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PERSPECTIVES FROM THE BENCH: THE IMPORTANCE OF ADJECTIVAL LAW, AND PRACTICE, TO SUBSTANTIVE OUTCOMES

INTRODUCTION : THE THEME

1. Rules of court, practice and procedure have their place on the road to judicial decision.

2. When forced to confront a court file with layers of sediment, generally out of order, a judge longs for a well-constructed "Court Book" (incorporating well drafted affidavits) as a preferred form of reading.

3. That realisation opens the way for appreciation of Court Books as a form of legal literature in their own right, never to be taken lightly by those who compile them.

4. The Court Book is, as often as not, the primary means by which a party can, in anticipation of a contested hearing, communicate its adversarial message to a "trial judge" for whom pre-trial preparation has become standard fare.

5. Gone are the days when, as a matter of routine, a judge sitting in the Equity Division of the Supreme Court of NSW would first learn the detail of a case as he or she listened to an opening address.

6. Gone too are the days – if they ever existed – when counsel (particularly counsel for a defendant or cross-defendant) could first become familiar with his or her brief at about the same time as the judge.

7. Case management precepts have engaged us all.

EQUITY JURISDICTION, FROM A PROCEDURAL PERSPECTIVE

8. Any practising lawyer, a judge no less than a barrister or solicitor, must be alive to the potential operation of broad concepts, and the critical importance of particular facts, in the process of defining problems for solution and devising solutions.

9. This is particularly true in the realm inhabited by equity lawyers because: first, equitable relief is generally discretionary, and not available "as of right"; secondly, an exercise of equitable jurisdiction generally requires a judge to have regard to "all the circumstances" of a case at the time of its exercise, not limited to historical events; thirdly, an application of equitable principles generally requires an appreciation of the nature, availability and limitations of legal rights as a foundation for equitable intervention; and, fourthly, equitable jurisdiction is generally informed by the concept of "conscionability".

10. The equity jurisdiction is one in which the general and the particular are often in creative tension, with equity lawyers instinctively, and correctly, driven to focus on the particular facts of a case, with a predisposition against the embrace of broad generalisations.

11. Nevertheless, there is a need of general ideas that may inform the practice, and theory, of an exercise of equity jurisdiction.

12. When equity lawyers congregate to discuss the problems that arise in their jurisdiction of choice they generally focus on what, to the modern mind, is described as "substantive law" as distinct from "adjectival law".

13. That is a tendency perfectly understandable. On the whole, the substantive law is more interesting. Moreover, a substantive law focus transcends particular courts, particular systems of law and particular territorial jurisdictions.

14. However, as Sir Henry Maine famously noted, the development of substantive law principles often follows from procedural practice: HJS Maine, *Dissertations on Early Law and Custom* (1883). Furthermore, the foundations of equitable jurisdiction in Anglo-Australian jurisprudence were laid in distinctive *procedures* that differed from the routine *procedures* of the Courts of Common Law: Sir William Blackstone, *Commentaries on the Laws of England* (9th "received" edition, 1783), volume 3, pp 429-466, esp 436-439; Story, *Commentaries on Equity Jurisprudence* (1st English ed, 1884), p 16 [26].

15. Blackstone, not a devotee of Equity as a separate field of study, wrote (in Volume 3 at pp 435-336):

> *"The rules of decision are in both courts [of common law and courts of equity] equally apposite to the subjects of which they take cognizance. …*
>
> *Such then being the parity of law and reason which governs both species of courts, wherein (it may be asked) does their essential difference consist? It principally consists in the different modes of administering justice in each; in the mode of proof, the mode of trial, and the mode of relief. …* [Emphasis added]*"*

16. As to the "mode of proof", Blackstone had in mind Equity's procedures for "compulsory discovery upon oath", not available at common law. As to "mode of trial", he had in mind Equity's procedures for the administration of interrogatories and the taking of evidence by depositions in writing, as distinct from the common law's procedures for taking evidence orally. As to "mode of relief", he had in mind the variety of remedies available in Equity, including orders for specific performance, going beyond remedies available at law.

