then moves to the defendant, and if the defendant does not put anything up the defendant has lost.

Justice Hansen said that that is particularly so if summary judgment is sought on a document such as a contract or a mortgage.

Justice Fisher stated the issue as whether it is better to put a formula in the rule in the first place or leave the wording more general, and define it in judicial decisions.

Justice Doogue said that if the Committee is to follow existing jurisprudence the choice is between "no genuine issue as to any material facts" or the Australian wording of "good defence on the merits". Another alternative is to follow Western Australia with "the plaintiff's claim cannot succeed on any possible view of the facts or law".

Chief Judge Young suggested using the style of the existing summary judgment rule so as to indicate that the same principles are to be adopted.

Mr Carruthers said that that wording that has been adopted in Ontario namely "where the court is satisfied there is no genuine issue for trial with respect to a claim or defence" and summary judgment may be granted accordingly.

Justice Doogue noted that that would be to interfere with what is already established and rewrite the position for the plaintiff's claims.

Chief Judge Young suggested the alternative is to use the terminology of r 136 but put it around the other way.

Mr Tanner said that when the issue was discussed in his office the preference came down for a test that the defendant should show the plaintiff cannot succeed.

Justice Doogue said that the objection to using the American wording of "no genuine issue as to material fact and the defendant is entitled to judgment as a matter of law" is that it is closer to a strikeout situation than a summary judgment.

Justice Fisher said that in the summary judgment context once there is a genuine issue on a question of fact the matter has to go to trial.

Mr Carruthers suggested picking up on the existing wording but to turn it round in a positive way ie the test is for the plaintiff to show that the defendant has no defence then it is for the defendant to show that it has an unassailable defence.

Justice Fisher said that the essence of it is to avoid getting into contests where there is a question of fact, if as a matter of law the defendant is entitled to

judgment, and he suggested that it may not matter too much how that is worded.

Justice Hansen said that the mere fact that a defendant throws up a smoke screen of contested facts has not prevented the case proceeding on the summary judgment procedure.

Justice Fisher expressed the proposition as: "if there is a genuine issue on a question of fact then the case goes to trial and if not the case goes to summary judgment, either for the defendant or the plaintiff."

Justice Doogue expressed the agreement of the Committee to a wording along the lines of "the plaintiff cannot succeed".

Justice Hansen brought up the need to consider time frames and Mr Carruthers suggested within the time for filing a statement of defence.

Justice Hansen queried whether a time limit should be extended for plaintiffs because it may be that after discovery the plaintiff can show there is no defence.

Mr Carruthers said that such a rule would be in keeping with the overall intent which is to achieve a reduction in unmeritorious cases going to trial.

Justice Doogue noted that draft rule 138(3) provides for an application by a defendant to be made at the time the statement of defence is served on the plaintiff or later with the leave of the Court while draft rule 138(2) provides that an application by a plaintiff must be made at the time the statement of claim is served on the defendant. He said that draft Rule 138(2) just needs to provide that the plaintiff can also make the application later with the leave of the court.

The Committee agreed that the summary judgment rules could be inserted into the draft High Court Amendment Rules 1997 if possible.

Justice Doogue expressed the thanks of the Committee to Mr Tanner and his staff for the drafting work involved.

3. Matters Referred for Statutory Amendment

(a) *Expert advisers*

Justice Doogue said that the Minister of Justice has recorded in a letter to the Chief Justice dated 3 June 1997 that this issue is controversial and that it will need to be discussed between the judiciary, the Law Society and the Ministry in order to find a satisfactory solution. The Secretary agreed to follow the matter up with the Ministry of Justice.

(b) *Review of Masters' decisions*

Justice Doogue said that an amendment has been inserted into the Statutes Amendment Bill and that the amendment will enable the Rules Committee to make rules to provide how the Masters' decisions should be reviewed. He said that the rules could await the passing of the Statutes Amendment Bill because the provision will not come into force until rules have been made.

(c) *Removal of proceeding from High Court into Court of Appeal*

Justice Doogue advised that an amendment is included in the Statutes Amendment Bill.

