

The expedited list of Western Australia

The Honourable Mr Justice DA Ipp'
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In the previous edition of *Consultus* reference was made (p 83) to a speech delivered by Mr Justice Ipp at the Second National Bar Conference (Durban, July 1991) on so-called "fast track" procedures introduced in Western Australia to prevent unnecessary delays in civil cases. It was also stated that the Judge's suggestion drew strong support

with the Chief Justice. Mr Justice Ipp has meanwhile written the article appearing below which is being published in the hope that the Rules Board for Courts of Law will take due note of the procedures followed in Western Australia with a view to having similar ones introduced in South Africa. (See also the note at the end of the article).

The Malaise of litigation delays

Delay in the courts is a relative concept. In *Earl of Radnor v Shafto*² the Lord Chancellor, Lord Eldon reserved his judgment for 20 years. He then commenced his reasons with the rather engaging throw-away line:

Having had doubts upon this will for 20 years there can be no use in taking more time to consider it.

A delay of 20 years apparently did not give Lord Eldon any concern. Delays in modern litigation are not normally as long. In several States in Australia the time taken from the issue of writ to the delivery of judgment is more than three years and occasionally more than five years. In Western Australia the usual period is two to three years.

Some may think that these lengths of time are an improvement in comparison with what has occurred in the

past; others may even consider that they are acceptable. The latter, it is certain, would not include members of the general community. Most lay people are totally unable to comprehend why it takes so long to get a civil case to court. Traditionalists in the profession point to the fact that "delays" of this kind, and worse, have been endemic for a hundred years and more, and they have been accepted in the past; why shouldn't they be accepted now? The fact is,

though, times and attitudes have changed. The demands of modern life are such that the public is no longer prepared to accept what is – at best for the profession – regarded as delays caused by reasons understood only by the high priests, or – at worst – caused by self promoting and self indulgent lassitude on the part of lawyers. The inability of lawyers and the courts to ensure that cases are tried at a far earlier stage than what presently occurs is an important cause in the general trend towards the diminution in the regard in which the profession, and the law and its institutions are held.

There is surely no doubt that a period of a year or more between the time a cause of action arises and the trial prejudices the quality of justice. Witnesses cannot be found; those who can be found cannot remember, agonising consultations take place while memories are reconstructed; costs mount up; often events overtake disputes; settlements are forced. Frustration and resentment abound. And yet a year between *cause of action* arising and trial is exceptional. The rule is a period of several years.

To the extent that the power to make rules and change procedures so as to bring about expedition is in the hands of the judges, they have some ability to improve matters. Any real improvement requires, however, both the co-operation of the profession and significant government funding. While the former is readily achievable, in the present economic climate the latter is not.

The introduction of the expedited list in Western Australia and its philosophy

In most States some relief from the burdens of delay is provided to parties to commercial cases by expedited commercial causes lists. The idea of an expedited commercial court is not new. A commercial court was instituted in England in 1895. A separate list of commercial causes for trial was kept and a judge charged with commercial work dealt with each commercial cause before it was entered into the List for trial. The commercial court in England is now highly sophisticated. It is often able

to hear commercial cases within days of the first step initiating the action. A commercial list was implemented in New South Wales in 1903 and the highly successful, modern commercial list in New South Wales stems from 1970. Victoria introduced a most effective commercial list in 1979. In Queensland the *Commercial Causes Act* was proclaimed in 1910 and a commercial causes list has operated successfully in Brisbane for many years. New Zealand has been operating a commercial list for some four years and this has proved to be most popular.

Until recently there had, however, not been any special expedited list in Western Australia. By the end of 1989, it was recognised by the Chief Justice, Malcolm CJ, that there was a pressing need for some kind of procedure that allowed urgent cases to be tried more speedily than normal. This was so even though Western Australia was amongst the best served of the States as regards waiting periods for trial. The explosion of commercial and other litigation in Western Australia, however, required some means to be devised of by-passing the delays caused by ordinary procedures. Accordingly, at the instance of the Chief Justice, rules were drafted so as to introduce an expedited procedure into Western Australia. Order 31A, setting up the rules for the expedited list, was promulgated, and the list commenced on 1 March 1990.