17. Blackstone refrained from referring to the length of the Chancellor's foot, but he was alive to that line of territory in its application to the law generally – as appears in the following extract from Volume 1 at page 62:

> *"Equity* [in the sense of "justice"] *thus depending, essentially, upon the particular circumstances of each individual case, there can be no established rules and fixed precepts of equity laid down, without destroying its very essence, and reducing it to a positive law. And, on the other hand, the liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge. And law, without equity, though hard and disagreeable, is much more desirable for the common good, than equity without law: which would make every judge a legislator, and introduce most infinite confusion; and there would then be almost as many different rules of action laid down in our courts, as there are differences of capacity and sentiments in the human mind."*

18. This paper is predicated upon three broad propositions. First, the nature of the real-life problems addressed by equity lawyers influences, if not underpins, the content and operation of principles applied in the equity jurisdiction. Secondly, at their core, many of those problems call for the management of property and personal relationships in the context of potentially complex competing interests, including future interests. Thirdly, the nature of the problems addressed in the equity jurisdiction and the managerial flavour of much decision making in equity demand that equity lawyers focus light upon questions of practice and procedure, as well as substantive law principles. In practice, close attention to adjectival law considerations can be of decisive importance to success in equity proceedings.

19. An invocation of equitable jurisdiction, before a judge trained in the traditions of that jurisdiction, is likely to engage considerations different from those brought to bear upon the determination of a claim of right at common law, whether or not the common law claim is determined *via* a trial by jury. A claim of an entitlement to damages in contract or tort is, in character, different from a claim in equity or one of the jurisdictions (notably, the probate or protective jurisdictions) historically associated with the practice of equity.

20. With: (a) the decline of trial by jury in New South Wales since the mid-1960s (Ian Barker, *Sorely Tried : Democracy and Trial by Jury in New South Wales* (Forbes Society, Sydney, 2003), c 11); (b) the rise of case management theory in the administration of justice; and (c) the proliferation of discretionary statutory remedies, there has been a blurring of distinctions between the common law and equitable jurisdictions, viewed both from a substantive and an adjectival law perspective.

21. Nevertheless, as references to legal history confirm, equity courts have long tailored their practice and procedure to accommodate the problems they routinely encounter and the nature of the jurisdiction they generally exercise.

22. Equity judges, traditionally confronted by a mass of paper (pleadings, affidavits and written submissions to the fore), have long manifested a preoccupation with precision in the paperwork.

THE IMPORTANCE OF AFFIDAVITS

23. An illustration of that tendency of mind can be found in two papers of John Bryson published in the *Australian Bar Review* (he will forgive me for saying) "last century".

24. The first was written by JP Bryson QC: "How to Draft an Affidavit" (1985) 1 *Australian Bar Review* 250. The second was written by Justice John Bryson, with a slight variation of title to reflect elevation to the bench. It was simply entitled, "Affidavits": (1999) 18 *Australian Bar Review* 166.

25. Both are gems of literary style married to deep practical insight. They have a common theme, presented in surprisingly similar language.

26. In the first paper, Bryson QC wrote the following (at 1 Aust Bar Rev 254):

> *"Each court has its own rules affecting the form of affidavits. <u>These seem unimportant until you get them wrong</u>, so you should study the applicable Rules and Forms, and you should not assume that they are the same as those you know best.* [Emphasis added]*"*

27. Fourteen years later, Justice Bryson wrote (at 18 Aust Bar Rev 167):

> *"There are many variations in the rules as you go from court to court, and these seem irrelevant or ridiculous until you get them wrong. So check what you are about. The most minor detail and the least apparent infelicity can turn out to be wrong somewhere, and it is better not to be wrong.* [Emphasis added]*"*

28. Both papers remain worthy of study.

29. The introduction to the 1984 paper presents concentrated good sense of enduring value:

> *"Most litigation is solved when the relevant facts are ascertained and stated in chronological order. It is a large part of advocacy to see that the evidence which the client has available reaches the court in a form which is complete and can be readily comprehended. The object of counsel adducing evidence, orally or by affidavit, is to put before the court the admissible evidence of the witness about the relevant facts in issue. So far as possible, the evidence should be put in chronological order. The principal contribution to an affidavit is what the witness can say. Counsel contributes to drafting an affidavit:*
>
> - *Knowledge of the law of evidence and of the practice about the form in which evidence is received;*
> - *Understanding the issues, relevance;*
> - *Capacity to marshal facts in order, and with circumstances, so as to produce what the reader can regard as a complete narration;*
> - *Command of the English language: grammar, spelling and punctuation;*
> - *Knowledge of the rules and practices of the court about the form of affidavits.*
>
> *The use of affidavits saves time for the court. The evidence in chief emerges quickly. This advantage is only worth having if the evidence is clear and readily comprehensible* [Emphasis added]*"*.

