LexisNexis™ Butterworths

Civil PROCEDURE NEWS NEW SOUTH WALES

Volume 5 Number 1

Print Post Approved 255003/00767

contents

Information contained in this newsletter is current as at November 2007

Civil
PROCEDURE NEWS
NEW SOUTH WALES

What are interrogatories?

G J Sarginson BARRISTER

Interrogatories are a form of discovery, which allows a party to proceedings to administer a series of written questions on another party. Provided the interrogatories have been properly administered, they must be answered to the best knowledge or belief of the party who is the subject of the interrogatories. The person answering the interrogatories usually provides an affidavit verifying the answers.

The significant forensic advantage of interrogatories is that any, or all, of the interrogatories and the answers to them can be tendered as evidence. Further, the person who has verified the answers can be cross-examined at the hearing as to the veracity of the answers given. Interrogatories that are well drafted can force a party to make damaging admissions in respect of facts relevant to its cause of action or defence. Poorly drafted interrogatories will either be successfully objected to and remain unanswered or, if answered, have no forensic utility. Consequently, it is important for practitioners to understand the relevant principles that provide the foundation for the administration of interrogatories.

Power to administer interrogatories

Part 22 of the *Uniform Civil Procedure Rules 2005* (NSW) (UCPR) deals with the administration of interrogatories. Part 22.1 relevantly provides:

(1) At any stage of the proceedings, the court may order that any party to answer specified interrogatories.

(2) An application for such an order must be accompanied by a copy of the proposed interrogatories.

(3) In the case of proceedings on:
  (a) a claim for damages arising out of the death of, or bodily injury to, any person, or
  (b) a claim for contribution for damages to claims so arising,

such an order is not to be made unless the court is satisfied that special reasons exist that justify the making of the order.

(4) In any case, such an order is not to be made unless the court is satisfied that the order is necessary at the time it is made.

(5) An order to answer interrogatories:
  (a) may require the answers to be given within a specified time, and
  (b) may require the answers, or any of them, to be verified by affidavit, and
  (c) in circumstances in which rule 35.3 authorises someone other than the party to whom the order is addressed to make the relevant affidavit, may specify the person to make the affidavit, or the persons from whom the person to make the affidavit may be chosen, in relation to the interrogatories or any of them.

Criteria for the court exercising its discretion to allow a party to interrogate

A party does not have the right to interrogate. The court must be satisfied that it should exercise its discretion to allow interrogatories. There are three important criteria that provide the touchstone as to whether or not the court should allow interrogatories. The criteria are as follows:

- the interrogatories are relevant to facts in issue in the proceedings;
- the interrogatories are necessary at the time the order is made; and
- the interrogatories are not objectionable under r 22.2 of the UCPR.

Relevance

The court will not allow interrogatories if the interrogatories in question are not relevant to facts in

issue in the proceedings. Consequently, if there is a dispute as to relevance, the party seeking interrogatories must be able to show that interrogatories are probative of facts in issue in the proceedings. This involves elucidating what are the facts in issue (which should be the starting point for drafting interrogatories in the first place) and linking the facts in issue to the pleadings.

Interrogatories that relate exclusively to the credit of a person are improper, because they do not relate to a fact in issue. Although it is permissible to cross-examine a witness as to credit, interrogatories are not the same as cross-examination, and are confined to facts in issue. In *Tiver v Tiver* [1969] SASR 40, Walters J stated that 'interrogatories ought not be allowed merely as to the credibility of a party' and that interrogatories that 'involve nothing more than a pure cross examination' are objectionable. However, provided the interrogatories are relevant to facts in issue, the collateral effect of the answers impugning the credibility of a witness is acceptable.

Interrogatories may satisfy the relevance test even if they are not directly relevant to a fact in issue, provided they are relevant to the existence or non-existence of facts that establish the existence or non-existence of facts directly in issue (that is, a train of inquiry). However, the more tenuous the link between the fact in issue and the interrogatory, the more likely that the interrogatory will fail the necessity test discussed below.

Necessity

The criterion for necessity is 'necessary in the interests of a fair trial' (*Boyle v Downs* [1979] 1 NSWLR 192. In *Fiduciary Ltd v Morningstar Research Pty Ltd* [2007] NSWSC 432; BC200703265, Barrett J pointed out that (at [22]):

> … the concept of necessity for the purpose of achieving a fair trial is closely related to the recognition in r 22.2(a) that an interrogatory is objectionable if it 'does not relate to any matter in issue between' the party to be interrogated and the party wishing to interrogate'.

If interrogatories constitute a 'fishing expedition', they will fail the necessity test.

