SUPREME COURT
OF QUEENSLAND

Downs & Southwest Law Association Cocktail function

Cobb & Co Museum
Thursday 23 April 2015, 5:30PM

The Hon Tim Carmody
Chief Justice

Introduction

Good afternoon to you all. It is a privilege and pleasure to be invited to participate in an event dedicated to sharing knowledge, professional development and cultivating networks among legal practitioners within regional Queensland.

I thank the Downs and Southwest Law Association and their President, Mr Darren Lewis for the opportunity to meet with you. I acknowledge the presence of Mr Ian Walker MP, Shadow Attorney-General and Minister for Justice, Industrial Relations and Arts and Mrs Walker; the Honourable Kerry Shine, former Attorney-General and Mr Ian Brown, past president of the Queensland Law Society and Mrs Brown.

As you know more than me rural and regional legal professionals are often underestimated. But the importance of your contribution to the smooth running of the Queensland justice system cannot be overstated or over appreciated. Regional lawyers are central to facilitating access to **practical** justice for those who, by reason of geographical remoteness, politico-legal vulnerability or socio-economic disadvantage, would otherwise be unable to effectively or equitably engage with the legal system. These features create challenges which do not commonly afflict urban legal practice. They also impact on the nature, time and cost of the delivery of legal services.

Accordingly, opportunities such as these must be taken to truly acknowledge the key role and function of regional legal practitioners in engaging with rural and remote communities.

100th Anniversary of Gallipoli:

Before commencing my prepared remarks, I would like to take a moment to note the significance of this time of year for all Australians as we draw closer to commemorating the 100th anniversary of the ANZACs at Gallipoli.

As the moral and ethical fabric of the legal and military professions are characterised by complementary fundamental values, which include commitment to duty, public service, personal integrity, and self-sacrifice, it is not surprising that Australian legal practitioners were crucial to the prosecution of the ANZAC Campaign.

Australian solicitors and barristers served directly as military leaders on the battlefields of Gallipoli, developing military strategy and fighting valiantly on the frontlines. As the beneficiaries of their immense sacrifice, their bravery and commitment to the protection of our nation is deserving of our admiration and commemoration.

Legal practitioners also supported the ANZAC Campaign in other equally vital ways. The legal community was principally responsible for the financing and establishment of the Red Cross Wounded and Missing Bureau in 1915. Legal practitioners also enthusiastically delivered voluntary legal services to active soldiers, often becoming involve in protracted, expensive, and complex legal disputes. Solicitors and barristers were also active in Comfort Funds, which addressed the personal needs of soldiers.[1]

It is often said that the Commonwealth of Australia was born of sacrifice on the bloodstained shores of Gallipoli. As a youthful nation – like many of our conscripted ancestors that fell during the Gallipoli Campaign – we fought courageously and honourably against a more numerous, well-trained and intractable adversary. Although this may – perhaps somewhat unjustly – marginalise the democratic origins of our country, it rightly reflects the enduring and defining legacy of the ANZACs within our national identity.

The 100th anniversary of Gallipoli is a time for us to remember, respect and revere the monumental service and sacrifice of those who form such a critical component of

Australia's national identity. It is also a time to reflect on the immense contributions made by the legal profession, whether in combat or auxiliary support, to Australia's military service.

Now let me turn to the topic I have been asked to address – chamber applications.

The History of the Chambers Jurisdiction:

The applications jurisdiction of judges in chambers is an ancient feature of the judicial administration of the common law. Indeed, the history and origins of the chambers jurisdiction has not yet been comprehensively traced. The jurisdiction does not derive from any statute or regulation promulgated by Parliament, nor is it the product of any decree or edict of the Executive. Although it is likely a procedural creation of the Judiciary, there is no singular decision within which the chambers jurisdiction was established.

The chambers jurisdiction developed as a customary procedure designed to avoid injustice and inconvenience. Historical courts – much like our modern courts – were frequently closed during festive or religious seasons, making them temporarily inaccessible to the community. Circumstantial exigencies also required the urgent determination of applications outside of ordinary court sitting hours to protect the subject of the dispute from irreversible destruction or frustration. Accordingly, the chambers jurisdiction evolved as an essential procedure to preserve the liberty and property of disputants, and the integrity and efficiency of the administration of justice.

