The Law Society of WA

Continuing Professional Development Breakfast

Recent Amendments to the Supreme Court Rules

by

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Introduction

I have been asked this morning to speak to you about the package of amendments that were made to the Supreme Court Rules earlier this year. The general effect of that package of amendments was essentially only to bring the Rules into line with practices that had evolved over a number of years, since about 2006. To that extent, they are not particularly revolutionary. Their main objective is to provide the case managers, the Judges and the Registrars with the authority of the Rules to provide specific legislative authority for things that we have been doing under the general discretion previously provided by the Rules.

The previous Rules relating to case management were incoherent to some extent. There had been *ad hoc* and incremental amendments over time and there were inconsistencies between O 29, O 29A and O 31A. We sought to eliminate the inconsistencies between those various Rules by bringing them altogether under one roof in O 4A.

Proportionality

A very significant amendment that was made was to introduce specifically into the Rules the notion of proportionality. Those who have studied procedure will be well aware that that was the notion that was first championed by Lord Wolfe in the reforms which he introduced in the UK during 1997. We adopted the philosophy by way of a Practice Direction some years ago, but it now has the sanction of the Rules. That was achieved by the amendment to O 1 r 4B.

O1 r 4A, r 4B

It is important to put the amendments that were made to introduce proportionality into the context of Rules 4A and 4B. Those two Rules embody a lot of the concepts that we are trying to embody in the more specific provisions of the new Rules, and in particular the practices and procedures that will be adopted under these new Rules. Order 1 r 4A provides:

> **4A. Elimination of delays**
>
> The practice, procedure and interlocutory processes of the Court shall have as their goal the elimination of any lapse of time from the date of initiation of proceedings to their final determination beyond that reasonably required for interlocutory activities essential to the fair and just determination of the issues bona fide in contention between the parties and the preparation of the case for trial.

Order 1 r 4B provides:

> **4B. System of case flow management**
>
> (1) Actions, causes and matters in the Court will, to the extent that the resources of the Court permit, be managed and supervised in accordance with a system of positive case flow management with the objects of —
>
> (a) promoting the just determination of litigation; and
>
> (b) disposing efficiently of the business of the Court; and
>
> (c) maximising the efficient use of available judicial and administrative resources; and
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> (d) facilitating the timely disposal of business; and
>
> (e) ensuring the procedure applicable, and the costs of the procedure to the parties and the State, are proportionate to the value, importance and complexity of the subject matter in dispute; and
>
> (f) that the procedure applicable, and the costs of the procedure to the parties, are proportionate to the financial position of each party.
>
> (2) These Rules are to be construed and applied and the processes and procedures of the Court conducted so as best to ensure the attainment of the objects referred to in paragraph (1).

In other jurisdictions which have civil procedure legislation, principles such as these are sometimes referred to as the overriding objective. So we have, through these Rules, created an overriding objective and all the specific rules are subordinate to, and are to be applied towards, the achievement of that overriding objective.

Order 1 r 4B(e) and (f)

The two new rules that we have introduced are pars (e) and (f) of rule 4B. Paragraph (e) starts with the word "ensuring". That is to make the point that these Rules are not just aspirational. These objectives are to be achieved. If the Rule is broken down further, it can be seen that each of pars (e) and (f) have two components. The first is the procedure applicable and the second is the costs of the procedure, so that both the procedure itself and the cost of the procedure have to be proportionate to some other things that I will come to in a minute. So we have the two components of procedure and cost. The new rules then identify two components to which they have to be proportionate are, firstly, by par (e) the value, importance and complexity of the subject matter, and, secondly - by par (f) - the financial position of the parties.

What this means in practice is that if the case involves a relatively small amount of money, we are not going to allow the parties to spend a disproportionate amount of money before referring that case to trial or for mediation. On the other hand, if the case is a very complex case involving a large sum in issue between two large companies, then greater amounts of resources are properly applied to the case. On the other hand, if the case is between a large company and a single person who lacks resources, then the financial position of that person will be relevant. The

cloth will be cut in order to suit the particular parties. There are two things to which the procedures and the costs have to be proportionate - namely, the nature of the issue and the financial position of the parties.

