SUPREME COURT OF SOUTH AUSTRALIA

(Civil: Application)

HARRIS SCARFE & ORS v ERNST & YOUNG & ORS (NO 3)

Judgment of The Honourable Justice Bleby

28 October 2005

PROCEDURE - SUPREME COURT PROCEDURE - SOUTH AUSTRALIA - PRACTICE UNDER RULES OF COURT

CASE MANAGEMENT - USE OF TECHNOLOGY

Contested application for use of electronic court at trial of complex matter – Power of Court to direct use of electronic court – Consideration of appropriate use of technology – Consideration of timing of directions as to use of technology – Consideration of scope of documents to be included in database – Consideration of who should bare expense associated with use of electronic court – Application of rules as to costs where electronic court used – Application granted.

Supreme Court Rules 1987 (SA) r 2.01, r 2A, r 3.04(g) r 3.06, r 55.11(y), r 78.01(2), r 101.02(1), r 101.07(6)(a), referred to.
Idoport Pty Ltd v National Australia Bank Ltd (No6) [2001] NSWSC 338; *Kennedy Taylor (Vic) Pty Ltd v Grocon Pty Ltd* [2002] VSC 32, applied.
Seven Network Ltd v News Ltd (No 9) [2005] FCA1394, considered.

Applicant/Plaintiff: HARRIS SCARFE LTD (REC'VERS & MNGERS APPOINTED) (IN LIQ), HARRIS SCARFE W'SALE P/L (REC'VERS & MNGRS APPT'D)(IN LIQ), HARRIS SCARFE HOLDINGS (REC'VERS & MNGRS APPT'D)(IN LIQ) & ANZ BANKING GROUP LTD Counsel: MR M BLUE QC WITH MR S DOYLE - Solicitor: FREEHILLS
Respondent/Defendant: ERNST & YOUNG (REG) Counsel: MR M LIVESEY - Solicitor: KELLY & CO
Respondent/Defendant: COOPERS & LYBRAND (REG) Counsel: MR I ROBERTSON - Solicitor: FINLAYSONS
Respondent/Defendant: PRICEWATERHOUSE (REG)
Hearing Date/s: 14/10/2005
File No/s: SCCIV-02-381
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HARRIS SCARFE & ORS v ERNST & YOUNG & ORS (NO 3)
[2005] SASC 407

BLEBY J:
Background

1 This is an action for damages by various companies in the Harris Scarfe Group which are now in liquidation, and by the ANZ Bank, the major lender to the Harris Scarfe Group. The action is brought against three firms of chartered accountants who, at various times, were auditors of the companies in the Harris Scarfe Group. The plaintiffs' losses are said to have been incurred in consequence of the preparation by the defendants of half-yearly reviews and audits of the Harris Scarfe companies between years ended 31 July 1996 and 31 July 1999. The reviews and audits are said to have been prepared negligently, in breach of a contractual duty of care and in circumstances amounting to misleading conduct in breach of s 56 of the *Fair Trading Act 1987* (SA).

2 In particular it is alleged that, in the preparation of the various reviews and audits, the defendants failed to detect that senior management of the Harris Scarfe companies had fraudulently manipulated the accounts so as to show substantial operating profits, whereas in reality throughout the relevant period the group had sustained significant losses. It is said that the net assets of the Harris Scarfe Group were thereby substantially overstated, and the liabilities understated.

3 The action is being managed in accordance with the provisions of r 2A of the *Supreme Court Rules* as a complex action.

4 After a number of amendments and interlocutory proceedings the plaintiffs' statement of claim appears now to be reasonably settled. Orders are in place requiring the defendants to file amended defences by the middle of November 2005. Substantial expert reports, both in number and volume, have been delivered by the plaintiffs. The defendants' responding reports are to be delivered at various times by the end of this year.

5 At this stage the trial is estimated to occupy at least six months. It could well be substantially more, given the differing nature of the defences already foreshadowed by the different defendants. The plaintiffs are presently represented by common solicitors and counsel. The three defendants are represented by two sets of solicitors and counsel.

6 The plaintiffs have submitted that this is a case in which the use of an electronic court is appropriate and will have numerous advantages. The first defendant supports the use of the technology for the trial and pre-trial preparations.

7 The second and third defendants were initially opposed, but once their argument was refined and reduced to writing it became apparent that they are not necessarily opposed outright to the use of the technology, but consider that the proceedings are not sufficiently advanced and that it is too early to make a decision as to the potential utility of an electronic courtroom at this time. They have further expressed concerns about the extent to which technology should be used, the cost implications and who should bear the expense associated with the establishment and use of an electronic court, particularly if this is required by order of the Court. They have also called in question the power of the Court to direct, without agreement, the use of an electronic courtroom.