The judges of the Supreme Court had decided that the new list should not be a commercial causes list. Philosophically, it was considered that no special merit attached to a commercial cause and a case should not be given expedition simply because it was of a commercial nature. The expedited list should be open to any kind of civil cause that deserved expedition and each case should be dealt with on its merits. Order 31A provides accordingly.

The rules contained in O31A were based largely on the commercial causes lists elsewhere, but these were adapted to suit the special needs of Western Australia. These needs were created largely by the size of the court, the nature of its business and the improbability of obtaining any financial backing from the government.

By the nature of its business I refer particularly to the fact that the District Court of Western Australia has

unlimited jurisdiction in personal injuries' matters and the Supreme Court generally hears only unusual actions of that kind. The majority of the causes coming before the Supreme Court are commercial in nature, but there are several categories of matters which are not. I need only to refer to claims in tort not involving personal injuries (as well as the more complex or unusual personal injuries cases), claims for defamation, and Testators Family Inheritance and other probate disputes as examples. All these categories of cases have to be accommodated in the List.

Thus it is a feature of the expedited list, which may be unique, and which seems to have achieved general satisfaction, that it is open not only to commercial matters but to all urgent cases. Examples of matters admitted to the list not of a commercial nature are cases involving aged widows or other persons, persons suffering from terminal diseases such as asbestosis, defamation cases involving plaintiffs who have an urgent need for the purposes of their profession or business to clear their name, and cases requiring judicial review.

The other factor that significantly affected the character of the Expedited List was the absence of financial resources available to support the initiative. This meant that the list had to operate without any increase in the number of judges or court staff.

The administration of the list

It was decided that the expedited list should be administered for a particular defined period (now fixed provisionally at one year) by one judge and his associate. The latter would act as a *de facto* registrar of the expedited list. The judge concerned, by necessity, in addition to his task of administering the list, would have to do the normal work carried out by the other judges.

The list is administered principally by the holding of directions hearings from 9.15am to 10.15am each morning with Fridays being set aside for opposed interlocutory hearings. From 10.30am onwards the expedited list judge hears trials of expedited proceedings, if any are listed. If there are other judges available he may list an expedited trial

before such other judge. Generally however, the expedited list judge will be the judge who will deal with the trials of expedited proceedings.

The expedited list judge is in control of his own list and can list trials or interlocutory hearings whenever he considers it appropriate.

The judge will normally hear three to five directions hearings in the hour before 10.30am but up to ten may be dealt with in that period. The only way in which these directions hearings can be disposed of so quickly is by the use of written submissions. The parties are required to file their written submissions the day before, the judge reads them overnight and forms a preliminary view on each matter. This enables him to dispose of all interlocutory disputes far more quickly than is otherwise the case.

Admission to the list

It is quite apparent, therefore, that the expedited list judge has to carry an additional burden. To control that burden the number of cases admitted to the list has to be limited. Accordingly, unlike the position in most commercial causes lists, admission to the expedited list is not automatic. Admission to the list is at the expedited list judge's discretion.

Order 31A provides that any party to a cause might apply, at any time, for admission to the expedited list and that application can be opposed. Practice has demonstrated that the expedited list judge will ordinarily admit a matter if it were shown to have features requiring it to be dealt with on a more urgent basis than an ordinary case. Nevertheless, the number of cases in the expedited list at a given time can materially affect a party's prospects of admission.

As is stated in *Civil Procedure Western Australia*; *Seaman*:³

The expedited list judge has a very wide discretion to admit or refuse to admit proceedings to the expedited list. The factors which will govern the exercise of that discretion cannot be crystallised into inflexible rules because of the variety of circumstances which may give rise to an application for admission to the list, and also because of the propriety of affording a particular case priority over other cases will be influenced by the position of the list generally, the time available to the expedited list judge to deal with complex interlocutory applications and the availability of trial dates at any particular time. It follows that particular circumstances

which justify admission at one time may not support it at another . . .

A matter can be admitted to the list, on good cause shown, over the objections of other parties. As the programmes and disciplines of the list can be onerous, the admission hearing, though generally brief (seldom lasting more than 10 minutes of oral argument) can be sharply contested. The launching affidavit is therefore of prime importance; the rule being that the applicant is not given a second chance. As is stated in *Seaman*:⁴

the affidavit in support must carefully explain any apparent delay in the proceedings themselves and make a full disclosure of every fact and circumstance which might affect the mind of the expedited list judge in exercising his discretion. If a case is admitted upon the basis of an affidavit which does not make full disclosure there is a grave danger that it will be subsequently discharged from the list.