As I have noted, another focus of the new Rules is to consolidate all the case management rules of the court under one rule and they are placed early in the set of Rules, in O 4A, because all the other Rules that come after those Rules should be read as subordinate to them and as a means of achieving the overriding objectives that are identified in Order 1.

Flexibility and Discretion

If one had to identify the principal concepts that are embodied in the new Rules, I would nominate flexibility and discretion. They are the key concepts that we are endeavouring to apply to case management. To use a tailoring analogy, the proposition is that each case should attain a bespoke solution - one size does not fit all in litigation. We want to encourage the parties, their advisors and case managers to think about the specific issues in the particular case, and to identify procedures that are best suited to the achievement of the overriding objectives in relation to that particular case. We have not been doing too well in that regard in recent years because there has been an understandable tendency to use the standard directions that we put in the Practice Directions as a *pro forma*. We have noticed that in almost every case we get the standard directions trotted up to us without necessarily a great deal of thought being given as to their appropriateness. I will return later to the steps we are going to take to try to reduce that tendency.

Case Management - O 4A r 5

The notions of flexibility and discretion are embodied in O 4A r 5. That rule provides that at any time upon notice to the parties, a case manager (and this is one of the rules that applies to case managers both in the CMC list and by the Registrars) may make any case management direction the court considers just. If the court considers a case management direction is just, it can make the direction. It can also make any interlocutory order which the court considers just. The only pre-requisite is that the parties have notice. That does not mean that there has to be a hearing. All it means is that the parties have to have notice, and, implicitly, the opportunity to put their position - but not necessarily in a hearing. This provides a mechanism whereby informal directions can be made provided the parties are aware of what the case manager is proposing. Sometimes they will propose it themselves by an exchange of emails and the direction can be made without further ado.

Order 43 r 16 provides a more formal process requiring a memorandum of consent orders executed by all parties. Order 43 r 16 is not intended for cases that are being case managed. For cases that are being case managed, the informality that is provided by O 4A r 5 should be used, because all that has to happen is that the parties have notice of what is proposed and that can be done through a variety of means. It can be done by telephone, email, or facsimile. Informality is another key aspect of what we are trying to achieve.

Order 4A r 2 - Broad Discretionary Powers

As I have noted, O 4A r 5 empowers a case manager to make any case management direction the court considers just. So what is a case management direction? In order to answer that question, we need to go

back to O 4A r 2. That rule defines a case management direction to be any procedural direction that in the court's opinion it is just to make in a case in order to facilitate the attainment of the objectives referred to in O 1 r 4B. That is why I have emphasised flexibility and discretion, and the importance of the overriding objectives. Anything that a case manager considers is just and which will achieve the overriding objectives, can be ordered. So if you wanted to paraphrase the essence of these new Rules, it is that the case manager can do anything he or she likes provided (a) it's just, and (b) it will assist in achieving the overriding objectives.

Order 4A r 2(2) goes on to provide some specific examples of the sorts of directions that can be made, but it has the usual provision that the specific provisions are not to be read as limiting the generality of the broad powers conferred.

So the specific examples of directions listed in rule 2(2) do not limit the breadth of the discretion that is conferred upon the case manager by the combination of O 4A r 5 and O 4A r 2(1). Just running through some of the specific examples that are given, in par (c), a case manager can dispense with all or any further pleadings. So it should not be assumed that the default position is necessarily that the case will have pleadings. What we will be looking at is to identify the issues in the case in the most effective, quickest, cheapest way. Sometimes that will be by way of pleadings; sometimes it will not be by way of pleadings. It would be a mistake to come down to court assuming that there will be a pleading process, because case managers can dispense with that process, and sometimes we have in the past, and sometimes we will in the future. We can dispense with any interlocutory step. We can say, "We're not going

to do discovery in this case because the issues are so clear, the facts are not sufficiently contentious to justify the time and expense involved in giving discovery." We can direct that an interlocutory application not be heard. If we have pleadings and someone wants to come along and argue for a day and half about how many angels can dance on the head of a pin, and whether a particular pleading meets the precedents provided in ***Bullen v Leake***, and we can see that resolution of that issue is not really going to advance the cause, and will cost a lot of money and time; we may direct that the application not be heard. So you may need to persuade the case manager to actually hear a contested application if the hearing of the application would interfere with the achievement of the overriding objective.