8 I previously directed that correspondence be exchanged between the parties and the Court outlining the grounds of the second and third defendants' opposition to the use of an electronic court in the interests of clarifying the issues in dispute. The plaintiffs then responded outlining their position. Subsequent to that I received additional written submissions from Mr Robertson, counsel for the second and third defendants, and heard oral submissions from both Mr Robertson and Mr Blue QC for the plaintiffs. I have taken all of that material into account.

9 The parties and the Court have been provided with a preliminary proposal for the establishment of an electronic court from a commercial information technology consultancy firm and service provider. Representatives of the parties, the Court and this firm have met to discuss the proposal and the requirements for its implementation. I am informed that the plaintiffs and the first defendant have already made preparations to ensure that the IT systems and procedures being used by their respective solicitors will be compatible with the proposed electronic court and have begun scanning documents. The second and third defendants, because of their opposition, have had only a limited role in these discussions to date.

The power of the Court to direct the use of an electronic courtroom

10 I have no doubt that the Court has power to make orders for the use of this type of technology in a trial, and I reject submissions of the second and third defendants to the contrary. Rule 55.11 provides that the Court may give such directions as are proper with respect to:

> (y) The use of any litigation support system or any other computer process considered appropriate by the Court.

11 Rule 3.04 also confers a power by which the Court may, in any case in which it thinks just to do so:

> (g) Do all or any acts or give any directions relating to the conduct of an action subject to such terms as to costs or otherwise as it thinks proper.

12 Those rules in themselves are sufficient foundation for the making of the orders proposed. However, in addition, r 3.06 provides:

> 3.06 The provisions of these Rules are in addition to, and shall not derogate from, any inherent jurisdiction of the Court.

13 In this regard I respectfully adopt what was said by Einstein J in *Idoport Pty Ltd v National Australia Bank Ltd (No 6)*:[1]

> [10] The Court is possessed of an inherent jurisdiction to exercise powers which are necessary to enable it to act effectively within its jurisdiction: *Connolly v Director of Prosecutions* [1964] AC 1244 at 1301 per Lord Devlin.
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> [11] The purpose of the implied jurisdiction is to allow the Court to make such orders so as to enable it to uphold, protect and fulfil the judicial function by ensuring that justice is administered according to law and in an effective manner. *John Fairfax and Sons v Police Tribunal* (1986) 5 NSWLR 465 at 476 per McHugh JA.
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> [12] The inherent jurisdiction of the Court includes an untrammelled power of regulating its own proceedings: *Abse v Smith* [1986] 1 QB 536 at 555 per May LJ.
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> [13] It is proper to exercise the power not only where it is strictly necessary to do so, but also to secure or promote convenience, expedition and efficiency in the administration of justice: *O'Toole v Scott* [1965] AC 939 at 959 per Lord Pearson.
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> ...
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> [15] Hence the inherent jurisdiction of the Supreme Court to regulate its own proceedings so as to promote matters relating to convenience, expedition and efficiency in the administration of justice, includes directing or ordering the parties to use certain procedures, if the benefits derived from the use of such procedures justifies the costs and will ensure that the trial proceeds quickly and efficiently.

14 The last paragraph refers to some particular rules of the Supreme Court of New South Wales which have their equivalent in South Australia in r 2.01:

> These Rules are made for the purpose of establishing orderly procedures for the conduct of litigation in the Court and of promoting the just and efficient determination of such litigation. They are not intended to defeat a proper claim or defence of a litigant who is genuinely endeavouring to comply with the procedures of the Court, and are to be interpreted and applied with the above purpose in view.

15 The same considerations will therefore apply to actions in this Court.

16 I reject the argument of the second and third defendants to the effect that r 78.01(2) restricts the Court's ability to make the orders sought. That rule enables the Court to order that evidence of any particular fact shall be given at

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[1] (Unreported) [2000] NSWSC 338 at [10] – [15].

the trial in such manner as may be specified in the order. It enables, for example, directions to be given that the evidence-in-chief of certain witnesses be given by written statement. It does not restrict in any way directions for the use of technology in the production of such statements or other evidence. Rather, it is another example of the wide discretion conferred on the Court to direct the giving of evidence in a manner that is efficient and appropriate.

Nature of the electronic court

17 The electronic courtroom is not new to this jurisdiction. It has been used in both civil and criminal trials of some complexity. It is used extensively in other jurisdictions. The electronic court enables the trial to be conducted to a large extent in a "paperless" fashion. It goes beyond the electronic storage and retrieval of relevant documents on the court file, such as pleadings, particulars, lists of documents and notices to admit. It includes electronic presentation of witness statements, expert reports, chronologies, lists of authorities and outlines of argument. More significantly the database includes documents which will be, or are likely to be, tendered and the electronic version of the transcript. There is the option of incorporating real time transcript of the proceedings.

