

UNSW CENTRE FOR CONTINUING LEGAL EDUCATION

LITIGATION MASTER CLASS

11 MARCH 2008

TOPIC 3: Pillars of litigation

OVERVIEW

Topic 3 of this seminar examines two components of litigation: orders and affidavits. This paper is an outline of the matters to be examined in the session scheduled from 10.15 am to 11.00 am, with a view to stimulating thought and promoting discussion, and not as definitive statement. Necessarily, the content and detail of the paper is constrained by the time available for the session.

Legal practitioners are cautioned to rely on their own research and enquiries in advising clients. This paper does not purport to be the first or last word on the matters examined. Legal practitioners will also be mindful of the evolving nature of the law, together with the importance of the relevant facts to determine outcomes in individual matters.

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A. Prologue – building houses that stand

“Wisdom hath builded a house: she hath hewn out her seven pillars.”¹

1. It is wisdom from human experience over millennia that conceptualisation and planning remains the most reliable means of achieving a preferred result and avoiding unwelcome surprises.
2. One example is the construction of a house where development of, and adherence to a plan or a design is the most effective means of building such an important structure. Care in planning the aesthetic form and the functional integrity is rewarded by harmony in appearance and structural performance.
3. Pillars are the components of a building, such as a house, which hold up the superstructure. Whilst often conceived and constructed at the earliest stage of building, they remain essential to the function of a house for its life. If poorly designed, or not constructed to design, the house may fail, be unusable or collapse.
4. Litigation involves functional components which are analogous to pillars in the built environment. Two such “pillars” are orders and affidavits which support the superstructure of a case.
5. To achieve a preferred outcome for a client, and to avoid the collapse a case, the wise litigator establishes sound pillars for each matter.

¹ Bible, Book of Proverbs (ix. 1)

B. Introduction: “command of the public force” and strategy

6. Litigation is a means to an end, and not an end in itself. Litigation exists as a component of the judicial system.
7. The purpose of the judicial system has been described by the High Court as:

“The ‘unique and essential’ function of the judicial branches the quelling of controversy by the ascertainment of the facts and the application of the law. Once a controversy has been quelled, it is not to be relitigated.”²

8. Society has an interest in finalising disputes for its wellbeing as an entity and the ongoing security of its individuals. Our system for the administration of justice provides parties with the opportunity to agitate a controversy in an adversary manner in the neutral environment of a court with an independent decision maker ie: a judge, to resolve the dispute, by making orders to give effect to his or her decision.
9. Oliver Wendell Holmes Jr in extra-curial writing described the process in 1897:

“In societies like ours the command of the public force is entrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees.”³ ..

10. Strategy is the skilful planning and management of one’s resources in getting the better of an adversary or attaining an end. The word is derived from the Greek *strategia* meaning generalship, and in English often has a military connotation. If necessary, better to imagine the care and planning of Alexander at Issus, rather than Haig at the Somme.
11. Conceptually, litigation is best conducted with a settled strategy which has identified the desired outcome and the necessary tactical plans to reach that outcome. The counsel of “prepare backwards, present forwards”,⁴ is a preferred and effective approach of many skilled advocates to achieve the preferred outcome.

² *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [43]

³ “The Path of Law”, 10 *Harvard Law Review* 457 (1897)

⁴ Thanks to Geoff Lindsay SC who introduced this concept to me.

12. It is by understanding the process of litigation from these higher levels of abstraction that the importance of pillars of litigation such as orders made by courts and the underpinning evidence leading to same, such as affidavits, becomes apparent.

C. What is an order?

13. The Shorter Oxford provides twenty-four meanings for the word “order” (from the Latin *ordin-*, *ordo*: row, series, rank etc) as a noun and nine as a verb. They range from military to ecclesiastical to commercial to scientific uses, with a theme of regularising or methodical arrangement through organisation and control.
14. I shall use the word “order” as a noun meaning an operative judicial act.
15. The preferred outcome which a litigator seeks for a client is hopefully realised in the order(s) made by the judge to quell the controversy and to resolve the dispute. For this reason careful conceptualisation and planning of strategy at the earliest stage, including formulating and articulating the optimal, but not overly optimistic, relief available is the sound way to achieve the desired result. Ongoing reassessment during the agitation of the dispute is essential to reach the planned outcome for the client, including changing and evolving strategy, orders or relief sought and re-assessment of prospects of success.
16. The nature of what an order is, may understood from three perspectives:
 - (a) how it arises;
 - (b) its purpose;
 - (c) its effect.
17. The source of a court’s power to make any order is its available jurisdiction. Different courts enjoy different jurisdiction and inferior courts have limits placed upon their power to hear and determine disputes including by:
 - (a) the subject matter of the issue;
 - (b) persons between whom the issue may be joined;
 - (c) the kind of relief that may be granted.

