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A Judicial Perspective on what the Court expects from legal practitioners in equity and commercial litigation

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A Controversial Beginning

1 Although the origins of the Equity Court[2], or the Court of Chancery, and the Commercial Court[3], or Commercial List, are different, their compatible existence within the Equity Division is now well recognised. This does not mean that this comfortable relationship was reached without controversy. In the late 1980's the Hon Justice G.A. Kennedy traced some of the criticisms that had been made over the previous century of attempts to apply equitable principles to commercial transactions[4]. His Honour referred to a number of then recent High Court decisions concerned with the application of equitable doctrine in commercial relationships[5] and said:

In this respect, the High Court appears to have been, if anything, more active and innovative than have the English courts. Perhaps the belated adoption of the judicature system in New South Wales has led to a greater awareness in this country of the equitable resources waiting to be exploited.[6]

2 Kennedy J also opined:

The application of equitable doctrine in this area of the law has not led to any substantial degree of uncertainty, for it has been applied with restraint and discretion. It has not served, as the common expression has it, as a medium for the indulgence of idiosyncratic notions of fairness and justice. ... equitable doctrine plays a most significant and innovative role in the modern commercial world.[7]

The Equity Division Lists

3 In 1998 the present Chief Justice announced changes to the structure of the Court. The Supreme Court Act 1970 was amended so that there are now only two trial Divisions of the Court, the Equity Division and the Common Law Division. Since that time, causes arising out of commercial transactions or causes in which there is an issue important to trade and commerce are heard in the Commercial List, which business is assigned to the Equity Division.

4 The Judges of the Equity Division also hear cases including injunctions to prevent particular alleged wrongful conduct, applications for specific performance of contracts or the setting aside of particular contracts, proceedings in relation to rights of property, both real property and intellectual property, and claims relating to the administration of corporations, partnerships, trusts and deceased estates.

5 The work of the Equity Division is administered within the following Lists: the Admiralty List[8]; the Adoptions List[9]; the Commercial List[10]; the Corporations List[11]; the Expedition List[12]; the Technology and Construction List[13]; the Probate List[14]; and the Protective List[15]. A Duty Judge from the Equity Division is available 24 hours per day for urgent relief including injunctive relief, with such Judges rostered on duty for a fortnight. There is also a Short Notice List, into which cases that will be ready for hearing with three days' notice are placed.

6 The majority of cases in the Equity Division, excluding cases in the Commercial List and the Technology and Construction List, are first listed in the Registrar's List on the return of a Summons or a Notice of Motion. The Registrar may give directions or may refer the matter to a Judge or Master. In particular the Registrar may refer a matter to the Duty Judge, the Judge dealing with the Corporations List, or a Master, or place it in the Short Notice List or, if appropriate, hear the matter personally. The extent of the Masters' and Registrars' powers are ascertained from Schedules D and E respectively of the Supreme Court Rules 1970 (the Rules).

7 It is very important that practitioners know their way around the Court structure and that they have a good working knowledge of the Rules, the Lists and of the relevant Practice Notes[16] ensuring the most appropriate forum is chosen for the client's case. As Bryson J suggested[17]:

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.

The Real Issues

8 Procedures for trial have changed over the years, in some respects quite markedly. In the early 20th Century when Sir Frederick Jordan was lecturing in Equity at the Faculty of Law at the University of Sydney, the revision of a portion of his Notes record references to the historical influences on "modern equity" including the circumstance that the "method of trial influenced the attitude of the Court". Those Notes record the following:

Originally the witnesses were examined orally before the Chancellor or his deputy. But from the time of Elizabeth until the middle of the 19th century, the witnesses did not come before the Court of Chancery at all. Each witness was

examined separately by an examiner (no third party being present) upon written interrogatories which had been framed by counsel; and the depositions were kept secret until the whole of the evidence was closed. Cross-examination was thus virtually impossible. There resulted a tendency on the part of the Court, which was out of immediate touch with the facts, to set up a standard of duty which was in some cases excessively high, especially in the case of trustees. This tendency has been corrected, partly as the result of the change by which witnesses are now heard before the Judge, and partly by modern legislation.[18]

9 Any discussion about the navigation of the Court system as it is today should not avoid mentioning the over-riding rule and concern of all Judges of the Court with the "just, quick and cheap" resolution of the real issues in proceedings. Perhaps only the latter two of those epithets would fit the methods of trial to which Sir Frederick Jordan referred and it is the concern with the last of them that may drive further reform to the trial process.

