Land and Environment Court
of New South Wales

LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

ONGOING REFORMS OF PRACTICE AND PROCEDURE

14 June 2006

Introduction

It will be apparent to people who appear regularly in the Land and Environment Court (whether as parties, legal practitioners or experts) that the Court perceives ongoing review and revision of its case management procedures, including for merit appeals, to be one of its essential responsibilities.

Some may say that there is too much review and revision (the "if it ain't broke, don't fix it" school of thought). That approach runs the risk of overlooking the fact that everything else is changing at a fairly rapid rate (legislation, technology, issues, expectations of court users). To ensure that the procedures for resolution of merit appeals remain apt for the just, quick and cheap resolution of the real issues in the appeal, an ongoing process of review and adjustment is essential.

Another essential part of the process is to ensure that Court users are aware of the case management procedures that have been adopted, to obtain feedback on their performance and to flag the areas of likely further review and amendment. This paper contributes to satisfying the first and last requirements.

This paper, in outline form, identifies some of the more important procedural issues on which the Court has focussed over the last 6 months or so, and identifies the issues which are currently under consideration for the purpose of further review within the next 6 months or so. This paper does not address the introduction of the Uniform Civil Procedure Rules 2005, which is a separate project scheduled for completion later this year.

Just, quick and cheap resolution of proceedings

The requirement that case management procedures facilitate the just, quick and cheap resolution of the real issues in civil proceedings is fundamental.

Part 1 rules 5A to 5C of the Land and Environment Court Rules 1996 provide for:

- The overriding purpose of the rules, in their application to civil proceedings, being to facilitate to the just, quick and cheap resolution of the real issues in such proceedings (rule 5A).

- The giving of such directions and the making of such orders for the conduct of any proceedings as appears convenient (whether or not inconsistent with the rules) for the just, quick and cheap disposal of the proceedings (rule 5B).

- The making of directions at any time before or during a hearing limiting the time for examination of witnesses, the number of witnesses, the time taken in making oral submissions, the time taken by a party in presenting its case, and the time of the hearing having regard to, amongst other things, the subject matter, complexity or simplicity of the case, the efficient administration of the Court lists and the interests of parties to other proceedings before the Court (rule 5C(1)).

It is doubtful that anybody would seriously suggest today that a court has no business concerning itself with case management. Equally, it is almost certain that most court users would embrace the concept that case management procedures should facilitate the just, quick and cheap disposal of the real issues in civil proceedings.

But (with apologies to Jane Austen) it is also a truth universally acknowledged that the procedures one party thinks facilitates the just, quick and cheap disposal of the real issues in civil proceedings, another party often does not; and if both parties think it, it is possible that the court might not.

An oversimplification might be – some think that quick and cheap disposal, by definition, is not just, whereas we think that disposal which is not quick and cheap, by definition, is not just. In short, each and every disposal that takes longer and is more expensive than it ought properly to be, having regard to a reasonable view of the real issues in the case is unjust in and of itself, both to the parties and to other court users.

Inherent in the formula “just, quick and cheap” is the notion of proportionality, that is to say, that the resources to be expended on a matter ought to be proportionate to the complexity and significance of the matters in dispute. Pt 1 r 5C, to some extent, authorises directions to be made so as to ensure proportionality in this sense, even though it does not use the word itself.

In contrast, for example, s 60 of the *Civil Procedure Act* 2005 (NSW) expressly provides that "*the practice and procedure of the court should be implemented with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute*".

Section 58 of that Act says that in deciding whether to make any order or direction for the management of proceedings, the Court must act in accordance with the "dictates of justice" which is defined to include:

- the provisions of s 56 which state that the overriding purpose of the rules is to facilitate the just, quick and cheap resolution of the real issues in the proceedings;
- the provisions of s 57 which refer to case management objects including timely disposal of proceedings at a cost affordable by the parties; and
- the degree of difficulty or complexity to which the issues in the proceedings give rise.

Similarly, the UK Civil Procedure Rules include an express statement (in paragraph 1.1(2)) that an aspect of a proceeding being dealt with justly, is ensuring that proceedings are resolved in a manner proportionate to their importance and complexity. Paragraph 1.1(2) says dealing with cases justly includes, insofar as is practicable:

- Ensuring the parties are on an equal footing.
- Saving expense.
- Dealing with the case in ways which are proportionate:
    - to the amount of money involved;
    - to the importance of the case;
    - to the complexity of the issue;

- to the financial position of each party.

- Ensuring that it is dealt with expeditiously and fairly.

- Allotting to it an appropriate share of the Court's resources while taking into account the need to allot resources to other cases.