18. The ample jurisdiction of the Supreme Court, including its inherent jurisdiction, to do all that is necessary for the administration of justice in New South Wales is well described⁵.
19. By comparison the District Court, as an inferior court, is a statutory court with specific jurisdiction conferred by Parliament⁶. The jurisdiction of an inferior court such as the Local Court of New South Wales is also limited by statute⁷.
20. The terms verdict, judgment and order often confuse. An order is best understood to be the process by which the first and second are expressed by a court, but the term “order” also encompasses directions and other interlocutory or final determinations of a court.
21. Furthermore, a distinction is required between the expressed outcome of decision making process by juries as opposed to a judge alone, and between criminal and civil procedure terminology.
22. A verdict is the expression of a court’s finding of facts. It is a term used to express the result of deliberations of a jury or the fact finding process in any trial. Of itself a verdict does not resolve a dispute, and until embodied in a judgment a verdict cannot take effect. Furthermore, the court may enter judgment contrary to a verdict in favour of a party:

UCPR⁸ r29.11 Judgment despite verdict, finding or assessment

If, at a trial with a jury, a verdict is given or a finding or assessment is made, the court may give judgment as it thinks fit despite the verdict, finding or assessment.

23. A judgment is the expression by a court of its determination as to the relief claimed in a civil suit in proceedings initiated by statement of claim, and is enforceable by writ of execution. Thus where a plaintiff at trial persuades a decision maker of entitlement to relief, the court will give judgment in favour of the plaintiff, will make orders appropriate to the matters in dispute and will be guided by the relief claimed by the plaintiff. Alternatively the court will give

⁵ See *Supreme Court Act 1970* s23

⁶ See *District Court Act 1973*

⁷ See *Local Courts Act 1982* s7; see for its civil jurisdiction Part 7 Division 1

⁸ For convenience I shall refer to the *Uniform Civil Procedure Rules 2005* by the abbreviation UCPR.

judgment for the defendant and make an order that the plaintiff's claim is dismissed.

24. By comparison in proceedings commenced by summons the judge's determination will be expressed as orders rather than as a judgment, often as a separate exercise after delivering reasons, decisions and an invitation that "*Short minutes should be brought in to encompass my decisions*".
25. In essence, it is the order(s) made by the court that:
- (a) bring(s) to an end,
 - (b) expresses its determination of, and thus
 - (c) quells,

the controversy which is the subject of the dispute between parties.

26. The recognition of the interest of society beyond the parties, as well as, the interest of the parties to achieve finality in litigation by this process is found in the recent passage by the legislature of the CP Act, including that:

CP Act⁹ s91

(2)...if, following a determination on the merits in any proceedings, the Court dismisses the proceedings, or claim for relief in the proceedings, the plaintiff is not entitled to claim any relief in respect of the same cause of action in any subsequent proceedings commenced in that or any other Court.

27. This is an expression of common law (in the sense of jurisprudence generally rather than the distinction relevant to the Judicature Acts), one often expressed passage of which is:

*"A judicial determination directly involving an issue of fact or of law disposes once for all of the issue, **so that it cannot afterwards be raised between the same parties or their privies.** The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification or its conclusion, whether that conclusion is that a money sum be recovered or that the doing of an act be commanded or be restrained or that rights be declared.."*¹⁰

⁹ For convenience I shall refer to the *Civil Procedure Act 2005* by the abbreviation CP Act

¹⁰ *Blair v Curran* (1939) 62 CLR 464 at 531 per Dixon J; see also Spencer, Bower, Turner & Handley, *Res Judicata*, 3rd ed,

28. The effects and potential consequences arising from orders include:
- (a) determination of rights, entitlements or obligations;
 - (b) enforcement, eg: writ of possession;
 - (c) *res judicata*;
 - (d) issue estoppel;
 - (e) appeal;
 - (f) contempt;
 - (g) professional misconduct.

D. Legislation and rules relevant to orders

29. The CP Act addresses the terms order and judgment in several provisions in a manner which suggests a degree of fluidity in the use of those terms, consistent with the overriding purpose of the Act to facilitate the just, quick and cheap resolution of the real issue in the proceedings.

CP Act s3 Definitions

judgment includes any order for the payment of money, including any order for the payment of costs.

CP Act s90 Judgments generally

- (1) The court is, at or after trial or otherwise as the nature of the case requires, to give such judgment or make such order as the nature of the case requires.

