'The Rules have been amended to deal with what has been said by the court to be a 'culture of non compliance' with court Rules and procedural orders by practitioners.'

The court has attempted to abolish the concept of 'general discovery' by, amongst other things, introducing Rule 13.07, which imposes the duty of disclosure on a party in respect of documents in the possession or control of the party that are 'directly relevant' to an issue. Division 13 deals with the content of the disclosure that is required in the cases to which it applies.

Expert evidence

Part 15.5 of the *Family Law Rules 2004* fundamentally alters the procedures and Rules that govern both the preparation and adducing of evidence of an expert nature.

Central to this part of the Rules are the concepts that the court will control:

- the issues on which it requires expert evidence;
- the nature of the evidence it requires on that issue; and
- the way in which expert evidence is placed before the court.

The expert evidence rules are focused upon encouraging the parties to appoint a single expert in all proceedings. Where a single expert is appointed then the parties do not need permission of the court to tender the evidence of that expert. The court may order of its own initiative that the parties obtain a report from a single expert witness.

Importantly, if a single expert witness has been appointed, a party is prohibited from tendering a report from a further expert witness without permission of the court.

In parenting cases, any expert's report that is obtained must be provided to all other parties. The Rules purport to override any legal professional privilege that would otherwise attach to an expert's report in a parenting case (15.55(4)). A party who fails to disclose an expert's report may not use that report at trial.

In relation to all expert evidence, there are strict requirements regarding the manner in which experts are to be instructed and the disclosure of such instructions.

An expert is now able to ask the court to make procedural orders to assist the expert in carrying out his or her functions. Prior to the hearing or trial a party may now put written questions to a single expert for the purposes of clarification of the expert's report.

Section 106: A source of jurisdictional conflict

The saga continues

By Malcolm Holmes QC

In the Winter 2002 edition of *Bar News* an article appeared which discussed the conflicts which have arisen at the interface between the jurisdiction conferred on the specialist Industrial Relations Commission under sec 106 of the *Industrial Relations Act 1996* (NSW) and the ordinary civil courts; both at first instance and on appeal in this and the other states of Australia.[1] Unbeknownst to the authors of that article, at the time of publication two members of the NSW Bar were sitting in a Colorado courthouse giving expert evidence on the operation of sec 106 in proceedings brought in Colorado by a number of American companies seeking an anti-suit injunction to restrain an American citizen from continuing proceedings in New South Wales under sec 106 of the Industrial Relations Act.

By way of background to those proceedings, it appears that some years ago an American company sent one of its employees, an American citizen, to Sydney to head up its Australian operations. He apparently worked in Sydney for some time and then was to be transferred to work in the American company's European operations. It appears that at the time of the transfer from Sydney he renegotiated his employment arrangement, which resulted in a separate concluded release agreement in relation to some claims which he had made. Also, there was an understanding as to the terms of a new employment arrangement, to be formally concluded, which would operate or be entered into when he commenced work in Europe. When he arrived in Europe the relationship between the parties deteriorated and they parted company.

'Common law courts in Australia: are those the guys that wear the wigs and everything?'

He then returned to Colorado where he commenced proceedings against his American employer and another company alleging that the concluded release agreement had

been entered into as a result of misrepresentation and should be set aside on the grounds of 'fraudulent inducement'. In addition, he alleged that the new employment arrangement in relation to Europe was enforceable; notwithstanding that it had never been formally documented. The Colorado court held in these proceedings that he was 'barred by the doctrine of tender back or ratification' from setting aside the release and that the new employment arrangement or understanding in relation to Europe was unenforceable. His appeal from that decision was ultimately unsuccessful.

While his appeal was pending, he returned to his place of employment in Sydney and in May 2001 commenced the second proceedings which were brought under sec 106 against a group of respondents including the two respondents to the first proceedings in Colorado. In those proceedings he alleged that the release agreement was unfair because the respondents had failed to honour a commitment in it to issue him with share options if the Australian operation were floated: which apparently later occurred.

In December 2001 the group of respondents to the New South Wales proceedings brought the third proceedings in Colorado seeking an anti-suit injunction to restrain him from further continuing with the proceedings under sec 106. It is these anti-suit injunction proceedings featuring the two members of the NSW Bar, which have prompted the current case note. However the proceedings are more illuminating insofar as the American judicial approach is concerned than on the enunciation of legal principles relating to anti-suit injunctions.