The jurisdiction expanded proportionately to the growing demands of society for formalised judicial resolution of legal disputes. As public confidence in the judicial system consolidated, litigants increasingly turned from traditional extra-curial conciliatory and alternative dispute resolution methods in favour of judicial determinations. With elevated demand for judicial services, and scarce public funding and resources, judges increasingly

[1] Tony Cuneen, *Solicitors in World War One*, Forbes Society for Australian Legal History <http://www.forbessociety.org.au/?page_id=190>; see also Bruce Oswald and Jim Waddell (eds), *Justice in Arms: Military Lawyers in the Australian Army's First Hundred Years* (Sydney: Big Sky Publishing, 2014).

heard applications in chambers or at their residences to improve efficiency in the administration of justice and responsiveness to community requirements.

As time progressed, the chambers jurisdiction was confirmed and further expanded by statute and practice. It soon became an indispensable tool facilitating the efficient and effective administration of justice.

Controversy Surrounding the "Privacy" of the Chambers Jurisdiction:

A fundamental component of the administration of justice is that justice must not only be done, but must be *seen* to be done. A significant justification for transparency within the justice system is that it promotes public scrutiny and judicial accountability for decision-making processes and outcomes, which:

1. reduces the risk of corrupt, arbitrary, unjust or idiosyncratic judicial conduct;
2. incentivises high quality and precisely reasoned curial decision-making;
3. promotes public awareness and understanding of the justice system; and
4. facilitates the alignment of judicial decision-making with community values, standards and norms.

The cumulative effect of these advantages is to cultivate and preserve public confidence within the judicial system. Accordingly, curial transparency is a foundational requirement of a liberal democracy governed by the rule of law.

Having regard to the virtues of public and open justice, it is unsurprising that certain eminent jurists have found chambers applications to be objectionable. Indeed, in 1669 Lord Chief Justice Coke disapprovingly stated that:

> [J]udges are not judges of chambers but of Courts, and therefore in open court, where parties' counsel and attorneys attend, ought orders, rules, awards and judgments to be made and given, and not in chambers and other private places.

The claims of Lord Chief Justice Coke risk apotheosising open and transparent justice, and unjustly minimizing rival means for securing judicial accountability.

Strictly speaking, chambers applications are not *in camera* proceedings or subject to suppression. The orders and reasons of a judicial decision-maker may be scrutinised through the publication of the judgment. Any defective decisions or procedures are generally subject to the appellate and review jurisdiction of superior courts. Accordingly, despite the ostensible 'privacy' of the venue, the integrity of the administration of justice is preserved.

Any disadvantages caused by a reduction of transparency or publicity is adequately compensated by improved access to justice and convenience for litigating parties. As Sir Eardley Wilmott held in 1765:

> [Regardless of when chambers applications began], it stands upon too firm a basis to be now shaken — a constant immemorial usage, sanctified and recognised by the Courts of Westminster Hall, and in many instances by the Legislature; and it is now become as much a part of the law of the land as any other course of practice which custom has introduced and established…

Accordingly, the chambers application remains an indispensable instrument in the judicial armoury facilitating access to justice, provided appropriate measures to promote transparency are preserved.

Nature of the Chambers Jurisdiction:

Notwithstanding the historical significance of the chambers jurisdiction, parties have often argued it remains distinct from the jurisdiction of the Supreme Court. This commonly emanates from the errant hypothesis that a judge determining an application in chambers is not acting in their capacity as a "judge" of the relevant court.

This matter was resolved in 1905 by the High Court of Australia in *Parkin v James* where Chief Justice Griffith for the court held that:

> the effect of a judgment as a final determination of the rights of parties is the same whether the Judge sits in an open or in a closed room...

Consistently with *Parkin*, most jurisdictions no longer distinguish between court and chambers. In Queensland, the distinction was abolished by clause 24 of the *Civil Justice Reform Act* No 20 of 1998. Although this clause was omitted by clause 207 of the *Civil Proceedings Act* No 45 of 2011, section 93 of the *Supreme Court of Queensland Act* 1991 regards "chambers" as an outdated term, which is to be replaced by a reference to "court".