CP Act s96 Effect of judgment or order

- (1) Any judgment or order of the Court for the payment of money shall have the effect of a judgment at law.

30. The powers conferred on courts by the legislature as to costs (see CP Act Part 7 and UCPR Par 42) allow a court to make orders as to whom, from whom, and what costs are to be paid, and on what basis such costs are to be assessed.

31. The power conferred on any court to which the CP Act applies to make costs orders against a party's legal practitioner, effectively by way of sanction in regard to the conduct of proceedings and notwithstanding the jurisdiction of the Supreme Court to regulate and supervise the conduct of legal practitioners, is broad, see **CP Act s99 Liability of legal practitioner for unnecessary costs**.
32. Examination of the content of several of the rules contained in Part 36 "Judgments and orders" of the *Uniform Civil Procedure Rules 2005* provides insight and understanding as to the process and function of orders.

UCPR r36.1 General relief

At any stage of proceedings, the court may give such judgment, or make such order, as the nature of the case requires, whether or not a claim for relief extending to that judgment or order is included in any originating process or notice of motion.

UCPR r36.4 Date of effect of judgments and orders

- (1) A judgment or order takes effect:
 - (a) as of the date on which it is given or made, or
 - (b) if the court orders that it not take effect until it is entered, as of the date on which it is entered.
- (2) Despite subrule (1), if an order of the court directs the payment of costs, and the costs are to be assessed, the order takes effect as of the date when the relevant cost assessor's certificate is filed.
- (3) Despite subrules (1) and (2), the court may order that a judgment or order is to take effect as of a date earlier or later than the date fixed by those subrules.

UCPR r36.6 Judicial notice to be taken of orders and undertakings

- (1) In any proceedings, the court may take judicial notice of:
 - (a) any order made by the court, or by any other court, and
 - (b) any undertaking given to the court, or to any other court.
- (2) In any proceedings, the court may be informed of an order or undertaking by (among other things) reference to:
 - (a) a note made by the judicial officer making the order or accepting the undertaking, or by his or her associate or by any other proper officer, or
 - (b) a note made by the registrar or other officer making the order or accepting the undertaking.

UCPR r36.11 Entry of judgments and orders

- (1) Any judgment or order of the court is to be entered.
- (2) Unless the court orders otherwise, a judgment or order is taken to be entered:
 - (a) in the case of a court that uses a computerised court record system, when it is recorded in that system, or
 - (b) in any other case, when it is recorded, in accordance with the practice of the court, as having been entered.
- (2A) If the court directs that a judgment or order be entered forthwith, the judgment or order is taken to be entered:
 - (a) when a document embodying the judgment or order is signed and sealed by a registrar, or
 - (b) when the judgment or order is recorded as referred to in subrule (2), whichever first occurs.
- (3) In this rule, ...
- (4) This rule does not limit the operation of rule 36.10.

UCPR r36.15 General power to set aside judgment or order

- (1) A judgment or order of the court in any proceedings may, on sufficient cause being shown, be set aside by order of the court if the judgment was given or entered, or the order was made, irregularly, illegally or against good faith.
- (2) A judgment or order of the court in any proceedings may be set aside by order of the court if the parties to the proceedings consent.

UCPR r36.16 Further power to set aside or vary judgment or order

- (1) The court may set aside or vary a judgment or order if notice of motion for the setting aside or variation is filed before entry of the judgment or order.
- (2) The court may set aside or vary a judgment or order after it has been entered if:
 - (a) it is a default judgment, or
 - (b) it has been given or made in the absence of a party, whether or not the absent party had notice of the relevant hearing or of the application for the judgment or order, or
 - (c) in the case of proceedings for possession of land, it has been given or made in the absence of a person whom the court has ordered to be added as a defendant, whether or not the absent person had notice of the relevant hearing or of the application for the judgment or order.
- (3) In addition to its powers under subrules (1) and (2), the court may set aside or vary any judgment or order except so far as it:
 - (a) determines any claim for relief, or determines any question (whether of fact or law or both) arising on any claim for relief, or

- (b) dismisses proceedings, or dismisses proceedings so far as concerns the whole or any part of any claim for relief.
- (3A) If notice of motion for the setting aside or variation of a judgment or order is filed within 14 days after the judgment or order is entered, the court may determine the matter, and (if appropriate) set aside or vary the judgment or order under subrule (1), as if the judgment or order had not been entered.
- (3B) Within 14 days after a judgment or order is entered, the court may of its own motion set aside or vary the judgment or order as if the judgment or order had not been entered.
- (3C) Despite rule 1.12, the court may not extend the time limited by subrule (3A) or (3B).
- (4) Nothing in this rule affects any other power of the court to set aside or vary a judgment or order.

