

# EARLY RETURN OF SUBPOENAS TO PRODUCE DOCUMENTS

Duncan McConnell, Law Society Council member

A practice has existed in the Supreme Court for some years now in which the parties issue subpoenas to produce documents to strangers to the action returnable prior to the hearing date.

This practice has developed as a means whereby parties can obtain relevant documents well before use in their preparation for the hearing. It is seen as a convenient and inexpensive means of obtaining documents in a way that reassures strangers to the litigation, that the request for the documents is sanctioned and supervised by the court.

Strictly speaking, however, the process of using a subpoena is reserved for the production by strangers of documents relevant to a matter at the trial of the matter itself.

The rules provide a different procedure for the production of documents prior to trial. That process is known as *Discovery from Non-Party* (Supreme Court Rule 32). Non-Party Discovery requires the making of an application by summons and may require the non-party to file an affidavit, or list of documents.

The courts have recognised the efficiency in an appropriate case, of utilizing the subpoena procedure rather than that of Third Party Discovery: see *CCC v Shell* (1999) 161 ALR 686.

Recent developments in the Supreme Court of the Northern Territory suggest that a narrower view of what is an appropriate case is now being taken: *Mamone v Gagliardi* [2000] NTSC 95 per Martin CJ, *Giblin v Beach* [2001] NTSC 67 per Bailley J, *Kanochkin v Stark Investments* NTSC unreported, 13.09.01 Master Coulehan.

The combined effect of those decisions appears to be that the Supreme Court will only regard an

early return subpoena to produce documents as having been appropriately used if the following features are demonstrated:

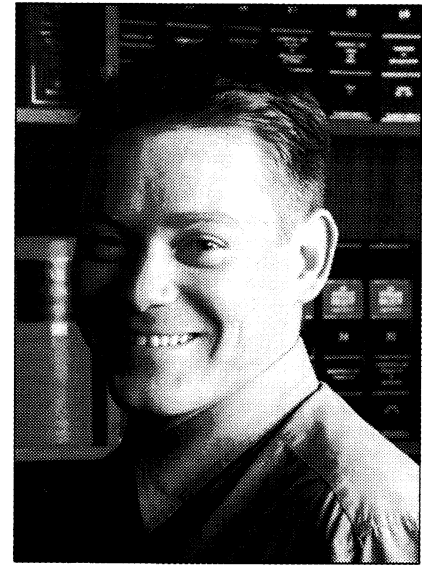
1. The pleadings are closed;
2. The subpoenas are directed to securing evidence clearly relevant to the issues pleaded;
3. the documents described for production are sufficiently particularised so that they are confined to matters in issue;
4. The subpoena is not a "fishing" expedition;
5. The proceedings have reached a stage where the issue of subpoenas is appropriate.

Unfortunately, the current practice of using subpoenas for production of documents prior to trial in light of the court's change of approach can lead to wasted time and costs in litigation because subpoenas are issued by the Supreme Court Registry automatically upon the filing of the form of subpoena by a party. The subpoena is then served upon the stranger, together with conduct money to cover the stranger's costs of compliance. Service of the subpoena usually incurs a service fee.

The first opportunity for consideration of the appropriateness of the subpoena is when the parties to the litigation seek access to the documents, usually when the documents have been physically produced to the court.

If access is at that point refused, the entire exercise has been a waste of time and money for the client, the practitioner and possibly even the stranger who may have already complied with the subpoena at the time.

It is therefore recommended that practitioners who intend to seek the production of documents before trial by use of subpoenas given an early return date, adopt the following practice:



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1. Obtain clear instructions from the client before embarking on the issuing of the subpoenas. This avoids the embarrassing possibility of a client incurring wasted costs without knowing beforehand;
2. Seek the consent of the other party to the issuing of subpoenas with an early return date. An application supported by both parties is less likely to be characterized as a fishing expedition or otherwise too imprecise in its terms;
3. If there is any doubt as to whether access to documents will be granted, make an application to the Supreme Court under Order 46 in the usual way, seeking an order pursuant to Order 34;
4. Support the application with an Affidavit of the legal practitioner, setting out matters relevant to the Court's determination of whether it is an appropriate case for the issue of such a subpoena;
5. Consider whether the procedure being adopted is the most appropriate, or whether the procedure for Non-Party Discovery should in fact be used.

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