18 The electronic court enables the parties, the trial judge and court staff to have secure access to all of the material in an efficient manner both in and out of the courtroom. Relevant documents, and if necessary more than one document at a time, are able to be displayed to persons in the courtroom on computer screens set up for this purpose. In the courtroom itself counsel, solicitors, the witness, the judge and the judge's associate each have such facilities available. Users have the ability to "freeze" a document they wish to keep in front of them, make annotations to documents and transcript, which annotations will be accessible only by that user, and to move between related documents and transcript by way of hyperlinks. The system allows for the orderly marking of documents for identification and the marking of exhibits, including references to the basis of tender, any qualifications on tender and admission, and transcript references at the point of tender together with subsequent referrals by witnesses and counsel to that exhibit. Users have the ability to create documents for access by a restricted group, for example between counsel and solicitors for one party only. "Public" documents, namely those which would be publicly available on a hard copy court file, including evidentiary material once it is before the Court, (referred to in the Federal Court as a "media courtbook"[2]) can be separated from other documents and confidentiality of commercially sensitive documents and the masking of parts of documents can be easily accommodated. Additional features include contact information, calendar and messaging capabilities and an interface with the internet with immediate access to most relevant case law and statutes. One of the most significant aspects is the ability to sort and index documents and the

[2] See *Seven Network Ltd v News Ltd (No 9)* (Unreported) [2005] FCA 1394.

powerful search facilities enabling quick and easy reference to documents and relevant transcript across the system.

Advantages of the system

19 In my opinion the advantages of an electronic court in a long and complex matter such as this are numerous and manifestly obvious. First and foremost is the reduction in trial time, which I consider is likely to be substantial. As I have said, a conservative estimate as to the length of the trial in this matter is six months. It may well take longer. It is obvious even at this stage that many witnesses will need to be called and a large number of documents tendered. The evidence is likely to require a detailed analysis of the accounts of substantial trading companies over a period of six half-year accounting periods. The collective costs of each day that the trial continues, including the costs of senior counsel and at least one firm of principal instructing solicitors from interstate, will be substantial, and even a minor reduction in the length of the trial will deliver significant cost savings. The expense involved in establishing and running an electronic court is insignificant when viewed against the costs which will necessarily be incurred in taking this matter to trial and also as against the amount of damages being sought. The reduction in photocopying and paper consumption alone, I believe, will contribute significantly to the cost effectiveness of the electronic court in this case.

20 The electronic court allows all persons involved in the trial to work more efficiently given that the materials will be available remotely, after hours, and that movement and physical accommodation of the materials will not be necessary. I consider that quick access to documents in court also promotes efficient use of time in court. The ability to search, in particular, will save many hours of work from the point of view of both counsel, the judge and the judge's staff.

21 I base these observations both on my own experience of the use of an electronic courtroom and the reported experience of others both in this State and elsewhere.

22 Much shorter trials than the one presently contemplated have been seen in other jurisdictions to warrant the use of this type of courtroom technology in the interests of efficiency. The Victorian equivalent to South Australian Practice Direction 52[3] goes a step further in that it has annexed to it a series of "default" or minimum technological requirements which will be applicable should the parties be unable to agree as to the systems and protocols to be utilised.

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[3] Practice Note No 1 of 2002 *Guidelines for the Use of Technology in Litigation in Any Civil Matter* [2002] 5 VR 107.

Policy considerations

23 A brief survey of recent decisions in the Federal, New South Wales and Victorian courts demonstrates that in those jurisdictions the basic question of whether to use an electronic court at all is generally no longer argued as the benefits are widely acknowledged. However, judges are still called upon occasionally to rule on the appropriate use of technology where the parties fail reach agreement.

24 This Court, by its own Practice Direction[4] requires consideration and adoption, where appropriate, of technology of this type. The direction sets out various recommendations as to the electronic exchange of documents, use of technology in the discovery process and at the hearing. Paragraph 2 relevantly provides:

> Parties to any proceedings are encouraged where appropriate to:
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> (1) use electronic data to create lists of their discoverable documents;
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> (2) make discovery by exchanging electronic data created in accordance with an agreed protocol;
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> (3) exchange electronic versions of documents such as pleadings, reports and statements;
>
> (4) arrange for inspection of discovered material by way of images if appropriate; and
>
> (5) consider the use of electronic data at trial.

