MANAGING COMPLEX LITIGATION

ADDRESS TO THE LAW SOCIETY'S CONTINUING LEGAL EDUCATION PROGRAM – 22 OCTOBER 2003

Every sermon should have a text and every address must include at least one quotation relevant to the topic. Hopefully it should also be humorous. Tonight's topic, as you know, is managing complex litigation. The topic is not concerned solely with the use of electronic technology in such litigation but that is clearly a large part of tonight's focus.

When I mentioned to my family that I had been asked to speak on this subject my youngest son, who is a law student, asked if I knew that Bill Gates had once said that he would not read any document longer than two pages in electronic form. I did not know that. It seemed relevant to our discussion. He offered to find the remark on the internet and print a copy for me. I accepted the offer because I share Mr Gates' alleged reluctance to read long documents in electronic form. I suspect I am not alone. There is a tendency to decry such attitudes as reactionary and old-fashioned and as indicating some sort of personal failure, namely an inability to adapt to change and embrace the future. Such an expressed reluctance coming from Bill Gates would obviously be of great significance.

My son could not find the quote which tells you something about the value of hearsay evidence, or the efficiency of internet search engines. He did, however, find another quote which I thought even more useful:

> ‘The first rule of any technology used in a business is that automation applied to an efficient operation will magnify the efficiency. The second rule is that automation applied to an inefficient operation will magnify the inefficiency.’

The point is worth emphasising. Managing complex litigation is about efficiency which may or may not be achieved by the use of information technology. My recent experience suggests that that technology will not be of any real use in the conduct of a long and complicated trial. It may be, but it may also be a wrong and costly assumption.

The point which I want to emphasise, and will repeat, is that managing complex litigation is about the means to an end, it is itself not the object. Litigation, like any intellectual endeavour requires that you first work out what it is you want to achieve and then examine the ways by which that end might be best achieved. It is the process of having disputes resolved by judicial determination. In simple words that means the judge will listen to and read the evidence, ascertain the facts and apply the law to them.

Obviously for the purposes of tonight’s discussion we are concerned with the first part of the process, the presentation of the factual material to the judge for his consideration.

From the perspective of individual litigants the concern is to give your client the best chance of winning. The challenge is to come up with

the best means by which the facts, and the arguments to which they can give rise, can be put before the court, and understood by the court.

Litigation is, or at least should be, inseparable from the art of persuasion. What each party seeks to do is to persuade the judge that the view of the facts most favourable to its client should be accepted. To do that the judge has to understand the respective arguments and the rival contentions of fact. This is all very obvious but it can be lost sight of in complex trials where the facts themselves may involve an examination of complex financial or commercial transactions, or piecing together a pattern of activity from a large number of disparate pieces of evidence. Inevitably the case will involve substantial numbers of documents. The task of the advocate, in which I include the whole of the legal team, is to facilitate the judge's understanding of the facts and comprehension of how they fit together.

The case will be won or lost by reference to the judge's view of the legal and factual merits of the respective cases. What you want to do is give your client the best chance of winning. This surely means putting forward supporting facts and arguments as simply and convincingly as possible. You will be at a disadvantage if the judge cannot understand your points or cannot find or read your material.

When preparing for trial you should obviously ask what you want to achieve and then proceed to the means by which that might be done.

Confusion and frustration will be the consequence if you move first to consider the technological ways in which information might be utilised or transmitted. If that is your approach the technology tail will wag the trial dog and litigation will become a process in justifying the use of technology instead of the intelligible and intelligent presentation of the rival contentions of fact and evidence.

Everyone has experienced, as actions proceed through the various stages of preparation for trial, the trial itself, and then the appeal, how issues become condensed and refined and reduce in number.

This is a natural phenomenon which should occur in every trial if it is well run. In this process the number of documents to which one has regard, and the scope of evidence, are both reduced. It is the result of the thoughtful examination of the materials and the issues as identified by the pleadings. It leads to efficiency. It may be frustrated if the focus of the parties is on the mindless reproduction and transmission of documents because that reproduction can occur more easily with modern technology. You should ask ‘why are we doing this’ before you ask ‘how can we do it’.

Technology has made it possible to capture thousands of pages of documentary material onto a compact disc and to transmit the contents electronically to a computer in the court precincts or the judge’s own chambers. What is the point if they have no real relevance to the case or if their significance can be understood only after a consideration of oral testimony or other documents. What I

am saying in a roundabout way is that technology should not be used just because it is available. People might climb Mt Everest because it is there but you should not send the judge 10,000 pages of irrelevant documents because you can do so by pressing a button.