In *Director General of Community Services v D* [2006] NSWSC 827; BC200606433, Brereton J discussed the distinction between a 'fishing expedition' and interrogatories necessary in the interests of a fair trial in the following terms:

> [49] Interrogatories must generally be relevant to matters in issue between the parties and to the proof of each party's case, so that interrogatories of 'fishing' nature — when a party seeks to investigate matters beyond those matters raised by the pleadings or by their respective cases, merely in the hope of finding something to assist the party interrogating to make out some case, not limited to achieving a clear and defined end — are not permitted … As Owen J said [*Associated Dominions Assurance Society Pty Ltd v John Fairfax & Sons Pty Ltd* (1952) 72 WN (NSW) 250 at 254]:
>
> > A 'fishing expedition' in the sense which the phrase has been used in the law means, as I understand it, that a person who has no evidence that there are a particular kind of fish in a pool desires to be at liberty to drag it for the purpose of finding out whether there are any there or not.

What type of information that is 'necessary for a fair trial' will of course depend on the facts in issue in the particular case. However, of relevance is whether the interrogatories are directed to matters that would otherwise be difficult to prove or would involve unreasonable costs (*Lang v Australian Costal Shipping Commission* [1974] 2 NSWLR 70 at 73; *Boyle v Downes* [1979] 1 NSWLR 192; *Hayward v Collaroy Services Beach Club Ltd* [2005] NSWSC 1203; BC200510265).

However, interrogatories will not be 'necessary for a fair trial' if directed at ascertaining what documents are to be discovered (*American Flange & Manufacturing Co Inc v Rheem (Aust) Pty Ltd (No 2)* [1965] NSWR 193), or whether a party has properly complied with an order for discovery. In *Fiduciary v Morningstar Research*, Barrett J rejected interrogatories designed to ascertain whether a party had properly complied with a consent order for discovery, in circumstances where the party dissatisfied with the documents produced under discovery had not sought orders for further discovery by way of a notice of motion.

… if there is a dispute as to relevance, the party seeking interrogatories must be able to show that interrogatories are probative of facts in issue in the proceedings.

Barrett J stated (at [28]):

> The clear message is that interrogatories should not become a form of inquiry into the adequacy and completeness of discovery, at least unless the processes of discovery have run their full course and grounds for some apprehension of incompleteness continue to exist.

Time for consideration of necessity

Rule 22.1 of the UCPR prescribes that the court can make an order for the administration of interrogatories 'at any stage of the proceedings' but that the interrogatories must be

'necessary at the time the order is made'. Consequently, it is unusual for the court to make an order for interrogatories early in the proceedings, before evidence has been served, and particularly before the pleadings are closed, because of the likelihood that the evidence sought by the interrogatories will become available before the hearing in any event (*Venacom Pty Ltd v Morgan Brooks Pty Ltd* [2006] NSWSC 46; BC200600493).

However, there are situations where evidence is served early in the proceedings, and the material facts in dispute have crystallised. In such situations, the court may still regard the proposed interrogatories as satisfying the necessity test, in the context of the overriding purpose of the *Civil Procedure Act 2005* (NSW) and the UCPR being the 'just, quick and cheap resolution of the real issues in the proceedings' (*Civil Procedure Act*, s 56).

Interrogatories: 'special reasons' matters involving damages arising from death or personal injury

Rule 22.1(3) provides that interrogatories in respect of 'a claim for damages arising out of the death of or of bodily injury to any person' or 'a claim for contribution for damages so arising' are not to be granted by the court 'unless the court is satisfied that special reasons exist to justify making the order'. The 'special reasons' requirement is additional to the criteria of relevance and necessity discussed above.

Courts have not attempted to exhaustively define the phrase 'special reasons'. In *Cavric v Coopers & Lybrand (ACT) Ltd* [2002] NSWSC 538; BC200203290, Harrison A J defined 'special reasons' as follows (at [13]):

> Special can be said to be exceptional, has a distinct, individual or instrumental character. 'Special' indicates to the decision maker that the discretion is one which is not lightly enlivened. However 'special reasons' is an elastic instruction suitable for application across a range of situations.

In *Priest v State of NSW* [2006] NSWSC 12; BC200600180, Johnson J described the phrase 'special reasons' in the following terms (at [128]):

> The core of the requirement for 'special reasons' is that there be something unusual or different to take the matter the subject of the discretion out of the ordinary course: *Boscolo v Secretary, Department of Social Security* (1999) 90 FCR 531 at 535–6; *Binks v North Sydney Council* [2001] NSWSC 27 [BC200100103].

Due to the flexibility of the 'special reasons' test, the authorities that deal with the issue depend heavily on the specific facts of the case. For example, in *Griebart v Morris* [1920] 1 KB 659 and *Schutt v Queenan* [2000] NSWCA 341; BC200007963, interrogatories were held to satisfy the 'special reasons' test in circumstances where the plaintiff had no, or limited, memory of the circumstances of a motor vehicle accident, and the interrogatories explored factual issues regarding the circumstances of the accident. However, in *Jajaw v State of NSW* [2007] NSWSC 725; BC200705346, Hoeben J refused an application for interrogatories in a wrongful arrest, false imprisonment and malicious prosecution case in circumstances where the plaintiff had 'an enormous amount of material relating to his claim' (at [42]), including statements in the police brief of evidence, and the transcripts of two sets of criminal proceedings.

