What A Judge Wants: Documentary Advocacy

Remarks of the Honourable Justice Hargrave, Principal Judge of the Commercial Court, Supreme Court of Victoria at Leo Cussen Centre for Law, Melbourne

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My presentation focuses on tasks performed by parties outside the courtroom, particularly the preparation of written materials to be provided to the Commercial Court. In my view, these tasks are just as important to good advocacy as the polished oratory of counsel. So much so, I have come to collectively refer to these tasks as 'documentary advocacy'. Documentary advocacy not only assists the parties in presenting their cases effectively, it also helps the Court and furthers the overarching purpose mandated by the *Civil Procedure Act 2010*.

However, these processes are often mischaracterised by practitioners as administrative, if not overlooked altogether, and consequently performed poorly or not at all. Judicial time should not be wasted in dealing with poorly prepared court books, irrelevant or inadmissible evidence in witness statements or affidavits (where ordered), or badly structured and overly long written final submissions. Such documents represent bad advocacy and may actually prejudice a client's case.

My presentation today reflects upon what standards of documentary advocacy Judges want from practitioners and explores how new technology may be best deployed in presenting written material to the Court in commercial cases.

Practice Note project

Before moving to some particular topics, I emphasise that the Court has recently completed a significant body of work to audit, consolidate and reorganise the Court's Practice Notes. This Court-wide project involved a comprehensive set of about 48 Practice Notes replacing more than 150 Practice Notes and Notices to the Profession. I want take this opportunity to to send a very clear message to the profession. READ THE NEW PRACTICE NOTES AND APPLY THEM AS INTENDED.

There are now eight Practice Notes that relate specifically to the Commercial Court and a number of 'general' Practice Notes which have application to Commercial Court business. These new Practice Notes took effect on 30 January 2017.

The changes to the Commercial Court Practice Notes have been made with a view to:

(1) refining and rationalising case management procedures to create greater uniformity within the Commercial Court;

(2) ensuring consistent use of terminology;

(3) re-organising topics and sections of practice notes to reflect the usual course of litigation within the Commercial Court; and

(4) creating a more accessible and practical set of procedures for Judge-managed Commercial cases.

Technology

The new Technology in Civil Litigation Practice Note is an ambitious document which sets out the Court's expectations in relation to the use of technology in the conduct of proceedings, both before and during trial:

(1) It creates a presumption that dealing in hardcopy documents is to be the exception rather than the rule.

(2) It covers the use of electronic filing, discovery of documents between the parties (including the use of Technology Assisted Review), and technology-assisted trials.

(3) While it does not mandate how or what technology should be employed in a particular case, the onus is placed on the parties to consider the appropriate use of technology at a very early stage of the proceeding and to engage with the Court on the preferable approach.

(4) Various suggested protocols are included, depending on the size and complexity of the proceeding.

More about the Technology Practice Note later.

The Court Book

Much of what I am about to say may be familiar to some of you. That is because I have twice spoken on the subject of the requirements of a good court book. First, in 2012 I delivered a paper to the Commercial Law Conference, 'How to assist the Court in the efficient conduct of a large commercial trial'. Second, in 2014 I delivered a paper to a Commercial CPD Seminar at Monash University Law Chambers, 'Court book preparation and related issues'. Notwithstanding delivery of these two papers, and distribution of copies to practitioners on a fairly regular basis before court books are prepared, the Court continues to experience problems with court books.

Court books are here to stay in one form or another. As noted on many previous occasions and reinforced by the new Commercial Court Practice Note SC CC 1, court books fundamentally exist to provide the Court, the parties and witnesses with an accessible set of documents for use at trial. Whether court books are prepared electronically or in hardcopy format, they remain essential to the efficient conduct of any commercial trial — provided that they are well prepared and accessible to those using them.

However, far too many court books continue to be poorly prepared. A bad court book delays the hearing, interrupts the flow of evidence, increases the judge's workload, especially in judgment writing, and is bad advocacy.

What are the main faults of court books? In summary:

(1) The contemporaneous documents are not chronological.

(2) There is unnecessary duplication of documents.

(3) There are too many irrelevant documents, including documents of marginal relevance that are unlikely to add to the evidence.

All of these faults arise regardless of whether court books are electronic or in paper form. In fact, ironically, these problems can be magnified in electronic trials. In particular, there may be a tendency to include unnecessary and duplicate (or near-duplicate) documents simply because court book does not occupy physical space in the court room.