The court will be slow to order expedition when an applicant has failed to process his action diligently. Parties who have not taken the trouble to move expeditiously, when they should have done so, cannot expect to have their cases heard more speedily than other litigants, unless special circumstances are shown.⁵

A rule of practice also designed to alleviate the burden on the expedited list judge and his associate is that it is the responsibility of the applicant to ensure that all relevant facts are set out in the supporting affidavit. Any reference to other material in the court file (without annexing that material to the supporting affidavit) is severely discouraged. The idea is that all the associate has to do the day before the hearing is to make sure that the judge has the affidavits of the parties and their written submissions. There should be no need to hunt through the court file to identify documents to which reference has been made in an affidavit. With between three and ten disputed interlocutory matters to consider each evening, and to dispose of next morning, there should be no time wasted in a search for documents.

Directions, milestones, sanctions and interlocutory hearings

Proceedings at directions hearings are shortened by the use of usual

forms of orders.⁶ The court has developed usual directions orders which are adapted by the parties to the degree required. This means that little time is taken each morning by the judge having to write out the detailed orders.

Once admitted to the expedited list the case becomes subject to milestones set by the expedited list judge. Within seven days of admission to the list a programme must be determined by the expedited list judge setting out specific dates by which particular procedural steps have to be taken. This programming is of essential importance to the operation of the expedited list. The dates set are tailored to the particular exigencies of the case concerned and have no relationship to the time periods set out in the rules for ordinary cases. A week is often the period allowed to elapse between a statement of claim and a defence, a defence and discovery and the other procedural matters of a similar kind.

It was recognised that sanctions were essential to a proper operation of the list. There would be little point in setting performance dates when there were no means of effectively implementing compliance with the dates set. Clearly the main sanction for the party wishing to remain in the list is removal from the list. If such a party does not comply with the timetable and fails to give a reasonable explanation for his failure the case will be removed from the list. Special costs orders and springing orders are sanctions applied to the party in default who has no interest in remaining in the list. These sanctions have been found to be most effective and little difficulty has been experienced in ensuring that programming orders are complied with.

Generally, O31A gives the expedited list judge very wide powers based on the basic concepts of case flow management. All of these are aimed at identifying the real issues between the parties as early as possible and obtaining a speedy disposition of the case. The system rests on the idea of the judge administering the list adopting an interventionist role.

In accordance with the basic principle of case flow management once the matter comes before the expedited list judge and is admitted to the expedited list it is never adjourned indefinitely. The expedited list judge will, after making

directions orders, adjourn each matter to a particular date so as to be able to monitor the progress of the matter. The parties are not entitled to agree between themselves to adjourn a direction hearing without the approval of the expedited list judge. If they do so sanctions may follow.⁷ Similarly the parties are not entitled to agree an extension of the timetable without obtaining the imprimatur of the judge. Should the parties in fact delay the matter without the court's approval there is a very strong probability that the matter will be removed from the expedited list. This means that if the innocent party does not take steps to enforce compliance with directions orders it, too, will face sanctions.⁸

Every Friday is set aside by the expedited list judge for the purpose of hearing any opposed interlocutory matter that may be required to be adjudicated upon in any expedited proceeding. Again, written submissions are required to be filed by each party some time before the Friday concerned and the judge will generally be able to form a provisional view before the hearing. This, too, results in the interlocutory hearings taking far less time than ordinarily is the case. The expedited list judge will, ordinarily, in any event, limit the time for oral submissions, often to 10 minutes for each party.

Opposed interlocutory hearings in expedited proceedings are discouraged, the philosophy being that the imminence of the trial, where issues will be fully and properly investigated, should allow the parties ordinarily to resolve their interlocutory disputes between themselves. Further, the expedited list judge has limited time available to hear interlocutory disputes and they have the capacity in any event to delay expedited trials. To this end, in addition to exchanging written submissions, the parties are required to meet in an attempt to resolve the interlocutory dispute. It is only then that the expedited list judge will grant a special appointment to hear the dispute.