10 In a number of recent decisions[19], the importance of the practitioner's knowledge of, and pursuit of, the "real issues" in the proceedings has been highlighted. In these cases, there is an emphasis of moving away from the "trial by ambush" approach to the "cards on the table" approach[20]. In Nowlan v Marson Transport Pty Ltd Young CJ in Eq said at 131:
In a culture where the plaintiff may be ambushed, it is incumbent on the plaintiff's solicitors to minimise that possibility by seeking to confine the defendant by forcing the defendant to state what his or her grounds of opposition to the plaintiff's motion are. Ordinarily, if this is not clear on the material filed, a letter should be written to the defendant's solicitors in good time before the motion is heard and complaints made to the judge if no reasonable response is received.

Judges should do their best to see that there is as little ambush as possible, and that people are up - front with what the real point is that the judge needs to decide. If need be the judge should actually ask the defendant at the commencement of the proceedings what are his or her defences, and if the plaintiff bona fide says that he or she is surprised, it may be preferable to adjourn the matter at that stage.

The culture has changed in the Supreme Court. The culture has changed in England, and it would seem, from judgments such Boyes v Collins (2000) 23 WAR 123 and White v Overland [2001] FCA 1333 in other places in Australia.

11 In White v Overland Allsop J said at par [4]:

... in the efficient and proper conduct of civil litigation, even civil litigation hard fought between the parties, it should always be recognised that in the propounding of issues for trial the parties should take steps to ensure that all relevant parties to the dispute are cognizant of what the issues are. Even if something has been said, where it is evident, or indeed suspected, that the other side is proceeding on the basis of a misconception or has not appreciated something, as a general rule, efficiency, common sense and an appreciation of the costs and resources (both public and private) likely to be wasted by confusion in litigation will mandate that a party through his or her representative ensure that the other is not proceeding on a misconception or that the other does appreciate something that has been said. Litigation is not a game. It is a costly and stressful, though necessary, evil.

12 In Nowlan Heydon JA said:

[26] Fourthly, the conduct of litigation as if it were a card game in which opponent's never see some of each other's cards until the last moment is out of line with modern trends. Those trends were developed because the expense of courts to the public is so great that their use must be made as efficient as is compatible with just conclusions. Civil litigation is too important an activity to be left solely in the hands of those who conduct it.

...

[31] If the ambush theory of litigation is permitted to survive in the specific area of time-extension proceedings, it will do no party any good, least of all the potential defendants. In the first place, it will have the effect of imposing on all applicants in this type of litigation a duty to file evidence which is adequate to deal with every conceivable point which might be taken against them. This would generate undue expense, would tend to consume court time unnecessarily, and would produce the undesirable result that applications to extend time would become mini-trials of the contemplated action ... Alternatively, an ambushed applicant might decide to do what the present appellant did, and apply to this Court seeking leave to appear and tendering further evidence. Fascinating though the Court finds this type of work, that too is undesirable, since the time of three judges is consumed and not just one, but it may be necessary if justice is to be done to an applicant. It is simpler, cheaper, more efficient and fairer for resort to these manoeuvres to be avoided and for appropriate notice to be given by respondents to applicants before the application to extend time is first heard.

13 Similarly in Glover, Ipp JA said:

[60] The "cards on the table" approach is now common practice in many jurisdictions ... The public interest in requiring a full disclosure of a party's case before trial is recognised by Pt 15 r 13 which requires parties to plead specifically any matter which, if not so pleaded, may take the other party by surprise.

