Queensland Law Society

District Court Seminar

"New Strawberries and Old Chestnuts"

by Judge DJ McGill

Broadly speaking there are two areas I want to address this morning. In the first place I want to say something about a few changes which have occurred in the civil side of the District Court in recent times, or in one case, is anticipated. Apart from that, I want to say something about applications to the District Court, most of which will involve going over familiar territory in the sense that it involves telling you things you should know about already, or addressing common problems which have been common problems for a long time. The fact that they are still common problems suggests that this part of the exercise is not a complete waste of time.

The Moynihan reforms

The first significant recent development was the changes to the District Court's civil jurisdiction as a result of the government's response to the Moynihan Report. That was implemented by an Act with the short title of *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act* 2010.[1] The changes to the District Court civil jurisdiction commenced on 1 November 2010; the monetary limit was increased from $250,000 to $750,000, and there were some other, less impressive changes made, on which I would like to focus (since I suspect everybody knows about the major change).

Most people know that, for the purpose of applying the monetary limit, the value of land is generally taken to be the valuer general's valuation, which in practice is usually much less than the market value of the land. As a result the District Court often has jurisdiction to deal with specific performance actions involving quite valuable land, though in practice few of these seem to come to trial. There was, however, a bit of a trap with this provision: prior to the commencement of these amendments, this mechanism only applied in the case of actions for specific performance, to recover possession of land, or to restrain any actual threatened or apprehended trespass or nuisance to land.[2] It did not apply, for example, to claims in relation to a partnership where the property of the partnership included land, it did not apply to applications under the *Property Law Act* in relation to jointly owned land, it did not apply to actions for the execution of a trust or a declaration that a trust existed where the trust was supposed to include land, and did not include the determination of a question of construction arising under an instrument in respect of the rights of persons involving property which included land. For those purposes, one used the market value of land.

That restriction has now been removed, so that subsection 68(3) provides that the valuer general's valuation (if there is one) is to be used "for the purpose of determining whether or not the District Court has jurisdiction *under this part*". I have, however, emphasised the words "under this part" because the use of a valuer general's valuation in this way is only applicable where the court is exercising jurisdiction conferred by

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1 Act 26 of 2010; that really is the short title; the long title runs to 128 words.

2 Ie the proceedings falling within subsection (1)(b)(iii), (xi) or (xii): see the then s 68(3)(b).

Part 5 of the *District Court Act*. That applies to most jurisdiction the court exercises, but sometimes the court exercises jurisdiction conferred under another Act.

For example, Part 19 of the *Property Law Act* confers jurisdiction on the District Court in relation to de facto property disputes, under s 329 of the *Property Law Act* 1974, but subsection (4) of that section provides that "in a proceeding the District Court … may make an order or declaration concerning an interest in property if the value of the interest is more than the court's monetary limit only if … a document has been filed under … s 72." Section 72 permits the parties to agree to have a matter involving more than the monetary limit litigated in the District Court; there have been examples of such cases, though they are quite rare. For present purposes, jurisdiction to make an order or declaration in such a case is not jurisdiction conferred "under this part" for the purpose of s 68(3), it is jurisdiction conferred under the *Property Law Act*, and therefore in order to determine whether the value of the interest the subject of an order or declaration is more than the court's monetary limit one looks not at the valuer general's valuation of any land covered by the order, but at the true or market value of the land. That limitation has not been changed by the amendment to s 68(3).

Another example of a situation when jurisdiction is conferred by another Act is s 138B(1) of the *Competition and Consumer Act* 2010 (Cth),[3] which confers jurisdiction in respect of any matters arising under the *Australian Consumer Law* in respect of which a civil proceeding is instituted by a person other than the minister or the commission. That jurisdiction is conferred on the several courts of the state "within the limits of their several jurisdictions, whether those limits are as to locality, subject matter or otherwise."[4] When that section applies, one looks to the State Act, that is Part 5 of the *District Court of Queensland Act*, in order to determine the limit of the jurisdiction of the District Court, and that includes s 68(3)(b). Accordingly, for the purposes of a claim under the *Australian Consumer Law*, if the value of land is relevant to the determination of whether the monetary jurisdiction has been exceeded, one can look at the valuer general's valuation. This of course does not apply when one is seeking damages, even if the calculation of the damages depends on questions involving valuation of land.