Similarly, interlocutory injunctions are discouraged on the basis that parties should be able to agree on some acceptable interim commercial arrangement. The allocation of a trial date for the substantive action and circumstances of urgency should normally alleviate the need for an interlocutory injunction hearing.⁹

Interrogatories, discovery, special damages and splitting of issues

Interrogatories can only be administered with the leave of the expedited list judge. On application, discovery can be limited to particular issues or limited generally. Every attempt is made to lighten the burden of discovery in complex cases.

Where special damages are claimed the expedited list judge will order the plaintiff to serve on the defendant a schedule of those damages. The defendant is thereupon required to state in writing whether and to what extent each item claimed is agreed, and, if not, why not, and if the disagreement relates to the quantification of an item the defendant is required to make a counter proposal with a view to agreeing that item.

Although there has been in the past judicial reluctance to agree to the division of issues there is no such reluctance in the expedited list. It is recognised that, in practice, if important issues are resolved often the entire case is shortly thereafter disposed of. With this in mind and with a view to ensuring that the true issues are litigated upon the expedited list judge will hold a directions hearing before listing the matter for trial. At this directions hearing he will order a division of the issues if necessary and make any other order relating to the hearing of the matter which he regards as desirable for the purposes of expedition.

Mediation between parties and experts

Unlike cases subject to the ordinary rules the expedited list judge has the power to order parties to attend conferences to mediate their differences. The usual mediation order requires the plaintiff by a stipulated date, to serve on the other parties a statement of issues for the purposes of a mediation conference. In the event that the statement of issues is not agreed, solicitors for the other parties are required to produce their statement or statements of issues. Thereafter the solicitors for all the parties are required to confer in an endeavour to agree the issues. Once the issues are

agreed, or once it has become apparent that agreement as to the issues cannot be arrived at, the mediation conference takes place before the Principal Registrar. There are very few cases where at least some issues have not been settled before the Principal Registrar. On several occasions commercial matters of great complexity have, to the surprise of all, been resolved. The mediation provisions have proved extremely popular and some parties attempt to gain admission to the expedited list solely to be able to take advantage of them. If a party fails to co-operate at a mediation conference, and, as a result, the real issues are not identified and the trial is unnecessarily lengthened, an appropriate costs order will be made.¹⁰

Not only may mediation be ordered between the parties to an expedited proceeding but the expedited list judge may order that the expert witnesses on the opposing sides attend a mediation conference, either between themselves or before the Principal Registrar. This procedure too has been most fruitful. It is a rare case indeed that the experts are not able to resolve at least some issues with the consequential shortening of the trial.

Pre-trial disclosures

Normally the expedited list judge will order the parties to exchange signed written statements of the evidence of the ordinary witnesses they intend to call. Generally, the statements will stand as the evidence in chief of the witnesses concerned. Oral evidence is then only allowed with the leave of the presiding judge. In a case where credibility is in issue evidence will normally be given in the usual way.

The principle that there be an exchange of witnesses' statements initially met with some opposition but the advantages of this procedure have been readily apparent to all. I would assess that the trial is shortened by at least 25% of its ordinary length if statements of witnesses are utilised as evidence in chief.

Consistent with the principle that in the expedited list there should be full disclosure of each party's case before the hearing, so as to ensure that the true issues are litigated upon, an order is generally made that each party will, by notice in writing, specify the documents which he intends to tender at trial. This

requirement does not relate only to documents discovered by him but documents which are in the possession of other parties which he intends to produce. It is common to include an order that the opponent must advise in writing which of the specified documents may be tendered by consent and to give reasons in writing as to why consent to tendering any other documents is withheld. As is stated in *Supreme Court Practice in Western Australia, Seaman*:¹¹

In practice these orders save time at trial not only by avoiding surprise and a necessary argument about the admissibility of documents but in shortening opening addresses and evidence in chief.

Listing for trial

It is a matter of considerable importance to the expedited list judge, maintaining – as he does – his own trial list, to be able to assess the length of each trial. For this reason detailed directions' orders for assessing trial lengths are made. Each party is required to file a document estimating the length of the trial, disclosing the number of non-expert and expert witnesses the party intends to call and the particular issue or issues in respect of which each witness is expected to testify, and disclosing the length of the proof of evidence relating to each witness and the estimated time of his evidence. At the same time the solicitors for each party are required to file a certificate that all the non-expert witnesses whom the party intends to call have been proofed, that a signed proof by each is held, that a written report is held from each expert whom the party intends to call, that a written advice on evidence has been prepared and that no amendments to pleadings or particulars are contemplated. The solicitors are also required to file a statement by counsel who signed the pleadings, or who has been briefed on the trial to his opinion concerning the probable length of the trial. While errors are still made experience has demonstrated that with these procedures the trial length can far more reliably than usual be estimated.