Enough negativity. My purpose is to give you tips on how to prepare a good court book; one which helps everyone – the judge, court staff, counsel, solicitors and witnesses.

Before turning to the simple and obvious ways to prepare a useful court book, a word on who should be involved: *the partner*, or at least senior associate, responsible for the case must take an active role. The task is often seen as essentially routine and one which can be delegated to junior solicitors, or even paralegals. That is not correct. Partners and senior associates must take 'active responsibility' for the court book.

I can hear partners groaning that this is mundane work which does not require their high skills or justify incurring their high fees. I do not agree with that view.

It undervalues the importance of the court book to the efficient conduct of the trial which, of course, is at the heart of the overarching purpose underlying the *Civil Procedure Act 2010*. A bad court book disrupts an efficient trial. If the supervising partner or senior associate does not ensure that the court book meets the basic requirements then he or she has failed to meet the overarching obligations, a fact underscored by the November 2013 decision of the Court of Appeal in *Yara Australia Pty Ltd v Oswal* [2013] VSCA 337. The applicants in that case had filed six lever arch folders of materials, in excess of 2700 pages' worth, in respect of an application for security for costs from the respondents.

The Court of Appeal held that the applicants' books 'contained voluminous unnecessary material which increased the costs for all parties and the burden on the court', very little of which was the subject of any reference in oral argument. These findings led the Court of Appeal to conclude that the overarching obligation on parties and their representatives to ensure that legal costs are reasonable and proportionate, contained in section 24 of the *Civil Procedure Act 2010*, had been breached.

In its orders, the Court of Appeal ordered each applicant's solicitor to indemnify the applicant for 50% of the respondent's costs incurred as a consequence of the excessive or unnecessary content of the application books and that each applicant's solicitor be disallowed recovery from the applicant of 50% of the costs relating to the preparation of the application books, and costs incidental thereto.

This case serves to underscore that the reach of the *Civil Procedure Act 2010* extends to the preparation of materials such as court books and that parties should exercise due care and diligence before filing materials with the Court. Where there is a bad court book, the Court may require a detailed explanation from the responsible partner as to why. Consideration will then be given as to whether the Court's powers to make practitioners personally liable for wasted costs, or limiting their right to charge their client,[1] may have application and, if so, require submissions as to why orders should not be made.

Counsel must also be involved. After all, it is counsel who must conduct the case by reference to the court book. Counsel fail to meet their duty to the Court if they do not have some involvement in the preparation of the court book, and approve its contents and organisation. Counsel should show leadership, and insist that they become involved.

The need to involve counsel may, in some cases, be a good reason to delay the provision of the court book until closer to the trial date, at which time updated witness statements containing court book references could be provided. Moreover, given the cost of preparing a court book well, delay in its preparation until completion of mediation may be appropriate.

[1] Rule 63.23 and/or 29(2)(b) of the *Civil Procedure Act*.

A further, perhaps more fundamental, reason for mandating the involvement of partners and counsel is that, ultimately, a badly prepared court book will cost more than if the job had been done properly in the first place; because it will likely prolong the trial and increase preparation costs and out of court work during the trial for all concerned – especially counsel.

I return to the requirements of a good court book. The following comments have been prepared on the basis of a paper court book. But the principles apply equally to electronic libraries of relevant documents, or an electronic court book, for the purposes of an electronic trial. Technology can help solve some, but not all, of the problems I will refer to. In any event, until the necessary Government funding is secured to enable all court rooms to accommodate fully electronic trials without the need for the parties to pay for an external e-trial provider, paper court books will continue to be used — at least in the short term.

The deceptively simple task of arranging documents in chronological order may give rise to issues. For example, where there are many documents bearing the same date it is necessary to consider the precise sequence in which those documents should be arranged, to the extent possible by reference to email times, and other issues. Further, in this regard, an experienced solicitor or barrister who knows the issues in the case will be able to exercise judgment as to whether undated documents, such as file notes or notes of conversations, can be safely inserted in the chronology; rather than simply

hived off to the ‘undated documents section’ of the court book, which all too often happens.

Of course, there is sometimes a good reason to break the chronology. A good example is a bulky document. The chronology should not be broken by a large contract, prospectus or other like document. That will separate key communications from one folder to the next, with 50, 100 or more pages in between. Common sense is required. It will often be enough to include the coversheet or first page of the bulky document, and sometimes the execution and date pages, in the chronological section. Of course, if there are a few critical pages they can also be included. The full transaction and other bulky documents can then be placed in a convenient order in a separate volume or volumes of the court book.