Interlocutory Hearings

In relation to interlocutory matters, we have the flexibility to direct that memoranda be exchanged identifying the issues before the matter is heard. We can direct that the interlocutory hearing be dealt with by telephone, video link or other similar means of communication. We can also direct that it be dealt with on the papers, although we would probably seldom do that if someone wants a hearing. Because we can do directions hearings by audio visual means, I wouldn't exclude the possibility of skype hearings at some time in the future. Such hearings are already conducted regularly in Tasmania where, of course, there are two main population centres, Hobart and Launceston. All the Judges and Masters are in Hobart, but there is a substantial legal profession in Launceston. All the Masters' hearings in Tasmania are done by audio visual connection. No-one leaves their office; they just dial in from their office. I would not exclude the possibility of that occurring here some time in the future. We have the flexibility to do lots of things under these new Rules.

We can limit discovery, or direct that discovery be given in stages, or we can direct that it be given in bundles, or by topic, or that there be a data room created, and no list created. We can direct the parties to confer on a without prejudice basis to identify the issues. By "conferral", we mean conferral in the way in which we use that term in O 59 r 9. We can direct experts to confer as we do now, or we can direct that a certificate of readiness is not required. Because of the more flexible approach to listing, often cases will now not achieve a listing until they are, essentially, ready for trial. The case manager will know how ready for trial they are and will not give you a listing until the case is ready for trial. The function previously performed by the certificate of readiness is diminishing in significance.

Timetabling the Trial

Using the case management powers, we can set a timetable for the trial of the case, including the imposition of any limits that are provided elsewhere in the Rules. So we can say this case will last for three days and it will be done on the "chess clock" style. Each party will have one and a half days and you can use that one and a half days as you wish. We have not used such procedures extensively yet, but now that we have the overriding objectives requiring proportionality, I would not exclude the possibility of that occurring. The days in which we will allow parties to come down and argue for 10 days about $100,000 in issue are gone.

We can also direct the parties to prepare trial bundles. I will return later to what we are going to do about the procedures in relation to trial bundles. We can also, of course, direct the exchange of signed written statements. That has been standard practice in the Supreme Court now for 15 or 16 years, and I doubt very much that we will be departing from

that practice, so in virtually every trial you can expect that there will be a direction for the exchange of written witness statements.

Order 4A r 6 - Procedural Timetables

In relation to timetables, O 4A(6) provides that the Judge or case manager can alter the timetable at any time of his or her own initiative. Unlike O 4A r 5, notice doesn't have to be given to the parties. So timetabling directions can be changed with great flexibility, and quite commonly, changes to the timetable will be made simply at the request of one of the parties with notice to the other, and if there is no objection, the timetable will be changed. That can be done by email to the Judge's or Registrar's Associate; again, the focus is upon flexibility and informality.

CMC List

In relation to the CMC list, there is only one category of case that automatically gets onto the list under the new Rules, and those are defamation cases. Since the Rules were drafted, we have by practice added another category and that is commercial arbitration cases. Cases challenging the decision of the commercial arbitrator will, by practice, automatically be added to the CMC list. All other cases get onto the list simply by one party writing a letter. There was a mistaken view afoot to the effect that getting onto the CMC list was like getting onto the old expedited list; that you had to beg and plead and file extensive affidavits. That is not the case. A letter will do, and sometimes you will be put on the list without even writing a letter - the court will simply decide the matter will go on the list. We usually give the parties the opportunity to be heard before being added to the list, but sometimes a case will be put on the list because the case ought to be there. If the case has shown a tendency for interlocutory dispute by, for example, a dispute having been

heard by the Master, then very often one of the directions that will be made is that the matter will be referred to a CMC list Judge for entry into the list. In the four years the list has been running, no case has ever been refused entry to the list. So it is not hard to get onto the list. It may be hard to avoid getting onto the list. Entry into the list can be opposed, but if you succeed, you will be the first person in four years who has succeeded. The idea of the list is that it is flexible and if there is a real prospect that a case will benefit from entering the list, then it will be put onto the list.