Settlements can often be the bane of a list which is not based on the continuous roll system. The procedures in the expedited list, incorporating as they do the directions hearings, the defining of issues, mediation between experts and mediation between the parties, result in matters which are

capable of being settled resolving themselves before the listing conference. In a period of 15 months from the inception of the expedited list on 1 March 1990 to 30 June 1991 settlements took place in several expedited list matters but none took place after the matter had been listed for trial. This of course saves a great deal of time in wasted judge days.

Documents for trial, adjournments and the trial itself

The usual order as to trial documents and issues requires duly indexed and paginated bundles of documents to be tendered at the trial by the parties and for the parties to have sufficient bundles available to prevent there being any wastage of time in identifying documents.

An adjournment of an expedited trial is only granted in exceptional circumstances. If late amendments are likely to cause adjournments they will not be granted. Before the case is entered the expedited list judge will normally have obtained an undertaking in writing from the solicitors for the parties that no amendment is contemplated. So for example in *Rothwells Ltd (in Liq) v Peng*¹² an application by the plaintiff in the course of the trial to amend his statement of claim to delete the claim for interest based on an implied term and to substitute a claim for damages for failure to repay the debt or alternatively a claim for discretionary interest under s 32 of the *Supreme Court Act* was refused. This was despite the fact that the interest was claimed on the sum of \$1,240,000 for a period of four years.

When considering applications for adjournment the expedited list judge will take into account any injustice which may be caused by the effect of the adjournment on the position of the expedited proceedings in the list and will bear in mind interests of others caused by the disruption of the list and prejudice to other litigants: *Wiese v Nationwide News Pty Ltd*.¹³

Generally, the parties have to be ready to go to trial on short notice. The practice in the expedited list in regard to trial dates and adjournments is consistent with that adopted in the commercial list in the Supreme Court of Victoria as explained by Mr Justice Marks,¹⁴ namely,

A dilatory party is liable to be required to go to trial unprepared. Trial dates

are not postponed at the request of a party not disadvantaged by delay or a party wishing at a late time to join third parties.¹⁵

And:¹⁶

The date fixed must be kept and adjournment disallowed, save for an exceptional circumstance, such as a sudden illness of a vital witness; success in the list depends on the application of a consistent policy and readiness to remove cases which are not urgent or being treated as urgent by the practitioners.

Unlimited cross examination will not be allowed in expedited proceedings. Evidence should not be unnecessarily prolonged and the court will exercise its discretion to ensure that this occurs.¹⁷

Monitoring by the profession and control by the court

Plainly the exercise of reasonably strict control from the Bench is a prerequisite to expedition under the expedited list. However the system will not work unless there is co-operation from the profession. There is no doubt that this co-operation has been forthcoming to a very high degree. The Law Society of Western Australia and the Western Australia Bar Association were consulted before O31A became part of the rules of the Supreme Court and full account was taken of the profession's views in this regard. Furthermore, a monitoring committee made up of representatives of the Law Society and the Bar meet at regular intervals with the expedited list judge and are encouraged to comment as fully as possible on the way in which the expedited list is being implemented.

The basic philosophy of the expedited list can be simply stated. That is, the control of every case is taken out of the hands of the parties and placed in the hands of the court. The court supervises and monitors the dates by which various specified events have to occur and if they do not occur the court imposes sanctions. Standards and goals are set for specific events such as the filing of specific pleadings, discovery, entry for trial and the trial date. If a party does not meet the standards due to fault on his part, sanctions will follow. The parties themselves are not allowed to set or extend dates. As has often, in recent times, been urged, the court, in its supervisory function,

represents the public interest by reducing delay and insisting on compliance with the time limits.

The statistics for the expedited list from 1 March 1990 to 30 June 1991 are self-explanatory. Some 150 cases were admitted to the list during this period. Eighty percent were disposed of within four months or less as from entry into the list. Entry usually occurred immediately after the issuing of the process initiating the action. Therefore nearly 80% of the cases admitted were completed within 4 months from the time they were started. Several were concluded within a week of commencement.