Sources of the Chambers Jurisdiction:

Notwithstanding the conceptual identity between the chambers jurisdiction and the ordinary jurisdiction of the Queensland Supreme Court, the judiciary has customarily subjected the chambers jurisdiction to certain limitations to preserve the integrity of the administration of justice. For example, it would be inappropriate – and impractical – for trials or certain contested applications to be conducted in chambers. Accordingly, the chambers jurisdiction will typically be exercised where:

1. Statute expressly provides a procedure for a matter to be heard in chambers; or
2. Practice or custom permits a particular category of matters to be heard in chambers.

Statute Provides for Chamber Procedure:

The legislature possesses the authority to expressly confer jurisdiction on a judge of the Queensland Supreme Court to hear a matter in chambers. Although it is impossible to list all statutes conferring authority on a judge to determine a matter in chambers, such legislation includes:

1. an appeal against an application made to a magistrate for an order that a private complaint be dismissed as frivolous, vexatious, or an abuse of process;[2]
2. an application for an order to protect a victim of violence by prohibiting the publication of information about proceedings;[3]
3. sentencing proceedings in relation to certain drug offences.[4]

Practice or Custom Provides for Chambers Procedure:

Aside from express statutory reference, it is a principle of statutory construction that where a statute confers powers in general terms to a court without any special limitation, either express or implied, they must be exercised in the ordinary and usual manner in which a court is accustomed to exercise such powers. Accordingly, if such powers are customarily exercised in chambers, the statutory provision will permit chambers applications.

There are a broad variety of matters which are customarily heard in chambers, including:

1. further and better particulars;
2. dismissal, default or summary judgment;
3. extension of time under the statute of limitations;
4. extension of time for notice of appeal;
5. costs;
6. criminal compensation; and
7. bail or variation of bail conditions.

Advocacy in Chambers Applications:

Chambers applications tend to be less formal than applications in court, and will often take place within a conference room or the chambers of the relevant judge. Furthermore, depending on the nature of the matter, the duration of time required to conduct a hearing, give reasons *ex tempore*, and render judgment, is frequently less than formal applications.

[2] *Justices Act 1886* (Qld), s102D.
[3] *Criminal Code* (Qld), s695A.
[4] *Drug Misuse Act 1986* (Qld), s122.

These features require certain behavioural adjustments in advocacy. To avoid embarking on a prolix treatise on advocacy, I will limit my discussion to four critical points:

1. Planning submissions for the target audience;
2. Devising a case theory and strategy;
3. Providing appropriate judicial assistance; and
4. Supplying and explaining draft orders.

1. Planning Submissions for the Target Audience:

An effective advocate plans the nature, form, content and duration of their submissions according to their target audience, namely the listed Judge. The informality and brevity of proceedings requires concise, structured, and well-reasoned arguments. This promotes persuasive and economical argumentation, whilst avoiding undesirable distraction.

One must also remember that your adjudicating Judge was likely once a formidable advocate. Therefore, emotive rhetoric and clever sophistry will be readily perceived and dispatched with appropriate contempt. Accordingly, effective advocates in chambers applications should rely on robust analytical pathways of persuasion.

Advocates must also make prudent concessions. An effective advocate need not triumph in every battle to succeed overall. Early concessions will improve your reputation and standing with the bench, and greater consideration will be given to those issues which you vigorously prosecute. Inappropriate disputation of peripheral matters wastes public resources and diverges from the issues truly differentiating the parties.

2. Devising a Case Theory and Strategy:

Effective advocates devise a strategy as part of their preparatory process. A strategy refers to a systematic course of action designed to achieve your client's objectives. It does not comprise of a cunning array of tactical manoeuvres to respond to circumstantial exigencies. Rather, a strategy is *proactive* and *shapes* emerging circumstances.

To develop an effective strategy, an advocate must be aware of the:

1. interests and objectives of their client;
2. likely interests and objectives of their opponent;
3. factual matrix of the case;
4. applicable law governing the dispute;
5. procedural history of the matter, and its likely development; and
6. commercial and legal context of the proceedings.