I suppose what all this boils down to is that there is still a trap lurking in s 68(3) in relation to how land is valued for the purpose of determining whether a proceeding is within the monetary limit, but the area where that trap applies has been reduced.

The legislative response did not extend to the approach adopted in some of the States, of conferring on the District Court all the jurisdiction of the Supreme Court except in respect of certain nominated matters. Nevertheless, in matters where the District Court has jurisdiction, s 69 confers on the court all the powers of the Supreme Court. There has been some debate in the past as to whether or not that includes a power specifically conferred on the Supreme Court under a different Act; for example, the power under the *Land Title Act* 1994 to remove a caveat.[5] The situation has now been clarified by

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[3] Formerly the *Trade Practices Act* 1974. Section 86(2) formerly conferred jurisdiction on the District Court in many matters under the Act, but it is now confined to matters enforcing industry codes under Part IVB.

[4] Section 138B(3).

[5] *Land Title Act* 1994 s 127: "The Supreme Court may make the order …".

adding to s 69(1) the statement that what s 69 confers includes "the powers and authorities conferred on the Supreme Court by an Act."

This means, for example, that where the *Land Title Act* conferred on the Supreme Court a power to remove a caveat, the District Court will now have power to remove a caveat, but only for the purpose of exercising jurisdiction conferred by Part 5 of the *District Court of Queensland Act*. The practical effect of that is that you cannot rely on s 69 as a free-standing conferral of power to do something; s 69 operates only where there is already a proceeding within the jurisdiction of the District Court under s 68. It follows that one cannot simply bring an application to a District Court judge for an order that a caveat be removed. On the other hand, if (say) a proceeding is brought for the determination of a question of construction arising under a contract for the sale of land, and seeking a declaration that the contract has been validly terminated by the plaintiff or applicant (within s 68(1)(b)(xiii)), the plaintiff or applicant may also seek an order that a caveat on the land be removed.

The jurisdiction under s 68 must be invoked before the power under s 69 arises. The practical effect of this is that the District Court does not have power to grant an injunction prior to the time when a proceeding has been commenced, or, to put it another way, one cannot simply file in the District Court an originating application just seeking an injunction, unless it can come within one of the paragraphs in s 68(1)(b). Accordingly, the District Court cannot grant a freezing order in anticipation of a proceeding being commenced. This is confirmed by s 69(3), which declares that the District Court may grant a Mareva injunction or Anton Pillar order *in proceedings in which jurisdiction is conferred under this part*. There is no jurisdiction to make such an order prior to the commencement of such a proceeding, and any such purported order is of no effect. (It may be that some judges have in fact made such orders, and such orders have in fact been respected, although there was nothing to require the person against whom they were made to obey them. Such a course, however, is very risky. An order made without jurisdiction is not merely subject to appeal, it is a nullity.)[6]

The limitations of s 69 were explained some time ago by the Court of Appeal in *Startune Pty Ltd v Ultratune Systems (Aust) Pty Ltd* [1991] 1 Qd R 192 and *Matelot Holdings Pty Ltd v Gold Coast City Council* [1993] 2 Qd R 168. I will not go through those decisions in detail today, but I can say that I have all too frequently had occasion to refer practitioners to them.