14 However one must be realistic about looking for misconceptions. It may be very difficult in some cases to ascertain whether there is a misconception or misapprehension in your opponent and the burden of assessing that matter will

probably be greater when the opposing litigant is unrepresented. It would be rather counter productive if the client's costs were to be expended on burdensome communications with the opposing side as to whether they are blinkered to the real issues in the case. It would be sensible to succinctly state the issues that your client relies upon and draw them to the other side's attention. Some cases may require a number of inter partes communications to settle upon the agreed issues but if that is unable to be done then it may need judicial intervention or assistance. It is rare that this occurs when counsel are briefed early in a case.

15 There is no suggestion in any of these recent cases that practitioners owe duties to the other side's client. The focus is on the duty to one's own client and the concern that it is in no one's interest that litigation is pursued on a false or misconceived premise. If a practitioner becomes aware that the opponent is proceeding upon a misconception or upon a false premise, then the practitioner should, in the interests of saving the client unnecessary costs in pursuing false issues, promptly do their utmost to ensure that any misunderstanding is corrected.

16 It is obvious that the preparation of evidence will be affected by the early identification of the real issues. Affidavits and/or statements will at times cover issues that will ultimately fall away. However one can hardly criticize the incurring of costs in that process, unless of course it is obvious that the issue was never a "real" one. The identification of the "real" issues is obviously necessary but it is also very important to remember that it is the practitioners who are acutely aware of the nuances of the evidentiary matters that may, or may not, cause an issue to fall away. It may be that, for various reasons, an issue does not present as "real" before trial but develops into a "real" issue during trial. I suggest that the early involvement of the trial counsel will assist in ensuring that the preparation of evidence covers the appropriate areas consistent with the issues to be fought at trial. An advice on evidence should be sought from counsel as promptly as possible so that relevant witnesses can be identified and their affidavits or statements prepared.

The Commercial List

17 Some of the advantages of resolving commercial disputes in the Commercial List were recently referred to by Einstein J in Rexam Australia Pty Ltd v Optimum Metallising Pty Ltd & Anor [2002] NSWSC 916 at [29]:

The Commercial List proceedings have comprised the regular invoking by parties to a commercial contract of the jurisdiction of the Commercial List which operates upon the basis of a speedy determination of commercial proceedings in the interests of the commercial community and of all parties to commercial contracts. Speed is very often of the essence in these proceedings and the Commercial List endeavours to case manage and determine proceedings in its list with the expedition necessary, but always consistent with the interests of justice, in order to ensure that no party to a commercial contract will, if this can be avoided, suffer by dint of delay in the fixing of a final hearing and in the production of a relatively speedy judgment.

18 There are three Judges of the Equity Division sitting full time in the Commercial List and a fourth who sits for 6 months of the year. All cases in the List are managed by the List Judge until they are allocated a hearing date. The Court expects practitioners to have a clear understanding of Practice Note 100 (the Practice Note), which deals with both the Commercial List and the Technology and Construction List. Practitioners are able to ascertain from the Practice Note what is expected of them when the proceedings are in the Commercial List. Paragraph 13(1) provides that at the first directions hearing orders and directions will be made "with a view to the just, quick and cheap disposal of the proceedings".

19 The practitioners are expected to agree upon a pre-trial timetable for the preparation of any further points of claim or defence or pleadings and the filing of evidence. It is only in cases where there is a valid reason why agreement is unable to be reached that the List Judge will impose a timetable on the parties. If the timetable, either agreed or imposed, is unable to be complied with, it is expected that immediate notification to the other side will be made with a request for consent to an amendment to the timetable. If there is consent, contact is then made with the List Judge's associate and a fax is sent attaching signed consent orders amending the timetable. It is usual for the List Judge to make those orders in chambers and the associate then notifies the parties of the orders made. It is important that any existing listing for further directions is vacated in the consent orders and the new date fixed to ensure the matter is not listed until the timetable is concluded. There may be cases where the slippage in the timetable is such that the List Judge requires an appearance, but this would be rare.

20 In regard to the compliance with directions and orders made by the Court it is important that practitioners are aware of Practice Note 108. Pursuant to that Practice Note, you are required to: (a) facilitate the just, quick and cheap resolution of proceedings; (b) identify the issues genuinely in dispute; (c) be satisfied there is a reasonable basis for alleging, denying or not admitting facts in pleadings; (d) observe directions and Rules of Court; (e) ensure readiness for trial; (f) provide reasonable estimates of the lengths of applications and trials; (g) present written outlines and submissions on time; and (h) give the earliest practicable notice of applications for adjournments.