Generally the approach in the expedited list is to adopt the recommendations made by Lord Templeman, when he said in *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co*:¹⁸

Proceedings in which all or some of the litigants indulge in over elaboration cause difficulties to judges at all levels in the achievement of a just result. Such proceedings obstruct the hearing of other litigation. A litigant faced with the expense and delay on the part of his opponent which threaten to rival the excesses of *Jarndyce v Jarndyce* must perforce compromise or withdraw with a real grievance. . . . The present practice is to allow every litigant unlimited time and unlimited scope so that the litigant and his advisers are able to conduct their case in all respects in the way which seems best to them. The results are not infrequently torrents of words, written and oral, which are oppressive and which the judge must examine in an attempt to eliminate

everything which is not relevant, helpful and persuasive. The remedy lies in the judge taking time to read in advance pleadings, documents certified by counsel to be necessary, proofs of witnesses certified by counsel to be necessary, proofs of witnesses certified by counsel to be necessary, and short skeleton arguments by counsel, and for the judge then, after a short discussion in open court, to limit the time and scope of oral argument. The appellate courts should be unwilling to entertain complaints concerning the results of this practice.

I suggest that the procedures now being implemented in commercial lists throughout Australia and also in the expedited list of Western Australia, are the ways of the future. Indeed, but for the shortage of financial resources, there is no reason why those procedures should not immediately be adopted in modified form in all cases. They point the way to huge reductions in delay, to a renewal in respect for the law as a just and efficient servant of the people and, in a very real (although not ordinarily appreciated) sense, to an affirmation of judicial independence. The judiciary, in the minds of the public, and sections of the media, is often accorded responsibility for delay in the courts (and concomitant injustice). It is surely desirable for the judiciary to have the powers to prevent delay, as well as having to bear that perceived responsibility.

Note:

This article was also published in the February 1992 issue of the *Journal of Judicial Administration*. We wish to record our appreciation to the Executive Director of

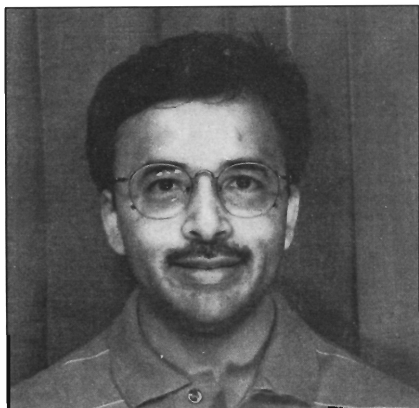
the Australian Institute of Judicial Administration for the permission granted to us to reproduce the article in *Consultus*. – Editor.

FOOTNOTES

- 1 Judge of the Supreme Court of Western Australia.
- 2 2 Ves Jun Supp 267.
- 3 At 7334.
- 4 Op cit at 7334.
- 5 *Rothwells Ltd (in Liq) v Peng* (1990) 1 WAR 380.
- 6 For the forms of orders see *Seaman* op cit at 7363 to 7378.
- 7 *White Star Holdings v Shire of Harvey* 1990, unreported, Supreme Court of Western Australia; per Ipp J; Library No 8529.
- 8 *White Star Holdings v Shire of Harvey*; see footnote 7.
- 9 *IHC Pathology Pty Ltd v Hookway* 1990, unreported; Supreme Court of Western Australia; per Ipp J; Library No 8590.
- 10 *Capolingua v Phylum Pty Ltd*; 1991, unreported, Supreme Court of Western Australia; per Ipp J; Library No 8784.
- 11 Civil Procedure Western Australia, *Seaman* at 7349.
- 12 (1990); unreported; Supreme Court of Western Australia; per *Seaman* J; Library No 8315.
- 13 (1990); unreported; Supreme Court of Western Australia; per *Seaman* J; Library No 8482.
- 14 In his article in 1988 *Aust Bar Rev* 112.
- 15 *Ibid* at 133.
- 16 *Ibid* at 114.
- 17 *Crafter v Singh* (1990) 2 ACSR 1 at 14.
- 18 (1990) 3 WLR 264 at 380. ■

Mr RBG Choudree, a barrister and solicitor of the Supreme Court of Western Australia and an advocate of the Supreme Court of South Africa, who also attended the Durban Conference, has very kindly submitted to us a memorandum on the progress that

has been made in Western Australia in implementing the "fast track procedures" referred to by Mr Justice Ipp. An edited version of the memorandum is reproduced below.