(d) *Winding up - Masters' jurisdiction*

Justice Doogue advised that Matthew Palmer's letter tabled at the meeting indicates that the Ministry is in the process of preparing a paper for the Minister of Justice for a decision.

(e) *Grant of probate or letters of administration to an attorney*

Mr Tanner confirmed that this matter is to be included in the Statutes Amendment Bill.

(f) *Summary judgment procedure*

See discussion under item 2(g). The Committee noted that the statutory amendment is included in the Statutes Amendment Bill.

(g) *Service on companies*

Justice Doogue said that Parliamentary Counsel had suggested an alternative amendment to which he had agreed: " By serving it at an address for service given in accordance with the Rules of the Court having jurisdiction in the proceeding or by such means as a solicitor has, in accordance with those Rules, stated that the solicitor will accept service". Mr Tanner said that there is an issued as to whether the amendment is in the Statutes Amendment Bill or whether it needs to be included in a supplementary order paper.

4. **Costs (Item 4 of Agenda)**

Justice Doogue expressed the gratitude of the Committee to Justice Fisher for his paper and referred also to the comments from Master Faire and Mr Chambers. He referred also to the letter from Dr Palmer tabled at the meeting. He noted that Justice McGechan in a recent judgment *Holden v Architectural Finishers Limited* (High Court, Wellington, M659/92, 21 July 1997) had had to deal with some fundamental issues about costs.

The Solicitor-General queried whether it is appropriate for the Committee to push too far ahead with its own view given that the attitude of the Treasury may be a prior question. He said that the Ministry of Justice has indicated it is interested in the structure and good incentives for the conduct of litigation and the Solicitor-General considered that the ideas of Mr Zuckerman (Costs/1/96) will be attractive to them. He noted that the present proposals indicate the Committee does not favour either indemnity or nil costs, and that the scale is out of date. If the Committee proposes a model which is inflation proof it may be faced with the Ministry of Justice, the Treasury and the Ministry of Commerce suggesting a more radical overhaul. He noted that discretions are being retained in the framework and said that Zuckerman's ideas include settling a fixed figure for costs at an early state in the proceedings. The Solicitor-General said that the Committee will need to decide how to proceed and one option is for the Chairman to speak to the Minister of Justice about it.

Justice Fisher said that the policy decisions need to be taken before the Rules are drafted but that the Committee has done a lot of work on the policy aspects of it and has discussed the issue quite widely with the Bar Association and others so the Committee is not approaching it from a narrow perspective. He said that the Committee needs to have something in the public eye because it focuses discussion and because the Committee needs to be seen to be progressing this issue because it has been before the Committee for a long time.

Justice Doogue said that if nothing else the schedule needs to be revoked because it is so out of touch. He noted that the Committee waited for some significant philosophical material to come through, namely the Woolf Report and the Australian reforms.

Justice Hansen said that there is no sense in discussing the detail of the Rules until the Committee has received some feedback. That feedback could come also from the Ministry of Justice, the Ministry of Commerce and the Treasury.

The Solicitor-General suggested that the Committee could approach the Minister to make sure that the Department does not hold things up.

Justice Hansen said that the public statement could include a reference to the fact that the Committee is not adverse to considering a completely different philosophical approach.

Mr Tanner said that at some stage the issues have to be engaged with the Government and he said that the use of the word "scale" will alert the economists to think deeply about the issue of costs. He said that he is sensitive to what the Solicitor-General is saying and that he would not want to confront economic arguments about access to justice too far down the track. On the issue of drafting he said that he has no difficulties with its release in its present form as an indicative draft but that any final draft would need to be changed. He also said that there may need to be an amendment to the Judicature Act to provide for the framework to be adjusted by practice note - he had a query as to whether this is "fixing" the scale of fees because of the delegation

issues. He noted that the key to it is the hourly rate which is fixed by someone else not the Governor-General in Council.

Justice Hansen said that in Hong Kong the Chief Justice had a legislative power that was very similar.

Justice Fisher referred to page eight of his draft rules and said that he had tried to leave it on the basis that it is for the court which deals with a case to fix costs; there is no structural link between the Chief Justice's practice note and the rules. In other words, all that is happening is that the Chief Justice issues practice notes and the rules still stand alone in legislative terms.