UCPR r36.17 Correction of judgment or order (“slip rule”)

If there is a clerical mistake, or an error arising from an accidental slip or omission, in a judgment or order, or in a certificate, the court, on the application of any party or of its own motion, may, at any time, correct the mistake or error.

33. The UCPR Forms provide a precedent for orders in Form 43 (version 1) per UCPR 36.11 (see page 24).

E. Directions

34. Directions are akin to orders of the court however are made by the court for the purpose of effective case management. Nonetheless, similar principles apply to drafting directions for the effective prosecution of the client’s case to achieve the preferred result, as with orders.
35. Sanctions for breach or disregard of directions include findings of contempt.
36. CP Act Part 6 brings together appropriate directions, however other gateway directions such as those found in UCPR Part 31 as to expert evidence, must be determined on a case by case basis.
37. There is no substitute for a careful scrutiny of the CP Act, UCPR and Practice Notes relevant to each matter to determine the nature and content of appropriate directions.

F. Why orders matter

38. The number of potential pitfalls arising from deficient or ineffectual orders are only limited by a litigator's imagination. Consider as examples orders for monetary payments contingent upon an event occurring which does not occur, or orders to enjoin a party to abate a nuisance which are defective, or orders seeking relief such as discretionary s87 orders pursuant to the *Trade Practices Act* where such relief is only available in a capital "C" Court and not in an inferior court.
39. Taking notice of doctrines of estoppel, there may be no opportunity to correct such oversight.
40. In addition, for the reasons stated by O W Holmes Jr, in paragraph 9 above, the potency of an order made by the court is evident.
41. Three legal consequences of an order are to:
 - (a) define the outcome of the dispute once and for all;
 - (b) give rise to enforceable rights and obligations;
 - (c) subject parties to the threat of the coercive power of the state.
42. An order of a court must be obeyed unless and until it is set aside. The belief of a party affected by an order that it is irregular or even void is not justification for ignoring the decision and treating it as of no effect or operation in law.
43. Disobedience amounts to contempt, which may cause a court to exercise its powers to protect its processes, see SCR Part 55 – "Contempt". The better approach to address any dissatisfaction with a judicial decision or order perceived to be infected with error is by the process of appeal.
44. An appeal may lie from the order of a court. However no appeal lies from the reasons for the decision leading to the order. It is only from the pronouncement found in the formal order of a court against which an appeal may be brought. Reasons for judgment may provide scope to identify error in the pronounced order, may explain the decision and have value as a precedent but they are not strictly the subject matter of the method of appellate review, unless the statute so specifies.
45. Mindful that the process of appeal is a creature of statute, the wise approach to considering an appeal is to refer to the relevant legislation as to the nature and extent the power of an appellate court to review an order, see as an example:

SC Act s75A - Appeal

- (1) Subject to subsections (2) and (3), this section applies to an appeal to the Court and to an appeal in proceedings in the Court.

...

- (10) The Court may make any finding or assessment, give any judgment, make any order or give any direction which ought to have been given or made or which the nature of the case requires.

46. Taking into account the above considerations the wise litigator will exercise great care and patience to draft and settle his or her party's desired orders or any orders settled between the parties, to avoid ambiguity and thereby greatly improve the prospects of achieving the preferred outcome.

G. Purpose of affidavits

47. Courts quell actual, rather than hypothetical disputes, disputes are founded on the facts relevant to the issues. A party proves the facts said to be relevant (and supportive) to his or her or its case by material admitted into evidence at the hearing.
48. It is useful to refer to UCPR Part 31 "Evidence" and Practice Notes for the relevant court to seek guidance as to procedure, and the *Evidence Act 1995* as to proof and admissibility of proposed evidence:

UCPR r 31.1 Manner of giving evidence at trial

- (1) This rule applies to a trial of proceedings commenced by statement of claim, or in which a statement of claim has been filed.
- (2) Subject to subrules (3), (4) and (5) and to the provisions of the Evidence Act 1995, a witness's evidence at a trial¹¹ must be given orally before the court.
- (3) The court may order that all or any of a witness's evidence at a trial must be given by affidavit or, subject to rule 31.4, by witness statement.
- (4) Unless the court orders otherwise, evidence of facts must be given by affidavit if the only matters in question are:
- (a) interest up to judgment in respect of a debt or liquidated claim, or
 - (b) the assessment of damages or the value of goods under Part 30, or
 - (c) costs.

¹¹ CP Act s3 "Definitions" - **hearing** includes both trial and interlocutory hearing.