Case Management by Registrars

In relation to cases not on the list, that is, cases managed by the Registrars, under O 4A r 17, the same notion of flexibility is embodied as in the rules relating to the CMC list. So simply writing a letter to the Registrar asking for directions is sufficient - there is no need to issue a Chambers Summons. There is provision in O 29 for the issuing of Chambers Summons, but that is not intended to be used in cases that are being case managed. In case managed cases, all one needs to do is to give notice to the other side and to the case manager that you want a particular form of direction and that is quite sufficient. The old structures of different hearings before the Registrars have been maintained under the new Rules, so that there is a status conference, a case evaluation conference and listing conference - although in practice, listing conferences are becoming increasingly rare because more and more often cases are being listed through the CMC list. Those cases will be listed by the Judge managing the list, often to be tried by him or her, without going to a listing conference.

Inactive Cases

The amendments also bring the provisions relating to inactive cases into the case management Order. There has been no substantial change in relation to those provisions. A case is deemed to be inactive if no step is taken in the action for 12 months. After it has been deemed to be inactive, the case can be added to the inactive cases list by the Principal Registrar sending a notice to the parties that that is what will happen unless application is made to stop that from happening within 21 days. If no application is made, the case goes into the inactive cases list. A step can only be taken with leave once the case is on the inactive cases list, and if no step is taken within six months, it is deemed to be dismissed for want of prosecution.

Amendments to Pleadings

There has been a standard direction for CMC list cases which has authorised amendment without leave at any time up to seven weeks prior to trial. That standard direction is now embodied in the Rules and applies to all cases. So there is no requirement for leave to amend the pleading providing the amendment is made at any time up to seven weeks prior to trial. The Rules also provide that other parties can make consequential amendments without leave if an amendment is made. Of course, application can be made to strike out the pleading after the amendment has been made. Instead of putting the onus upon a party seeking to amend to show why they should be given leave to amend, effectively, we have reversed the onus. The onus is on the party seeking to oppose the amendment to show why it should not be allowed. That has worked quite well in practice in CMC list cases for the last four years, and it is now embodied in the Rules.

Order 29

I have mentioned O 29. That Order remains in force and provides for a summons to directions, but as I have mentioned, we would not expect that procedure to be used very often, because if the case is being managed either by a Registrar or in the CMC list, all you need to do is give notice to your opponent and to the case manager of the directions that you seek.

Redaction of Discovered Documents

Moving on from case management, there were some other provisions made by the amendments to the Rules. There were a number of cases where redaction of discovered documents had given rise to disputes. There was no express provision in the Rules for redaction. Order 26 has now been amended to give a party providing discovery or inspection of a document the power to edit the document, but if you exercise that power, you have to tell the other side that you have done it, and you have to say why you have done it. This shifts the onus to the other party to then challenge the redaction. There is express power to redact for irrelevance.

Certificate of Practitioner

There is also an amendment to O 26 that is quite significant which requires the practitioner who is providing an affidavit of discovery to certify that the practitioner has explained to the client the obligations of discovery, and in the case of a corporate client, to identify the person within the corporation to whom that obligation has been explained, so that in the event of inadequate discovery, there is someone who can be identified upon whom sanctions may be visited. It is also intended to reinforce to practitioners that it is their professional obligation to explain to the client just what the obligations of discovery are.

Subpoenas

There have also been some changes in relation to the rule relating to subpoenas. The rule now specifically authorises the party who caused the subpoena to be issued to alter the date for its return simply by advising the party to whom it has been issued. Again, that reflects a practice that has been in force for quite some time now.

Changes in Practice Directions

That is essentially an overview of the changes made by the Rules. These amendments to the Rules have been in the drafting process for a couple of years now and time has moved on, so we are going to make a few more changes by way of Practice Direction.