Justice Hansen said that in Hong Kong it was not done by practice note; rather a daily rate was agreed and the judges were made aware of it.

Justice Fisher suggested that the reference to practice notes could be removed entirely, leaving the daily rate for the court to determine through the judiciary getting together with the law profession.

The Solicitor-General suggested that it may be preferable to remove the Law Society and Bar Association from this consultation process anyway because it would effectively be a collective pricing mechanism. He suggested that a firm like Sheffield could do a survey for the Chief Justice.

Justice Fisher suggested that under paragraph eight "daily rate" the words "without limiting the discretion" onwards be deleted, leaving just the first three sentences in that paragraph.

Justice Hansen said that in Hong Kong the costs of the survey were borne by the profession.

The Solicitor-General said that in Hong Kong the profession had control over concepts like competition. He suggested a solution may be to ascertain daily rates as the Chief Justice thinks appropriate.

Mr Tanner referred to s 51C(2)(g) which gives the power to fix scales of costs and said that the proposed "scale of time" is not the same thing.

Justice Doogue said that he would have considered it a guide to the judge in the exercise of that judge's discretion. Justice Fisher suggested that no delegation problem would arise if the Rules Committee set the rate annually, although the Committee had not originally wanted to pick up on a function that is exercised by the judges. The Solicitor-General suggested that it is appropriate for the Committee to refer the paper to the Ministry of Justice and leave it to them to deal with Treasury and the Ministry of Commerce.

Justice Fisher suggested that in the public statement it should be emphasised that the Committee remains open to all views both at a philosophical and at a procedural level.

He also suggested that the reference to "scale of costs" should be deleted and instead refer to a "scale of time allocation".

In relation to the practice note, Mr Carruthers suggested that there should be disclosure of what is going to happen in practice because that could help shape suggestions on how the rate can be set.

The Solicitor-General said that the word "consultation" is a dangerous one because it is really a question of how the Chief Justice informs himself so that he can make a decision; the Solicitor-General reiterated his point that a survey is appropriate to ascertain the facts.

The Solicitor-General referred to r 48 and the expression "unusually low" value of the property and suggested that it should read "disproportionately low".

Justice Doogue said that r 46 should begin with the words "except as expressly provided in any Act ...".

The Committee agreed that it would leave it to Justice Fisher and Mr Chambers to settle any points of the wording between them.

The Committee then discussed the different approaches taken by Justice Fisher and Mr Chambers. Justice Doogue said that he found Mr Chamber's approach easier to follow.

Justice Fisher said that he would be reluctant to settle costs on an interlocutory matter at that stage. He gave the example of an interim application for an injunction which the defendant opposes and loses, and then the plaintiff loses at trial. He said there are two ways of viewing it: either to hold that at the interlocutory stage if the defendant loses then the defendant pays; or if the defendant loses at the interlocutory stage only the defendant pays costs relating to the opposition part of it and those costs which the plaintiff would have incurred on the interlocutory application whether it was opposed or not go forward to trial and follow the fate of the proceedings. On the simple approach he said that the plaintiff is better off if the defendant opposes because if the defendant loses the defendant pays. If the defendant does not oppose the plaintiff carries those costs through to trial.

Mr Chambers said that he preferred the simple approach because in nearly every case there has been discussion between counsel which they have not been able to resolve. Party "A" then seeks an interim injunction from "B". "A" will have sought from "B" an undertaking not to do something which "B" will have refused. "A" then makes an application which is opposed by "B" and "A" wins. Mr Chambers said he considered that "B" should have to pay for that because "B" has made a wrong judgement call, and put "A" to the trouble of coming to the court. He said that the disadvantage of Justice Fisher's approach is that it involves cutting the interlocutory costs in half and revisiting the other half at the time of the final costs order. He said that he considered

that unnecessarily uncomplicated, but that he does agree with Justice Fisher to the extent that interlocutory applications should be determined as a discrete exercise.

Chief Justice Young suggested that if the Committee floated the simpler proposal the Committee will still receive comment on it.

Mr Carruthers noted that the Court has a discretion to reserve costs in any event.

Justice Fisher said that express reference can also be made to reserving in appropriate cases a component of those costs.