Objections to interrogatories

Rule 22.2 sets out the grounds on which a party can object to being ordered to answer interrogatories, provided leave has been granted to administer the interrogatories. Rule 22.2 states:

> A party may not object to being ordered to answer an interrogatory except on the following grounds:
> (a) the interrogatory does not relate to any matter in issue between that party and the party seeking the order,
> (b) the interrogatory is vexatious or oppressive,
> (c) the answer to the interrogatory could disclose privileged information.

Rule 22.2(a) is closely related to the issue of relevance, as discussed above. In r 22.2(b), oppression is a wide concept involving unduly burdensome obligations on the party to whom the interrogatories are addressed (for example, enquires of numerous volunteer workers in *Hughes v Western Australia Cricket Association* (1986) (1986) ATPR 40-726. Vexation involves the concept of the interrogatories being sought for an improper or collateral purpose (for example, to obtain information regarding trade secrets in *American Flange & Manufacturing Co Inc v Rheem (Aust) Pty Ltd (No 2)* [1965] NSWR 193. Privileged information for the purpose of the UCPR is defined in the UCPR dictionary as privilege under Pt 3.10 Div 1 of the *Evidence Act 1995* (NSW).

Answers to interrogatories

Rules 22.3 and 22.4 deal with the requirements of answers to interrogatories. Rule 22.3(1) states that the party required to answer interrogatories must serve a 'statement of answers on all other active parties' within the requisite time. Rule 22.3(2) stipulates that the statement:

(a) must deal with each interrogatory specifically, setting out each interrogatory followed by the answer to it, and
(b) must answer the substance of each interrogatory without evasion, and
(c) to the extent to which, and the manner in which, the order so requires, must be verified by affidavit.

The provision of r 22.3(2)(b) is important when drafting interrogatories because the more general an interrogatory is, the more difficult it is to argue that the answer is evasive. A general answer will be sufficient if the interrogatory is general (*Gorden & Co v Bank of England* (1844) 8 Jur 1132), but it will not suffice if the interrogatory is specific (*Earp v Lloyd* (1885) 70 ER 24). If a simple answer could be misleading or evasive, it is permissible to add a reasonable explanation or qualification, provided that the answer does not introduce material that is irrelevant and extraneous, resulting in the answer being unable to be used at the hearing (*Peyton v Harting* (1873) LR 9 CP 9).

A party must answer interrogatories to its best knowledge, information and belief (*Lyell v Kennedy (No 2)* (1883) 9 App Cas 92; *Douglas v Morning Post* (1923) 39 TLR 402; *Hoffman v Postill* (1869) 4 Ch App 673; *Hawkes v Schubach* [1953] VLR 468), and must make reasonable inquiries from its employees or agents (*Sharpe v Smail* (1975) 5 ALR 377). However, 'reasonable inquiries' must not involve 'the pursuit of ancient history' (*Stanfield Properties Ltd v National Westminster Bank Plc* [1983] 2 All ER 249). A person verifying interrogatories on behalf of a corporation is usually an officer of the corporation, and must answer from their own individual knowledge or information obtained from other servants of the company with personal knowledge of the facts (*Bank of Russian Trade Ltd v British Screen Productions Ltd* [1930] 2 KB 90).

Default and insufficient answers

Failure to answer interrogatories at all, or insufficiently, is dealt with in rr 22.4 and 22.5. If the party answering is in default, the court may order that the proceedings be stayed or dismissed in whole or part (r 22.5(1)(a)), or that the defence (if the party in default is the defendant) be struck out (r 22.5(1)(b)). If answers are insufficient, the court may order the party to make further answers (r 22.4(1)(a)), or order an oral examination (r 22.4(1)(b)). Orders for oral examinations are rarely made (*King v Commercial Bank of Australia* [1920] VLR 218).

Use of interrogatories

The forensic advantage in litigation of interrogatories is that, under r 22.6, a party may tender as evidence one or more answers to interrogatories, and may tender an answer in whole or part (r 22.6(1)(a) and (b)). However, answers to interrogatories are part of the evidence in the proceedings, and do not have the same weight as admissions in pleadings. The answering party is not prevented from adducing its own evidence that contradicts the answers to interrogatories (*Stateliner Pty Ltd v Legal and General Assurance Society* (1981) 29 SASR 16). However, any attempt by a party to contradict its own answers to interrogatories will be closely scrutinised by the court, and the party must have a good explanation as to why it traverses answers which have been verified by affidavit.

Tips for drafting interrogatories

The above principles can be distilled into the following tips to assist the drafting of interrogatories.