21 You will see that the Practice Note makes mention of the possible referral of practitioners to the Legal Services Commission, the Law Society or the Bar Association in circumstances of repeated defaults. May I suggest that it be your aim that this process is never applied to you.

22 Practitioners should also be cognisant of the provisions of Part 72 of the Rules which provides for reference to a referee appointed by the Court for enquiry and report by the referee on the whole of the proceedings or any question or questions arising in the proceedings. The Practice Note annexes [21] the form of Summons to be used in the Commercial List within which there is the Note that there is a requirement to inform the Court whether there are any questions that are appropriate for referral[22] and to identify those questions[23]. A reference may be made "at any stage of the proceedings" (Pt. 72, r 2(1)). Cases in which there are many technical matters or cases calling for specific

expertise may be appropriate for such referral.

23 It is also important for practitioners to be aware of Part 72C dealing with mediation and neutral evaluation, more importantly, the former of these two matters in commercial or equity cases. The form of Summons in the Annexure to the Practice Note also refers to these matters[24]. Practitioners will also need to be aware of the Court's powers to order mediation under Part 7B of the Supreme Court Act 1970 (NSW). In this regard it is imperative that practitioners are aware of the issues in the case and the strengths and weaknesses of their client's case. Unless that is the position, proceeding with mediation is of little value to the client. It is also important that practitioners are aware of the mediation process so that they are able to provide advice to the client firstly, in relation to the nature of the process and secondly, in relation to the advantages and disadvantages of it. In McLernon Group (Insurances) Pty Ltd and Anor v Bernard John Kelly and Ors, unreported, NSWSC, 24 October 2000, Rolfe J said:

My experience in large cases ... is that a judicial decision inevitably leads to an appeal and an unfortunate diversion of the commercial talent of the parties to the appeal from pursuing gainful commercial activities and opportunities, by having to concentrate on litigation. If some independent evaluation by an experienced commercial mediator was to lead the parties to recognize potential weaknesses in their respective cases, as well as strengths, a commercial resolution could bring an end to the whole proceedings once and for all.

24 It is important to bring to the client's attention the differences between mediation and litigation; the former providing an opportunity to fashion their own solution, with the possible promotion of the continuation of the commercial relationship; the latter in which the commercial relationship may be destroyed. The confidentiality of the former process may be attractive, however the client may prefer to have a Judge decide the case. This is a position that must be respected, but it does not mean that the alternatives are not advised upon.

Experts

25 You will see that the matters listed in the Practice Note for possible orders or directions include the exchange of experts' reports and the holding of conferences of the experts (Par. 13(1)(f)&(g)). You are expected to be aware of the provisions of the Evidence Act 1995 (NSW) as they affect expert evidence[25] and the relevant aspects of the Rules, including of course, Schedule K.

26 You will also be aware of the detailed discussion and the criteria in respect of the admissibility of experts' reports outlined by Heydon JA in Makita (Australia) Pty Ltd v Sprowles[26], whilst keeping an eye on more recent developments and discussions about the practical problems that arise in applying the criteria too strictly.[27] As Heydon JA said:

[64] The basal principle is that what an expert gives is an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact upon which opinion is based. If other admissible evidence establishes that the matters assumed are "sufficiently like" the matters established "to render the opinion of the expert of any value", even though they may not correspond "with complete precision", the opinion will be admissible and material ... One of the reasons why the facts proved must correlate to some degree with those assumed is that the expert's conclusion must have some rational relationship with the facts proved.

27 The careful preparation of evidence and reasonable anticipation of what facts will be established is pivotal to the validity of the opinion to be expressed by the expert. Once again I emphasise the importance of the early involvement of counsel who is to be retained to appear at the trial to ensure that these aspects are subject to counsel's advice. That emphasis should not be understood as any lack of confidence in the role of solicitors. It is simply realistic, important and conducive to cost efficient and effective preparation to involve at an early stage the person who will have to make the forensic decisions at trial.