I should also mention that s 75 of the *District Court Act*, which provides for trial by a civil jury, was amended so as to provide that a jury is not available in a matter where the amount claimed is not above the Magistrates Court jurisdictional limit, currently $150,000. This was to prevent people from bringing in the District Court claims which would otherwise have been brought in the Magistrates Court, just so as to obtain a jury trial. There are not too many situations where one can still obtain a jury trial in a civil matter, but (sadly, in my view) there are still some and s 75 acts as a useful cut-off in relation to more minor matters.

In the past when monetary limits have been increased, the opportunity has been taken to move into a lower court existing proceedings which now fall within the increased

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[6] Because the District Court is an inferior court.

jurisdiction of the lower court; no doubt as a result of the fall off in civil litigation in recent years, there are no courts in Queensland which are currently feeling the pressure of civil business, and as a result ss 77 and 78 have been amended so as to provide that matters are not to be transferred down just as a result of the increase in jurisdiction pursuant to this amending Act. Existing proceedings will therefore stay where they are (unless they could have been transferred down anyway).

Section 118(2) was amended to provide an appeal as of right in respect of interlocutory orders in relation to matters where a final order would have been subject to an appeal as of right, which was a sensible change. Finally, I should mention that the amendments made to ss 68, 75 and 118 apply only to proceedings commenced on or after 1 November 2010; presumably the amendment to s 69 does apply to existing proceedings.

District Court Commercial List

No doubt as a consequence of the increase of the monetary limit of the District Court civil jurisdiction, the Chief Judge of the District Court has now established a commercial list for the District Court, by Practice Direction No. 3 of 2010, made on 29 October 2010. This practice direction is based heavily on the practice direction which is the foundation of the Supreme Court commercial list; indeed, much of the Supreme Court practice direction is simply adopted by reference. At the present time there are four commercial list judges, not because the list is much busier than the Supreme Court commercial list, but because the District Court commercial list judges are not given extra time in their calendars for commercial list matters, so that such matters will have to be fitted into the ordinary civil list calendar time. This is not expected to be a problem.

As with the Supreme Court, at any given time there is one commercial list judge rostered as the judge to deal with applications to list a matter on the commercial list. Ordinarily, if a commercial list judge is the applications judge, that judge will also be the judge to deal with applications to list on the commercial list; otherwise, such applications are usually heard by a commercial list judge who is in the civil list. For the time being at least, the District Court commercial list will be managed by the District Court civil list manager, and enquiries in relation to listing an application to list a matter on the commercial list should be made to him; there is in the practice direction an email address, and contact by email is encouraged.

One difference from the Supreme Court is that the test for listing a matter on the commercial list in the District Court is simply that a commercial list judge considers that it ought to be placed on the commercial list. The practice direction provides, however, that ordinarily that will apply only to a defended matter of a general commercial character or arising out of trade or commerce in general, and gives a number of examples. Most of these overlap with the Supreme Court list; there are a few matters on the Supreme Court list which are not duplicated on the District Court list because of considerations about jurisdiction. One significant addition to the District Court list is "building disputes", a matter not particularly encouraged on the Supreme Court commercial list. It must be borne in mind, of course, that matters which are not on the commercial list receive a good deal of supervision anyway in the Supreme Court, either through the supervised case list or through the registry under a practice direction,

whereas in the District Court most matters are not supervised unless they are sufficiently significant to attract the attention of the Chief Judge, or are referred to the Chief Judge on the initiative of an applications judge. (This is to avoid the additional legal costs to the parties commonly associated with case management of proceedings.)

Commercial list judges are conscious of the fact that a large part of the success of the Supreme Court commercial list has been due to the flexible approach to the resolution of disputes, in particular by the identification of key issues for early determination. So far there has been little activity involving the commercial list in the District Court; I have made only one order placing a matter on the commercial list. Only time will tell how much use is made of this list, and how successful it will be, in the District Court.