25 Paragraph 22 refers specifically to technology for the hearing and relevantly provides:

> More generally, parties should consider:
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> (a) the equipment and services (including appropriate hardware, software and additional infrastructure) that they and the relevant court may require at the trial; and
>
> (b) the arrangements that may need to be made between the parties, the court and any third party service providers to ensure that appropriate equipment and services are available at the hearing.

26 Thus strong encouragement is given by the Court to parties to consider carefully and to use the appropriate technology at trial. In the event of disagreement it will then fall to the Court, in the exercise of its jurisdiction to control the conduct of trials, to give appropriate directions[5] as to the use of that technology.

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[4] Practice Direction 52 - Guidelines for the use of technology in litigation in any civil matter.
[5] See SCR 3.04(g) and 55.11(y).

Timing of the direction

27 A major argument put forward by the second and third defendants was that the proceedings are not sufficiently advanced for an informed decision to be made as to the use of an electronic court. It was contended that the decision should be delayed at least until the finalisation of pleadings and expert reports and ideally until notices to admit and tender lists have been prepared. I disagree that it is too early to decide whether an electronic court will be of assistance. There are numerous aspects of this matter, as already outlined, which point to the conclusion that, no matter what changes might be made to the pleadings and expert reports, the use of an electronic court for the trial is appropriate. I also consider that having the arrangements in place at an early stage can only assist in the preparation of notices to admit, tender lists and the timely preparation of the court book.

28 It is preferable that preparations begin as soon as possible. Time must be afforded to the service provider for discussion of the details of the parties' requirements, and to customise software. Arrangements need to be made for the provision of hardware. Those involved in the trial will need time to familiarise themselves with the use of the system and undergo appropriate training. If the parties, in consultation with the court, choose not to incur the expense of having a technician on site for the duration of the trial, then court staff will need to be trained in the operation of the system. All of this takes time and has the potential to cause delay if no decision is made and no action taken until the late stage suggested by the second and third defendants. It is also preferable that the benefits of the technology be taken advantage of as much as possible during the pre-trial preparations and not just at the hearing itself. I respectfully adopt Byrne J's observation in *Kennedy Taylor (Vic) Pty Ltd v Grocon Pty Ltd*:[6]

> Experience shows that the later the decision to conduct the trial in electronic form is taken, the consequent savings of time and cost at trial and in preparation for trial are less.

29 One of the issues at the heart of the second and third defendants' opposition is the extent to which documents should now be uploaded onto the database and the costs associated with that process. Their concern is that, especially given the unfinished state of the pleadings, there is a risk that a large number of documents will be scanned and coded, thus incurring expense, which documents are later found to be unnecessary for use at the trial.

30 The scope of the content of databases for use in conjunction with an electronic court or courtbook has been the subject of contention in other courts and was the issue Byrne J was called upon to determine in *Kennedy Taylor*[7].

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[6] (Unreported) [2002] VSC 32 at [17].
[7] Ibid.

31 In that case, orders had already been made for the preparation of an electronic courtbook and the plaintiffs applied to expand the scope of the documents to be included. The defendant opposed the application. Byrne J noted that while it might be a quick and simple process to transfer data to the courtbook where an electronic database had been used for the purposes of discovery, this was not the case if the database was being established for the first time. Byrne J considered whether documents should be included beyond those which were to be tendered at the trial. He described the appropriate test for inclusion as follows[8]:

> To my mind, a preferable test is "documents which are reasonably expected to be tendered or used at trial". This formulation acknowledges the reality that a relevant document might be put to a witness or otherwise used at trial without its being tendered. In such an event, there is likely to be a saving of trial time and costs, and a minimisation of inconvenience for all parties and the witness, as well as for the Court, if all of these are working from a common paginated bundle of documents.

32 He concluded that the plaintiffs in that case had failed to show that the proposed extension of the database would "have the consequence that the trial of this proceeding will be more completely, promptly, and economically determined"[9]. The application was refused.

33 Because the exact course that a trial will take cannot be predicted and the tendering of some documents will necessarily depend on forensic decisions made by counsel at a later stage, it is possible that some documents, if included now, may never be used. I accept that, at this stage, not all issues in the trial have been crystallized. In those circumstances, parties, if required to decide now what to include, may be forced to err on the side of cautious inclusion rather than exclusion when it comes to exercising judgment about whether to upload a particular document or class of documents. It will not be a requirement of any order I make that the process must immediately be taken to completion once it is started. What is included in the courtbook and when will depend not only on progressive clarification of issues but on advice as to timing and technical matters by the service provider and co-operation of the parties. In the event of dispute as to content or timing further recourse can be made to directions of the Court.

