Litigation Lawyers Report

by Sally Gearin,
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Litigation Lawyers Group

The second Litigation Lawyers meeting was held on 19 September.

Copies of the minutes have been circulated to all firms.

John Neill's paper formed the basis of the discussion which is summarised below.

Work Health

In the event of payments being terminated it is not possible to get a determination made on interim payments at an early time. It was noted that the legislation does not provide for such matters to be dealt with on an urgent basis.

Local Court

There appears to be an inadequate number of magistrates.

Matters were being triple listed but were not being reached on the due date with the result that barristers and solicitors were waiting around with witnesses for hours. The additional cost is being borne by the client and is reflecting badly on the profession and the legal system.

The suggested means of avoiding the situation of triple listing is: (a) for some cases to be on a standby list which backs up other cases; (b) other cases to be on a fixed list date, for example when interstate witnesses are required to give evidence; and (c) some others to be on a "warned" list such that when a magistrate is unexpectedly available other hearings can be dealt with, for example where there is no oral evidence, the case is ready to proceed on short notice and the case can be dealt with in one day.

Some of the other matters set out below in relation to Supreme Court listing procedures also apply to the Local Court.

Supreme Court

The Registrar is not acting as a mediator to attempt to resolve matters or to provoke settlement. This is increasing cost and creating delays as the matters are still settling on the door of the Court. This is not only taking up days which would otherwise be available for other matters to be listed, but is increasing cost as the matter must be sufficiently prepared to proceed on the listed day.

Listing conferences are a waste of time because the Master is not active enough in ensuring matters are ready to proceed.

The Registrar/List Clerk meetings are also a waste of time resulting in an unnecessary increase in cost with practitioners being required to attend on call. The Registrar and List Clerk are inexperienced and do not have any statutory authority to require compliance with any directions which may be made. One solution is to increase the salary of the Registrar so the position is an attractive proposition for a more experienced practitioner and to give the Registrar more power.

Another suggestion was that judges specialise in different areas rather than participating in all areas of law as appears to be the case at present.

Discussion ensued regarding the desirability of having a list of documents prepared and lodged with pleadings. If the list of documents was prepared at the time of the statement of claim, for example, the pleadings would be more likely to be accurate. It was suggested that application could be made for exemption if the matter required it, for example with expiration of a time limit or for an urgent injunction. A countering argument was that the list of documents should await the close of pleadings so that the broad range of inquiry on discovery could be narrowed by pleadings.

The question of early discovery was raised. This can be ordered even prior to institution of proceedings in appropriate cases.

It was noted that Order 48 contained all of the powers of the Master to deal with each of the problems which had been raised. There appears to be no power in the Registrar to sanction any directions given.

In listings hearings before the Trial Judge there needs to be a real assessment of what issues are involved in the case with penalties for failure to properly prepare for those listing hearings. The listing hearings should take place some time prior to the listed hearing date -- six weeks, for example.

Discussion ensued regarding a judge being brought in to participate in the proceedings at an early time so that the judge is having positive input into what becomes a judge-driven case list. It was noted that Justice Martin was interested in developing such a procedure. It was suggested that a judge be drawn into category B and C matters, and it was suggested that the judge be involved in the conduct of cases at an early time.

Status Assessment meetings not before two months, for example, within 14 days of delivery of the defence.

The proposition in John Neill's paper was discussed whereby penalties in costs be awarded against solicitors for failure to properly attend to matters on the basis that they can apply to have the cost order against them set aside within 14 days. It was raised that this would create a conflict of interest between the solicitor and the client each time it occurred and would use up time and costs which would need to be charged back to the client. Further, it was noted that there is already a procedure for financial adjustment between the solicitor and the client in the event of failure by the solicitor to properly attend to a matter.

Power to discipline solicitors and barristers by costs already exists. It is not an automatic rule. However, barristers and solicitors and officers of the court bound by the rules of the court and if they are not doing their job then provisions exist for them to

be dealt with by the court.

