Case management in the Court of Appeal: a new Practice Note

A new Practice Note relating to case management of proceedings in the Court of Appeal was issued and commenced in operation on 27 March 2009 (Practice Note No. SC CA 1). This Practice Note replaces the previous version which had been issued on 7 April 2008.

In large part the new Practice Note is similar to its predecessor. There are three new requirements, which are as follows:

- Parties are now obliged to inform the registrar of the Court of Appeal at the earliest opportunity of any related appeal or application which should reasonably be taken into account in the listing of any appeal or application.
- Lists of authorities should disclose the name and contact details of the person(s) providing the list.
- Lists of authorities should annex relevant parts of unreported judgments from which passages are to be read at the hearing of an appeal or application.

Despite the small compass of these changes, in light of recent lectures by the president of the NSW Court of Appeal, the Hon Justice Allsop, in the New South Wales Bar Association's 2009 Continuing Professional Development Programme, it is timely to reflect upon other requirements of the Practice Note and Part 51 of the *Uniform Civil Procedure Rules 2005* (UCPR).

Submissions and summaries of argument

The substantive rules in relation to submissions and summaries of argument are contained in rr 51.12, 51.13, 51.36 and 51.45 of the UCPR. Importantly, a summary of argument and response (which are applicable to applications for leave) must not exceed 10 pages and submissions on appeal must not exceed 20 pages.[1] The Court of Appeal has recently commented on the nature and quality of submissions expected of counsel: *Hooker v Gilling* [2007] NSWCA 99 at [65] – [68]; and *Kendirjian v Ayoub* [2008] NSWCA 184 at [45] – [48] per McColl, JA. It is important to note that the court will order costs against counsel where the inadequacy of written submissions leads to unacceptable delay and additional work: see *Kendirjian v Ayoub* (No. 2) [2008] NSWCA 255 and ss 56 and 99 of the *Civil Procedure Act 2005* (NSW).

Chronologies

The substantive rules in relation to chronologies are contained in rr 51.34 and 51.35 of the UCPR. Chronologies should not only refer to the principal events leading up to the litigation (*Woods v Harwin* (CA(NSW), Mahoney AP, Clarke and Meagher JJA, 5 November 1993, unreported), they should also include reference to the key events in the litigation. Further, a chronology should not simply be a recitation of events favourable to one party, but should objectively set out all events relevant to the litigation. The Practice Note makes it clear that failure to file a proper chronology may have adverse costs consequences.

Concurrent leave and appeal hearings

Where leave is required to appeal, litigants will confront the vexed issue as to whether the hearing for leave to appeal and appeal should be concurrently heard. In their summaries of argument and responses, parties are required to address whether it is appropriate for both matters to be heard concurrently and, if so, why. In addressing these matters, parties should consider the extent to which the application for leave to appeal will canvass the merits of the appeal, the extent to which evidentiary materials will overlap, whether there are any issues of public importance, questions of prejudice and delay and any other matter considered by the parties to be relevant. Applications for concurrent hearings will be determined on the papers by a judge of appeal.

Interlocutory applications and motions

All interlocutory applications and motions will continue to be listed before the registrar on Monday mornings at 9.45am unless otherwise stated. Contested matters may be referred to the referrals judge for hearing on that day.

Appeal books

Part 51 of the UCPR makes detailed provision in relation to the filing and content of appeal books. It is important to bear in mind that non-compliance with these rules may result in adverse costs orders, including orders that costs of preparing non-compliant appeal books not be recoverable from clients: *Jeffery v Lintipal Pty Ltd* [2008] NSWCA 138 at [68]. Adverse costs orders may also be made where appeal books contain irrelevant materials: *Slater v Thompson* [2003] NSWCA 220 at [30].

Conclusion

Although the new Practice Note does not make a significant departure from its predecessor in relation to case management in the Court of Appeal, recent cases and comments made by the president have put practitioners on notice of the standards expected from counsel who appear before the court.

AR Moses SC

Endnotes

1. Unless leave is granted by the court because of the nature of the case.