34 Having said that, I expect that consideration will be given to what is necessary, or likely to be necessary for use at the trial, that judgments will be made on that basis and documents identified at an early stage which are likely, in any event, to be required. It is not appropriate to simply transfer data without giving thought to the purpose of its inclusion.

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[8]Ibid at [15].
[9] Ibid at [23].

35 The second and third defendants have also raised the additional concern that some documents may need to be provided in hard copy form in order to view and comprehend the document clearly. This may well be the case. It is inevitable that some original documents will have to be produced during the course of the trial. But this alone is insufficient to outweigh all of the benefits of an electronic court. I do not consider it likely that such a large number of documents would fall into this category so as to render the use of electronic images pointless.

36 The orders I propose to make will not require the uploading of every single discovered document. Furthermore, a substantial number of the documents to be entered will not require scanning because they are already in and were produced in electronic form. Therefore I do not foresee the imposition of huge expense in establishing the database.

Expense

37 The second and third defendants have made submissions first, to the effect that they can not, or should not, be forced to incur the expense associated with the use of an electronic court against their will and secondly that the plaintiffs should bear, at best initially, the entire cost of the use of the electronic court in case it turns out that the technology does not assist in the expeditious conduct of the litigation.

38 I do not think it necessary to address the second submission at this stage. I consider it highly unlikely that the electronic court would prove to be an entirely wasteful exercise.

39 The expense incurred, at least initially, by the defendants, in association with the use of the technology is no different from any other expense necessarily and properly incurred in the defence of the claim against them. I consider that here, as in other jurisdictions,[10] costs payable to the technology service provider will fall into the category described in Rule 101.07(6)(a) as those "necessarily and reasonably incurred by [a] party in the conduct of the litigation". The costs of using an electronic court should be treated like any other disbursement and can be dealt with in the usual fashion when it comes to taxation of party and party costs. Generally speaking, the use of an electronic court will not warrant of itself any departure from the presumption that costs will follow the event.[11] If costs, including those associated with the use of technology, were to be thrown away, for example due to one party abandoning a particular aspect of their case, then any application in respect thereof would be decided and assessed in the usual way. In summary, there is no special feature of the use of an electronic court which warrants a departure from the

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[10] Practice Note No 1 of 2002 *Guidelines for the Use of Technology in Litigation in Any Civil Matter* [2002] 5 VR 107.

[11] SCR 101.02(1).

existing rules as to costs. The rules are quite capable of providing adequate compensation after the resolution of the matter.

40 There remains the issue of payment of the costs of the service provider. Those costs should initially be shared equally by the parties as a disbursement to be adjusted between them in accordance with any ultimate order for costs.

Conclusion

41 For these reasons I conclude that it is appropriate that the hearing of this matter proceed in an electronic court. I will hear the parties as to the precise details of the directions to be made at this stage. An initial proposal is attached to these reasons. Other directions may be necessary as the case proceeds. However, I expect the parties to use their common sense in the light of the advice of their legal advisers in order to agree as much as is reasonably possible on the subject of procedures and protocols for the establishment and use of the electronic court, including the documents and classes of documents to be included in the database and the time at which it is appropriate to upload them. There may be instances in which agreement cannot be reached. I will deal with such issues if they arise. However the benefits of this course of action will be diminished somewhat if there are endless applications relating to the use of the technology. I urge the parties to adopt a cooperative approach from now on in the implementation of the technology.

ATTACHMENT

Proposed Orders

1. That the trial of this action be conducted by means of an electronic courtroom and ancillary services, including the use of court book software, associated information technology services and appropriate computer software and hardware.

2. That such services be provided by or in association with a commercial service provider to be agreed by the parties and the Registrar or in default of agreement to be determined by the Court.

3. That the costs of the service provider, other than for the provision of computer hardware for use by the Court, be paid equally by the parties.

4. That the parties enter into negotiations forthwith as to the appropriate service provider and with the nominated provider with a view to reaching agreement as soon as possible as to the services to be provided, the protocols for the use of the equipment and the cost of providing such services.

5. That representatives of the parties confer as to documents to be included in the court book and the process and the timing of their inclusion, provided that such documents are to include:

   (a) Pleadings as amended and particulars;

   (b) Parties' lists of documents;

   (c) Expert reports reasonably expected to be tendered or used at the trial;

   (d) Statements of witnesses to the extent that they are directed to be prepared for use at the trial;

   (e) All documents, whether at present in hard copy or electronic form, which are reasonably expected to be tendered or used at the trial.

6. In the case of any doubt or difficulty in the implementation of these orders any party, including the Registrar, be at liberty to apply for further directions.