As to duplication, I continue to be astounded at the prevalence of this occurring. Of course, there will be circumstances where duplicates are important. For example, there may be a number of copies of a document which each contain important evidence; such as email transmission and forwarding times, date stamps, draft documents, hand written annotations and the like. But even then, the mere fact that there are different versions of the same document does not mean that all differing versions must be placed in the court book. It is only if something is likely to turn on the history of or annotations on the documents that more than one copy is required. If nothing turns on those matters, then the best copy should be included, *and that copy only*. Don’t clutter the court book with email transmission receipts unless something

turns on the time or fact of receipt. The same goes for the ‘letter follows’ or is attached kind of email.

The inclusion of superseded pleadings and particulars is usually irrelevant and unnecessary surplusage. If the earlier versions are going to be relevant at trial for forensic or other reasons, begin the court book with the current pleadings and particulars only; and then have a separate section which includes the pleading history.

A court book in perfect chronological order, but which includes many irrelevant and duplicate documents, is as good as useless.

Next, how to deal with affidavits and exhibits. For example, there may have been a contested application for interlocutory relief, with the parties putting forward conflicting affidavits and exhibits. Special care is necessary. Reproducing copies of all the affidavits and their individual exhibits will usually result in lack of chronological sequence and much duplication. There may also be irrelevant documents; for example, as to the ability of a plaintiff to satisfy an undertaking as to damages.

If an affidavit remains relevant, and subject to a digression I will mention, it can be included in the court book. But only include it in the chronological section if something turns on the time it was sworn and, if so, treat it like any other bulky document — just include the front sheet and, perhaps, a short extract.

As to the exhibits, they should be included in the general chronological section — one copy only, unless something turns on a separate copy as I have discussed. The affidavit will usually make it clear enough what document is exhibited. The Court does not need copies of exhibit sheets which often litter the court book.

The digression. If a witness who is to provide a witness statement has previously sworn a relevant affidavit, consider incorporating the relevant portions only of the affidavit into the witness statement. A good way to do this is to start with the electronic copy of the affidavit, amend the exhibit references to court book references, or discovery numbers if the court book has not then been prepared, and then include further evidence beyond the affidavit evidence. Show the further evidence by italics or bold. In this way, the judge and the other parties will see the whole of the intended evidence in chief of the witness in one document — which should, of course, contain a chronological account. If this is done, there will usually be no need to clutter the court book with a copy of the witness's affidavit. The content of the affidavit will still be clear and can be used for forensic purposes if necessary. If something in an affidavit is being corrected or withdrawn — show this in the witness statement and explain why.

Key Documents

I move to a more refined and specialised aspect of advocacy by document management. I think the stage has been reached where it is the basic responsibility of commercial solicitors and counsel to review the evidence and court book in advance of trial, and to prepare a concise set (ie no more than a single folder) of the key documents in chronological order for the assistance of the Court. The copies should be taken from the court book, so they bear the court book pagination. Usually, this task will fall initially to counsel for the plaintiff. But, wherever possible, counsel for opposite parties should be consulted and given the opportunity to include key documents. The set of key documents can grow, or reduce, as the trial progresses. It does not belong to the party whose counsel initially prepared it, but is for the benefit of all parties and, in particular, the Court.

In an era of technology assisted trials, it may be appropriate to re-imagine the concept, purpose and timing of a traditional court book entirely. In some cases, all the Judge, lawyers and the witnesses may need is an abridged set of key documents in readily accessible and searchable electronic format. A separate and broader 'electronic library' of documents bearing relevance to the case can remain available throughout the trial in the event additional documents are later referred to in the course of evidence or referred to in submissions. In the event any further documents need to be drawn from the electronic library, they can be added to the set of key documents as the case progresses. In most cases the trial will conclude with the set of

key documents only being marginally supplemented but without the Court being burdened with gigabytes of irrelevant material.

Whether the court book involves only a few folders, tens of folders, or gigabytes of electronic information in a fully-fledged electronic trial, the task of preparing a set of critical documents must be undertaken. It may be time-consuming and costly, because it must involve counsel. But it saves time and money in the long run. And it helps the Court.

When I was at the Bar, I called this process the ‘concentric circle’ or ‘sieving’ approach. It is best explained by an extreme example, to show that the job can be done and that it is good advocacy.

Many years ago I was involved in a trial involving many parties, 30 or more volumes of documents, a multiplicity of claims and cross-claims and three or four rows of bar tables. My client was the first defendant, the deep pocket, and lost the big-money issue. We appealed, as did other losing parties, and there was a cascade of notices of contention and cross-appeals. The appeal books also comprised 30 or more volumes.