- Before commencing drafting, identify what are the material facts in dispute on which you wish to interrogate.
- Only interrogate on the most important issues in dispute. Any peripheral issues will run the risk of failing the 'necessity test' discussed above.
- Keep the interrogatories as short in number as possible. Interrogatories are not a fishing expedition and the more numerous the interrogatories, the more likely it is that the court will find they do not satisfy the necessity test, or are oppressive.
- Ensure that each interrogatory is not ambiguous, or does not contain compound propositions that cannot be properly answered. To achieve such an outcome, use short questions and simple language.
- Before issuing a Notice of Motion seeking leave to administer interrogatories, ascertain whether the party you seek to interrogate consents to the interrogatories.
- Ensure that, if the other party does not consent, you have reasonable prospects of satisfying the court of the relevant principles discussed above to obtain an order allowing the administration of interrogatories. ●

G J Sarginson, Barrister,
Sixth Floor Windeyer Chambers,
Sydney.

Civil
PROCEDURE NEWS
NEW SOUTH WALES

Review of Victoria's civil justice system

Peter O'Donahoo and **Adam Butt** ALLENS ARTHUR ROBINSON

In Brief

- The Victorian Law Reform Commission (VLRC) is currently undertaking a review of Victoria's civil justice system, with a view to reducing the cost, complexity and inefficiency of civil proceedings. As part of that review, the VLRC has released its draft civil justice reform proposals, which it set out in its exposure draft of 28 June 2007. This article explores some of the VLRC's more contentious draft reform proposals. A second exposure draft, setting out further draft reform proposals, was released on 6 September 2007.

Potential impact of the proposals

The Victorian Law Reform Commission (VLRC)'s proposals cover a broad range of topics, including:

- the establishment of a Justice Fund to facilitate the commencement of class actions;
- amendments to the rules on expert evidence;
- the introduction of pretrial examinations or depositions; and
- the use of *cy pres* or public interest remedies in class actions.

Accordingly, should the proposals be accepted by Parliament, their impact on the Victorian civil justice system is likely to be significant, particularly for parties likely to be involved in defending large-scale litigation.

While the VLRC is no longer accepting submissions on the first exposure draft, interested parties may have an opportunity to comment on the civil justice system at a later stage of the review.

Civil justice review background

In May 2004, Victorian Attorney-General Rob Hulls issued a Justice Statement outlining directions for reform of Victoria's justice system. The VLRC's *Civil Justice Review* is part of this reform program. In September 2006, the VLRC released a preliminary consultation paper and, following research and consultation with stakeholders, the VLRC then developed the draft civil justice law reform proposals, set out in its exposure draft dated 28 June 2007. The draft reform proposals are broad and cover issues including:

- standards of conduct;
- disclosure of information and cooperation before proceedings are commenced;
- getting to the truth before trial;
- alternative dispute resolution;
- expert evidence;
- class actions and public interest remedies;
- access to justice and litigation funding; and
- costs.

The VLRC proposes that all participants in civil proceedings should have a paramount duty to further the administration of justice. Consistent with this aim, it proposes to establish a new Civil Justice Council, comprised of representatives of various stakeholder groups, to have ongoing statutory responsibility for review and reform of the civil justice system.

While the VLRC's final report to the Attorney-General was initially due by 5 September 2007, a six-month extension until 4 March 2008 has now been granted. This will complete stage one of the VLRC's civil justice review. It is likely that there will then be a longer stage two of the review.[1]

VLRC draft civil justice reform proposals

The stated objective of the VLRC's draft reform proposals is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute in civil proceedings, and to improve the 'adversarial culture' of dispute resolution. While all of the VLRC's proposals, referred to above, may have a significant impact on the civil justice system, the areas discussed below warrant particular attention.

Litigation funding

The VLRC proposes to establish a new 'Justice Fund', to be used to:

- provide financial assistance to parties with meritorious civil claims;
- provide an indemnity for adverse costs orders; and
- meet any requirements imposed by the court for security for costs.

Certain aspects of the proposed Justice Fund are cause for concern. For instance, the VLRC proposes that the Justice Fund's legal liability for adverse costs would be capped at the level at which financial assistance had been provided to the party assisted by the fund. As the fund would share in any damages awarded to the funded plaintiff, and would therefore acquire an interest in the proceeding's outcome, the proposal would effectively subvert the costs indemnity rule and leave defendants exposed. The VLRC would also allow the fund to enter into joint venture agreements with commercial litigation funders or with law firms, yet successful defendants would not be entitled to enforce the full amount of any costs orders against the fund. Instead, they could only recover costs to the extent that the fund has assisted the plaintiff.

Accordingly, any proposal to establish a fund to encourage class actions should oblige that fund to pay the full amount of any costs awarded against the plaintiffs funded. Otherwise, defendants would have no adequate recourse where plaintiffs could not meet adverse costs orders, and those defendants may have to bear the often significant cost burden of the litigation.