When preparing for trial or in the presentation of your case at trial approach the use of technology from the standpoint of whether it will assist in the orderly and intelligible presentation of your case; whether it will make it easy for the judge to comprehend and understand or whether it will have the tendency to overwhelm, or confuse, or both. Remember you will in a large case be a member of a team with supporting staff both legal and non-legal. When the judge reserves his decision and retires to consider the material he is alone and what cannot be found or understood will, in all likelihood, be ignored.

Against this background can I consider some of the means by which complex trials might be managed.

Data Bases

The word no doubt immediately conjures up thoughts of computers and CD Roms. But that ‘ain’t necessarily so’, or at least, it need not be. The nature of the case may make it inappropriate to put documents, or all the documents, in electronic form. The advantages of an electronic format are, no doubt, compactness, that is economy

of space, ease of communication and so on, and the quick retrieval of documents and their display on a monitor. Of course this last feature depends upon the quick identification of the document so it can be retrieved. The disadvantage of documents in electronic form is that they are harder to read than in print and harder to compare with other documents when a contemporaneous comparison is called for. Let me expand.

I think we all accept that it is easier to read typed script on paper than images on a screen. It does not much matter if the document is short but it becomes quite difficult and tedious if one has to look at clauses of a lease or mortgage, or lengthy contract. It is also harder to skip from page to page or clause to clause, and back again as one often has to do.

There is often a need to compare versions of letters or of contracts or financial statements. It is easy enough in hard copy. All one needs is a sufficiently large flat surface and some bookmarks. It cannot be done on the screen where one can only look at one document and indeed one part of one document at a time. Even if the technology allowed the use of split screens the images would be too small and too fragmented to be of any use.

The obvious point to emerge from this is that an electronic data base will be appropriate for some case and some kinds of documents, and a paper data base, that is an agreed bundle of documents or something similar, will be appropriate for other cases and other

documents. Indeed in the one case one could easily have both sets of data base: the electronic form for shorter documents and hard copy for those documents which, for whatever reason, do not lend themselves to that form of presentation. The process of selecting what goes where is one that requires common sense applied rigorously. When preparing data bases you should, as I mentioned earlier, ask yourself what is the most convenient way of getting the point across, of presenting the documents and having the court read them, comprehend them and make a note of them so that they can be found later.

The recent experience which I mentioned earlier makes me suspect that the use of documents in electronic form to replace paper copies is not likely to be successful. There may be a use for an electronic data base of documents at the pre-trial stage. I expect Mr McDonnell and Mr Bond will talk about that, but the attempt to conduct a paperless trial in Emanuel failed. I am not, for a moment, being critical of the service provider in that case or of any of the parties who, I am sure, all tried very hard to make the system workable. The fact is it did not work and in the end was effectively abandoned in favour of photocopies of documents organised in a conventional manner.

I am not sure why the experiment failed and I will be interested to hear what the other speakers have to say. From my point of view the problems were that not all the documents to which the parties referred in evidence were on the data base. One didn't know

whether a failure to find a document was because it wasn't there or because the search technique was inadequate. This led to a lack of confidence in the data base so that reliance was placed on paper. Another feature was one I have mentioned. Much of the case involved examination of audit files and financial statements. The size of the documents, their length, made it very difficult to comprehend them by looking at a screen. The witnesses who gave evidence on these topics could not be expected to, and did not give, evidence by reference to documents on the data base. They looked at their hard copies of the documents.

Another drawback was the difficulty of document identification. Initially the parties each had their own identification system rather than one common system. That problem was overcome, no doubt at a large cost, by the time the trial started. Nevertheless retrieval was often slow. Another drawback was that the particular program in use did not allow a document of more than one page to be scrolled. Instead each page was a separate document which had to be separately called up, adding to the delay. No doubt these problems can be overcome with suitable program adjustments but the first problem I mentioned is, I suspect, insuperable.

If you have a case in which you think that an electronic data base of documents and their presentation to the court in electronic form would be appropriate, it will be imperative to reach an early agreement with your opponents as to the compilation of the data base. I mean such things as the manner of identifying documents

and their retrieval, as well, of course, as the documents that should go on the data base. If you cannot reach agreement at a very early stage, really before the task has begun, you should apply to the court for directions about it so that the ground rules are laid down early and you will all work on the same system to the same rules. You should resist the temptation to put every document on the data base. Those that you do not realistically believe can be conveniently used in that form should not be. It may be harmless to put them on the data base, depending upon cost, but you should work on presenting those documents in hard copy.