The Land and Environment Court's current procedures do not directly address inequality of resources between parties, although parts of the Class 3 Valuation Objections Practice Direction recognise and seek to redress the potential for disparity between the Valuer-General as a repeat respondent and applicants. But the requirement for procedures to facilitate the overriding purpose of the just, quick and cheap resolution of the real issues in civil proceedings is consistent with the concept of proportionality embodied in the NSW *Civil Procedure Act* and the UK Civil Procedure Rules.

Many case management procedures are designed to encourage parties to focus early on the real issues and make a realistic assessment of their real importance. The need to do so is acute in merit appeals involving the development of land. This is because such an appeal involves, at the highest level of generality, a public resource use issue, and is not properly seen as a private dispute. Where litigation has this public character, there is a heightened risk of disparity between the importance of the issues and the resources necessary to resolve the issues (on any reasonable view), and the perceptions of those directly or indirectly involved. This heightened risk makes it essential for case management procedures to be subject to ongoing scrutiny, for Court users to be required by those procedures to make a realistic assessment of the real issues, their importance and the resources which ought to be applied to their resolution and for procedures to be adjusted where they are found wanting.

Case management procedures that do not achieve the fundamental objectives do not merely invite (proper) criticism. If a system consistently fails to meet the fundamental objective, it runs the risk of being perceived as "beyond repair" by case management. It then runs the risk of legislative abolition and replacement. Examples are not difficult to recall – worker's compensation and personal injury

litigation spring to mind. But other examples abound. The Consumer, Trader and Tenancy Tribunal of NSW, for example, is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of procedural fairness (similar to merit appeals in the Land and Environment Court). Yet, in that jurisdiction, parties may only be legally represented with approval of the Tribunal.

Case management procedures can only do so much. Court users need to provide constructive feedback on the procedures. They also need to make sure that they do "their bit" to make the procedures work. Some of the more obvious examples of what that includes are matters such as:

- Minimising the number of pre-hearing court attendances by:
    - Not seeking adjournments based on mere convenience;
    - Formulating extended timetables, rather than timetables which include only one or two steps in the process;
    - Ensuring compliance with timetables;
    - Re-listing matters at the first opportunity when compliance cannot be achieved; and
    - Liaising with the other side to agree an extended timetable before the court attendance.
- Making each court attendance involve a substantive outcome in moving the matter towards resolution by:
    - Each of the matters above;
    - Ensuring that the person attending understands the matter so as to be able to make a meaningful contribution to the directions required to move the matter forward; and
    - Handing to the Court short minutes of proposed orders or directions (whether agreed or not agreed).

- Recognising that costs accumulate over time – a rapid resolution is likely to be a less expensive resolution.

Structure of this paper

It will be no surprise that having made two Practice Directions dealing with the main types of Class 3 proceedings (claims for compensation and valuation objections), the focus is currently on appeals in Classes 1 and 2 of the Court's jurisdiction. Because there were significant reforms from 2003 onwards, the focus currently is on consolidation and adjustment based on the experience of the last couple of years. But first we will deal with the two new practice directions, and some of the issues that have recently been the subject of adjustment (by amendment to practice directions) and decision. Then we will identify some of the areas of interest that are likely to be the focus of the proposed review, adjustment and consolidation of the procedures applying to Class 1 and 2 proceedings and expert evidence.

Class 3 Compensation Claims Practice Direction

The Class 3 Compensation Claims Practice Direction commenced on 31 March 2006.

One of the primary functions of the Compensation Claims Practice Direction is to identify the Court's expectation of the number of interlocutory appearances before the Court (leaving aside notices of motion for special orders).

Paragraph [6] of the Compensation Claims Practice Direction specifies that there should be no more than three pre-hearing attendances for these proceedings to be ready to go to hearing. Usual directions for each mention accompany this requirement. If satisfied, the usual directions would enable most compensation claims to achieve this three pre-hearing attendances standard. One reason prompting the introduction of this requirement and the formulation of usual directions is that:

- Timetables formulated by parties in this class of proceeding were perceived by the Court to involve:

- Too many adjournments of the proceedings, absent any specific action being taken during the adjourned period;

- Timetables being agreed between the parties which were too short and, thereby, necessitated further attendances (which could have been avoided with extended timetables); and

- Parties failing to relist matters for fresh directions in circumstances where one or other party had not complied with a timetable.

- Some of these proceedings had inexplicably large numbers of pre-hearing attendances and very significant delay in coming on for hearing (absent any sound reason such as mediation).

Paragraph [11] requires proceedings to be promptly re-listed if there is any significant slippage in compliance with the timetable. This is intended to ensure that unnecessary delay is avoided.