The VLRC has also not addressed the need for regulation, including prudential regulation, of third-party litigation funders more generally. This leaves plaintiffs, defendants and the administration of justice at risk. Without regulation, funders may retain

an inappropriately high percentage of any damages awarded, to the detriment of the funded plaintiffs. Plaintiffs may be encouraged to commence proceedings, even if their claim is not particularly strong, with the result that defendants may face an increased number of unmeritorious claims. Further, without prudential regulation, defendants may not be able to recover the cost of successfully defending actions funded by commercial litigation funders, where those funders do not have the means to meet adverse costs orders.

To avoid these risks, legislation should be introduced to regulate funders, including:

- a requirement that funding agreements be filed with the court at the commencement of proceedings;
- a cap on the percentage of damages that can be retained by the funder; and
- a limit on the control exercised by funders over the conduct of the proceedings.

Importantly, funders should be subject to prudential regulation and should be required to pay the full amount of any adverse costs ordered against the funded plaintiff.

On a similar note, the VLRC has not made any proposals concerning the prohibition against lawyers charging contingency fees, but has flagged this issue as one it will consider further. Removing that prohibition may have serious consequences, the most significant of which is the risk that a lawyer's independent financial interest in the litigation may conflict with the lawyer's duty to the client and the court. The VLRC's next step on this issue will be keenly observed.[2]

Class actions and public interest remedies

The VLRC proposals on these issues also raise some concerns. First, they seek effectively to convert what is an 'opt out' regime into an 'opt in' regime, proposing to open the class action procedure to use by identified persons or entities who are aggregated together or who consent to the pursuit of claims on their behalf. While this may be appealing from an access to justice perspective, it would likely result in increased multiple proceedings, with a resulting burden on both defendants and the court's time and resources.

The VLRC also proposes to overturn the current law[3] that all class members should be required to have individual claims against *all* defendants in class action proceedings involving multiple defendants. This proposal appears to undermine the class action regime goal of allowing for convenient and economic case management. To allow defendants with varying claims to be part of the same class action would increase the cost, length and difficulty of the class action, outweighing any benefits of the class action procedure.

In addition, the VLRC seeks to confer on the Supreme Court a new judicial power, or to clarify that it has the power, to order *cy pres* or public interest distribution of damages in certain class action proceedings, where a defendant has been unjustly enriched through a contravention of the law, and it is not possible or practical to identify some or all of those who have suffered the loss.

This proposal may result in the redistribution of moneys from one party to a public interest group through a *cy pres* trust where the proper recipient (party) cannot be identified. Such a proposal would seem to have the courts engaging in 'social engineering' or policy making, which is not a task for the courts but one for Parliament. Courts, rather, should resolve justiciable controversies between parties.

Expert evidence

The VLRC recommends the adoption, with minor modifications, of the recently introduced NSW Court Rules concerning expert evidence in order 'to facilitate less adversarial, more objective and less expensive evidence at trial.'[4] One proposed rule would allow for the court to order that an expert be engaged jointly by the affected parties.[5] While this might be appropriate in small or straightforward matters, it may limit the court's ability to arrive at just decisions where the issues to be addressed by way of expert evidence are genuinely in dispute. Unless parties can brief their own experts, the court would not receive varying views that have been scrutinised and challenged. The quality of evidence before the court may suffer as a result.

A preferable approach would be to ensure that any rule concerning the engagement of a single expert is discretionary, to be used only in appropriate cases. Further, even if the court appointed a single joint expert to deal with an issue, the parties should nonetheless be able to call their own experts on that issue to test that expert's evidence.

The VLRC questions whether and to what extent privilege should apply in relation to an expert, whether or not that expert gives evidence. Where a party proposes to call an expert to give evidence in a proceeding, the VLRC recommends that privilege should not apply to any communication or any document arising in connection with that expert's engagement. Further, the VLRC queries whether privilege should apply where a party engages an expert without any intention of calling him/her in the proceeding, but where the expert is subpoenaed by the opposing party to give evidence.

It is most important that privilege apply in both of these situations, as the alternative position would undermine the administration of justice. Parties must often seek expert assistance in assessing and preparing their case, and a party should not be required to disclose its communications with an expert to the other party before trial. Only when an expert is actually called to give evidence should a party be required to produce those communications. If privilege did not protect parties from their preparatory work for litigation, there might be little incentive to invest time and effort in properly investigating their cases. Moreover, all relevant information may not be disclosed to experts for fear of disclosure to their opponents before the trial had started, or experts may not be engaged at all. This would be detrimental for the administration of justice.

Conclusion

The VLRC's proposals suggest a significant shift in the approach to civil proceedings in Victoria. The second exposure draft contains a number of

similarly controversial proposals. In this context, the VLRC's report to the Attorney-General will be keenly anticipated by all participants in the civil justice system. ●

Peter O'Donahoo, Partner, and Adam Butt, Articled Clerk, Allens Arthur Robinson, Melbourne.

Endnotes

1. See the VLRC website at <www.lawreform.vic.gov.au/>.
2. In its second exposure draft, dated 6 September 2007, the VLRC again raises this issue but makes no proposal.
3. *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487. See also s 33(1)(a) of the *Supreme Court Act 1986* (Vic).
4. See the VLRC first exposure draft, 28 June 2007, p 3.
5. This proposal is based on r 31.37 of the *Uniform Civil Procedure Rules 2005* (NSW).