Proposed repeal of the *Supreme Court Act* 1995

When the Rules Committee was established under amendments to the *Supreme Court Queensland Act* 1991 made by the *Civil Justice Reform Act* 1998, one of the functions conferred on it was to "advise the minister about the repeal, reform or relocation of the provisions of the *Supreme Court Act* 1995": s 118C(2)(a). Because of pressure of other work, and because of the substantial nature of this assignment, it has taken the committee some time to complete this task, but it is close to finalising an advice to the minister in compliance with this obligation. A draft of that advice was placed on the court website late last year, and has been made available to the Law Society and the Bar Association for the purposes of consultation.

I should say something by way of background about the *Supreme Court Act* 1995. If ever any of you have had occasion to look at that Act, you may find it rather surprising, particularly for an Act of that vintage. The explanation is simply that it is only nominally an Act of that vintage. For a long time Queensland has had a number of different Acts governing the constitution and operation of the Supreme Court, and additional Acts dealing with matters of civil procedure. When the *Supreme Court Constitution Amendment Act* 1861 was largely superseded by the *Supreme Court Act* 1867, some sections were left unrepealed, and thereafter new Acts generally changed or modified the operation of earlier Acts rather than completely superseding them.

Apart from that, in 1867 there were a number of Acts passed which reproduced statutory reforms from England, most of which had been adopted by legislation in New South Wales prior to separation, but which were readopted in this legislation. Subsequent Acts producing procedural reforms, such as the *Judicature Act* 1876, largely built on the existing foundation, and often not too much attention was paid to the need to repeal provisions of earlier Acts which had become irrelevant as a result of later Acts.

When the Queensland statutes were reprinted in 1936 there were a total of 28 Queensland Acts and one Imperial Act listed under the heading "Supreme Court", while a further 22 Queensland Acts (or sets of rules) and two Imperial Acts appeared under the heading "Practice". The situation was not much better when the 1962 reprint was prepared, where the combined heading "Supreme Court and Practice" filled two volumes. Volume 18 comprised the annotated Supreme Court rules, while Volume 17 set out 19 separate Acts which fell under that combined heading.

Not surprisingly, the Law Reform Commission looked at the question and after many years' study and a good deal of work by particular individuals, produced a report on a bill to consolidate, amend and reform the Supreme Court Acts and ancillary Acts regulating civil proceedings in the Supreme Court: QLRC 32. This did not entirely supersede all of the existing ancillary Acts, but it did supersede almost all of the Supreme Court Acts, and did clear away a good deal of what had become obsolete.

Unfortunately the recommendation of the Law Reform Commission was not adopted by the government of the day; this may have been due to the controversial proposal to create a Court of Appeal within the Supreme Court. In 1990 an updated version of the draft bill was provided by the Law Reform Commission to the government, but that was also not adopted in 1991 when the *Supreme Court of Queensland Act* was passed. That Act followed the pattern of other Supreme Court Acts since 1867, by legislating for changes in those particular areas where change was proposed, but otherwise leaving provisions as to the structure and operation of the Supreme Court scattered over a range of other Acts. The 1991 Act in its original form had really nothing to say about matters of civil procedure, except that Part 7 provided for a litigation reform commission, the function of which included to make reports and recommendations with respect to court practices and procedures, including the laws of evidence: s 75(1)(b).

I do not know whether the Litigation Reform Commission did anything with a view to carrying forward the Law Reform Commission's work on procedural reform. In any event, in 1995 the legislature, possibly despairing of any early resolution of these matters, gathered up virtually all of the old legislation and relocated it to the *Supreme Court Act* 1921 which was then rebranded the *Supreme Court Act* 1995: s 2. This was certainly consolidation without reform. The explanatory note for these amendments indicated expressly:

> "Nor is there any intention to update the relocated provisions in anything but a minimal way. Later reform of legislation relating to the Supreme Court will, however, be assisted by bringing the provisions presently scattered over 19 Acts into a single Act."[7]

An important step forward, however, occurred with the *Civil Justice Reform Act* 1998. Apart from making a number of changes to the 1991 Act in other respects, this Act laid the foundation for the Uniform Civil Procedure Rules, and inserted into the 1991 Act a new Part 7 which dealt with a number of procedural matters which applied to all three state courts. It also significantly provided for the provisions of the 1991 Act in this amended form, and the Uniform Civil Procedure Rules made under it, to prevail over the *Supreme Court Act* 1995.