30. The later paper was altogether more prosaic. Its introductory paragraphs set the tone:

> *"I tune my lyre to no noble theme, but to very ordinary requirements of the Rules of Court. I will take you to practical concerns for the good lawyer. I will not deal with any important principles or with anything the mastery of which is very flattering to the self. Some characteristics of the good lawyer are involved. The good lawyer will be altogether in command of the English language and the art of communication. Communication, persuasion and ready use of written and spoken language are at the heart of our profession, which is concerned to avoid and if need be adjust with skill the conflicts which arise from the social nature of humanity. You cannot be a lawyer on your own, and*

you must bring a ready grasp of language to bear on the process of communication if you are to achieve any result. Written communications which you produce should be fully and readily comprehensible, and should not present their recipients with difficulties or inefficiencies of understanding. A document produced by a lawyer ought to evince a full participation in the culture of literacy. It is not usually the place for slang, colourful idiom or technical language which is not in general use, although these may be required, and may have to be explained if used.

The good lawyer is economical with time, busy and assiduous, and governs behaviour with appropriate regard to the needs of others also to be busy and efficient with their time. Preparing affidavits offers opportunities to use and demonstrate your facility in communication and your efficiency, or alternatively an opportunity to demonstrate in a clear way and in a humiliatingly public way that you lack those qualities. The advocate in the court room and the office lawyer preparing the advocacy material are both engaged in the art of persuasion, and as part of that art in communicating the witness' evidence to the judge in a manner which is clear, authentic to the witness and readily absorbed by the judge, so as to attain the efficiency of adducing the evidence in chief quickly. The art of persuasion requires that art should conceal art; the information communicated should seem to be all that is involved; the process of communicating it should not claim attention. If your documents are inartistic the judge will be distracted from the process you wish to engage the judge in, that is, absorbing the relevant evidence, and the judge's mind will be led to pathways where you do not wish it to go, and to doubts, hesitations and impediments to comprehension produced by the crudity of the attempt to give information.

Although this is not my main theme, I will say that you should approach the preparation of an affidavit imbued with literary culture, with legal culture, and with a love of language. If you do not do a lot of general reading, and if you do not have a feeling for language well used, and for a well-printed well-bound book, your failings may come through in a document which you produce. If you read nothing but newspapers and race-books this will show up. If all your reading is hurried and careless you will not notice misprints and basic errors of grammar. If you have not troubled to find out what are basic errors of grammar and spelling, or have not troubled to learn how to compose a clear sentence, the documents you draft will be hard to follow. They will present the careful reader with incidental disruptions and uncertainties. [Emphasis added]"

31. Having warmed to the topic, and having warned his audience to check rules of court on a regular basis, his Honour got to the point:

> *"The Supreme Court Rules say a great deal of the obvious on the subject of affidavits. I will repeat much of the obvious. Much of it can be made to seem trivial, but it is not; it is important because it is the rule. If you affect a fine disregard of rules on small matters you may seem a very hollow advocate.*
>
> *At the very beginning, an affidavit is on paper. …"*

32. John Bryson, a master of style, is a very thorough man.

33. The 1999 paper was very popular amongst barristers because it was so wonderfully droll.

34. It still comes to the minds of judges, perhaps more often than it should, when they survey ill-prepared affidavits or court books. Two of its principal messages about the art of affidavit preparation boil down to this: number the pages, and bind the affidavit securely.