The Compensation Claims Practice Direction also introduces a Friday list system for Class 3 compensation claims (paragraph [5]). One reason for this system being adopted was to ensure that parties were aware when the matter was most likely to be before the Court and could make arrangements to ensure that a person familiar with all aspects of the matter was available to attend the mention. This requirement was based upon the Court's perception that persons who were not familiar with the matter were (not infrequently) representing parties at mentions. One consequence was that proceedings would either have to be stood down the list or adjourned to another mention, thereby increasing the time and cost of the mention for both parties. This requirement is supplemented by paragraphs [18] and [19] which provide that:

> *18 Each party not appearing in person shall be represented at any callover, directions hearing or pre-hearing mention by a legal practitioner familiar with the subject matter at the proceedings and with instructions sufficient to enable all appropriate orders and directions to be made.*

> 19 *Legal practitioners should communicate prior to a callover, directions hearing or mention with a view to agreement on directions to propose to the Court and preparation of short minutes recording the directions.*

One of the other primary aspects of the Compensation Claims Practice Direction is in paragraphs [20] and [21], which provide as follows:

> 20 *The use of the single expert or a Court appointed expert is encouraged. The parties are to confer before the first directions hearing by the List Judge with a view to reaching agreement as to whether the use of such an expert is appropriate and, if agreed, the inclusion of such appointment should be accommodated in the timetable.*
>
> 21 *If there are large differences in the assessments of value by the parties' expert valuers, the Court may appoint a Court appointed expert valuer to conduct a valuation.*

Expert evidence (other than valuation evidence) has a unique role in compensation claims. It is usually relevant only insofar as the hypothetical willing but not anxious purchaser and vendor would have received such advice. The hypothetical purchaser and vendor (almost by definition) are not at the radical ends of the spectrum of potential expert opinion. As such, this class of case is particularly well suited to the appointment of a single expert. The Court wishes to encourage parties to consider the role of expert evidence in this class of proceeding, and recognise the potential benefits that single experts on non-valuation issues can offer.

The discipline of valuation experts knowing that a single expert may well review their opinions on disagreed issues is likely to militate against the unconscious adversarial bias to which all experts retained by parties are subject (an inevitable tendency which is now well recognised and consistent with ordinary human experience). As such, any tendency towards inflated claims by applicants and undue parsimony by resuming authorities can be ameliorated.

The usual directions specify the types of directions that the Court expects would be made in the ordinary course to ensure that a compensation claim is ready to proceed to hearing. One important aspect of the usual directions is the requirement that experts confer up front, and for the whole of their evidence to be in the form of a joint report to the Court, rather than individual reports to the parties. This requirement will be extended to all experts shortly, rather than only valuation experts.

The Compensation Claims Practice Direction also reminds parties of the potential for costs orders (paragraphs [27] and [28]). This is necessary because costs orders are one of the most important sanctions that the Court has available to it to ensure that proceedings are conduced as efficiently as practicable.

The Compensation Claims Practice Direction recognises that no standard case management procedure is suitable for every matter. As such, it expressly allows parties to suggest an alternative regime if that would better facilitate the just, quick and cheap resolution of the real issues in the claim (paragraph [4]).

The other primary role of the Compensation Claims Practice Direction is to give express recognition to the potential for alternative dispute resolution to be used considerably more than presently in this class of case (paragraphs [22] to [26]).

Class 3 Valuation Objections Practice Direction

The Class 3 Valuation Objections Practice Direction commenced on 8 May 2006. Its provisions are intended to provide a procedural regime for the just, quick and cheap resolution of valuation objections. Its provisions differ from the Class 3 Compensation Claims Practice Direction because:

- In all valuation objections, the Valuer-General is the respondent.
- Before valuation objections come before the Court they are subject to a specific statutory regime for potential resolution under the Valuation of Land Act 1916.

- Many valuation objections involve relatively simple issues capable of resolution without expert evidence.

The key aspects of the case management regime imposed by the Class 3 Valuation Objections Practice Direction include:

- Imposing obligations on the Valuer-General to provide the applicant with copies of relevant documents prior to the first mention (paragraph [5]).

- Requiring the applicant to notify the Valuer-General of the valuation for which the applicant contends prior to the first mention (paragraph [6]).

- Requiring the parties to have engaged in a formal or informal mediation/negotiation process before substantive directions are made to enable the matter to proceed to hearing (paragraph [7], supplemented by paragraphs [35] to [38]).

- Requiring the Valuer-General to prepare a statement of basic facts early in the proceedings (usual directions at fist callover).

- Requiring the parties to focus on the issues in the proceedings and to determine whether the calling of expert evidence is both reasonably necessary and proportionate to the amount in dispute on the objection (paragraph [9]).

- Requiring the use of Court appointed experts in appropriate circumstances (paragraph [10]).

- Allowing, in larger cases, parties to retain expert valuers (not other experts) to enable a joint conference to be completed and joint statements to be prepared, at which time the issue of Court appointed expert valuers needs to be reconsidered in respect of any disagreed issues (paragraph [11]).