The Rules Committee which was also established by the amendments made in 1998 has had a lot on its plate since then, particularly finalising the terms of, and getting bedded down, the Uniform Civil Procedure Rules. There has also been a host of other distractions, but ultimately the question of what to do with the 1995 Act has been tackled. Basically the intention is to have a separate statute, the *Civil Proceedings Act*, which will deal with procedural matters in a systematic way, and also deal with those substantive matters included in the 1995 Act which ought to be retained. There are

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[7] Queensland Acts 1995 Vol 4 p 3021.

some matters in the 1995 Act which can be conveniently relocated to other statutes, but generally those parts of it which are worth retaining will be put into the new Act.

A lot of it is not worth retaining. It largely comprises procedural provisions which were reforms in their day, but have been overtaken by later reforms. For example, the *Judicature Act* reforms made irrelevant a good deal of pre-*Judicature Act* reform, but there was little attempt to clear away the earlier provisions which had become irrelevant. I think also that there was in the past a good deal of concern about repealing procedural provisions because of the risk that that would interfere with existing proceedings or existing rights which would not be covered by the new provisions. Whether that was a realistic concern or not I cannot say, but it does seem to be the only plausible explanation for the retention of a number of provisions which ultimately ended up in the 1995 Act.

In addition, the Rules Committee is seeking to reform the 1991 Act, so as to move provisions dealing with procedural matters applicable in all three courts into the new Act, while moving into the 1991 Act all of the provisions of the 1995 Act which are still relevant to the structure and organisation of the Supreme Court. The result will be that the 1991 Act will deal comprehensively with the composition, structure, organisation and operation of the Supreme Court, but will not deal with procedural matters applicable to all three courts; relevantly, the District Court. On the other hand, the new *Civil Proceedings Act* will contain a good deal of the statutory foundation for the way civil proceedings are conducted in Queensland.

That, however, would not change in any practical way as a result of the passage of the Act. This is not the sort of reform which is directed to changing the way things are done; it is rather directed to tidying up the statutory basis for the existing court procedures. Up until now the 1995 Act has been very difficult to use. There is no index, and the provisions are arranged essentially chronologically, so it is difficult to find provisions relating to a particular topic. Even if one finds a relevant section, there may well be another section somewhere in the Act which modifies or even reverses the operation of the earlier section. When one has identified the relevant sections, most are still drafted in the 19th century style which is difficult to understand these days. As well, when one has identified and come to grips with the meaning of relevant provisions of the 1995 Act, that is not the end of the matter; it is still necessary to consider whether there is anything in the 1991 Act, or in the Uniform Civil Procedure Rules, which is inconsistent with what is in the 1995 Act, because if so it takes priority. The effect of all this is that in practice one does not often find people relying on something in the 1995 Act.

Hopefully the new *Civil Proceedings Act* will be much more accessible, and will provide a proper statutory foundation for procedural matters. Some matters currently governed by the rules, in particular the power to permit matters to be proved other than strictly in accordance with the rules of evidence in certain circumstances, and the rules dealing with judgments for the return of chattels, would be moved to the Act, and the rules will have to be adjusted accordingly. Other practical changes include that the ADR provisions, which currently appear in identical terms in three different Acts, would be replaced by one set of provisions in the new Act, which would also gather up and rationalise all of the provisions dealing with the transfer of proceedings from one court to another. You should all know the District Court rule in relation to

counterclaims: if a counterclaim seeks relief otherwise not within the District Court's jurisdiction it is a matter for someone to apply to remove the proceeding or the counterclaim to another court, otherwise the court is given jurisdiction to hear and determine it. One change which would be effected is that that rule would be extended to the Magistrates Court. There are, however, not many real changes proposed to be made by this Act. It is essentially an exercise in tidying up the accumulation of statutory baggage as a result of numerous ad hoc reforms over the years, which have generally not been implemented in a systematic way, and have not in the past resulted in a careful consideration of the impact of the new provisions on the existing legislation.