28 At this point I should say something about the Court's expectation of the role of practitioners in the process of the preparation of experts' reports. In Whitehouse v Jordan [1981] 1 WLR 246, the House of Lords considered expert evidence in a case involving the attempted forceps delivery of a baby. Lord Wilberforce, with whom Lord Fraser agreed, said at 256-257:

I have to say that I feel some concern as to the manner in which part of the expert evidence called for the plaintiff came to be organized. This matter was discussed in the Court of Appeal and commented on by Lord Denning MR. While some degree of consultation between experts and legal advisers is entirely proper, it is necessary that expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation. To the extent that it is not, the evidence is likely to be not only incorrect but self defeating.

29 In the Court of Appeal[28], Lord Denning MR said of the expert evidence at 655:

In the first place their joint report suffers to my mind from the way it was prepared. It was the result of long conferences between the two professors and counsel in London and it was actually 'settled' by counsel. In short, it wears the colour of special pleading rather than an impartial report. Whenever counsel 'settle' a document we know how it goes. 'We had better put this in', 'We had better leave this out", and so forth. A striking instance is the way in which Professor Tizard's report was 'doctored'. The lawyers blacked out a couple of lines in which he agreed with Professor Strang that there was no negligence.

30 In Kelly v London Transport[29] Lord Denning MR said[30] of practitioners' obligations in cases which were legally aided:

They must not run up costs by instructing endless medical experts for endless reports or by any unnecessary expenditure. They must not ask a medical expert to change his report, at their own instance, so as to favour their own legally-aided client or conceal things that may be against him. They must not 'settle' the evidence of the medical experts as they did in Whitehouse v Jordan [1981] 1 WLR 246, which received the condemnation of this Court ...

31 These authorities need to be read in conjunction with The New South Wales Barristers Rules and The Law Society of New South Wales Professional Conduct and Practice Rules made pursuant to the Legal Profession Act 1987 (NSW) [31]. Within the confines of their professional obligations practitioners are obviously entitled to confer with experts to ensure, where the expert's opinion is pivotal to the success of the case, that the case is able to be brought and properly prepared and run efficiently and effectively at trial.

32 There is nothing wrong with discussing in conference with the expert, topics and matters that the expert may wish to comment upon and indeed that the expert has already commented upon. In fact it is expected that such conferences will occur. It may be that the expert may wish to supplement the report already provided with a more expanded or contracted view as a result of the discussions in conference but it has to be the expert's decision and opinion and not that of the legal representatives. It is imperative in the client's interests that the expert not be exposed to allegations of collusion or lack of independence of thought. It is therefore most important that the practitioner keeps that in mind when conferring with the expert in respect of opinions that are about to be expressed in writing or have already been expressed in writing[32].

Court Appointed Experts

33 You will also see that the Practice Note refers to the possible "appointment of an expert as a Court expert and the giving to him or her of authority, directions and instructions" (Par. 13(1)(n)). Part 39 of the Rules governs Court Appointed Experts and provides for such appointment "where a question for an expert witness arises". Such appointment may be made "at any stage of the proceedings" (Pt 39, r 1(1)).

34 Until 19 May 2003 a party was entitled to adduce evidence on the same question, the subject of the court appointed expert's report, from one other expert if reasonable notice to the other side had been given (former Pt 39, r 6(a)). A party was not able to adduce evidence from any other expert, that is, additional to the one other expert, without the leave of the Court (former Pt 39, r 6(b)). From 19 May 2003 Part 39, Rule 6 now provides:

6 Other expert evidence
Where an expert has been appointed pursuant to this Part in relation to a question arising in the proceedings, a party to the proceedings may not adduce evidence of any other expert on the question except with the leave of the Court.

35 Part 39, Rule 7 provides:

7 Assistance to the Court
The Court may, in any proceedings other than proceedings entered in the Admiralty List or proceedings tried with a jury, obtain the assistance of any person specially qualified to advise on any matter arising in the proceedings, may act upon the adviser's opinion, and may make orders for the adviser's remuneration.