In common with the Class 3 Compensation Claims Practice Direction, the Class 3 Valuation Objections Practice Direction aims to minimise the number of pre-hearing attendances before the Court (although to two, rather than three). To facilitate this, the Practice Direction includes usual directions at each of the mentions (paragraph

[25]). It also contains similar provisions about the capacity for variation of the requirements of the Practice Direction (paragraph [4]), need for representatives to attend who understand the matter (paragraphs [33] and [34]), the Friday list (paragraph [24]), the requirement to re-list the matter if there is significant slippage in the timetable paragraph [30]) and the potential for adverse costs orders (paragraphs [39] and [40]).

Given the nature of valuation objections, the Court has also prepared a valuation objections callover information sheet to facilitate parties understanding and complying with the usual directions at the first callover before the Registrar, as well as brief guideline document showing the ordinary course that such proceedings are expected to take.

Leave to rely on expert evidence in Class 1 and 2 proceedings

Paragraph [14] of the Court Appointed Expert Practice Direction has been amended (effective 2 June 2006), pending the overall review, amendment and consolidation of the practice directions applying to Class 1 and 2 proceedings. The amendment requires a notice of motion for a party to seek leave to rely on expert evidence other than that of the Court appointed expert.

The requirement for the notice of motion is seen as reasonably necessary in order to ensure that:

- There is a record of an application having been made and determined in relation to leave to rely upon other expert evidence.
- The party seeking leave is able to demonstrate that calling the additional expert at all, or at the particular stage in the preparation of the proceedings, promotes the just, quick and cheap resolution of the proceedings.
- There is a more effective mechanism to ensure that the other party is aware of the application and the need to formulate a position in response to the application.

- In appropriate matters, the Court is able to formulate principles, for the future guidance of the parties, on when such applications may be appropriate.

Leave to rely on amended plans

Court Appointed Expert Standard Direction No. 1 paragraph (3) has also been amended (effective 2 June 2006) to require a notice of motion for an applicant to seek leave to rely upon amended plans, whether or not the amended plans arise out of a report by a Court appointed expert. Again, this is seen as reasonable because:

- It is necessary that both the Court and the parties have a record of the plans upon which the applicant proposes to rely for the purpose of the hearing.

- Not all amendments are likely to facilitate the just, quick and cheap resolution of the proceedings. Before leave is granted, the applicant should be able to identify the respects in which the amendments lessen the environmental impact of the development and/or otherwise lead to an improved community outcome.

- Experience has also demonstrated that applicants should not assume that the fact that they have amended plans in accordance with what they perceive to be an opinion of a Court appointed expert will:

  - result in the grant of leave to rely upon amended plans;

  - necessarily accord with the final opinion of a Court appointed expert; and

  - incorporate all amendments that the Court decision maker thinks necessary and appropriate to warrant approval of the application.

The requirement for a notice of motion to rely upon amended plans, accompanied by a short affidavit in support identifying the amended plans and how the amendments will lead to a better community outcome, is likely to:

- Increase the transparency and accountability of the Court's processes and

- Ensure that all relevant issues are considered in respect of the grant of leave to an applicant to rely upon amended plans.

Costs in Class 1 and 2 appeals and certain Class 3 proceedings

The capacity of the Court to order a party to pay the whole or part of the costs of another party to compensate for some conduct which has increased costs or delay is a significant deterrent to such conduct.

Part 16 rule 4 came into force on 19 December 2003. Sub-rule (2) provides that:

> *No order for the payment of costs will be made in the proceedings to which this Rule applies unless the Court considers that the making of a cost order is, in the circumstances of the particular case, fair and reasonable.*

The rule applies to class 1 and 2 appeals, valuation objections and certain other land tax proceedings.

The intention of the rule is to ensure that parties are aware that if their conduct of the proceedings (procedural or substantive) is not designed to facilitate the just, quick and cheap resolution of the real issues in the proceedings, they are at risk of an order for costs.

Recent cases have demonstrated the rule in action.

In *Grant v Kiama Municipal Council* [2006] NSWLEC 70 at [15], Preston CJ analysed the categories of case in which orders for costs have been made in merit appeals. The analysis disclosed seven broad categories of case in which costs orders have been made that may be described in summary form as where:

- The proceedings cease to have the character of merits review.
- The matter the subject of the costs application involves only a preliminary question of law.
- A party fails to provide or delays unreasonably in providing documents required as part of the application for approval, including statements required

by the relevant statute, statements or information required by an environmental planning instrument or information or documents centrally relevant to the development the subject of the application and necessary to enable a consent authority to gain a proper understanding of and to give proper consideration to the application.

- A party has acted unreasonably in the conduct of the proceedings.
- A party has acted unreasonably in circumstances leading up to the proceedings such as effectively inviting the litigation.
- The proceedings or the defence of the proceedings has been commenced or continued where the applicant or the respondent respectively properly advised should have known that it had no chance or very poor prospects of success.
- A party conducts its case in the proceedings for extraneous purposes.