The transcript reveals an American trial judge who appears to have an admirable sense of dispensing justice in a no-nonsense manner. The following quotations are taken from the transcript verbatim:

- When counsel attempted to flatter the judge by saying that he had gone straight to the heart of the matter, the judge retorted[2]:

  > Even a blind hog turns a potato once in a while.

- When being addressed on a voluminous bundle of sec 106 decisions, texts and articles and being told that there was an opportunity for leave to appeal to the Full Bench of 'fifteen' judges before the Industrial Commission, the judge responded[3]:

  > It is more the equivalent of a social security proceeding, where it is heard before an administrative law judge and then you can appeal to the full commission.

- When being taken through the same voluminous material the judge interrupted[4]:

  > For Pete's sake. You all have submitted a whole volume of Australian case law?

- In relation to the suggestion that they could have sued in a common law court in Australia the judge interrupted[5]:

  > Common law courts in Australia: are those the guys that wear the wigs and everything?'

- When the court's attention was drawn to the *Reich*[6] case in which the Industrial Commission had seemingly held that 'varying the contract can include an order that it strictly be complied with', the judge responded[7]:

  > Well, this court just, evidently turns language on its head. In common law courts, that's called a breach of contract by the other party, which gives rise to a law suit by the injured party to enforce the terms of the contract.

And he later, in the same vein, continued[8]:

> Well, you know, the contract principles have been in existence in England, presumably in Australia and in this country for a thousand years. Why do they not call it a breach of contract and an action for breach of contract, rather than use this language which seems to me to point plainly in another direction?

- When the opening submissions had been concluded and followed by a short interchange with the respective counsel, the court noted[9]:

  > These were opening statements. And I allowed some liberality in argument, but this is not a tennis match.

- When one of the Australian experts was giving evidence on sec 106. The expert was asked by the judge[10]:

  > When you use the term 'have regard', does that mean that it will consider itself bound or that it will examine the decision and say; Well, that's nice, but we have a different view of the matter.

The Australian expert responded 'The latter, your Honour.'

- When the cross-examination of the expert was dragging on, the judge intervened rather bluntly and said[11]:

  > You know, counsel, I think he's conceding there are cases to the contrary. He's just told you that this is what his opinion is as a general matter. I think I understand that. You will not be persuading me by sitting here and arguing cases with him all day. You're wasting time.

- When there was an objection to evidence on the basis that it required the witness to give an interpretation of the pleadings, the judge overruled the objection and observed[12]:

  > You interpreted his pleadings. I will allow that, under the well known rule of evidence, what's sauce for the goose is sauce for the gander.

- When the expert witness was being cross examined on the chronology of the litigation, the judge interrupted to point out that the papers which had been lodged with the court included a complete chronology and there was no need for the expert to go into it, it having been accepted as an accurate chronology. The judge then informed the parties[13]:

> I already read it while you were going through some of your examination. Trying to get in touch with my feminine side by multi-tasking.

- When one of the experts was asked if the case were to go to trial in Australia how many days it would take to try it in Australia, the expert said 'The best I could do would be to say five to ten hearing days'. The judge then interrupted and said[14]:

> You can bet that these parties will beat the case to deat' which then caused the witness to say 'Ten days plus then thank you', to which the court commented: 'That's reasonable.'

After both expert witnesses were examined and cross examined, the parties addressed and the court gave an *ex tempore* judgment refusing the anti-suit injunction. In the course of judgement there was one passage dealing with the question of public interest, which gave a further insight into American judicial thinking:

> which brings me to the public interest here. I think an injunction would be contrary to the public interest. What the plaintiffs are asking me to do, as I told counsel in colloquy, is to jump in the middle of this litigation in Australia and put up a big stop sign and blow the whistle, not going directly to the Australian court and doing that, but by enjoining the plaintiff and precluding the plaintiff from litigating in Australia, which has the same effect.

For those lacking an appropriate religious background, the *Concise Oxford Dictionary* defines 'colloquy' as 'a conversation; judicial and legislative court in Presbyterian Church' whilst the *Macquarie Dictionary* defines it as 'a conversation, ...and (in certain Reformed Churches) a governing body corresponding to a presbytery.