- (5) Unless the court otherwise orders, at any trial on an assessment of the amount to be recovered by a plaintiff after default judgment has been given, the following evidence may be given by affidavit:
- (a) evidence of the identity of any motor vehicle,
 - (b) evidence of the damage sustained by a motor vehicle in a particular collision,
 - (c) evidence of the reasonable cost of repairing that damage.

UCPR r31.2 Evidence of witnesses at other hearings

Subject to rule 31.1, evidence in chief of any witness at any hearing must be given by affidavit unless the court orders otherwise.

49. Significant advantages may be gained by the careful distillation of evidence and presentation in an affidavit that brings certainty to a party's case which is usually unavailable when a witness' evidence at trial is given orally.
50. In terms of the power of persuasion the process commences much earlier particularly as judges will often read affidavit evidence before coming on the bench and form a preliminary view as to the merits of each party's case.

H. Substance of affidavits

"Get your facts first and then you can distort them as much as you please."¹²

51. Success or failure in litigation is often determined at the earliest stage in a solicitor's office by taking detailed instructions as to the facts which give rise to a client's grievance. These first instructions are precious as they often provide the perspective to the dispute from which the judge will view the client's case.
52. The substance of any affidavit evidence is determined by the use to which the affidavit is to be put. The test for the practitioner is how to put this motherhood statement into practice.

¹² *Oxford Dictionary of Quotations*, Mark Twain #30

53. The key to success is to grasp the following matters in regard to the dispute:
- (a) the facts;
 - (b) contemporaneous documents;
 - (c) the operation of law on the facts;
 - (d) the likely issues in dispute.
54. These matters inform as to what is “relevant evidence” to be included in the affidavit. Holmes provides a pithy example:

“The reason why a lawyer does not mention that his client wore a white hat when he made a contract, ..., is that he foresees that the public force will act in the same way whatever his client had upon his head.”¹³

55. Effective affidavits have the following features:
- (a) the form of the affidavit complies with the rules;
 - (b) the content of the affidavit is relevant to the issue in dispute;
 - (c) the facts are set out in a chronological order;
 - (d) direct speech rather than indirect speech is used;
 - (e) submissions are not included;
 - (f) speculation is not included;
 - (g) the *jurat* is completed in accordance with legislative requirements.
56. Useful guidance as to the process by which evidence is reduced to and presented in affidavit form may be found in the following sources:
- (a) the commentary by Geoff Lindsay SC and Steve Jupp to UCPR Part 35 *Thomson Law Book New South Wales Civil Practice & Procedure: Uniform Civil Procedure*;
 - (b) *How to draft an Affidavit*, J Bryson QC (1985) 1 Aust Bar Rev 250-6;
 - (c) *Affidavits*, Bryson J (1999) Aust Bar Rev 166-72;
 - (d) *Civil Procedure Commentary and Materials*, 3rd Ed, Colbran & Ors, 2005, Butterworths Lexis Nexis.

¹³ Supra FN 3

I. Legislation and rules relevant to affidavits

57. It is essential for all litigators to have a working knowledge of Part 35 UCP Rules, and Practice Notes for the relevant court. For convenience that part is set out in full below, and I have underlined specific areas to be addressed during the seminar as to the form, substance and use of affidavits.

UCPR r35.1 Irregularity does not invalidate affidavit

An affidavit may, with the leave of the court, be used despite any irregularity in form.

UCPR r 35.2 Cross-examination of deponent

- (1) A party may, by written notice served on the party serving or proposing to use an affidavit, require the attendance for cross-examination of the person by whom the affidavit has been made.
- (2) Such notice is to be given a reasonable time before the time at which the person is required to attend for cross-examination.
- (3) If reasonable notice of such a requirement has been given in respect of an affidavit, and the deponent does not attend for examination, the affidavit may not be used unless the deponent is dead or unless the court orders otherwise.
- (4) If a person making an affidavit is cross-examined, the party using the affidavit may re-examine the person.

UCPR r 35.3 Persons who may make affidavit

- (1) If a party is required by these rules to file an affidavit or to verify any matter by affidavit, such an affidavit may be made by the party or:
 - (a) if the party is a person under legal incapacity, by the party's tutor, or
 - (b) if the party is a corporation, by a member or officer of the corporation or (if it is in liquidation) by its liquidator, or
 - (c) if the party is a body of persons lawfully suing or being sued:
 - (i) in the name of the body, or
 - (ii) in the name of any member or officer of the body, or
 - (iii) in the name of any other person associated with the body, by a member or officer of the body, or
 - (d) if the party is the Crown or an officer of the Crown suing or being sued in his or her official capacity, by an officer of the Crown, or
 - (e) if the proceedings are being brought in the plaintiff's name by some other person pursuant to a right of subrogation:
 - (i) by that other person, or
 - (ii) if that other person is a corporation, by a member or officer of the corporation or (if it is in liquidation) by its liquidator.