In the particular case, Preston CJ held that it was fair and reasonable that the Council be compensated by the applicant for unnecessary additional expense incurred in having to pay for the Council and the Court appointed expert to address information which ought to have been submitted in support of the original application, and otherwise by reason of the failure of the applicant to comply with directions made by the Court.

In *Manly Warringah Rugby Leagues Club Pty Ltd v Warringah Council* [2006] NSWLEC 88, Preston CJ added a category to the circumstances identified in *Grant* – namely, the discontinuance of a merit appeal without consent where the discontinuance may properly be considered as the abandonment of the claim. Preston CJ identified the following considerations relevant to costs orders on discontinuance at [14]:

- In the specified proceedings in Classes 1, 2 and 3 to which Pt 16 r 4 applies, there is a presumption that there will not ordinarily be any order for costs in the proceedings unless there is some circumstance which would make it fair and reasonable that there should be an order for costs.

- Ordinarily, the filing of a notice of discontinuance without the consent of the other party to the litigation will be a circumstance which would make it fair and reasonable that there be an order for costs. This is because the discontinuance usually represents an abandonment of the applicant's claim, so that costs incurred by the other party are necessarily wasted or thrown away.

- A relevant consideration in every case is whether the discontinuance was reasonable conduct on the part of the discontinuing party in the circumstances of the case, such as to negate the ordinary costs consequences of a discontinuance of the proceedings. Such conduct may be based on some action by the other party to the litigation or some supervening event beyond the parties' control.

In *ACM Landmark Pty Limited v Cessnock City Council* [2006] NSWLEC 256, Preston CJ considered the application of Pt 16 r 4(2) in respect of proceedings where:

- None of the expert evidence in the proceedings supported any of the issues raised by the respondent Council.

- All of the expert evidence in the proceedings was "one way", and supported the grant of the modification of the development consent.

- The applicant expressly invited the Council to enter into consent orders rather than continue to oppose the appeal, but the Council continued to oppose approval of the modification application.

As could be anticipated, the applicant was successful in the substantive proceedings. The Council opposed an order for costs on the basis that the concerns of residents relating to an increased perception of morbidity (the application was to modify a consent authorising a crematorium) were "honestly and sincerely held and it was reasonable for the Council to give voice to those concerns by maintaining … opposition to the modification application and the appeal".

Preston CJ held that:

- If residents' concerns about the perception of the particular development (a crematorium) was an issue that the Council intended to run in the proceedings, then it was not explicitly stated in the statement of issues articulated by the Council and, at best, could be seen to fall obliquely under one or more of the other issues. In these circumstances "it should not be for an applicant, nor for that matter a Court which is trying to determine an application, to have to read between the lines".

- The issue relied upon by the Council to defend the costs application, therefore, was not identified with precision in the amended statement of issues as required by Pt 13 r 14 of the Land and Environment Court Rules 1996, nor was the nature and extent of that impact clearly identified as required by paragraph 8(c) of the Pre-Hearing Practice Direction.

- There was no reasonable argument contrary to the proposition that the development was substantially the same development and had only minimal environmental impact. All expert evidence in the proceedings had come to the same conclusion. Even though there was some "fine tuning" of conditions, the Pre-Hearing Practice Direction also specifies that issues which go only to conditions are to be articulated as such (paragraph 8(e)), which the Council had not done.

- The Council, therefore, acted unreasonably in all the circumstances in raising over 20 issues many of which had no evidentiary foundation and were ill conceived. It never thought to amend those conditions or articulate them as matters going only to conditions with the Pre-Hearing Practice Direction.

- In those circumstances, the Council was ordered to pay the applicant's costs of the appeal as agreed or as assessed.

A similar result was reached in *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 285. The Council opposed a mobile phone installation on the ground of alleged adverse health effects caused by radio frequency electro magnetic energy. However, in the proceedings, all of the evidence established that the

emissions from the proposed installation would be no greater than 5.51% of the maximum level prescribed by the relevant Australian Standard.

Again, the respondent Council opposed any order for costs on the basis that it was reasonable for the Council to put before the Court the evidence of resident objectors who had concerns about potential health effects, notwithstanding the fact that all of the expert evidence established that the emissions would be less than 5.5% of the maximum prescribed by the Australian Standard.

Preston CJ ordered the Council to pay the applicant's costs and said that:

- All of the expert evidence was "one way" – namely that there would be no adverse health or biological effects caused by exposure to emissions from the proposed mobile phone installation.

- There was no probative evidence of any adverse effects on the amenity of the locality or the health and safety of persons in the locality or the environment.