Much of what would be swept away with the repeal of the 1995 Act is really, really obsolete. It has often been necessary to delve into the dark recesses of pre-*Judicature Act* procedure in order to identify just what it is that these sections are talking about, and to understand just what was being achieved by late 19th century Queensland legislation which generally adopted, in a reasonably unquestioning fashion, early 19th century English legislation.[8] The English procedural reform in the early part of the 19th century was frequently somewhat tentative and limited, and most has been overtaken by more sweeping reform since that time. It has often been easy enough for the Rules Committee to conclude that a particular section was obsolete and should be repealed, but more difficult for the committee to explain exactly why it was obsolete, in terms of the actual intended operation and effect of the provision.

The committee has prepared as part of its report to the minister a section by section analysis of the 1995 Act, indicating in those cases where the committee's advice is to repeal the section just what the committee understands the section achieved originally, and why that is no longer relevant. Hopefully, that will provide an adequate justification for the repeal of those provisions.

It is to be hoped that the recommendations of the Rules Committee, which should be uncontroversial, will be speedily enacted. No doubt there will be further reform in the future, but at least the Supreme Court would move into the second half of its second century with a single, coherent, comprehensive statute which could be the basis for any further reform. In addition, all courts would benefit from a single, comprehensive statute for procedural law, which hopefully will continue to be the sole repository of such law, with future reforms being effected only by amendment to that statute.

Applications practice

In April 2007 I distributed at a Law Society advocacy workshop a series of tips to overcome problems commonly encountered in District Court chambers. The list was not novel; it was based on other lists which had been prepared by other judges in the past, but it was still useful then, and in the modified form attached is (hopefully) still useful today. I do not intend to go through all of the tips, but I do want to say something about two particular matters.

The first is a question of jurisdiction. I have already had something to say about jurisdiction in the context of some of the changes to jurisdictional matters made by the legislation implementing the Moynihan report. Nevertheless, this is an area which it

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[8] At the time this was, on the whole, not a bad thing; the English Acts were generally worthwhile reforms, as far as they went.

seems to me cannot be overemphasised. Most weeks when I am sitting in applications at least one matter comes before me where, on the existing documents, the District Court does not have jurisdiction. Sometimes this is simply a matter of making an amendment to the claim or statement of claim, or the originating application, but often the end result is that I simply transfer it to the Supreme Court. Such issues are almost inevitably avoidable, and they show that insufficient care is being taken by many practitioners about the question of jurisdiction.

It is all very well if you are in the Supreme Court, which is in the technical sense a superior court, to assume the court has jurisdiction unless somebody raises the issue. That is not the case with the District Court, which is technically an inferior court, which means that its orders are not necessarily valid unless set aside either on appeal or otherwise; they are only valid if in fact the court has jurisdiction, otherwise they are a nullity. It is therefore a matter of some importance, if you want to get an order which is actually effective, to ensure that the District Court does have jurisdiction in the proceeding. If you are coming before me on an applications day you certainly need to be able to answer the question: "How do I have jurisdiction in this matter?" In practice you will not be asked it in the great majority of cases; I won't ask the question just to test you, though I can't guarantee that none of my colleagues would. But if you don't think about these things in advance, and I do ask the question because I have some real doubt about the matter, it is not very comfortable at that point to be considering the question of jurisdiction for the first time.

That deals with the question of whether the originating process has properly invoked the jurisdiction of the court. It is also relevant to consider the basis on which the court has power to make the particular order being sought on that occasion, if that is a different question, as it usually is. You should always think about these matters in advance.