36 In cases where you see utility in the use of a Court Appointed Expert it would be sensible for an approach to be made to the other side to see if agreement can be reached in principle and if so to attempt to reach agreement on the identity of the expert. The use of this Rule can be a cost advantage to a client in an appropriate case and may I suggest that consideration be given to it. You may regard it as far more effective for the profession to take up the cudgels for this change in approach and use it to the advantage of their clients than have the Court impose its use.

Usual Order for Hearing

37 After the timetable is completed or even before this happens, depending upon the particular case, a hearing date will be allocated. At this time the List Judge will make the Usual Order for Hearing. That Order is found in Annexure 3 to the Practice Note and by the time the Order is made it is probable that paragraphs 1 to 3 will not be applicable. There is also the capacity to propose alternative orders to those in Annexure 3 or to seek relief from compliance with the Practice Note generally if you can demonstrate that the alternatives proposed will be more conducive to the just, quick and cheap disposal of the proceedings (par 5).

38 If the case involves large numbers of documents it will be necessary to ensure that a chronological index with cross-referencing to other evidence, such as affidavits, is prepared. This is an invaluable tool and although it is very cost intensive prior to the trial it enables the parties and the Court to find relevant documents very quickly when particular issues arise either during the evidence or submissions. It is of course also very helpful for the Judge in writing the judgment.

39 Some practitioners also deliver their submissions in hard copy and on disk or CD. This may assist the promptness with which a judgment is delivered depending upon the extent to which those submissions are referred to in the judgment. Any process by which the Court is assisted to deliver a judgment promptly will of course assist the client

irrespective of the outcome.

At Hearing

40 In either large or not so large cases it is imperative that you have the facts at your fingertips. The facts are so important and an encyclopaedic knowledge of the law will not mean success unless you have the facts that fit within the relevant legal principles. The client must be made aware of whether the prospects of success are reasonable and without a detailed knowledge of the facts, informed advice is unable to be given. There is also the requirement for the Certificate pursuant to s 198L of the Legal Profession Act 1987 (NSW) (the Certificate) in cases in which damages are claimed.[33] It seems to me that it is not appropriate to simply leave the mastery of the facts to trial counsel. The solicitor's mastery of the facts is essential not only for the purpose of being able to provide the Certificate but also for the purpose of preparing a proper brief to trial counsel and enabling the client to be informed of the progress of the trial in a more informed manner. The benefit of the different perspectives of how the facts are unfolding during the trial will also assist the client.

41 Trial counsel will be cross-examining and dealing with specific forensic decisions in that process. The solicitor may have a broader view of the matter as it progresses, including any relevant reaction from the Bench. The integrity of that view will be adversely affected if the solicitor is not across the facts and the ability to advise the client whether to take specific steps, for example in the settlement process, will also be compromised. It is essential that you are across the facts.

42 A question that practitioners might ask themselves when appearing before the Court is - What will the Court expect of me? In some jurisdictions in the USA there is a prominently placed checklist for practitioners on the bar table. One Judge's explanation[34] of what the Court looks for is, you may think, a good ready reckoner for interlocutory or other appearances in Court. It was this:

* A factual summary distilled in a few sentences;

* A "dialogue with the court, not a monologue to the court";

* No jury speeches, lectures, personal attacks on opposing counsel or overstatements;

* A logical analysis;

* Eye contact;

* Courtesy and honesty; and

* A complete understanding of the law pertinent to all issues.

43 I am sure you will be on top of the last of the items and then, with experience, all the other matters will fall into place. The breadth of the topic permits a lengthy discussion and has inspired some to write texts. However in this environment I trust these small clues as to what the Court expects of practitioners will assist you in your most important work, in which I wish you every success.