CMC List - Strategic Conference

The first is to remedy what I have already described as the default adoption of the standard directions without discrimination in individual cases. The whole idea of these case management rules is to motivate people to think laterally, inventively and to come up with bespoke solutions for the particular case. That objective is not achieved if parties simply trot out the standard directions.

To encourage people to think specifically about how a case should go forward, we are now going to convene a Strategic Conference in the CMC list. It will only be in the CMC list to start with, but we may find that the concept spreads over into Registrar case management. The Strategic Conference will be a special appointment for an hour or so, and will be held in a conference room. The idea of holding it in a conference room is that it is intended to be collegial rather than adversarial. We are trying to encourage that by the environment in which we conduct it. It

will be recorded and the statements made will be on the record. The idea is to encourage an interchange of views. It will usually be the first hearing in the CMC list. The first time the matter comes into the list, there will be a Strategic Conference at which consideration will be given to just how the case is going to be managed.

Unlike all the other hearings in the CMC list, this is one conference that the parties will be directed to attend and there will also be directions to the effect that counsel, if engaged, will be required to attend, including the most senior counsel who is engaged, because this is a conference at which we would hope critical decisions will be made about the future direction of the case. We also want the most senior solicitor involved in the case to attend this conference, because it will be an important event in the progress of the case.

The conference will open with a short presentation by each of the representatives of the parties about their client's position and what they see as the main issues in the case. To that extent, it will resemble something like a mediation, but as I mentioned, it is not a mediation. Statements will be on the record. What that will mean is that you will have to come down prepared. You will have to be briefed; you'll have to know what the issues are, and your clients will be there. They will be listening to your enunciation of their position. What we are hoping is to encourage people to give early thought to what the case is about, what the issues are and where the case is going. After the opening statements have been made, there will then be specific attention given to how the issues are going to be identified, and what steps can be taken to narrow those issues. Will this be a case with pleadings, or is there a better way of

identifying the issues, for example, by the exchange of statements of facts and issues in contention?

Consideration will be given to how we identify the facts that are non-contentious; how we can identify the facts that are contentious and in the case of contentious facts, how we can resolve those contentions. Consideration will also specifically be given to whether there are any preliminary issues desirably tried in advance of other issues. Consideration will also be given to the general approach to be taken to discovery. Because it will be early in the life of the case, we would not expect that discovery orders would be made at this stage, but there will be general discussion about the approach which ought to be taken to discovery. Detailed consideration will be given to mediation and the point at which the case should be mediated, and the steps that should be taken prior to the mediation occurring. Virtually no case goes to trial in the Supreme Court without first being mediated. We like to look at the pre-trial processes as pre-mediation processes as well. One of the points I have made repeatedly in my public statements is that less than 3% of the cases that are lodged in our court are resolved by a trial. 97% of our lodgements are resolved by some means other than a trial. It is therefore inefficient to prepare every case as if it is going to trial because we know that 97% of them won't go to trial.

What we are trying to do at a Strategic Conference is identify those cases that are less likely to go to trial, and if they are not likely to go to trial, identify the minimum steps that need to be taken before there is a mediation, and then proceed to mediation. That will assist in achieving the overriding objectives which are the timely, efficient and just disposition of a case at a minimal cost to the parties and to the court.

Consideration will also be given as to whether the case is one in which expert evidence is to be given, and what steps might be taken to reduce the burden to the parties in relation to the expert evidence. For example, consideration might be given to identifying the facts that the experts should assume for the purposes of their opinion, and if there are a range of facts which the parties contend, the different factual hypotheses which should be assumed by an expert for the purposes of their opinion, and also identifying the issues upon which the experts should be asked to opine. That way we might reduce the risk of experts' reports being like ships passing in the night because they are proceeding on different assumptions of fact, or because they have been asked to opine on different issues.