I noticed in a recent article in The Times that Lord Justice Hutton's inquiry had been praised for its use of technology. He, you will recall, conducted the inquiry into the circumstances surrounding the death of the British scientist David Kelly. The Times journalist was impressed by the 'document display system. All the evidence put before the hearings, about 10,000, has been scanned and the images displayed on monitors, avoiding the need for participants to retrieve documents from files. This has saved time.'

The technology is not new, nor is its use. The Royal Commission of Inquiry into the New South Wales Police Force conducted by Mr Justice Wood about 10 years ago made use of the same technology. I do not know, but I suspect that the documents in question were all short, no more than one page. They seemed to be a collection of minutes or emails or inter-office memoranda. These are the kind of

documents that can be displayed and read easily and if properly catalogued and marked can be retrieved quickly.

It is different if one is engaged in the painstaking task of reconstructing some complicated financial transaction, or how items of income or expenditure have been treated in books of account over succeeding years. There are no doubt other instances but by now I am sure you've got the point I'm trying to make.

In some cases it is important to preserve and to display documents in the form in which they appeared in the client's possession. That is to say whether a particular document was on a file and, perhaps, where on the file. Its location may indicate a chronology proving when knowledge of some fact was conveyed to a party or something similar. An obvious example is found in cases involving auditors and what they knew. The audit files themselves and the relative position of documents on the files can often be important. There is no substitute in such a case for reproducing the file rather than separately reproducing documents electronically which will lose sequence and context.

An agreed bundle of documents can be a very useful and effective data base. These bundles figure prominently in the draft directions the parties ask the court to make as part of the preparation of an action for trial. They seem to give rise to enormous difficulty and anxiety for reasons that are not readily apparent to me. People often have odd ideas about the consequences of putting documents in an

agreed bundle, and therefore become nervous about agreeing to their inclusion. Some people on some occasions also seek to qualify the use to which documents included in an agreed bundle can be put.

I take a simplistic view. To me an agreed bundle of documents is simply that. It is a collection of documents which the parties agree are relevant and admissible. A degree of common sense and co-operation should be shown in the compilation of the bundle in the sense that one has to accept that documents harmful to one's own case may nevertheless be relevant and admissible and should be included. The bundle should, I think, be kept as small as the circumstances of the case allow. There is no point in putting in copious pages of documents that might become relevant or which one hopes might be proved. The agreed bundle should be reserved for those documents which are plainly relevant and are plainly admissible. If everyone has a copy of the bundle it facilitates the presentation of evidence and argument.

Can I say that it is useful for a judge to be given his own copy.

The agreed bundle has obvious uses. Apart from putting before the court in a convenient form the relevant documents it is possible for witnesses to be examined and cross-examined by reference to the documents in the bundle. There is convenience and saving of time if everyone has the same compilation of papers and the witness, judge and parties can have their attention directed easily to the particular passage or passages at the same time.

There is nothing radical or innovative about this but it is astonishing how seldom agreed bundles are used to proper effect. I have tried a case where the parties simply could not agree on what should be included in the bundle with the result that three separate sets of ‘agreed bundles’ were provided, almost none of which contained documents which were in fact the subject of agreement as to relevance or admissibility. The case, I remember particularly, was a building dispute involving claims for variation, acceleration and prolongation. It should have been relatively easy to compile lists of site instructions, signed variations, timesheets and the like which were relevant to those claims. That was not done. Each party, as I mentioned, produced their own bundles all of which were bulky and led to inconvenience and confusion.

The fact that a document does not appear in the agreed bundle does not mean that it cannot be got into evidence. If it is relevant to some issue and can be proved by any of the means available for that purpose it can be tendered. I think a misunderstanding on this point is responsible for much debate about the compilation of agreed bundles. I have seen people become anxious because their opponent would not agree to the inclusion of some documents or classes of documents. Whatever the merits of that particular discussion between the parties the preparation of the bundle need not have been delayed.