35. The two critical paragraphs, fondly remembered, are the following:

> *"More obvious requirements would be hard to imagine, yet they are disregarded every day, so it seems to me from my experience in court. Anyone who has ever read a book or studied anything should need no persuasion of the need to number the pages of an affidavit, and to carry the numbering system through all the annexures in one consecutive series.. Yet every day affidavits appear in which this has not been done .Elementary acquaintance with the process of reading an affidavit in court, where several parties take part, several advocates have to follow the document, and the judge has to be referred to parts of I, shows how essential numbering is. I find myself being told that a letter is Annexure Q, that it is about 12 pages from the back of the affidavit, and sometimes it emerges that the copy of the affidavit given to the judge has page numbers on it, but that no-one else in court has a copy with page numbers; or they have different numbers, and the numbering has no real utility. Another recurring failure is that an annexure itself has numbered pages within it, a contract with say 10 numbered pages, and an advocate causes exasperation by slipping from one series to the other. The advocate causes infuriation by referring to both….*
>
> *The crown of my complaints on [SCR] Pt 65 r 2 is the requirement that the document shall be securely fastened. What could be more obvious than that if an affidavit is to appear convincing it should appear to be in the form which it took when it was sworn. An affidavit held together by a bulldog clip or a slide fastener, or by the fingers, will immediately raise doubts as to its integrity. How can the reader be sure that this is the bundle of papers, and in this order, that the witness gave his oath*

> *to? Anyone with any acquaintance with literacy, or facility in the use of written material, or experience in handling paper must know that an important record which is to remain in the court file for an indefinite number of years cannot be clipped together with a bulldog clip, but for those who cannot perceive this the rules of court prescribe that it must be securely fastened.* [Emphasis added]*"*

36. These paragraphs do not stand in isolation. There are other observations on the connection between human folly and legal practice. They are drawn together in the final paragraph:

> *"If anything is persistent in the observations I have made it is the steady note of complaint. I suggest that you notice the sense of grievance which this subject can create, and do your best not to incur the disadvantages of it. Make a small inner resolution that the next time someone appears in court with an affidavit on a torn and irregular piece of fax paper, lacking a date, unnumbered, not filed in the registry and not acceptable to the clerks there, and its date identifiable only by a fax inscription upside down at the top of the first page, that person is not yourself. Avoid follies. Find a middle way between loftily ignoring the rules of court and the form and appearance of things, and appearing to be obsessed with them. The flow of events should be that everything is in good order so good order does not have to be mentioned. Perhaps I am telling you to be obsessed with the rules of court but not to let it show, and that is the note on which I end.* [Emphasis added]*"*

37. There is no end to observations of this character. They recur.

THE IMPORTANCE OF "COURT BOOKS"

38. The Supreme Court Rules 1970 NSW have given way, in large measure, to the *Civil Procedure Act* 2005 NSW and the *Uniform Civil Procedure Rules* 2005 NSW. Criticism of affidavits remains but, in the Equity Division of the Supreme Court, it is subsumed in talk about "Court Books": their form and the necessity for their timely delivery.

39. A substantial part of the job of a modern tipstaff is chasing up lawyers for delivery of Court Books; marking up objections to affidavits in Court Books; and assembling authorities, from lists of authorities or outline submissions. To the extent that parties do not do what is expected of them in the mundane, it must be done by somebody within the Court.

40. In the way business is presently conducted in the Equity Division of the Supreme Court of NSW, "the usual order for hearing" (as defined by paragraph 12 of, and annexure "A" to, *Practice Note SC Eq 1 – Case Management*) is generally an indispensable aid to the life of a judge assigned to the Division.

41. The core concept for which it provides is a "Court Book" (delivered to the judge's chambers "no later than three working days before" a contested hearing) "consisting of all evidence, any objections thereto (limited to those that are essential having regard in particular to s 190(3) of the *Evidence Act* 1995) and a short outline of submissions".

REFERENCES TO AUTHORITIES : A DIVERSION

42. As a matter of practice (not discouraged) Court Books generally incorporate all documentation anticipated to be the subject of reference at a contested hearing, including pleadings, subsisting interlocutory orders and current notices of motion. They are generally accompanied by lists of authorities (at least) and, not uncommonly, bundles of authorities.

43. A bundle of authorities can be important because, these days, fewer and fewer lawyers (including judges) have extensive personal law libraries close at hand. Judges do, generally, have good access to electronic copies of law reports (courtesy of the Law Courts Library); but the process of locating reports on-line and, more often than not, printing them can be laborious.