The appeal was listed for three weeks. As senior counsel for the principal appellant, with the onus of opening the appeal and explaining all of the intersecting issues to the Court, my junior and I took a step back to reflect how we could simplify the most complex of cases and assist the appeal court in its unenviable task. We set ourselves a

mammoth task: to prepare a single folder of key documents, and refer only to those documents in the course of our submissions — which were scheduled to take three full days. This is how we went about the task:

(1) We identified six key issues, or groups of issues, which affected our client.

(2) My junior tagged every document in the appeal books which might be classified as pertinent to those key issues.

(3) We reviewed the tagged documents together, sometimes added some, and more often deleted some as being insufficiently pertinent. Bulky documents were reduced to their bare minimum — a single face sheet and a copy of the particular clause or passage to be referred to.

(4) After these initial culls, we still had a few folders. But we sieved and sieved until we could fit the documents to which we would refer at the hearing into one folder.

(5) We then assigned a colour to each of the six key issues, and attached a tape flag bearing that colour in a graduated fashion down the right hand side of the documents. Some documents had multiple tags. But the colour coding allowed the appeal court to follow through, when writing the judgment, the key documents relied upon in respect of each issue.

(6) About a week before the appeal, we sent a copy of the folder to each appeal judge and gave a copy to each of our opponents.

(7) What happened? When I stood up to open the appeal, I received effusive thanks from the bench. They were obviously relieved to have been given something manageable to assist them in understanding the issues and following

> our submissions. With the rare occasional exception of a question from the bench which made it necessary, perhaps three or four occasions over the full three days, the appeal judges did not need to open any of the appeal books. Of course, where a relevant document arose from the Court's questioning, we had the relevant extract photocopied, hole-punched and provided to the Court for insertion in the key documents folder at a place we nominated.
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> (8) Amazingly, not one of our opponents adopted a similar course. The next cab off the rank, experienced senior counsel, had the Court rummaging around different folders and having more than one open at a time for the whole of his address. There was great annoyance from on high.

By the way, the presiding judge in that appeal made a very good suggestion about written submissions. Not only were written submissions limited in length but, on each key appeal issue, each party was required to file a concise outline limited to three pages only.

The discipline of preparing those concise outlines assisted us to refine the issues and ensure we did not waste valuable court time. Reading the judgment, it is fairly apparent that the longer submissions were mostly ignored by the Court due to the volume of material they had to digest — the concise outlines were all that was required.

That brings me to the next main focus of my presentation. It concerns the identification of the issues for determination.

Identifying the issues

The early identification of issues is a principal purpose of case management. It benefits the whole of the litigation. It ensures that discovery, the preparation of the court book and witness statements are directed only to relevant issues.

For some years now, Commercial Court judges have been requiring agreement between bar and bench as to the essential issues for determination before any evidence is given or, at the latest, before written final submissions are prepared. The process often commences with the judge's draft of the central issues for determination, based on reading the pleadings, witness statements if there are any, and what are perceived to be the key documents. I often circulate this to counsel and ask for input during the course of openings or soon after openings are completed. Other times, I ask counsel to confer and prepare the first draft. Wherever possible each issue is posed as a question — either factual or legal.

The detail of the questions depends upon the nature of the case. It is not intended that every possible factual issue be highlighted and framed as a separate issue — rather, a broader factual question will often encompass many subsidiary factual issues.

The use of an agreed statement of issues directed by the Court has legislative recognition. Relevantly, s 50A(1)(b) of the *Civil Procedure Act 2010* provides that such statements, when directed by the Court, may be used in any manner the Court considers appropriate to further the overarching purpose in relation to the conduct of the trial. Although s 50A(3) states that a statement of issues 'does not displace the function of pleadings in a proceeding', I have recently held that the statement may supplement the pleadings where appropriate — see eg *Sino Iron Pty Ltd v Worldwide Wagering Pty Ltd* [2017] VSC 101 [317]–[325].

The identification of issues in this way is vital to an efficient trial and an early judgment.

First, the process assists in the determination of what evidence is relevant. Collateral issues raised in witness statements often fall away when the real issues are defined, and objections take less time.