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1 Paper delivered by the Honourable Justice P.A.Bergin on 26 July 2003 at the Law Society of New South Wales Specialist Accreditation Business, Property, Wills, Advocacy & Commercial Litigation Annual Conference.
2 Meagher Gummow & Lehane's Equity Doctrines & Remedies, Chapters 1 and 2, 4th Ed, RP Meagher, JD Heydon, MJ Leeming, Butterworths Lexis Nexis, 2002.
3 Centenary of the Commercial Court in London, Bar News, 1995 31-33, p32; Commercial Causes Act 1903 (NSW).
4 Equity in a Commercial Context, Equity and Commercial Relationships, P.D.Finn (Ed) The Law Book Company Limited, 1987.
5 Hewett v Court (1983) 149 CLR 639; Commercial Bank of Australia Limited v Amadio (1983) 151 CLR 447; O'Dea v Allstates Leasing System (W.A.) Pty Ltd (1983) 152 CLR; Amev-U.D.C. Finanace Ltd v Austin (1986) 162 CLR 170; Legione v Hateley (1983) 152 CLR 406; Hospital Products Ltd v United States Surgical Cor. (1984) 156 CLR 41; & Muschinski v Dodds (1985) 160 CLR 583.
6 Equity and Commercial Relationships, p 2.
7 Ibid, p 18. See also at 185 where R.P. Austin, as his Honour then was, predicted that equity and commerce would co-exist in an atmosphere of "critical hostility" unless equity judges produced "more specific rules or themes" to make the application of fiduciary principles "more predictable to businessmen and their legal advisers".
8 This List deals with maritime and shipping disputes, presently administered by Palmer J.
9 This List deals with applications for the adoption of children, presently administered by Bryson J.
10 This List deals with commercial causes, presently administered by McClellan J until 25 August 2003 and by Bergin J from 25 August 2003.
11 This List deals with applications under the Corporations Act 2001 (Cth), presently administered by Austin J and Barrett J.
12 This List deals with cases for urgent final hearing, presently administered by the Young CJ in Eq.
13 This List deals with major technological and construction cases, presently administered by McClellan J until 25

August 2003 and by Bergin J from 25 August 2003.
14 This List deals with deceased estates, presently administered by Windeyer J.
15 This List deals with applications in respect of people allegedly incapable of looking after their property or themselves, presently administered by Windeyer J.
16 For example: Practice Note (PN) 99, Registrar's Call-Over; PN 100, Commercial List and Technology and Construction List; PN 43, Expedition List; PN 46, Short Notice List and Pre-Trial Directions Hearing.
17 The Hon. Justice J Bryson, Affidavits (1999) 18 Australian Bar Review 166.
18 Sir Frederick Jordan Select Legal Papers, Chapters on Equity in New South Wales, p16.
19 Glover v Australian Ultra Concrete Floors [2003] NSWCA 80; Nowlan v Marson Transport Pty Ltd (2001) 53 NSWLR 116; and White v Overland [2001] FCA 1333, unreported, Allsop J, 20 September 2001.
20 Glover v Australian Ultra Concrete Floors, par [60]; Nowlan v Marson Transport Pty Ltd, pars [20]- [36] and [40]-[46].
21 Annexure 1.
22 Paragraph (e) of Annexure 1.
23 Paragraph D of Annexure 1.
24 Paragraph (g) of Annexure 1.
25 Eg. ss 55, 79, 80 &135
26 (2001) 52 NSWLR 705. I also suggest that practitioners read Einstein J's paper Understanding the Evidence Act 1995 and Heydon JA's Commentary on Einsten J's paper in (2001) 5 (No 2) The Judicial Review 81 and 124 respectively.
27 Notaras v Hugh [2003] NSWSC 167 at par [6]: Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd (2002) 55 IPR 354, per Branson J at [6]-[8]; Weinberg & Dowsett JJ at [86]-[87].
28 [1980] 1 All ER 650
29 [1982] 1 WLR 1055.
30 At 1064.
31 In particular Rules A15 to A72 of the Solicitors' Rules and Rules 16 to 72 of the Barristers' Rules.
32 See Marsden v Amalgamated Television Services [2001] NSWSC 510, unreported, Levine J, 27 June 2001, pars 4859 - 4886 for a very good example of how expert evidence can go terribly awry.
33 See: New Part II Division 5C of the Legal Profession Act 1987: Expanded Duties of Barristers in Damages Cases, B Walker SC, Bar Brief Special Edition, September 2002; What are Reasonable Prospects of Success? N Beaumont, (2002) (August) Law Society Journal 42.
34 Justice Gormon Houston of the Alabama Supreme Court as reported in "Making your Appeals More Appealing", Susan S Wagner, 59 Ala Law 321.