CASENOTE

Business records exception to the hearsay rule

Brendon Drain FREEHILLS

STREET v LUNA PARK SYDNEY PTY LTD
[2007] NSWSC 695; BC200705557

In a recent case, Brereton J considered the application of the business records exception to the hearsay rule.

Background

The plaintiffs brought proceedings against Luna Park Sydney Pty Ltd (Luna Park) in 2005, originally as a noise nuisance case. By late 2005, the nuisance case had been effectively defeated by an Act of Parliament and the proceedings were reframed as proceedings for:

- an injunction to restrain an alleged contravention of the *Crown Lands Act 1989* (NSW); and
- damages and injunctive relief under the *Trade Practices Act 1974* (Cth).

In late 2005, two of the plaintiffs decided to list their apartment for sale. Their reason for doing so was the impact of noise from Luna Park. By letter from their solicitors to the defendants' solicitors, the two plaintiffs identified that at least part of their case for damages would involve a comparison of the actual value of their apartment at the date of hearing with the value it would have had if it had not been affected by noise. Thus, the more the impact of noise depressed the value of their apartment, the greater would be the two plaintiffs' damages.

During or about early April 2006, the two plaintiffs listed their property with LJ Hooker. LJ Hooker provided letters to the two plaintiffs, which included representations that the noise from Luna Park was having a negative impact on the marketing of the apartment. One of the plaintiffs relied on and annexed the letters to an affidavit. The defendants objected that the evidence contravened the hearsay rule. The two plaintiffs submitted that it was admissible under the business record exception in subs 69(2) of the *Evidence Act 1995* (NSW).

Business records exception

Subsection 69(3) of the *Evidence Act* relevantly provides:

> Subsection (2) does not apply if the representation:
> (a) was prepared or obtained for the purposes of conducting, or for or in contemplation of or in connection with, an Australian or overseas proceeding ...

Brereton J made the following observations about the business records exception:

- the purpose of subs 69(3) was to exclude from admissibility previous representations contained in business records that were made in an atmosphere or context that could affect their impartiality by reason of possibly being influenced by interest in the outcome of legal proceedings;
- the words 'in contemplation of' added something to 'for the purposes of'; the additional words 'in connection with' must add something more;
- a representation is made or obtained 'in contemplation of' legal proceedings, not only if the prospect of proceedings is the occasion for the representation being made, but also if legal proceedings or the prospect of them is 'in mind' when the representation is made or obtained. An act is done in contemplation of something if that thing is in the mind of the actor when it is done;
- an act is done 'in connection with' something if there is a link or nexus, other than a remote or tenuous one, between the act and the thing; and
- no question of dominant or substantial purposes had arisen; once any aspect of subs 69(3) is attracted, it did not matter that the dominant or substantial purpose of making or obtaining the representation in question was unconnected with legal proceedings.

Application

Brereton J held that the context in which the plaintiffs obtained the representations from LJ Hooker was one in which they had a manifest interest in showing the greatest possible depression in the current market value of their apartment due to the impact of noise. The proceedings were therefore in the mind of the plaintiffs when they obtained the representations.

Brereton J added that even if the proceedings were not *in mind* there was an obvious nexus between obtaining the representations and the proceedings that was not remote or tenuous: the value of their apartment as a result of the impact of noise was a matter that they needed to establish, and the price at which they could sell their apartment would affect their recoverable damages.

It followed that the representations contained in the letters from LJ Hooker annexed to the affidavit were obtained in contemplation of and/or in connection with the proceedings, and that the business records exception to the hearsay rule was not available. The representations were therefore inadmissible. ●

Brendon Drain,
Solicitor, Freehills, Sydney.

Civil
PROCEDURE NEWS
NEW SOUTH WALES

the costs COLUMN

Alyson Ashe
ALYSON ASHE & ASSOCIATES

Tips for barristers in recovering fees from their instructing solicitors

A solicitor's appeal against the decision of Johnstone DCJ (*Dennis v Cameron* [2007] NSWCA 228; BC200707568) has failed, and further Court of Appeal authority is added to the growing number of cases providing guidance on matters of costs affecting counsel. Traditionally, counsels' fee notes have been sparse on information and usually fail to comply with the constraints that solicitors grapple with, namely reg 22A of the *Legal Profession Regulations 1994* (NSW) (in this case) and its successors, reg 45 of the *Legal Profession Regulations 2002* (NSW), and now s 333 of the *Legal Profession Act 2004* (NSW).

In the circumstances of *Dennis v Cameron*, the barrister had for some years before 1997 been regularly briefed by the solicitor. In a bankruptcy matter the barrister duly performed the services for which he was retained, and he sent to the solicitor four memoranda of fees between April 1999 and November 2000. Each memorandum of fees was on the barrister's letterhead and was accompanied by a covering letter, which had been signed by the barrister. Each memorandum of fees included an amount comprising a 25 per cent contingency fee. None of the memoranda made any provision for the payment of interest.