Another matter which is unsatisfactory is a failure to have regard to one of the simplest and most straightforward practical aspects, the question of the title to a document. There are rules about this, but they are not complicated; one rule, which permits a concise alternative to a full title to be used on most documents, is almost never used in practice, so that in cases where there are numerous parties it is commonplace to have a page or two of title before anything of substance appears in an affidavit. There is no reason for that.

But the real problem seems to lie with interlocutory applications. These take the title of the principle proceeding, obviously enough, though surprisingly lots of people do not realise that, and treat an interlocutory application as a justification for rewriting the title or inventing a new one. It is not uncommon to see an interlocutory application in a proceeding started by claim which refers to an applicant and a respondent, who are generally not the plaintiff and defendant respectively. That should never happen. It is quite wrong, confusing and potentially misleading.

An interlocutory application takes the same title as any other document in the proceeding. Where the proceeding was commenced by a claim, the words "applicant" and "respondent" are never used in the title. Indeed, in such a proceeding they should never be used at all, anywhere, ever. There are few things more unhelpful than a statement in an interlocutory application in a proceeding commenced by claim: "This is an application by the applicant …". In a proceeding commenced by claim, there is no

applicant. There will be a plaintiff and a defendant (and there may be more than one), and there might be third parties, a defendant by counterclaim, etc, but there are never applicants or respondents.

In the same way, where there is a proceeding commenced by an originating application, there will be one or more applicants and one or more respondents, but whether a person is an applicant or a respondent depends on that person's status in the context of the originating application. If a respondent files an interlocutory application in the proceeding it is an application by the respondent, not an application by the applicant, and the person appearing for the person making the interlocutory application is not appearing for the applicant; he or she is appearing for the respondent.

This is all obvious enough, and it is a source of continuing amazement to me that it is such a common problem. There is no reason why it should now be such a common problem, though I suspect that perhaps in the past it was more difficult to get the registry to accept a document that did not have the correct title on it. Once somebody who had made these mistakes did not get the documents accepted for filing, so that such defective documents never ended up in court annoying the judge.

Another unhelpful and confusing practice is to identify a party by name and then add the words "trading as" followed by a business name. The rules permit a proceeding to be started by or against a partnership in the partnership name. If A, B and C are carrying on business in a partnership under the name D & Co, then one can sue A, B and C by suing "A, B and C" as three defendants, or by suing "D & Co" as one defendant, a partnership sued in the partnership name. One should never do both; to describe the parties as "A, B and C trading as D & Co" is quite wrong, confusing, unhelpful and tantamount to a written confession that: "I do not know what I am doing." At one time, if a partnership was sued the rules required the addition of "(a firm)"; the current rules do not require that, and it is unnecessary.

The same applies to a company which carries on business under a business name. You can sue a company "Bloggs Pty Ltd", or you can sue the business name "Bloggs Vertical Shelving" under Division 2 of Part 3 of Chapter 3 of the UCPR, but it is quite wrong to sue "Bloggs Pty Ltd trading as Bloggs Vertical Shelving". I am also of the view that including ACNs after the name of a company in the title to a proceeding is unnecessary and inappropriate, unless it is one of the very rare companies where the name is actually the ACN followed by "Pty Ltd".

The rules are quite clear about suing partnerships and suing people under business names. If you are going to use them, fine, but use them correctly. But if you know the name of the individual or company which is trading under a business name, it is so much simpler just to use the true name of the person or company you are suing. The rules are really there to accommodate the possibility that the plaintiff may not know who it is who is carrying on business under that name.

Once upon a time if you got the name wrong in an originating process it was a fatal defect, at the very least in that action, and possibly in relation to any action. These days such errors are not fatal, though they can be expensive, particularly if you end up before a grumpy old judge who disapproves of this sort of thing and punishes a party in costs for not having done things properly.