The Supreme Court of Western Australia has recently mooted a system of sanctions to encourage case management "milestones" which it expects will be in operation by the middle of 1992 in relation to civil matters generally.

The proposed civil case management system will require some amendments to the Supreme Court Rules including the implementation of an effective system of sanctions to encourage and, where necessary, enforce compliance with "mile-

stones" (set dates for compliance with rules or orders).

The legal profession in Western Australia was given the opportunity of expressing its views to two Committees of the Supreme Court charged with obtaining the views of the profession on the implementation of a civil case management system (the Supreme Court Case Management and Delay Reduction Committees).

As a first initiative, a system of default milestones on specified events

in the course of a civil claim has been proposed. Such milestones might initially be imposed at the point of entry of appearance or close of pleadings (or filing of affidavits) and at entry for hearing. It was to breaches of these milestones that primary consideration was given. It was also noted that any system which enforced the case management milestones might also be used to enforce court orders generally.

Such sanctions might be either: –

- Costs orders against the offending party, or
- The opportunity to the opponent to move for judgment or dismissal of the defaulting party's claim or defence (as appropriate).

It is envisaged that any enforcement system might operate to permit the appropriate judicial officer (ranging from a Master of the Supreme Court, a Registrar or Judge) to impose a sanction for milestone breaches as well for breaches of any court orders. It could be available to the court on its own motion, or at the request of the opposing party.

It is expected that the system would incorporate a wide discretion to impose a sanction most appropriate to the default. However the court might also develop a consistent policy on sanctions so that lawyers would know the type of sanction likely to be imposed and could then monitor their own efficiency levels.

Three main types of costs orders were identified for the purposes of sanctions: –

1. Orders to pay ordinary party and party costs;
2. Orders to pay "indemnity costs"; and
3. Orders against solicitors to pay costs personally.

The power to impose normal costs orders on the basis of party and party costs was not viewed by the Committees as being entirely useful as a real sanction. It was contended that costs orders can be embarrassing but they might also be subsumed in the litigation and passed onto clients without any real effect on the litigation process.

It was also suggested on the other hand that orders for indemnity costs and costs against solicitors personally may offer more substantial sanctions. Accordingly there might be an

expansion of the rules to enshrine indemnity costs orders as the first sanction for milestone breaches and a re-working of matters triggering costs orders against solicitors personally.

The general deterrent effect of indemnity costs orders is probably already acknowledged by the profession in Australia. Thus, an order that the defaulting party pay indemnity costs for a milestone breach could operate as a sanction. If indemnity costs were adopted as a sanction for milestone breaches, defaulters could expect to be ordered to pay all the costs incurred by the innocent party as a result of the breach, except in so far as those costs were of an unreasonable nature or had been unreasonably incurred. Thus, an innocent party would be completely indemnified by the defaulter, for its costs. The indemnity costs order could include a condition that the costs be paid by the defaulting party to the innocent party within 14 days of the date of the pronouncement of the order and not at the discretion of the defaulting solicitor. Although the normal order could be that a defaulting party pay indemnity costs, it might not extend to the entire costs of the action to date, but only to the costs on the way.

Accordingly the following programme has been mooted as being suitable: –

- (a) Where it appears that a milestone has not been complied with, a default notice could be sent by the court to the apparent defaulting party inviting that party to show cause why an appropriate costs order should not be made against him. The usual order would be indemnity costs but in special cases, the court might reduce the severity of the costs order to mere party and party costs (if it were satisfied that the default was limited). In serious cases the order could be costs against a solicitor personally.
- (b) Prior to the return date of this first "show cause hearing", the innocent party could lodge its costs claim (in schedule form) so that in the event of the court sanctioning the defaulting party, costs could be fixed, in terms of the schedule, on the spot.

(c) If a costs sanction order were made against a defaulting party, he would have 14 days within which to pay the full amount of the costs to the innocent party.

(d) However, it has also been proposed that no order would be made against a solicitor personally until he has received a notice allowing 14 days to file an affidavit explaining the serious default and showing cause why a personal costs order should not be made. The defaulting solicitor should also be required to appear.

