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COURTBOOK PREPARATION AND RELATED ISSUES

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1. My presentation focuses on tasks performed by parties outside the courtroom. In my view, these tasks are just as important to good advocacy as the polished oratory of counsel. Indeed, the latter isn't worth a cracker without the former. Yet these tasks are often mischaracterised by practitioners as administrative, if not overlooked altogether, and consequently performed poorly or not at all. An essential part of advocacy involves meticulous out of court preparation, especially in respect of materials that are to be provided to the Court.

The Court Book

2. I will not rehash the debate about court books. They are here to stay in one form or another. My own view is that court books are essential to the efficient conduct of a large commercial trial - provided that they are well prepared.

3. With rare exceptions, however, court books continue to be poorly prepared by too many. A bad court book delays the hearing, interrupts the flow of evidence, increases the judge's workload, and is bad advocacy.

4. 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.

5. 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.

6. 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 good enough! Partners and senior associates must take 'active responsibility' for the court book.

7. 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 accept that excuse.

8. 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.

9. The Court of Appeal (comprising Redlich, Priest and Macaulay JJA) held that the application 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.

10. 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.

11. 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.

12. 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.

13. 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.

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

14. 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.

15. I return to the requirements of a good court book.

16. 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, facsimile imprints 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.

17. 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. Commonsense 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.

18. As to duplication, I continue to be astounded at the prevalence of this occurring. It can only mean that the court book has been prepared by a person who lacks the necessary attributes to which I have referred.

19. 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 facsimile imprints, date stamps, 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 imprints 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 lumber the court book with facsimile transmission reports or cover sheets unless something turns on the time or fact of receipt. The same goes for the 'letter follows' or is attached kind of email.

20. 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.

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

22. 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.

23. 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.

24. 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.

25. 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, 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.

26. Before leaving the topic of court books, a word on the folders to be used. Most court books are presented in cheap folders that are over-filled, difficult to handle and often fall apart. Given the cost of litigation, this is remarkable. So, provide the Court with the best quality folders available, and only fill them up about two-thirds of capacity. This makes the folder manageable and allows for supplementation, which often occurs. Make sure that any supplementary document provided to the Court is hole-punched and not stapled, before

handing up two copies – one for the judge and one for the witness or exhibit copy of the court book.

Key Documents

27. 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 every commercial barrister to review the evidence and court book in advance of trial, and to prepare a concise 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 key documents folder 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.

28. In some cases, the folder will be a slim one. In others, ingenuity may be required to fit the key documents into one large folder. But 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 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.

29. 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.

30. 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.

31. 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.

(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.

32. 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.

33. 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.

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

Identifying the issues

35. 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.

36. In recent trials, I have been requiring agreement between bar and bench as to the essential issues for determination before any evidence is given. The process usually commences with my draft of the central issues for determination, based on my reading of the pleadings, witness statements if there are any, and what I perceive to be the key documents. I circulate this to counsel and ask for input during the course of openings. Wherever possible each issue is posed as a question – either factual or legal.

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

38. 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.

39. 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.

40. 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.

41. 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 outside the pleadings. That is not acceptable.

Drafting written submissions

42. 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 do not assist the Court. They usually obscure the issues and waste the judge's time when it comes to writing the judgment. The concentric circle or sieving process should be applied in this process also. 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 will usually involve better advocacy. If the judge wants more information, he or she will doubtless ask during the course of oral submissions.

43. 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.

44. Use commonsense and play by the rules. I recall fixing a 40 page limit on final submissions after a trial lasting nearly three months. 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.

45. 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. 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

46. A final issue. Large commercial trials usually involve the provision of folders 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.

47. 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 in folders of authorities, when only a small aspect of the case is relevant. Just photocopy the headnote and the relevant portion of the case which is relied upon. If the judge wants a full copy, he will ask counsel or have his associates do so during the deliberation process.

48. Third, the profession has largely ignored Practice Note 9 of 2011: 'Citation and provision of copy judgments to the Court and opposing counsel'. 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. Take the trouble to read the Practice Note and ensure that the Court receives a copy of all medium neutral cases in either Rich Text Format (RTF) or Portable Document Format (PDF). And provide the authorised report where it is available.

49. 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. 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.

Conclusion

50. 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. Most of it will save costs in the long run and, in any event, any extra cost is justified in the context of large commercial trials.

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