Not long after the last memorandum of fees had been sent, the solicitor requested that the barrister forward to him replacement memoranda of fees with the contingency fee deleted. The barrister did so but thought (the evidence was a bit hazy on this point) that he had faxed them back rather than posting them with an accompanying letter.

In February 2001, the solicitor contacted the barrister and asked him to accept a deferral of payment of his fees in order to allow time for the clients to subdivide and sell land, which they owned and from the proceeds of which his fees would be paid. The solicitor told the barrister that he had a mortgage over the land and that the clients were willing to pay interest on the barrister's fees. The barrister agreed to this proposal.

It transpired that the land was subdivided and sold in about September 2003 (without the solicitor's knowledge), and that the solicitor did not in fact have a mortgage which secured the fees. After the barrister unsuccessfully sought payment of the fees from the solicitor, he commenced proceedings in the District Court. Johnstone DCJ gave judgment in favour of the barrister on 26 September 2006.

The reasonableness of the barrister's fees was never in issue. The solicitor's case was that the barrister's claim was barred by s 192(1) of the *Legal Profession Act 1987* (NSW) (the Act) because the solicitor submitted that the amended memoranda of fees did not comply with s 194(1) of the Act and with cl 22A of the *Legal Profession Regulations 1994* and was not a 'bill of costs'. Consequently, the barrister could not bring proceedings for the recovery of his fees.

Section 194(1) relevantly provided that a bill of costs must be signed by the barrister or by the solicitor, or by his or her partner or employee, but that it was sufficient compliance if a letter that is so signed is attached, or enclosed with, the bill of costs. Regulation 22A provided for detailed particulars to be included in a bill of costs (the more recent versions, which will be more relevant to readers, require a notification of rights reassessment of costs, as well as explicit details of the work done).

In response to the allegation that the barrister had not given a bill of costs, the barrister (while also arguing that his memoranda of fees complied with the requirements of the Act) argued that the agreement of February 2001 constituted an accord and satisfaction in the sense that the barrister accepted the solicitor's promise in satisfaction of existing obligations. The barrister submitted that the proceedings were not for the recovery of costs but were based on the agreement of February 2001, which was sufficiently different as to constitute a new arrangement for payment.

Applying the decision of the Court of Appeal in *Koutsourais v Metledge & Associates* [2004] NSWCA 313; BC200408094, his Honour concluded that the agreement of February 2001 was sufficiently different to the memoranda of fees that proceedings on which it was based could not be properly characterised as proceedings for the recovery of costs. In his Honour's opinion, the proceedings were correctly characterised as proceedings for breach of the agreement. Accordingly, the barrister was not obliged to comply with the provisions of the Act.

His Honour went further and held that, because the amended memoranda (unsigned) were sent by way of replacement at the request of the solicitor, and the original memoranda had been accompanied by letters signed by the barrister, his Honour found that this was sufficient compliance with s 194(1). Then there was the challenge that there was a lack of particulars as to:

> (g) The basis on which the costs have been calculated and charged (whether on a lump sum basis, an hourly rate basis, an item of work basis, a part of proceedings basis or other basis).
>
> (h) The facts relied on to justify the costs charged by reference to the above, the practitioner's skill, labour and responsibility, the complexity, novelty or difficulty of the matter, the quality of the work done or any other relevant matter.

On his Honour's reading of the memoranda of fees, they complied with those sub-clauses and even if they didn't, the particularisation of such

information was not required when the person receiving the memoranda of fees was a person who was aware of the matters to be particularised. In that regard, his Honour relied on the long-standing professional relationship which had existed between the barrister and the solicitor before the presentation of these memoranda of fees, and on the decision of Bryson J in *Hogarth v Gye* [2002] NSWSC 32; BC200200618 at [25] that '[a]n obligation to make a disclosure does not require the communication of any information to a person who is aware of the matter supposedly to be disclosed.'

On appeal, the Court of Appeal rejected the solicitor's submissions that the barrister's claim was based on the amended memoranda of fees and must fail, because the failure to sign meant that the mandatory terms of s 192(1) operated as a bar to the proceedings (*Zizza v Seymour* (1976) 2 NSWLR 135 and *Conder v Silkbard* [1999] NSWCA 459; BC9908057).

The Court of Appeal was unimpressed by that argument because it failed to have regard to the reality of the transaction. The amended memoranda of fees should not be looked at in isolation but as part of the total billing process that took place. There was no issue that the original memoranda of fees were accompanied by letters signed by the barrister and were amended at the request of the solicitor. Taken as a whole, the memoranda of fees complied with the provisions of s 194(1).