Second, and of greatest importance, the issues form the template for final submissions, written and oral, and are intended to be the headings in the Court's final reasons for judgment. This helps this judge enormously. It enables the judge to start drafting the judgment during the course of the trial, especially as to those uncontentious aspects of the evidence and the law. As the evidence unfolds, and factual issues disappear or their result appears obvious, the matter can be raised between bar and bench with a view to limiting the issues which require

determination. During this process, responsible counsel will often make appropriate concessions or abandon issues. This assists the Court and the parties.

The benefit of having counsel's final submissions arranged in the logical order which has been settled on at the outset of the trial, subject to refinement during the trial, cannot be understated. Put simply, it makes the task of writing the judgment easier, more efficient and quicker. That, of course, is in the interests of the parties and the Court. Judicial time is a valuable community resource which should not be wasted by dealing with irrelevant evidence, uncontentious issues, badly structured final submissions or a raft of hopeless points which are thrown in by counsel for good measure in their pleadings. The sooner the wheat can be sorted from the chaff, the better, so that the Court and the parties can focus on the real issues for determination.

I have experienced occasions where counsel have not embraced this process. They have either too readily agreed with the Court's identification of the issues, without subjecting those issues to real scrutiny, or have unreasonably multiplied the issues — often well outside the pleadings. That is not acceptable.

Pleadings

Of course, the identification of key issues for determination of the case is made easier by the existence and use of a well-drawn set of pleadings. The days of 'holding' pleadings, especially defences drawn by solicitors, have long gone. The Court will often strike such pleadings out, with costs, on its own motion. In all but exceptional

cases, counsel should draw and settle, or at least settle, pleadings. And they must put their name on them — ie take responsibility for the document. In this regard, I refer to a paper given by the Chief Justice to the Victorian Bar & Law Institute of Victoria Joint Conference on 17 October 2014, where her Honour stated:

> Most importantly, I hear from many judges, particularly in the Commercial Court, that counsel has not been briefed early enough in the case. Secondly, that delays in providing the brief to counsel have led to unnecessary and wasteful preparation. For example, pleadings. Pleading is an art. I do not suggest that practitioners cannot draw pleadings but it needs to be appreciated that there is particular expertise at the Bar and for as long as we have pleadings, which we do in litigation, then they should be prepared by the artists, not by those whose strengths lie elsewhere.[2]

I endorse the Chief Justice's comments.

I hear that the Federal Court is experimenting with using concise statements in certain cases, instead of pleadings. The profession may be attracted to this. In my opinion, however, the discipline of pleadings serves a useful purpose. The function of pleadings was stated by Mason CJ and Gaudron J in *Banque Commerciale SA (En Liqn) v Akhil Holdings Ltd* as being:

[2] Chief Justice Marilyn Warren, 'The Litigation Contract: The Future Roles of Judges, Counsel and Lawyers in Litigation' (Speech delivered at the Victorian Bar & Law Institute of Victoria Joint Conference — High Stakes Law in Practice and the Courts, Melbourne, 17 October 2014).

> to state with sufficient clarity the case that must be met … In this way, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision.[3]

However, statements of issues as discussed remain very important in trial management and judgment writing.

Drafting written submissions

Next, some tips about drafting written submissions. It is now becoming routine for judges to limit the length of written submissions at the end of the trial. Counsel often complain. They complain because it takes longer, and more discipline, to refine the submissions to a manageable length. Submissions which are too long, or too short, do not assist the Court. They usually obscure the issues and waste the judge's time when it comes to writing the judgment. Write your submissions with a weather eye out to concision and the likelihood that a page limit will be imposed by the Court, if that has not already been done. Don't think that your submissions must be as long as the limit which is set. If they can be shorter, that may involve better advocacy. If the judge wants more information, he or she will doubtless ask during the course of oral submissions, or call for further written submissions if necessary.

Consider the three page summary, or less. It is often a good idea to put that at the front of the submissions as an executive summary.

[3] (1990) 169 CLR 279, 286.

Use common sense and play by the rules. I recall fixing a 40 page limit on final submissions after a long trial. Counsel were horrified at the brevity I stipulated. One played by the rules and the other didn't. Counsel for that party prepared submissions in single space, reduced margins, reduced font size (requiring a microscope to read the footnotes) and so on. Numerous schedules of evidence on particular topics were prepared and put forward outside the page limit. It put me in a bad mood and was bad advocacy. I required that it be redone. When it was, in accordance with the rules I had set, the submissions were of a high quality and of great assistance.