The parties have now returned to Australia with the concluding words of the American judge ringing in their ears:

> My assumption is the Australian courts will decide the case in accordance with Australian law, Australian procedure, and they'll decide the case as this [i.e. the Colorado] court would, hopefully, by applying principles of equity. The plaintiffs ought to at least have given them the chance to do that before they come to this [i.e. the Colorado] court on the assumption that they won't.

The anti-suit injunction was denied by the Colorado court.

As a footnote, the transcript revealed that one of the expert witnesses from Sydney gave expert evidence that 'Sydney has about two million people in it'[15] which itself illustrates the practical significance of the remarks by Gleeson CJ in the High Court's decision in *HG v The Queen* (1999) 197 CLR 414 at p.427, para [39] about the dangers of experts giving evidence outside the area of expertise.

Since returning to Australia the applicant has tried to have the sec 106 case determined on the merits but without much success[16] (although the writer understands that the matter is fixed for hearing in November this year) and at last report the parties were seen recently to be in the Court of Appeal arguing over 'an application for prohibition against Industrial Relations Commission or an anti-suit injunction against' the American citizen.

The passing reference by the Colorado judge to the Australian judges wearing 'wigs' and his expression of hope when sending the parties back to Australia that the Australian court would decide the sec 106 case 'by applying principles of equity', are prescient and suggests that he has a far deeper knowledge of the sec 106 jurisdiction and the procedures of the New South Wales courts than might be expected.

His reference to those judges wearing wigs could not be a reference to members of the Industrial Relations Commission, having regard to the fact that there is a longstanding prohibition on such judges (and counsel appearing before them) wearing wigs in all proceedings, not only in sec 106 (or its predecessors sec 275 and sec 88F) proceedings.

It appears that the Colorado judge might have had in mind the members of the Supreme Court if he envisaged judges wearing wigs when deciding sec 106 cases. Strange though this may seem, this has recently occurred with the Equity Division of the Supreme Court hearing and determining a sec 106 case. Briefly the facts in that case involved one set of proceedings commenced in the Federal Court relying upon several federal causes of action, another set of proceedings commenced in the Equity Division relying upon equitable and other remedies and sec 106 proceedings in the Industrial Relations Commission[17]. Using orders under the cross vesting legislation the Supreme Court ordered that all three proceedings be heard together in the Equity Division. Remarkably once all the proceedings had been brought under the one umbrella and heard in the Equity Division, the plaintiff informed the court that the jurisdiction under sec 106 'was so wide as to subsume every other head of action under which the plaintiff could bring his claim'[18] and that the court need only trouble itself with determining the application under sec 106 of the Industrial Relations Act. As the defendants seemed to agree to this, the trial judge, the Chief Judge in Equity, adopted this course, and granted relief under sec 106. Further, the trial judge, when determining the matter, may have unconsciously followed the admonition of the Colorado judge and determined the matter 'by applying principles of equity'. When considering whether the contract was unfair in its operation as required by sec 106, the court considered the concern of the equity courts in corporation law cases and held that it could 'easily transpose this learning into the field of unfair contracts'.[19]

The Colorado judge's hopes of equity being applied and this recent transposition of learning are perhaps understandable given the underlying rationale of the sec 106 jurisdiction. As

was said in relation to the origins of Equity by the then Lord Chancellor, Lord Ellesmere, in the *Earl of Oxford's Case* in 1615[20]

> The Cause why there is a Chancery is, for that Men's Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances'
>
> Likewise it has been similarly been said that the process which led to the creation of jurisdictions such as sec 106 and the *Contracts Review Act 1980* involved the Legislature coming to regard 'the common lawyer's belief in the inviolability of contract as misconceived and require that society, functioning through its courts, should supervise the contracts made between its members ... [and, this at a time when the] intellectual climate favours the examination of the justice of each individual contract rather than determining whether it was made in accordance with some fixed principle[21].

The recent sec 106 case in the Equity Division also highlights the contradiction which exists where the Supreme Court (of NSW or another state[22]) exercises jurisdiction under sec 106, in that the parties then have the benefit of a right of appeal to the Court of Appeal which does not exist when a sec 106 matter is determined in the Industrial Relations Commission.