The strategy need not necessarily result in judgment in favour of your client. Rather, it may be to secure an advantageous settlement or inexpensively mediated agreement. However, the strategy must be compatible with the legitimate purposes of the Court.

Whilst formulating the strategy, effective advocates will generally devise a "case theory". A case theory refers to the unique combination of factual and legal findings an advocate intends to propose to the court. The case theory requires an understanding of:

1. The orders sought from the court;
2. The critical issues in dispute;
3. The facts provable on the admissible evidence; and
4. The relevant law governing the dispute.

Often, the case theory will comprise of a sequence of events, interlaced with legal argumentation, which constitutes the "narrative" which will be presented to the Court. The case theory may properly possess alternative formulations based on the likely findings of the tribunal of fact having regard to evidentiary weaknesses.

The case theory and strategy will determine any appropriate concessions to be made, the arguments to be submitted, and the tactics to be deployed during the hearing. Furthermore, it will allow the advocate to "guide" the judge through efficient and effective submissions directed towards clear objectives. This promotes an efficient allocation of public resources and significantly improves a party's prospects of success.

3. Providing Judicial Assistance:

Skilled advocates provide valuable assistance to the Court through balanced and persuasive communication. They guide the Court on the relevance and application of the law, rather than merely identifying the applicable provision. In this respect, advocates must present well-structured and reasoned submissions synthesising the factual and legal matrix. This requires prudent concessions to ensure the Court is not side-tracked by peripheral or non-contentious issues.

Advocates possess an overriding duty to the Court and the administration of justice. As chambers applications are typically informal and brief, they must provide an accurate representation of the strengths and weaknesses of their case. This is particularly important in *ex parte* proceedings relief where the Court will not have the benefit of the opponent's submissions. Balanced submissions assist the Court in efficiently rendering the most preferable decision whilst fortifying your reputation as an advocate.

Advocates should also ensure the accessibility of any material documents and evidence. Court files and documentation should be appropriately cross-referenced to promote navigability. However, in particularly complex litigation involving voluminous materials, an effective advocate will prepare a separate file with extracts of any material documents which will be used during their submissions. The extracts may be handed up to the Court to promote efficiency and ease of reference. All documents should be appropriately highlighted to emphasise important passages.

Although the Court is often mired in tradition, sophisticated legal practitioners are increasingly utilising information technology to assist the Court. Skilled advocates have used electronic hyperlinks to relevant documentation for the purposes of allowing the Judge to promote accessibility before, during and after the proceedings. Others have used audio-visual teleconferencing facilities to dispose of urgent applications in remote locations without a sitting Supreme Court Justice. Such emerging applications of

technology, subject to the requirements of confidentiality and document security, should be encouraged to improve the quality and efficiency of the administration of justice.

4. Supplying and Explaining Draft Orders:

As chambers applications are abridged, parties should supply draft orders to the Court. Draft orders clarify the objectives and submissions of the parties by identifying the intended outcome of the proceedings. They also ensure that a party secures all required orders to avoid unnecessary re-listings or amendments. Through draft orders, advocates assist the Court in economically disposing of matters. In urgent applications, such as applications for bail involving a change in custodial status, draft orders enable the registry to expeditiously issue the orders, allowing an early release of the accused.

The objects of certain provisions contained in draft orders are not always obvious. Accordingly, it is imperative that advocates *explain* the nature and purpose of the operative provisions of draft orders. This enables the Court to render orders which are customised to the particular needs of each accused. However, parties must diligently prepare their draft orders. Imprecisely drafted orders may result in the setting down of the matter for a future date for amendment or reapplication.

Concluding remarks

Before concluding my address, I would like to stress the importance of developing your own approach to advocacy. No two advocates are alike, and each possesses their own vices and virtues. However, the unifying principle of advocacy is your overriding responsibility to the Court and the administration of justice. Through assisting the Court, you discharge the terms of your oath and strengthen your professional standing. And always remember: as advocates, your professional reputation is your most valuable asset.

Thank you for your time, and I trust you will enjoy the rest of tonight.