44. Surprisingly, not all advocates appear to appreciate the importance (forensic and clerical) of reference to "authorised reports" where an authorised report exists, and to the full range of alternative citations where no authorised report has been published.

45. Austlii and BarNet provide easy, free-to-air access to case law and legislation. They are, for many, indispensable research tools.

46. However, at the point of communication with a judge, a conscientious advocate will turn his or her mind to whether ostensibly "unreported" judgments have in fact been reported, and, if so, where.

47. An advocate who fails to attend to this level of detail in case presentation detracts from his or her case. Judges of the Supreme Court have an established expectation that they will be given citations to published law reports (and, especially, authorised reports) where available.

48. If and when such an expectation is disappointed, inconvenience to the judge might turn to doubt in his or her mind: about the thoroughness of an advocate's preparation and about the reliability of the advocate's submissions.

EQUITY COURT BOOKS : LEGISLATIVE UNDERPINNINGS

49. The definition in *Practice Note SC Eq 1* invites attention to s 190(3) of the *Evidence Act* 1995 NSW: a provision, one suspects, never uppermost in the formal thinking of any participant in equity proceedings, but instinctively, a shared aspiration of all at a deeper level.

50. It does, at least, two things – both rather obliquely. First, it implicitly calls attention to a need for everybody to focus on "the real questions in dispute" and the means of addressing those questions by evidence or other adjectival procedures. Secondly, it manifests a deeply entrenched judicial distaste for being presented with a mass of evidentiary objections upon which, over the course of a hearing, nothing of significance is likely to turn.

51. In a judge-alone hearing in civil proceedings (which is to say all Equity proceedings, where judges do not sit with juries), in the context of case management provisions found in the *Civil Procedure Act* 2005, the *Uniform Civil Procedure Rules* 2005 and the *Evidence Act* 1995, there is, in practical terms at least, validity in the observation that there are only two "rules of evidence" of enduring significance, both encapsulated in a question: First, is the evidence sought to be adduced *relevant* to a fact in issue? Secondly, is it *probative* of a fact in issue? Both questions focus attention on ready identification of the questions (issues) for determination. In this forensic environment, there is often limited utility in a protracted process of advocates insisting that a judge rule upon more than a few objections to evidence.

52. Forensically, the process of debating objections to affidavits, in particular, often seems directed, principally: (a) to providing a structure for each party to outline his, her or its case to the judge at an early stage of a hearing; and (b) incidentally, to ensure that the judge has read the papers and is alive to questions in dispute.

53. More than that is often perceived by judges as a waste of time, particularly as the tendency of many advocates is to 'cross-examine" back into evidence those parts of an opponent's affidavits excluded in the process of preliminary, evidentiary objections.

54. That may happen because, in apprehension of the operation of the "rule in *Browne v Dunn*", the cross-examiner confronts each witness with the case "the witness" has to meet, and each witness responds unconstrained by the cross-examiner's earlier evidentiary objections.

55. The complexity of the process of balancing "objections to evidence" against "topics for cross-examination" often remains hidden from the view of lawyers who prepare lists of objections for inclusion in a Court Book, and remains hidden until (having had foreshadowed, listed objections marked up in the Court Book) a judge calls upon the advocate to address the admissibility of evidence.

56. Some degree of slippage in the maintenance of foreshadowed objections to evidence may be inevitable, as well as desirable, as bench and bar reach an accommodation on their shared perception of the "real questions in dispute". However, oftentimes the problem is that, in the isolation of chambers, the lawyer preparing a list of objections for inclusion in a court

book is over cautious about allowing affidavits to be read without extensive objections.

57. Section 190 of the *Evidence Act*, expressly incorporated by reference in the "usual order", provides a reminder to all participants in the trial preparation of the need to contain disputation to what is essential.

58. Because case management provisions of this character are often passed over without fresh examination, the opportunity is taken, here, to notice the nature and breadth of two of them: s 190 of the *Evidence Act* and s 62 of the *Civil Procedure Act*.