There have always been limitations on the supervisory powers of the Court of Appeal over the Industrial Relations Commission. When sec 88F, the progenitor of sec 106 was first introduced, as was noted by McHugh QC (as his Honour then was), 'the superior courts are entitled to ensure that the case falls within these jurisdictional limitations. But once a case is within jurisdiction, the Industrial Commission is the sole judge of the merits of the case.'[23] This situation once led Meagher JA (as RP Meagher QC then was) to pithily note that a decision of the Industrial Commission was '...clearly wrong. Yet, they had jurisdiction to err.'[24]

The privative provision now found in sec 179 of the Industrial Relations Act when compared to its predecessors has been 'strengthened' because of an apparent legislative desire to limit this supervisory jurisdiction[25]. The Court of Appeal has recently been called upon to consider this provision in *Mitchforce v Industrial Relations Commission of New South Wales*, a decision which was discussed in the last issue of *Bar News*[26] and which has not been received unhesitatingly by the Industrial Relations Commission[27]. However, this decision has lead to a cluster of cases coming before the Court of Appeal including our case brought by the determined but patient American citizen whose travails led to the two members of the NSW Bar giving evidence in Colorado. The interface between the jurisdictions is clearly continuing to cause irritation and uncertainty and detracting from the great deal that has been achieved since the provision was first introduced in 1959.

In view of the fact that sec 106 provides an 'armoury of weapons (which) is spectacularly larger than that possessed by the courts of Common Law or Equity', an observation made as long ago as October 1976[28] by the reincarnate RP Meagher QC (as he then was and is again), it seems that the number of cases being brought under the legislation will continue to grow and continue to attract the attention or amazement of courts both here and overseas.

1 Malcolm Holmes QC and Andrew Bell, 'Section 106 of the Industrial Relations Act 1996: A souce of jurisdictional conflict', *Bar News*, Winter 2002, p.23.

2 Transcript 6, ('T')

3 T9.

4 T10.

5 T14.

6 Reich v Client Server Professionals (2000) 49 NSWLR 551

7 T23.

8 T24.

9 T33.

10 T50.

11 T102-103.

12 T148.

13 T157.

14 T161.

15 T34.

16 The saga has involved an application for summary dismissal: see *McRann v United Globalcom Inc* [2003] NSWIRComm 131, an application for leave to appeal [2003] NSWIRComm 318 and a separate application for costs to be paid forthwith [2004] NSWIRComm 16.

17 Other examples of such a three pronged approach include *Johnstone v Deutsche Australia Ltd* [2003] NSWSC 933 and *Premier Sports Australia Pty Ltd v Dodds* [2001] NSWSC 707 and [2003] NSWSC 948, although in the later case, ultimately no submissions were made in support of any order under s.106 and this part of the action was dismissed.

18 *Bruning v MMAL Rentals Pty Ltd* [2004] NSWSC 60 at [36].

19 Supra, at [178].

20 [1615] 1 W & T at 617; 1 Chan Rep 1 at 6; 21 ER 485 at 486

21 per Michael McHugh QC in 1981 Young Lawyers Section, Queenstown, New Zealand, 55 at p.57

22 For an example of a s.106 proceeding cross vested to Queensland, see *Tryam Pty Ltd v Grainco Australia Ltd* [2003] NSWSC 812

23 1981 Young Lawyers Section, Queenstown, New Zealand at p.59.

24 *Rothmans Distribution Services Limited v Industrial Court of New South Wales* (1994) 53 IR 157 at 162.

25 See the discussion of the earlier privative provision in s.301 in *Walker v Industrial Court of NSW* (1994) 53 IR 121 at 136 to 139, per Kirby P and at 149 to 155, per Sheller JA

26 Ingmar Taylor, 'Mitchforce v Industrial Relations Commission', *Bar News*, Summer 2003/2004, p.4.

27 See the judgments in the subsequent decision in *Mitchforce Pty Ltd v Starkey* (No2) [2003] NSWIRComm 458

28 An observation made when speaking of the progenitor of sec 106, sec 88F in (1976) *Law Society Journal* 229 at 241.