- (2) Such an affidavit may also be made, in relation to proceedings in a Local Court:
- (a) by the party's solicitor, or by a commercial agent with respect to debt collection (within the meaning of the *Commercial Agents and Private Inquiry Agents Act 2004*), in relation only to proceedings on an application for:
 - (i) an instalment order, or
 - (ii) an order for examination, or
 - (iii) a writ of execution, or
 - (iv) a garnishee order, or
 - (v) default judgment (but only in the Small Claims Division), or
 - (b) by a person holding a licence as a real estate agent, strata managing agent or on-site residential property manager within the meaning of the *Property, Stock and Business Agents Act 2002* in relation only to:
 - (i) proceedings on an application referred to in paragraph (a), or
 - (ii) the filing of a certificate under section 51 of the *Consumer, Trader and Tenancy Tribunal Act 2001*.
- (2A) If more than one person is qualified to make an affidavit on behalf of a party, it is sufficient for such an affidavit to be made (subject to subrules (1) and (2)) by any one or more of them.
- (3) Subject to any order of the court, the person by whom an affidavit is made must be a person having knowledge of the facts deposed to in the affidavit.
- (4) If an affidavit is made by a person other than the party required to file or verify the affidavit, the affidavit must set out the facts that qualify the person to make the affidavit.
- (5) Subject to subrule (1), a requirement of these rules for an affidavit as to any matter may be satisfied by separate affidavits made by separate persons in relation to separate aspects of that matter.

UCPR r 35.3A Heading to affidavit

The heading to an affidavit must include the name of the deponent and the date on which the affidavit is made.

UCPR r 35.4 Format of affidavit dealing with more than one matter

If the body of an affidavit alleges or otherwise deals with more than one matter:

- (a) it must be divided into paragraphs, and
- (b) each matter must, so far as convenient, be put in a separate paragraph, and
- (c) the paragraphs must be numbered consecutively.

UCPR r 35.5 Alterations

If there is any interlineation, erasure or other alteration in the jurat or body of an affidavit, the affidavit may not be used, except by leave of the court, unless the person before whom the affidavit is sworn initials the alteration and, in the case of an erasure, rewrites in the margin of the affidavit any words or figures written on the erasure and signs or initials them.

UCPR r 35.6 Annexures and exhibits

- (1) A document to be used in conjunction with an affidavit may be made:
 - (a) an annexure to the affidavit, or
 - (b) an exhibit to the affidavit.
- (2) An annexure to an affidavit must be identified as such by a certificate endorsed on the annexure (and not on a page separate from the annexure) signed by the person before whom the affidavit is made.
- (3) The pages of an affidavit, together with any annexures, must be consecutively numbered in a single series of numbers.
- (4) An exhibit to an affidavit must be identified as such by a certificate attached to the exhibit entitled in the same manner as the affidavit and signed by the person before whom the affidavit is made.
- (5) An exhibit to an affidavit must not be filed.
- (6) If any other party so requires, a party who serves an affidavit to which a document is an exhibit:
 - (a) must produce the document for inspection by that other party, or
 - (b) must provide a photocopy of the document to that other party, or
 - (c) must produce the document at some convenient place to enable it to be photocopied by that other party.

UCPR r 35.7 Affidavits by persons who cannot read

An affidavit made by a blind or illiterate person may not be used unless:

- (a) the affidavit bears a certificate referred to in section 27A of the *Oaths Act 1900*, or
- (b) the court is otherwise satisfied:
 - (i) that the affidavit was read to the deponent in the presence of the person before whom it was made, and
 - (ii) that it appeared to that person that the deponent understood the affidavit.

UCPR r 35.7A Name of legal practitioner or commissioner for affidavits on affidavit

- (1) A legal practitioner who takes and receives an affidavit concerning any matter within the jurisdiction of the court must, by use of a stamp or otherwise, add, legibly below the legal practitioner's signature, the legal

practitioner's name and address together with the word "barrister" or "solicitor", as the case requires.

- (2) A commissioner for affidavits who takes and receives an affidavit concerning any matter within the jurisdiction of the court, must, by use of a stamp or otherwise, add, legibly below the commissioner's signature, the commissioner's name and address together with the words "commissioner for affidavits".
- (3) In this rule, **commissioner for affidavits** means a person who is authorised by the Chief Justice of the Supreme Court, under section 27 (2) of the *Oaths Act 1900*, to take and receive affidavits.