- The residents' fear that there might be an adverse health effect on them or their amenity was an argument doomed to failure because the evidence established that the particular fear was without rational or justified foundation. A fear without rational or justified foundation is not a matter that can properly be considered in the assessment.

- In exercising its statutory functions under the EPA Act, a local government authority must act on the basis of probative evidence and reason. If a decision cannot be reached by a process of logical reasoning on probative evidence then a consent authority, as a responsible public body, ought not to raise or maintain issues or a position that development consent should be refused.

Accordingly, the Council was ordered to pay the applicant's costs of the appeal as agreed or as assessed.

Separate questions

The capacity to allow the separate determination of questions in proceedings may significantly contribute to the just, quick and cheap resolution of disputes. It is, however, a power which must be exercised on a principled basis – experience shows that what might be perceived as a "short way" home, may be the "long way" after all. But careful use of the power in an appropriate case can be a very effective case management tool.

Section 36(5) of the *Land and Environment Court Act* 1979 provides that a Commissioner may refer a question of law to the Chief Judge for determination by a Judge. This power, however, operates in circumstances where there has been a delegation by the Chief Judge to a Commissioner to determine a particular matter (that is, it generally arises during a hearing). Where parties identify an issue of law or fact which might be appropriate for separate or preliminary determination (that is, preliminary to the hearing), the relevant power is currently contained in Pt 31 r 2 of the Supreme Court Rules 1970 which provides that:

> *The Court may make orders for:*
>
> *(a) the decision of any question separately from any other question, whether before, at or after any trial or further trial in the proceedings; and*
>
> *(b) the statement of a case and the question for decision.*

Such a question, as noted, may be one of fact or law. However, experience has shown that it is necessary that parties carefully consider whether the question which they have formulated it appropriate for separate or preliminary determination before making any application for an order under Pt 31 r 2.

Jagot J summarised the relevant principles in *Metropolitan Local Aboriginal Land Council v Minister Administering the Crown Lands Act* [2006] NSWLEC 57 at [12] and *Greg Young v Parramatta City Council* [2006] NSWLEC 116 at [6] to [12]. The principles include that:

- Generally speaking, all issues should be tried at the same time.

- If an issue of law or fact is raised which, if decided in one way, will dispose of the claim then a separate determination of that issue may be appropriate. There is no requirement that the issue sought to be separated be decisive whichever way it is answered.

- Because of the risk that the use of the separate question procedure may miscarry, the courts have formulated tests of the degree of confidence required that the separate determination will resolve the litigation or substantially narrow the controversy – namely, that:

    - The appropriateness of the procedure should be able to be seen "with clarity", as "clearly ascertainable" or be "far more likely than not";

    - The procedure should be used only where the "utility, economy and fairness to the parties beyond question".

Make each Court attendance count

One of the most important current issues of concern is the Court's perception that the number of pre-hearing attendances for merit appeals has increased over recent years. Although this is in part likely to be related to:

- more frequent applications to amend plans following preliminary reports by Court appointed experts;

- informal negotiations between applicants and councils; and

- more applications to amend plans at, or even, after the substantive hearing,

these matters are not likely to be the sole source of this increase. Like all things, there seem to be trends in litigation. Recent experience with the Registrar's callover list discloses that while most people recognise that delay equals cost, there are still applications to adjourn proceedings (by consent), absent a satisfactory reason for thinking that such an adjournment will yield a more just, quicker or cheaper result. No applications of this character are appropriate.

Experience with the Registrar's callover list also discloses that legal representatives attending pre-hearing mentions in merit appeals are sometimes not sufficiently familiar with the matter in order to provide the Court with real assistance in formulating directions which will facilitate the just, quick and cheap resolution of the real issues in the particular dispute.

There is a direct relationship between the number of attendances before a hearing and the costs incurred by both parties, as well as the delay in bringing the matter to final hearing.

The new Practice Directions applying to Class 3 Compensation Claims and Valuation Objections specify the number of pre-hearing attendances which, in the ordinary course, the Court expects for such proceedings (no more than three for compensation claims and no more than two for valuation objections) and require that representatives attending a mention must be familiar with the matter. If these requirements (or anything approaching them) can be consistently achieved, then there is a real prospect of decreasing costs and delay in resolving these matters.

A similar approach to both issues is likely to be taken in the review and amendment of the practice directions which apply to class 1 and 2 proceedings.