A suggestion was raised that barristers should also be responsible for failure to properly draw pleadings to avoid amending pleadings at the time the matter comes before the court. In the case of some pleadings, new facts or documents come into existence brought about, for example, by a change in the law (restitution and estoppel). Circumstances can arise which require amendment pleadings which are not the fault of the lawyers involved.

It was noted that refining issues were supposedly good, but sometimes the refining of issues requires amendment to pleadings.

The prospect was raised of the client, solicitor and counsel being involved in an appearance at least one month before the hearing. A problem arises if there is open discussion in that a judge presiding is then precluded from sitting on the case. A comparison was drawn with the resolution phase of litigation in the Family Court before the Registrar which, it was reported, had a great deal of success.

The prospect of reducing evidence in chief to writing was raised, as in commercial causes jurisdiction in the Supreme Court in Victoria. The evidence in chief was settled by counsel before the hearing and the parties obtained the benefits and comments from the judge after reading those briefs of evidence. This would move away from the element of surprise and may overcome the need for an extra judge. It was noted that civil hearings are now being listed for October 1993. A comparison was drawn with the Federal Court where the proceedings are judge-driven with judges making directions and requiring compliance at various stages. The cases are assigned to the same judge so that the judge can see the case as it develops and contribute to its direction.

The question of penalties for failure to comply was discussed. An order could be made that witness statements be required from the parties after the close of pleadings or before the pre-trial conference before the judge.

A suggestion was to standardise indexing in documents so that the statements could refer to, for example, D17 in discovery thereby using the affidavit of documents in other documents. The statements of evidence or affidavits to be available before the matter is listed for hearing so that the length of hearing can be assessed. There would also need to be a kind of voire dire day before the final hearing to eliminate objectionable material in affidavits.

Leave could be granted to file supplementary material. Such leave could be obtained from the controlling judge.

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(continued)

Discussion ensued regarding the proceedings in the Federal and Family courts. In the Federal Court orders can be made for affidavits for evidence in chief. In the Family Court, the trial of property cases involves commercial elements such as corporate structures and valuations of businesses. Experts reports in advance are already required under the Supreme Court Rules to enable some issues to be resolved in advance.

Discussion ensued regarding whether there should be any examination in chief. Difficulty with giving "colour" to evidence was raised, for example explaining the extent of pain in a personal injuries action.

Factual issues will still have to appear in black and white. This would halve the length of trials. the length of the trial could be extended to permit and extra, say, two days to enable the judge to prepare his judgment and hand it down at the conclusion of the hearing rather than the present system of waiting on judgments for months and years.

In the Planning Appeals Committee evidence is all in black and white thereby making it possible to hone in more quickly on the issues. If all evidence was available at commencement of the hearing it would be possible to prepare an ex tempore judgment.

Pre-trial conferences in the Family Court are used with success. Facts in issue are pleaded, then there is a pre-trial conference on a without prejudice basis. Following that there is a programming phase for filing evidence in chief. If the plaintiff doesn't file, there is no trial and an interlocutory summons can be made to strike out a claim. If the defendant fails to file, the trial is deferred. Cost orders are then made for counsel fees, etc.

If you have views which have not been addressed and you wish them to be included, please contact Danny Masters on 430400 within the next 14 days.

The recommendations of this group will be presented to Mr Justice Martin and Mr Gray CSM by Trevor Riley and Danny Masters at the end of this month.

Thanks to all those practitioners who attended.

The next meeting is scheduled for 9.30am on Saturday 31 October at William Forster Chambers. The agenda is: (1) Delays in the delivery of judgments (Trevor Riley QC), and (2) Video conferencing (Alan Dawson, Office of Courts Administration).

We look forward to seeing you there.

HELP

The Darwin Community Legal Service needs volunteers for its free legal advice sessions (three a week). Contact Margaret on 413394 if you can help.