UCPR r 35.7B Each page of affidavit to be signed

Each page of an affidavit must be signed by the deponent and by the person before whom it is sworn.

UCPR r 35.8 Affidavit of service not to annex copies of filed documents

- (1) An affidavit of service of a document that has been served must clearly identify the document, but must not annex a copy of the document unless the document has not been filed.
- (2) An affidavit of service must contain:
 - (a) a statement as to when, where, how and by whom service was effected, and
 - (b) a statement, using as nearly as practicable the actual words used by the person to whom the process was delivered, as to what, if anything, that person said, on the occasion of service, concerning the service or the subject matter of the proceedings, and
 - (c) a statement that the deponent is over the age of 16 years, or is of a named class of persons who by virtue of their status, occupation or otherwise must be over that age.

UCPR r 35.9 Filing of affidavits

Except by leave of the court, an affidavit must not be filed unless it is filed:

- (a) in accordance with these rules, or
- (b) in accordance with other rules of court applicable to the court in which it is filed, or
- (c) in accordance with a practice note applicable to the court in which it is filed.

58. Attention to Practice Notes of courts is often rewarding to litigators:

PRACTICE NOTE SC Gen 4 Supreme Court – Affidavits

Commencement

1. This Practice Note commences on 17 August 2005.

Application

2. This Practice Note applies to the Court of Appeal, the Court of Criminal Appeal, and each of the Divisions of the Supreme Court.
3. This Practice Note does not apply to the Criminal List of the Common Law Division.

Introduction

5. UCPR 35.9 provides that an affidavit may generally not be filed in proceedings except by leave of the Court. A rule may require an affidavit to be filed: UCPR 35.9(a) and (b); and see pars 8 and 16 below. UCPR 35.9(c) provides that affidavits may be filed in accordance with a Practice Note. The purpose of this Practice Note is to prescribe the procedures surrounding the use of affidavits in the Court.

Affidavits may not be filed without leave of the Court

6. As stated, an affidavit generally may not be filed in proceedings except by leave of the Court. An affidavit which has not previously been filed should be filed in Court at the hearing before it is read.
7. However, where an affidavit is to be read, unless it has already been filed and served (see UCPR 10.1), the party seeking to rely upon that affidavit must serve the affidavit on the relevant parties within a reasonable time before the hearing, unless the Court otherwise orders. See UCPR 10.2.

Proceedings in which Affidavits must be filed

8. Subject to any orders or directions of the Court, an affidavit must always be filed before it can be relied upon in the following types of proceedings:
 - All proceedings in the Court of Criminal Appeal.
 - All proceedings concerning the adoption of a child in the Equity Division.
 - All proceedings in the Admiralty List of the Equity Division.
 - All proceedings in the Corporations List of the Equity Division.
 - All proceedings in the Probate List of the Equity Division.
 - All proceedings in the Protective List of the Equity Division.
 - All proceedings involving an appeal to the Court under UCPR 46.

Cross Examination

15. Parties should note the provisions of UCPR 35.2 in respect of the requirements of giving notice for the attendance of a deponent for cross-examination.

Specific exemptions under the Rules.

16. Notwithstanding this Practice Note, parties should note that certain provisions of the UCPR require the filing of an affidavit. These provisions include:
 - UCPR 7.2 – Affidavit as to authority to commence proceedings.
 - UCPR 12.2 – Affidavit where proceedings are discontinued.
 - UCPR 14.23 – Verification of pleadings.
 - UCPR 14.24 – Further affidavit as to verification of pleadings.

- UCPR 16.3 – Default judgment.
- UCPR 16.4 – Default judgment for possession of land.
- UCPR 16.5 – Default judgment for return of goods.
- UCPR 16.6 – default judgment on liquidated claim.
- UCPR 16.7 – Default judgment on unliquidated claim.
- UCPR 16.9 – Default judgment for costs alone.
- UCPR 26.6 – Default of receivers.
- UCPR 27.3 – Certificate on sale of land.
- UCPR 31.26 – Direction for further evidence by an expert.
- UCPR 32 - *Evidence and Procedure (New Zealand) Act 1994* (Commonwealth).
- UCPR 36.8 – Judgment for possession of land.
- UCPR 36.10 – Filing of a certificate under the *Legal Profession Act 1987* or the *Legal Profession Act 2004*.
- UCPR 37.2 – Application for instalment order.
- UCPR 37.6 – Variation of an instalment order.
- UCPR 38.2 – Application for an Order for Examination.
- UCPR 39.3 – Application for Writ of Execution.
- UCPR 39.21 – Registration of Writ.
- UCPR 39.35 – Application for Garnishee Order.
- UCPR 39.45 – Application for a Charging Order.
- UCPR 43.2 – Stakeholder’s interpleaded.
- UCPR 46.14 – Affidavits in respect of appeals.