Expert evidence

One of the most difficult areas for effective case management in merit appeals is expert evidence. It is no coincidence that there has been an increased judicial and academic focus throughout common law countries on the potential implications of expert evidence for the resolution of (in particular, civil) disputes. Ultimately, all expert evidence is adduced to assist the decision-maker. The potential issues to which the calling of such evidence gives rise are numerous, including:

- concerns about unconscious adversarial bias in even the most scrupulous experts, if they are retained by the parties;

- the nature and quality of expert opinions adduced in evidence – in particular whether the opinions are those of a person applying their expertise day to day in the actual field of expertise or are opinions of a person who mainly gives

evidence in litigation – which is an aspect of the selection of expert witnesses (or selection bias);

- the potential for parties to perceive that all issues require expert evidence, when they may not;
- the potential for undue costs to be expended in obtaining expert evidence on issues properly seen as marginal;
- the (quite understandable) tendency for parties to take a "tit for tat" approach to expert evidence (if one party has an expert, then the other is often not far behind);
- the tendency for any adversarial system to produce extremes of expert opinion, even on issues which do not involve original research or "cutting edge" scientific issues;
- the question of the propriety of contingency fees for experts and whether they should be disclosed;
- the tendency for expert evidence which involves a large subjective component to descend into a battle of conclusions or assertions, rather than reasoned opinions based on provable facts; and
- the risk of unequal resources being brought to bear on proceedings and their resolution.

These issues are not the product of mere anxious "hand wringing". Various procedures have been implemented in the Court to address them in merit appeals, including expert witness codes of conduct, joint conferences, joint statements, concurrent evidence and Court appointed experts. Other jurisdictions use some of the same and different procedures. Other possible procedures include requiring permission from the court to adduce any expert evidence, requiring all communications with an expert to be in the presence of both parties, and requiring all expert reports to be reports to the court.

The NSW Law Reform Commission Report 109 on Expert Witnesses (2005) makes recommendations including:

- The Uniform Civil Procedure Rules 2005 (NSW) should be amended to provide that in civil proceedings parties may not adduce expert evidence without the court's permission.

- The Uniform Civil Procedure Rules 2005 (NSW) should be revised to include provision for joint expert witnesses in addition to the existing provisions for court-appointed experts.

- The Uniform Civil Procedure Rules 2005 (NSW) should be amended to include rules relating to joint expert witnesses as follows:

    - A provision for an order that a joint expert witness be engaged by the parties affected;

    - A provision for the joint expert witness to be selected by agreement between the parties affected or, failing agreement, by or in accordance with directions of the court;

    - A requirement for consent by the expert being engaged as such;

    - A prohibition against a party eliciting the opinion of a proposed joint expert witness before engagement, and provision for disclosure of any such communication;

    - A provision allowing the joint expert witness to apply for directions, with advance notice to the parties affected;

    - The same requirements in relation to the code of conduct as apply in the case of experts engaged by the parties individually;

    - A provision allowing an affected party to put questions in writing to the joint expert witness for the purpose of clarifying the witness's report;

    - A provision allowing an affected party to tender the report of the joint expert witness and to tender answers by the joint expert witness to

written questions put to the witness by a party, unless the court otherwise orders;

- A provision prohibiting the parties from calling other expert evidence on a question submitted to the joint expert witness, except by leave of the court;

- A provision allowing an affected party to examine the joint expert witness orally in court; and

- A provision for payment of the joint expert witness's fees.

- The provisions of the *Uniform Civil Procedure Rules 2005* (NSW) relating to experts appointed by the court should be amended as follows:

  - Selection of the court-appointed expert to be by the court or as the court may direct, in place of the existing provision for selection by the parties, by the court or as the court may direct;

  - Adding a requirement for the expert's consent to being appointed;

  - A right to examine in chief, cross-examine or re-examine the court-appointed expert as the court may direct, in place of the existing provision for cross-examination only; and

  - Repeal of the existing provision which prohibits the parties from calling other expert evidence in relation to a question submitted to a court-appointed expert.

- The code of conduct for expert witnesses (Schedule 7 to the *Uniform Civil Procedure Rules 2005* (NSW) should be revised by:

  - Deleting those provisions that relate to matters of form rather than the experts' duties (those matters to be dealt with in rules or practice directions);

  - Providing that the duties of disclosure apply to oral evidence as well as to the contents of expert reports.

- The *Uniform Civil Procedure Rules 2005* (NSW) should be amended to require that the fee arrangements with an expert witness be disclosed.

- There should be a provision, by rule or practice note, requiring that expert witnesses be informed of the sanctions relating to inappropriate or unethical conduct.

Some of the NSW Law Reform Commission's proposals, such as the permission rule and the fee disclosure rule, are controversial. The extent to which the Commission's proposals should be implemented is currently under consideration by the Civil Procedure Working Party which meets regularly and comprises representatives of all NSW courts including the Land and Environment Court, as well as the NSW Bar Association and the Law Society.

It will be apparent that, insofar as Court appointed experts are concerned, the Land and Environment Court already operates on the basis of many of these procedures in merit appeals. Given the amount of expert evidence relied upon in merit appeals, it should be no surprise that the Court sees the issues with expert evidence as acute and requiring ongoing consideration.