59. Section 190 is in the following terms:

> "***190 Waiver of rules of evidence***
>
> *(1) The court **may**, **if the parties consent, by order** dispense with the application of any one or more of the provisions of:*
>
> *(a) Division 3, 4 or 5 of Part 2.1, or*
> *(b) Part 2.2 or 2.3, or*
> *(c) Parts 3.2-3.8,*
> ***in relation to particular evidence or generally***
>
> *(2) In a **criminal** proceeding, a defendant's consent is not effective for the purposes of subsection (1) unless:*
> *(a) the defendant has been advised to do so by his or her Australian legal practitioner or legal counsel, or*
> *(b) the court is satisfied that the defendant understands the consequences of giving the consent.*
>
> *(3) In a **civil** proceeding, the court **may** order that any one or more of the provisions mentioned in subsection (1) do not apply in relation to evidence **if**:*
> ***(a) the matter to which the evidence relates is not genuinely in dispute, or***
> *(b) **the application of those provisions would cause or involve unnecessary expense or delay**.*
>
> *(4) Without limiting the matters that the court may take into account in deciding whether to exercise the power conferred by subsection (3), it is to take into account:*
> *(a) **the importance of the evidence in the proceeding**, and*
> *(b) **the nature of the cause of action or defence** and **the nature of the subject-matter** of the proceeding, and*
> *(c) the **probative value of the evidence, and***
> (d) ***the powers of the court (if any)** to adjourn the hearing, to make another order or to give a direction in relation to the evidence.* [Emphasis Added]".

60. Section 190(3) provides the Court with a power which is independent of the power contained in s 190(1), although the subject matter of both powers is to be found in the sub paragraphs of s 190(1).

61. That subject matter of s 190 is quite extensive.

62. Chapter 2 of the *Evidence Act* is entitled "Adducing Evidence". Chapter 3 is entitled "Admissibility of Evidence".

63. Sections 190(1)(a) and (b) together pick up the whole of chapter 2, except for Division 1 (relating to competence and compellability of witnesses) and Division 2 (relating to oaths and affirmations) in Part 2.1 (headed "Witnesses").

64. In Part 2.1 the subject matter of s 190 includes Division 3 (general rules about giving evidence), Division 4 (relating to examination in chief and re-examination) and Division 5 (relating to cross examination).

65. Part 2.2 (headed "Documents") relates, *inter alia*, to proof of contents of documents (s 48), proof of voluminous or complex documents (s 50) and abolition of the original document rule (s 51).

66. Part 2.2 (headed "Other evidence") relates, *inter alia*, to the conduct of views.

67. Section 190(1)(c) picks up a substantial part of Chapter 3 of the *Evidence Act*, which is headed "Admissibility of evidence". The parts picked up are those found in Part 3.2 (headed "Hearsay"), Part 3.3 (headed "Opinion"), Part 3.4 (headed "Admissions"), Part 3.5 (headed "Evidence of judgments and convictions"), Part 3.6 (headed "Tendency and coincidence"), Part 3.7 (headed "Credibility") and Part 3.8 (headed "Character").

68. Those parts of Chapter 3 not within the subject matter of s 190 include Part 3.1 (headed "Relevance"), Part 3.10 (headed "Privileges") and Part 3.11 (headed "Discretionary and mandatory exclusions").

69. One wonders whether the pen of the parliamentary draftsman hesitated before deciding not to include within the ambit of s 190's subject matter Part 3.1 of the *Evidence Act*. The dry logic of a system of rules based upon the "relevance" and "probative value" of evidence bearing upon questions in dispute dictates that there be no formal embrace of a procedure for "waiver" of the requirement (found in ss 55-58) that evidence must be "relevant" in order to be admissible. However, life experience, at bench and bar, invites, at least, a passing thought that "waiver" of the "relevance rule" needs no formal foundation. Parties manage to embrace the irrelevant without need of a court order permitting them to do so.

70. The power for which s 190(3) provides is less well known than the now notorious case management provisions found in Part 6 (sections 56-89) of the *Civil Procedure Act* 2005 NSW.

71. Few litigation lawyers would be unfamiliar with the concept (embodied in s 56) of the "overriding purpose" of the *Civil Procedure Act* and the *Uniform Civil Procedure Rules* 2005 NSW "to facilitate the just, quick and cheap resolution of the real questions in the proceedings".