After discussion, the Committee agreed to circulate the paper widely amongst the profession and potential litigants, seeking comments by 30 November.

5. **District Court Rules - Composition and Servicing of the Rules Committee (item 5 of agenda)**

Chief Judge Young said that this issue has been discussed before with agreement that the membership be increased by the Chief District Court Judge and one other person. Further representation from the Law Society depends on whether existing members can adequately represent the interests of the profession.

Justice Fisher said that he would support an additional District Court Judge and an additional practitioner. He noted that the Law Society tends to have only one practitioner available which has implications for the people available to work for the Committee between meetings.

Justice Hansen said that equally the Committee should not be so large as to be unwieldy.

Mr Carruthers mentioned the ability to appoint members of the Committee for special purposes and suggested it may be more efficient to appoint someone to attend as and when required.

Justice Doogue said that if the Chief District Court Judge and one other District Court Judge are to be members, that requires a statutory amendment, and the Committee agreed with that suggestion.

The Solicitor-General said that in the initial phase it would be helpful to have a practitioner with experience in the District Court.

Justice Doogue expressed the agreement of the Committee when he said that a member of the profession with expertise in District Court procedure should be appointed for special purposes.

Justice Doogue noted that the membership of the Committee could be implemented immediately but that a statutory amendment is required to give the Rules Committee jurisdiction over the District Court Rules.

The issue of servicing of the Committee was stood down until the next meeting.

6. **Election Petition Rules (Item 6 of Agenda)**

The Chairman said that the Committee needs to agree on a date for an extension to enable the Election Petition Rules to be incorporated into the High Court Rules. After discussion, taking into account the existing programme for the Parliamentary Counsel Office, the Committee agreed on 31 December 1998.

7. **General - Access to Justice (Item 7 of Agenda)**

Justice Doogue referred to the Woolf Committee Report (General/4/96) and the Canadian Bar Association Task Force on Systems of Civil Justice (Directions/1/97) and suggested that members highlight any matters they think useful for discussion at the next meeting.

8. **Habeas corpus (Item 8 of Agenda)**

Justice Fisher said that quite independently the Auckland judges had prepared an almost identical paper to the letter that Justice Doogue wrote to the Law Commission, and Justice Doogue said that the Auckland judges paper was adopted by the judges with only minor amendments. The essential theme is that rules should not be in the statute.

The Solicitor-General said that that stance is consistent with submissions made by the Crown Law Office to the Law Commission.

Justice Doogue said that he had in his letter queried the need for a separate Act and while he accepted that any policy matters should be in the Act, he said that the procedural rules relating to habeas corpus should be in the High Court Rules where practitioners can find them.

The Solicitor-General said that the Crown Law Office had also queried the need for a statute generally.

Justice Doogue said that he wrote to the registrars of the Courts in Auckland, Wellington and Christchurch to see if they could provide statistics on applications. He said that Christchurch has had none in the last five years, that Wellington has had a few and Auckland rather more although they are hard to identify because they are not separately indexed. He said that most Wellington judges have had an application from one individual who is a patient under the Mental Health (Compulsory Assessment and Treatment) Act 1992. He mentioned also that the habeas corpus procedure had been tried in Auckland in order to avoid the bail rules and to prejudice the ability of the Crown to reply.

The Solicitor-General said that any legislation will be some way off and the Committee needs to have its views on record so that it is ready to make submissions to the Department and if need be to the Select Committee.

Chief Judge Young pointed out that s 14 of the Judicature Act provides for rules to be made. The Committee agreed that where the draft contains a matter of principle it should be contained in the Judicature Act and where it relates to a matter of procedure it should be in the High Court Rules.

Justice Fisher said that at some stage the Rules Committee should look at the content of the rules and perhaps modify the proposals put forward by the Law Commission.

Justice Doogue said that this is the first time that habeas corpus has ever been seen as a problem and that, as a matter of practice, practitioners have never had any difficulties getting applications to the judges.

Justice Doogue suggested that in responding to the Law Commission the Committee should indicate that in view of the concern it will be looking at the rules having regard to the Commission's paper (when published). The Solicitor-General said that the two options are to tell the Law Commission that the Committee is going to review the habeas corpus rules, or to first prepare a draft and give it to the Law Commission for comment. He said that he personally favoured the latter course.