The documents that were the subject of agreement could have made into the bundle and the other documents, if they were helpful to the

party's case and could be proved, could have been tendered in due course in its case. Likewise it is unhelpful to include in the bundle documents about which there is to be some argument, for example that their use is to be limited, or their inclusion in the bundle is conditional upon the occurrence of a subsequent event. It is too much to expect a judge to have to remember that some out of maybe hundreds of documents in an agreed bundle may not be taken at face value. If some sensible objection is to be taken to a document it should not be included in an agreed bundle. The party who wants it in can attempt to prove it in his case during the trial. Whether or not it ultimately becomes part of the evidence, the debate about its admissibility before the point can be tested at trial, is no reason to delay the preparation of an agreed bundle.

Another difficulty I have encountered is that some people appear to have taken the view that every document, or almost every document the subject of disclosure, should be included in the bundle. There may be cases where that is necessary but I suspect they will be few in number. The point about an agreed bundle is that it should contain the important documents which will be frequently referred to or on which the issues will largely depend. They are there for ease of reference and convenience. The bigger the bundle the less convenient it is to use. In some cases it is of course not possible to have concise bundles but conciseness is relative and one should aim at it to the extent it is possible.

It is very common to find documents in an agreed bundle which should have never been inserted. I have come across documents in foreign languages which were never referred to and were clearly not thought to be of any importance by the party who inserted them. The danger you run in such a careless approach in putting material before the court is that the lack of care in the presentation of the case may be thought to reflect a lack of merit in it. That is a temptation judges seek to resist but if you are serious about putting your case forward it is better not to tempt the judge in the first place.

One technique that was used in a very long trial recently is worth mentioning. I thought it worked well. It was to produce a separate, comparatively small bundle, of documents for use in the examination of the witnesses. When each witness was called the particular bundle was produced in multiple copies. One was shown to the witness, one given to the judge and a copy supplied to each of the other parties. The bundles were paginated and the examination proceeded by reference to those identified documents. At the end of the examination the bundle was tendered. I think I gave them the title ‘documents relevant to the evidence of X’.

Such a technique inevitably means duplication of documents because the same document will no doubt be relevant to the evidence of several witnesses and will appear in the agreed bundle. I think this is harmless. The cost is infinitesimal and the convenience

is much greater than having to pause while other folders in which a document appears is found and given to the witness.

One must take care that the bundles include only those documents which the witness will speak to or prove. Their preparation requires some foresight of what the examination will touch but there is no difficulty in adding documents to the bundle either in examination in chief or in cross-examination. The witness's evidence can then be reviewed later by reference to the transcript and the one exhibit.

Real Time Transcript

The Times journalist who reported on the Hutton inquiry was very impressed by what we call real time transcript. He wrote, a little breathlessly:

> 'Two applications of information technology in the courtroom have proved vital. One has been computer assisted transcription. As stenographers have captured all the words spoken, their keystrokes have been converted into transcripts that have appeared – almost instantaneously – on computer screens in and around the courtroom. This has increased the pace of the hearing. More, the full collection of these transcripts now constitute a searchable data base … a valuable resource …'

Two concepts have been rolled into one. The facility for conducting word searches of transcripts has been in use in Queensland for at least a decade. It is very valuable but it is not, as far as I have seen, put to much use during the trial itself. No doubt Counsel and solicitors utilise the facility after court hours in preparing for cross-examination. It is obviously a quick means of seeing what witnesses have said about a particular topic or the same witness on a previous day. It is also useful when finding relevant passages for the preparation of addresses and judgments but it does not I think do much to assist the trial process itself.

Real time transcript is comparatively new, although it has been in use for some years. It is not used much. I do not know why The Times should have thought that it increased the pace of the hearings. My experience of it is that it has the opposite effect. All that happens is that the transcript is made available almost immediately rather than an hour or so after the close of business for the day. That does not affect the pace with which witnesses are asked to answer questions or at which points are debated between parties and the court.

I have only one experience of real time transcript and that was as counsel. I have declined the opportunity to have a trial I conducted as a judge with real time transcript because of my experience in the earlier trial. I will tell you why. It was of some weeks' duration involving three parties so it was complicated but not inordinately so. What I noticed about the real time transcript was that everyone, senior and junior counsel for all parties, solicitors and judge all

watched the screen as the transcript was produced. No-one looked at, or listened to, the witnesses. The pace of proceedings actually slowed a little because counsel who was asking questions would wait for the previous answer to appear on the screen before proceeding with the next question. Real time transcripting involves a small delay. It is not quite instantaneous so that the examination and cross-examination was a little slower than usual.

This, however, is not my real objection.