It remains early days for the use of Court appointed experts in the Court and the development of the best procedures to ensure effective joint conferences between experts and giving of concurrent evidence. The issues confronting the Court and its users in the area of expert evidence remain significant. It is likely that these procedures will be the subject of ongoing review and refinement –certainly over the next 6 to 12 months.

Many of the issues raise important considerations of the appropriate balance to be struck, having regard to different aspects of the concept of fairness. Part 1 rule 5C(2) states that any direction under rule 5C(1)) (for example, limiting the number of witnesses to be called or time to be taken in a matter):

> *… must not detract from the principle that each party is entitled to a fair hearing.*

The content or substance of the right to a fair hearing arises in a context. The *Land and Environment Court Act* 1979 sets the context. The key elements of that statutory context, for the resolution of merit appeals, are contained in s 38, s 39 and, in particular, s12.

The key aspects of s 38 are that:

- Merit appeals are to be conducted with as little formality and technicality, and with as much expedition, as permitted by law.
- In merit appeals, the Court is not bound by the rules of evidence but may inform itself in such manner as it thinks appropriate.
- In merit appeals, the Court may obtain the assistance of any person having professional or other qualifications relevant to any issue arising for determination in the proceedings.

The key elements of s 39 are that:

- In merit appeals, the Court has the same functions as the original decision maker had in respect of the subject matter of the decision.

The key aspects of s 12 are that persons are only qualified to be appointed as Commissioners of the Court if they have the special knowledge, suitable qualifications and/or experience set out in that section.

It is plain from these provisions that the statutory scheme is intended to establish a pre-dominantly inquisitorial mode for the resolution of merit appeals. Yet many features more consistent with a traditional adversarial system have been grafted on merit appeals over time. Many of the reforms instituted by McClellan J (when Chief Judge) were aimed directly at reducing adversarial modes of practice in merit appeals. For example, starting on site at 9.30am made the traditional opening statement beloved by lawyers irrelevant. Requiring all evidence to be given concurrently reduced the importance of cross-examination by lawyers and increased the importance of questions designed to elicit the common ground, the areas of divergence and the reasons for divergence. Using Court appointed experts

addressed some of the sources of adversarial bias in expert witnesses (selection bias, unconscious bias and deliberate partisanship).

A focus on getting parties in merit appeals to give realistic consideration to whether expert evidence will assist the Court and is reasonably necessary (i.e. proportionate) to the real issues in dispute and their complexity deals with the issue at the outset. To be blunt - many issues in merit appeals are either not particularly assisted by the calling of expert evidence (submissions on the issue could just as readily be made and given weight, because the Court is entitled to inform itself as it thinks fit and is not bound by the rules of evidence) or do not warrant the calling of expert evidence (having regard to the cost and level of additional assistance the opinion will provide compared to the overall importance of the issue in the proceedings).

The proliferation of expert opinions in merit appeals which, on any rational view of the appeal, give rise to relatively simple issues has significant potential to undermine the overriding purpose of the just, quick and cheap resolution of the real issues and disputes. With these matters in mind, it will be no surprise that one of the Court's main objectives for 2006 will be to review and consolidate its practice directions applicable to Class 1 and 2 merit appeals (particularly Practice Direction no. 17, Expert Witness Practice Direction 2003 and Court Appointed Expert Practice Direction 2005).

Some of the issues which will be considered include the following:

- How can parties be encouraged to give more active and realistic consideration to whether any expert evidence in merit appeals will actually assist the Court or not?

- If active encouragement of the parties fails (either generally or in a particular case), when is it consistent with the principle that each party is entitled to a fair hearing to direct that expert evidence may not be called in a case either at all or in respect of a particular issue?

- If a Court appointed expert has been appointed, when is it appropriate to grant leave to a party to rely upon other expert evidence, and what procedures should be imposed to ensure any such grant of leave is consistent

with the overriding purpose of facilitating the just, quick and cheap resolution of the real issues?

- Where expert evidence on an issue is appropriate, should all experts in merit appeals be required to proceed to a joint conference before having committed their final expert opinion to paper in the form of an expert report unless that is impracticable for some reason in a particular case?

- What procedures better ensure that, in any expert joint conference, the experts approach the joint conference, insofar as possible, without any unconscious predisposition towards the position of the party who has retained them and with a willingness to engage in a rational dialogue with the other expert informed by their specialist qualifications or experience?

- When should the Court insist on the appointment of a Court appointed expert after experts retained by the parties have prepared joint statements? What are the appropriate criteria given that this will involve additional cost: the size of the claim, the nature of the issue requiring resolution, its potential importance in the proceedings or, for example, any potential failure of the joint conference and joint statement process of experts retained by parties to produce a rational common ground for expert debate?

Feedback

Constructive feedback from Court users on existing procedures and ideas for reform are valuable and welcomed.

Comments may be forwarded to the Registrar.