A final suggestion concerning written submissions. They must be settled by the counsel who is going to present them orally — the senior counsel if there is one. It is commonplace for written submissions to be prepared by committee — involving one or more solicitors and junior counsel. This causes inconsistent expression and overlap. Senior counsel must truly settle the written submissions, not merely cast an eye over them and then deliver a final address without following the same structure or substance. That is not good enough. The Court expects counsel who is to make the final address to take ownership of the written submissions — to settle them so they speak in one voice — and to speak to them in the order in which they appear which, as I have said, will be the logical order determined by the Court and will reflect the headings in the Court's reasons for judgment.

Providing authorities to the Court

Large commercial trials usually involve the provision of sets of authorities. A number of issues arise. First, we still see competing folders of authorities with much overlap; often with different reports of the same case. Competent solicitors should know that they should confer with their opposing colleagues with a view to one joint set of authorities being provided to the Court.

Second, too many authorities are provided. This is usually because too many authorities are cited in counsel's submissions. If there is a governing High Court case, cite that only. And provide only an extract of the relevant portions of the cases. We routinely see lengthy cases reproduced in full, when only a small aspect of the case is relevant. Just provide a copy of the headnote, the relevant facts and issues, and the relevant portion of the case which is relied upon or to be referred to. If the judge wants a full copy, he will ask counsel or have his associates do so during the deliberation process.

Third, the profession largely ignored Practice Note 9 of 2011, which has been replaced by Practice Note SC Gen 3: 'Citation and authorities and legislation'. Even the largest and most well-resourced firms in town, and experienced counsel, are routinely providing cases in medium neutral form which do not comply with the Practice Note. Please take the trouble to read the Practice Note and provide the authorised report where it is available.

Technology should also be used to present the relevant authorities to the Court. The Court needs to receive a copy of all medium neutral cases in either Rich Text Format (RTF) or Portable Document Format (PDF). In addition, a list of authorities which are hyperlinked to electronic copies of those cases may be of enormous assistance to the Court.

Fourth, as with key documents, there is much to be said for reasonable endeavours being made to fit all of the authorities within one folder or the electronic equivalent of one folder. This will require more than five minutes instruction to the librarian, junior solicitor or photocopying department, but will save many trees and many thousands of dollars in legal costs. It will also save much judicial time and, together with limiting the size of court books, prevent judges' chambers looking like document storage rooms.

Use of technology generally

Before concluding, I want to return to the new Practice Note SC Gen 5: 'Technology in Civil Litigation'. It is an ambitious document which sets out the Court's expectations in relation to the use of technology in the conduct of matters, details the facilities the Court can provide and outlines protocols which may be employed in the presentation of material to the Court and the running of a trial.

The principles and procedures set out in the Technology in Civil Litigation Practice Note are particularly relevant and important in commercial litigation. As we know,

communications and dealings in the modern commercial world are predominantly conducted electronically. Moreover, a large number of discoverable documents are stored by parties electronically.

Critically, the Practice Note creates a presumption that dealing in hardcopy documents is to be the exception rather than the rule in all aspects of civil litigation in the Court. The Practice Note covers the use of electronic filing, discovery of documents between the parties and technology-assisted trials. The document is 'technologically agnostic' and does not mandate how technology should be employed in a particular case. In other words, the document does not insist on a 'one-size fits all' approach but instead is flexible enough to be used in cases of varying size and complexity.

In commercial litigation, it is critical that parties engage with each other and the Court at a very early stage about the most efficient use and deployment of technology in the running of the case. This not only reduces costs but also makes the process of running the case easier and more efficient for both the parties and the Court. Ideally, this engagement and discussion should occur prior to and during the first directions hearing. As the relevant Practice Note identifies, some of the matters the parties will need to consider, and agree on, are:

(1) The appropriate use of technology in searching for and exchanging discoverable documents. If there is an agreed numbering protocol using the same or compatible software systems, the preparation of an electronic court

book will be enhanced. **The Court will expect this as a minimum, and resolve disputes if agreement cannot be reached**. The parties are referred to the Technology Practice Note at paragraph 8 and to Annexure 1 to that Practice Note. This will ensure the consistent identification of documents, from discovery all the way through to use of documents at trial.

(2) For large document cases, the use of Technology Assisted Review.

(3) In all cases, the use of de-duplication of documents software in the discovery and court book processes.

(4) The modes of presenting evidence in technologically-assisted trials.

Conclusion

In conclusion, some of what I have said may be thought to involve a counsel of perfection which will lead to increased cost. I do not accept that is so. Appropriate standards of documentary advocacy will save costs in the long run and, in any event, any extra cost is justified in the context of large commercial trials. This is particularly so where technology is deployed early and effectively in a case.