72. Less attention is generally given to the express powers of the court to give "directions" relating to "practice and procedure generally" (s 61) or in relation to the conduct of a hearing (s 62).

73. Particular reference might be made, by way of example, to the provisions of s 62:

> ***"62 Directions as to conduct of hearing***
>
> *(1) The court may, by order, give directions as to the conduct of any hearing, including directions as to the order in which evidence is to be given and addresses made.*
>
> *(2) The court may, by order, give directions as to the order in which questions of fact are to be tried.*
>
> *(3) Without limiting subsections (1) and (2), the court may, by order, give any of the following directions at any time before or during a hearing:*
>
> *(a) a direction limiting the time that may be taken in the examination, cross-examination or re-examination of a witness,*
> *(b) a direction limiting the number of witnesses (including expert witnesses) that a party may call,*
> *(c) a direction limiting the number of documents that a party may tender in evidence,*
> *(d) a direction limiting the time that may be taken in making any oral submissions,*
> *(e) a direction that all or any part of any submissions be in writing,*
> *(f) a direction limiting the time that may be taken by a party in presenting his or her case,*
> *(g) a direction limiting the time that may be taken by the hearing.*
>
> *(4) A direction under this section must not detract from the principle that each party is entitled to a fair hearing, and must be given a reasonable opportunity:*

(a) to lead evidence, and
(b) to make submissions, and
(c) to present a case, and
(d) at trial, other than a trial before the Local Court sitting in its Small Claims Division, to cross-examine witnesses.

(5) In deciding whether to make a direction under this section, the court may have regard to the following matters in addition to any other matters that the court considers relevant:
(a) the subject-matter, and the complexity or simplicity, of the case,
(b) the number of witnesses to be called,
(c) the volume and character of the evidence to be led,
(d) the need to place a reasonable limit on the time allowed for any hearing,
(e) the efficient administration of the court lists,
(f) the interests of parties to other proceedings before the court,
(g) the costs that are likely to be incurred by the parties compared with the quantum of the subject-matter in dispute,
(h) the court's estimate of the length of the hearing.

(6) At any time, the court may, by order, direct a solicitor or barrister for a party to give to the party a memorandum stating:
(a) the estimated length of the trial, and the estimated costs and disbursements of the solicitor or barrister, and
(b) the estimated costs that, if the party were unsuccessful at trial, would be payable by the party to any other party. [Emphasis added]*"*

74. The remarkable thing about both s 190(3) of the *Evidence Act* and s 62 of the *Civil Procedure Act* is that, for the most part, because they exist there is rarely a need to refer to them. They can be, and usually are, held in reserve. They underpin a culture of case management that governs case presentation.

75. The central point, upon which the minds of all participants in the process are called to concentrate is: What are the true nature and purpose of the proceedings before the court? What are the real questions in dispute?

76. These questions are rarely merely rhetorical, even if not always articulated. They drive, or should drive, the preparation of all documents incorporated in a Court Book and ancillary materials.

77. A well presented Court Book (incorporating ancillary materials as appropriate to the particular case) is a critical forensic tool.

78. It frees the mind of the judge, lawyers and witnesses from a need to marshal scraps of paper or to refer to documentation otherwise than by reference to a consistent, uniform system of pagination.

79. It allows the judge to reflect, more effectively than otherwise, on the substance of a case outlined in written submissions, supported by a chronology, cross-referenced to Court Book pagination.

CONCLUSION

80. An advocate practising in the equity jurisdiction generally needs to know: first, the nature of the jurisdiction which the court is called upon to exercise; secondly, the rules of court and other adjectival law considerations bearing upon an exercise of that jurisdiction; and, thirdly the predisposition of the judge, or judges, likely to be called upon to exercise jurisdiction.

81. The focus of this paper is on the second of these three topics. The first can, here, only be the subject of passing reference. The third is beyond the scope of the paper, subject to one important qualification.

82. There are very few judges ever likely to be indifferent to the importance, to the discharge of the judicial function, of a well constructed Court Book, incorporating well drafted affidavits and accompanied by judicious lists of objections and short, insightful case outlines, with reference to authorised law reports where available. That much can be assumed in the quest of "knowing" the judge.

Justice Geoff Lindsay
5 September 2013

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