The Court of Appeal referred to the public purpose of the section, which is designed to protect the recipient of the bill of costs by having the party claiming costs acknowledge clearly that he or she accepts responsibility for its contents. The relevant UK statute on which s 194 was based was considered by Sir John Romilly (Master of the Rolls) in the matter of *In re Gedye* (1851) SC 20 L.J. Ch 410; 15 Jur 851; 51 ER 208. His Honour there said:

> … the client who receives an unsigned bill may, if he pleases, treat it as a nullity; the attorney can bring no action upon it and he may wholly disregard its existence. But, on the other hand, he may if he pleases, treat it as a bill delivered under the statute; he may, in fact waive the signature of the attorney to the bill and treat it as if the proper formalities had been complied with; it is his privilege to do so, and the solicitor by delivering the unsigned bill, enables his client to exercise his option on this subject. But I apprehend that it is not in the power of the client to treat it as both, [that is,] to treat it first as a duly signed bill and if that fails his purpose, then to treat it as a nullity.

Applying that approach to s 194(1), the barrister also submitted that the solicitor had accepted the amended memoranda of fees as a proper bill of costs complying with the Act (that is, by seeking the barrister's agreement to the deferral of its payment) and, accordingly, was now estopped from denying their validity. As a 'fallback position' he also argued that the memoranda being on letterhead was sufficient.

The Court of Appeal thought that the above statement of principle by Sir John Romilly MR remained as valid today as when it was made. 'It satisfies the purpose of s 194(1) and provides a common sense and fair application of the section.' While the court was also inclined to agree that a formal signature, as such, was not required and that something less may, depending on the circumstances, suffice for compliance with the section (*Moreton v Copeland* (1855) 16 CB 517 and *Goodman v J Evan Ltd* (1954) 1 QB 550), it did not accept that the use of letterhead for a memorandum of fees without anything more met the requirement of s 194(1). The wording of the section required that something be added to the bill of costs which identified it as having been adopted by the party sending it.

The court also confirmed (in connection with the requirement of reg 22A(h) above) that the other matters in subclause (h) need only be particularised if the costs need to be justified on some other basis, such as the practitioner's skill, labour and responsibility; the complexity, novelty or difficulty of the matter; the quality of the work done; or any other relevant matter. Such additional justification was not (as Johnstone DCJ had found) required here.

In all respects the Court of Appeal agreed with Johnstone DCJ but went further, to say (at [46]):

> Even if that were not the case, the relationship between the barrister and the solicitor was such that there was no obligation of disclosure as between them [*Hogarth v Gye* above].

The wording of the section required that something be added to the bill of costs which identified it as having been adopted by the party sending it.

Because of the finding that the accounts satisfied the requirements of reg 22A and ss 192(1) and 194(1) of the Act, the court did not consider the first ground of appeal, which challenged his Honour's finding that, properly characterised, the barrister's claim did not constitute 'proceedings for the recovery of costs'.

This of course begs the question of whether the traditionally sparse information in a counsel's fee note would be sufficient for a client seeking later on to challenge the reasonableness of counsels' fee. But that is a fight for another day. ●

Alyson Ashe,
Alyson Ashe & Associates,
Legal Costs Consultants;
<*royleg@bigpond.com*>.

PRACTICE update

Legislation

Bills introduced

- Courts Legislation Amendment Bill 2007 (NSW)
- *Evidence Amendment Act 2007* (NSW): assented to 11 November 2007
- Legal Profession Bill 2007 (SA)

Legislation passed

- Legal Profession Amendment (Education) Act 2007 (Vic): assented to 25 September 2007

Rules and statutory instruments gazetted

- District Court Amendment (Appeal Against Determination of a Costs Assessor) Rule 2007 (NSW)
- *Uniform Civil Procedure Rules (Amendment No 17) 2007* (NSW)

Judicial speeches

Chief Justice J J Spigelman 'Judicial appointments and judicial independence' address to the Rule of Law Conference, Brisbane, 31 August 2007.

Chief Justice J J Spigelman 'Commercial litigation and arbitration: new challenges', address to the first Indo-Australian Legal Forum, New Delhi, 9 October 2007.

Justice Keith Mason, 'Throwing stones: a cost/benefit analysis of judges being offensive to each other', address to the Judicial Conference of Australia Colloquium 2007, Sydney, 6 October 2007. ●

Speeches are available at <*www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speeches*>.

PUBLISHING EDITOR: Bridget Brooklyn BA (Hons) PhD PUBLISHER: Susan Robinson PRODUCTION: Christian Harimanow
SUBSCRIPTION INCLUDES: 10 issues per year plus binder SYDNEY OFFICE: Locked Bag 2222, Chatswood Delivery Centre NSW 2067 Australia
TELEPHONE: (02) 9422 2222 FACSIMILE: (02) 9422 2404 DX 29590 Chatswood www.lexisnexis.com.au darren.smith@lexisnexis.com.au

ISSN 1448-6415 Print Post Approved PP 255003/00767 Cite as (2007) 5(1) *CPNN*