Trial Bundles

Up until now we have proceeded on the basis that the trial bundle is the first thing that is done in relation to the preparation of a case for trial - even prior to the preparation of the witness statements. The reason for that was to avoid the previous practice whereby every witness statement would come in with a huge bundle of documents referred to in the witness statement. Forests were being destroyed and we ended up with about eight different copies of the one document. The idea was to have the trial bundle prepared first, so that the witness could refer to the witness statement document in the trial bundle by reference to its unique identifier and avoid the need to copy it. The problem we found with that approach is that the trial bundles are huge. When we have a trial, trolleys come down to court with, effectively, what is nothing more than a composite discovery from the parties rebadged as a trial bundle. No-one is actually giving thought to what ought to be in the trial bundle, or if they do, they are erring on the side of caution and throwing everything into the

trial bundle. At the end of the trial, often neither side has made any reference whatever to the majority of the documents in the bundle.

We are now going to revert to the practice of doing the witness statements first. However, we don't want people to copy the documents that are referred to in the witness statement. Instead, what we will require is that the witness statement be prepared referring to a document by its discovery number. This will provide a unique identifier which enables one to identify the documents referred to. After all the witness statements have been exchanged, then we will direct production of the trial bundle. Hopefully by then people will have a clear idea of what the issues are and a Practice Direction will require that the only documents that will go into the trial bundle are the documents that a party intends to tender at trial - not documents which "I might tender it perhaps if the wind blows in a certain direction". If witness statements have been exchanged, the parties and their advisors should know the way the wind is blowing, so a document should only be put in the bundle if it is going to be tendered and the party nominating a document for inclusion for the bundle should be in a position to justify the inclusion of the document in the bundle if called upon to do so by the trial judge.

After the trial bundle has been prepared, we will then require the parties to go back and annotate the witness statements so that each document referred to in the witness statement is then given its reference in the trial bundle. You will not have to ask the witness to re-sign it. You can simply do it by manuscript or by type, on another copy of the witness statement showing what the document is in the trial bundle.

Revision of the Supreme Court Rules

Those are some of the things we are doing. On the broader time-scale, one of my frustrations since appointment has been a failure to undertake a much more radical revision of the Rules. The Rules are out of date; there have been many attempts to rewrite them as a whole. Experience suggests that that exercise is a bit like painting the Sydney Harbour Bridge because as soon as you start from scratch with a blank piece of paper and write the Rules, by the time you finish writing them, it's time to start again. Justice David Newnes, for example, was commissioned as a consultant well before his appointment to the court in the mid-90s to write a set of Rules, but they never went anywhere and are now out of date.

I floated a proposal with the previous government to rewrite the legislation relating to the Supreme and District Courts, and to enact a *Civil Procedure Act* along the lines of New South Wales and Queensland. That proposal was accepted by the previous government and work was well in hand. The present government has no immediate enthusiasm for that course, so we will be looking at other ways of bringing our Rules up to date. Because of the problem I have mentioned - the enormity of the task - what I think we will probably do is look for the best set of comparable Rules that we can find and adopt them as much as we can without undertaking an original rewrite.

By way of illustration of the difficulties involved in writing an original set of rules from scratch, I can remember attending a meeting with Justice Bruce Lander at the Federal Court in 2003, he being the Judge in charge of that court's rewrite of its Rules. He told me that he expected the exposure draft of those Rules to be available later that year and for the

Rules to be implemented in 2004. Chief Justice Keane has recently told me that he expects the exposure draft of those Rules to be available in December of this year, and for them to be implemented next year. This time there is a real chance of that prognostication coming to pass. We will obviously look carefully at those Federal Court Rules as a possible model for ours because of the obvious advantages of consistency, but only if they embody the notions of flexibility, discretion and proportionality to which I have referred.

If adoption of the Federal Court Rules in large scale is a possibility, then we will look at that. If not, we will look at the adoption of some other comparable model - possibly Queensland or New South Wales which are models that commend themselves. I would hope that we will find the time to do that during the course of next year.

Conclusion

We recognise that the Rules we do have are less than perfect, but the focus of the Rules until substantially rewritten has to be O 4A. The key components of that Order are flexibility and discretion. We are encouraging you, as practitioners, to help us to achieve the overriding objectives. You, as practitioners, know the case; you know the issues; you know the likely course of the case much better than we ever can. We are encouraging you to suggest how we might take control of the future destiny of the case and, in the CMC list, we will be doing that through the Strategic Conference.