Not many cases turn on a simple issue of credit between a few witnesses but in nearly every case in which oral evidence is called the impression made by a witness on the judge has some importance. It is important for the court to assess how a witness deals with searching questions or with points which might be awkward for his side. Even in witnesses of intelligence and experience, one sees indications which are of assistance in arriving at an overall assessment of the evidence in a case. This advantage is lost if one's eyes are glued to a television screen. I think it is important for cross-examining counsel in particular and the judge to observe a witness when giving evidence. Real time transcript detracts from that process if one watches a screen closely. If one does not there is not, I think, much point in having it.

The transcription service given by the State Reporting Bureau is a very good. The accuracy level is very high and, as I mentioned, transcripts are delivered within an hour or so of the court adjourning

for the day. Sometimes the morning's transcript is available by the time court resumes in the afternoon. There are not many occasions on which one needs quicker service than this.

I speak, of course, of the Supreme Court. I do not know what the standard of transcription service in a Federal Court is.

Can I mention two other features which might qualify as the use of technology in litigation. They both involve the examination of witnesses from outside the courtroom. One is the use of telephones and loud speakers and the other is the more sophisticated use of video conferencing.

The receipt of testimony by telephone is now quite common, though I think it has limitations. It is frequently used in cases involving evidence from medical practitioners but it is not limited to that. I recently had experience of its use in a criminal trial. It has obvious advantages for the witness, and to the extent that it makes witnesses more co-operative, it assists the parties. I have some reservations about the use of telephonic evidence. Where the evidence is necessary but is uncontroversial or at least uncontested there is I suppose no harm in receiving it. I suspect that there are occasions when a witness will say things by telephone he would not say if he were in court and subject to the scrutiny of the parties and the judge. You can never be sure whether the suspicion is justified but I have felt it from time to time.

The use of telephonic evidence must be limited to cases where the witness is only asked to give oral testimony. This should be obvious but I have experienced counsel attempting to have a witness giving evidence by telephone identify documents in the courtroom. I even once saw counsel attempt to tender a document through a witness who was giving evidence by telephone. 'Look at the document please' is not likely to produce a responsive answer from a witness who is a hundred miles away. Nor is it much better to say 'Is this document in my hand the letter you wrote to X?' Courage is a good attribute in an advocate, but intelligence is better.

That sort of problem can be overcome with the use of video links. The Supreme Court does have that facility. Court 15 has been equipped to allow the receipt of evidence from remote witnesses. I used it once and was quite impressed. The case involved taking evidence from an important witness who was in Japan during the trial. Arrangements were made for him to go to, I think, a Post Office which had reciprocal facilities. The screens in the court were connected to a voice sensitive microphone so that a camera would focus on whoever spoke. Those of us in the courtroom had a picture of the witness in Japan with a small insert showing us the picture of what he was seeing. He would see whoever was speaking to him and the camera, as I say, focussed on the speaker near the microphone that was actually in use. Because of the distance there was a slight delay between the person speaking and the receipt of the sound overseas. The questioner would have to wait a second or two for his question to be received in Japan and the witness would

finish speaking a second or two before his answer was heard in Brisbane. It was easy to adjust to that circumstance.

That witness was to be examined by reference to some documents. There was a fax machine in the courtroom and an operator. The witness had a fax where he was. A document about which counsel wished to ask the witness was identified in the courtroom, given to the operator and then sent by fax to the witness who received it as we all watched. He could then be questioned on that document. I thought the whole procedure worked very well.

The last thing I might mention is the use of electronic technology for the delivery of judgments. Many of you will know that I recently delivered reasons for judgment by CD Rom. In conventional hard copy the reasons would have run to almost 500 pages. They fitted conveniently on a disc, two copies of which were given to each of the parties as the publication of reasons. There was an index of sorts to the reasons which were connected by hypertext so that one could move quickly to a point of interest, assuming there were any such in the judgment. I think that was a useful innovation though it is probably only worthwhile in very long judgments. The photocopying involved had judgment been given in hard copy would have been enormous. The delivery of reasons in that format allowed it to be transmitted very quickly to each of the parties.

I have since then delivered judgment in smaller matters involving reserved matters from Chamber applications by email. There is an

obvious convenience though the procedure has its limitations. Obviously where there is to be argument about costs or consequential orders the parties have to attend court to present their submissions. In that case, however, it can be useful to receive an advance copy of the reasons so that submissions can be composed.

I am not in favour of abandoning the traditional means of delivering judgment. I think it is an important part of the formality of the trial process and it is a part of that process. Judgment should be delivered publicly in the presence of the parties and any member of the public who wishes to attend.