(e) The first show cause hearing (see paragraph (a) above) could be totally summary in word and deed. No affidavits would be required to be filed unless the court specifically requested them. If any argument were presented at this first hearing, it could be strictly limited in time (perhaps a maximum of 10 minutes) and all show cause for milestone breach hearings could be listed as short matters. It is suggested that ordinarily the sanction for a first breach of a milestone ought to be an indemnity costs order although it would be open to the innocent party to seek an order against the solicitor personally or judgment or dismissal of the same of the defaulting party. Perhaps in this event where costs are being sought against a solicitor personally, a judge instead of a registrar or the master could adjudicate. If a personal costs order or judgment (or dismissal) were sought, the court could require affidavits in support of the innocent party's application and a special hearing. However, motions for judgment etc would ordinarily not be made in the first instance. Thus, a sanction for milestone defaults could be an indemnity costs order that the defaulting party pay the costs thrown away. A practice direction might encompass all matters in this paragraph.

(f) It could always be open to an innocent party to move for an order against the solicitor personally or to move for judgment (or dismissal) where the order party fails to meet the milestone which had already been the subject of a court order relating to a breach of that milestone ie on the

second breach of the same milestone. Again seeking an order against a solicitor personally would be more appropriately adjudicated upon by a judge instead of a registrar or the Master.

According to the Committees considering the matter the design to describe the programme *supra* would, of course, require changes to the

Rules of the Supreme Court of Western Australia, but the bulk of the design could be reduced to and included in a single new "delay reduction order" in a fashion similar to a new order of the Supreme Court Rules which governs the expedited list.

It is envisaged by the Committees that the proposals would have, as their object, a civil case management system in which sanctions *will* work.

It is pointless in having a variety of sanctions without teeth that really bite! Mindful that all sanctions orders are capable of generating appeals, and conscious of the need to avoid new procedures which have the effect of clogging up lists, the show cause hearing would have to be rigorously controlled. A purely summary form of hearing is therefore contemplated by these Committees. ■

International Bar Association: News and Developments

Milton Seligson, SC
Chairman, GCB
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The International Bar Association (IBA) continues its progress as the world's leading international lawyers association. At the end of last year it had 14 161 members, of which 2 646 were under 36 years and 133 Bar Associations and Law Societies from 82 countries as member organisations. Membership of the Section on Business Law (SBL) was 10 638, of the Section on General Practice (SGP) 2 834, and of the Section on Energy and Natural Resources Law 1 362.

During June 1991 the SGP held a most successful meeting in Montreal in conjunction with the IBA Council meeting and a Forum of World Bar Leaders and a Judges' Forum. From 30 September - 4 October 1991 about 2 000 lawyers and 700 guests attended the 10th Biennial Conference of the SBL. The participants included 36 lawyers from mainland China, as well as 37 young lawyers from the Asian region who received scholarships from the SBL

allowing them to attend the conference. Over 400 speakers addressed the 36 committees of the SBL and meetings were also held of the Judges' Forum, the Eastern European Forum and the newly formed Academics' Forum.

A new IBA committee on Lawyers with Disabilities has been formed to encourage and promote the activities and interests of such lawyers through the IBA.

The IBA, through letters from its President, Giuseppe Bisconti of Italy, has given support to lawyers in human rights cases in such diverse countries as Brazil, Djibouti and Turkey. In October 1991 the IBA sent an observer to the hearing of contempt proceedings against the Chairman, Vice-Chairman and seven Council members of the Law Society of Kenya. These proceedings were an aftermath of statements by the Law Society calling for an inquiry into the performance of the Chief Justice and another Judge of the High Court with a view to their removal.

The next meeting of the IBA Council (on which the GCB and the ALS are represented) takes place in Lisbon at the end of May this year. It will be held in conjunction with a meeting of the SGP and another meeting of the World Bar Leaders' Forum. The major event in the 1992 calendar will be the IBA's 24th Biennial Conference which is to be held in Cannes on the French Riviera from 20 to 25 September. Various seminars are also planned by the IBA sections in different parts of the world.

Members of the South African Bar attending IBA conferences are permitted to deduct, for income tax purposes, the cost of attendance. Membership forms can be obtained from the Secretary of the GCB in Johannesburg or by writing to:

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