PRACTICE NOTE SC Eq 3

Supreme Court Equity Division - Commercial List and Technology and Construction List

USUAL ORDER FOR HEARING

Affidavits and Statements

5. Where no directions have been given for the service of affidavits or statements of evidence, each party shall, not less than 28 days before the date fixed for hearing, serve on each other party a statement of the evidence proposed to be led from each witness to be called by that party, signed by the proposed witness, unless the Court otherwise orders.

J. Conclusion

59. The judicial arm of government remains enshrined by Chapter III of the Commonwealth Constitution and legislation of the States. Litigation is a concomitant of the judicial arm. To paraphrase Churchill, litigation is the worst kind of dispute resolution except for all the others, and also Mark Twain, that the reports of the death of litigation are exaggerated.
60. Knowledge of and competence in:
- (a) making and the use of a probative affidavit;
 - (b) drafting an effective order;
- are fundamental skills to a successful litigation practice.
61. As with any specialised knowledge, facility arises from training, study or experience. A disciplined application of the matters considered above is likely to ensure that these pillars of each case that you construct remain functional.
62. My thanks to the University of New South Wales Centre for Continuing Legal Education, its Director, Christopher Lemercier, for the opportunity to participate in this seminar, and to you, my fellow participants, thanks for your time and patience.

**Mark Walsh
Seven Wentworth
11 March 2008**

Form 40 (version 1)
UCPR 35.1

AFFIDAVIT OF [NAME] [DATE]

COURT DETAILS

Court

#Division

#List

Registry

Case number

TITLE OF PROCEEDINGS

[First] plaintiff **[name]**

#Second plaintiff #Number of
plaintiffs (if more than two)

[First] defendant **[name]**

#Second defendant #Number of
defendants (if more than two)

FILING DETAILS

Filed for **[name]** [role of party eg plaintiff]

#Filed in relation to [eg plaintiff's claim, (number) cross-claim]
[include only if form to be eFiled]

#Legal representative [solicitor on record] [firm]

#Legal representative reference [reference number]

Contact name and telephone [name] [telephone]

[on separate page]

AFFIDAVIT

Name

Address

Occupation

Date

I [#say on oath #affirm]:

1 #I am [role of deponent].

2 [state information to be included in the affidavit in numbered paragraphs].

#SWORN #AFFIRMED at

Signature of deponent

Signature of witness

Name of witness

Address of witness

Capacity of witness [#Justice of the peace #Solicitor #Barrister #Commissioner
for affidavits #Notary public]

Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.

Form 43 (version 1)
UCPR 36.11

JUDGMENT/ORDER

COURT DETAILS

Court

#Division

#List

Registry

Case number

TITLE OF PROCEEDINGS

[First] plaintiff **[name]**

#Second plaintiff #Number of
plaintiffs (if more than two)

[First] defendant **[name]**

#Second defendant #Number of
defendants (if more than two)

DATE OF JUDGMENT/ORDER

Date made or given

Date entered

TERMS OF JUDGMENT/ORDER

3 []

4 []

SEAL AND SIGNATURE

Court seal

Signature

Capacity

Date

[Include the following section if the document is to be provided to the Registrar for sealing under UCPR 36.12.]

#PERSON PROVIDING DOCUMENT FOR SEALING UNDER UCPR 36.12

Name **[name]** [role of party eg defendant]

#Legal representative [solicitor on record] [firm]

#Legal representative reference [reference number]

Contact name and telephone [name] [telephone]

[on separate page]

[Include only if more than two plaintiffs and/or more than two defendants and/or any cross-claims.]

#PARTY DETAILS

PLAINTIFF['S][S'] CLAIM

Plaintiff[s]

[name] [role of party eg first plaintiff]

[repeat as required for each additional plaintiff]

Defendant[s]

[name] [role of party eg first defendant]

[repeat as required for each additional defendant]

#[FIRST] CROSS-CLAIM

Cross-claimant[s]

[name] [role of party eg first cross-claimant to first cross-claim]

[repeat as required for each additional cross-claimant]

[repeat as required for each additional cross-claim]

Cross-defendant[s]

[name] [role of party eg first cross-defendant to first cross-claim]

[repeat as required for each additional cross-defendant]