Mr Tanner said that any review of habeas corpus will be some time away and he queried whether the Committee wishes to work now on procedural rules without knowing first what recommendations will be adopted by the Government.

Justice Doogue suggested that the Committee record that it is happy to cooperate with any improvements to the Act and to the rules.

Justice Doogue said that one of the Judges' Clerks is very interested in the topic and may be prepared to assist in preparing a paper for the Committee.

The Committee agreed that the Secretary should prepare a draft and that the Chairman and the Solicitor-General should settle on a final response to go from the Chairman to the Law Commission.

Justice Fisher noted that this is a recurring problem where procedural rules are prepared for inclusion in the act as part of a policy review and suggested that the Rules Committee prepare a paper giving the reasons for having a manageable set of rules. The Secretary said that this issue has been addressed by letter with a number of parties in the past and that the issue is in fact diaried to come back onto the agenda in March 1998. The Secretary agreed to provide a copy of the letter that has gone in the past.

9. Interlocutory Matters (Item 9 of Agenda)

Justice Doogue referred to the Clerk's paper.

Mr Chambers said there is a need to grapple with the untidy way chambers hearings are conducted because there is still confusion as to when a Master is exercising a court or a chambers jurisdiction.

The Committee agreed that Justice Doogue and the Secretary should decide closer to the next meeting whether to put this matter on the agenda for discussion then.

10. **Pleadings (Item 10 of Agenda)**

The Committee noted that Justice Fisher is to prepare a paper on this matter.

11. **Tax (Item 11 of Agenda)**

The Secretary advised that the Department of Inland Revenue is to prepare a response for the next meeting in November.

Mr Carruthers said that he had made enquiries around tax practitioners and none of those have been consulted.

12. **Winding Up (Item 12 of Agenda)**

Justice Doogue said that the issue of what is to be done about applications subsequent to liquidation was discussed at the last meeting but not definitively resolved. The Committee agreed that no further action is called for at this stage.

13. **General Business**

Justice Doogue said that the High Court Management Pilot Committee had met on 22 July and will be approaching the Rules Committee for an amendment to the Fees Regulations.

Justice Doogue noted also that Mr Fulton had presented a paper which sets out the Rule changes the Case Management Committee will be seeking from the Rules Committee.

Justice Hansen said that the rule change is to place the onus for payment of fees on the solicitors for the party because in Auckland in particular there is a large amount of fees outstanding.

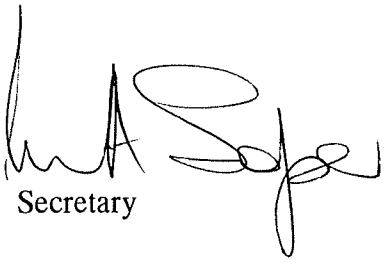
Justice Doogue said that the problem is arising in Auckland because the management pilot deals with the problem differently in that there is no praecipe to set down.

Mr Chambers said that a party is taken out of the list if the setting down fee is not paid, but that a particular problem arises with the daily fee.

Justice Doogue suggested that the easy answer is to provide that the judge does not sit until the fee is paid. He noted also that the High Court Fees Regulations are a departmental matter and not within the jurisdiction of the Rules Committee.

Justice Doogue expressed to Mr Tanner the appreciation of the Committee for his attendance at meetings and for the work that his team has done.

The meeting closed at 2.45 pm.
The next meeting is to be held on Friday 14 November 1997



Secretary

ADDENDUM TO THE MINUTES OF THE MEETING

HELD ON FRIDAY 29 AUGUST 1997

ACTION REQUIRED BY:

Justice Fisher:	*Distinction between Interlocutory and Final Orders*
	Prepare a proposal for the next meeting.
	Pleadings
	Prepare a brief paper and promulgate it for comment from the legal profession
Master Hansen	*Insolvency Rules sub committee*
All	*General*
	Highlight matters for discussion on access to justice.
Miss Soper:	*Costs*
	Settle letter with Solicitor-General and Justice Doogue to go to the Law Commission.
	Expert Advisers
	Follow up with the Ministry of Justice.