Commercial Litigation: Tips for Success and Traps for the Unwary: A Judge's Perspective on Case Preparation

Commercial Litigation: Tips for Success and Traps for the Unwary: A Judge's Perspective on Case Preparation [1]
Justice P.A. Bergin

1 I see from the programme of this intensive conference that you will have the benefit of detailed papers in respect of the particular steps that are necessary for the effective preparation and presentation of cases in the Commercial List. I am delighted to see that one of the speakers today is Acting Judge A. Hogan who is the co-author of Principles of Practice and Procedure[2], a text which has given guidance to so many practitioners during the last twenty-seven years. To ensure that I do not trespass into specific areas to be covered by the speakers, I shall focus on more general matters.

2 It is just one hundred years since judges in New South Wales hearing commercial causes were given the statutory discretion to give directions "expedient for the speedy determination of the questions in the action really at issue between the parties"[3]. A list of commercial causes was established at that time and the judges were given power to effect the speedy determination of the questions in the action really at issue between the parties by: (a) dispensing with pleadings; (b) dispensing with the technical rules of evidence in certain instances; (c) requiring particulars to be served within a specified time; (d) ordering mutual discovery and inspection; (e) requiring either party to make admissions with respect to any question of fact involved in the cause; and (f) settling the issues for trial[4].

3 In 1923 in the Foreword to W.A. Bewes' book The Romance of the Law Merchant Atkin LJ wrote:

They whose lawful occasions bring them into the commercial courts of this country are not usually associated with romance: whereby they are doubtless spared much publicity ... This book reveals to anyone who can sympathise with the romance of commerce to-day the same spirit pervading commerce and the formation and enforcement of the rules of commerce from the earliest ages[5].

4 Bewes, in referring to the distinctive elements in the Law Merchant, wrote:

Now, it is above all things necessary to bear in mind that the courts enforced the custom of merchants and the customs made the law: and we may as well remember that the two great distinctive elements in the merchant's law, as enforced by their own courts, were good faith and despatch, for speed and honesty must be obtained, though by means not sanctioned by the common law which was and ever has been a laggard, and by its halting procedure hinders the rapid course of commercial justice[6].

5 One hundred years after the enactment of the Commercial Causes Act 1903, the Supreme Court Act 1970 (NSW) and the Supreme Court Rules (the Rules) still apply the same approach to commercial litigation, although using different epithets. Instead of "speedy", as used one hundred years ago, the term is "just, quick and cheap". The terminology one hundred years ago was for the determination of the "questions in the action really at issue between the parties". Today the Courts approach the trial process with a prohibition on "trial by ambush" and the promotion of a "cards on the table approach"[7].

6 Much has happened since the commencement of the Commercial Causes Act 1903. As Heydon J said in one of his mild, extra-curial historical statements:

However, though the problems which Lord Selborne LC and Lord Cairns LC, and their Australian political equivalents, had long laboured to cure by fusing the administration of law and equity were real, they were radically different from, and much less harmful than, those which were to face Judges applying equity in the Supreme Court of New South Wales, and later the Federal Court, in the post-fusion period. These problems flowed from contemporary business, professional and legal developments.

An enormous proliferation took place in the quantity of documents which citizens, particularly corporate citizens, used to conduct their affairs. This flowed from the widespread use of the photocopier, the ubiquity of composition by dictating to tape recorders rather than by handwriting, the development of speedy electronic methods of communication, the use of computers for many purposes, and the capacity to compose documents by retrieving their elements from computer records[8].

7 Heydon J also described the offices of the large law firms as "Babylonian in their splendour" and alleged that the partners of large law firms were guilty of "avarice"[9]. This attack was apparently intended to convey the message that lawyers, in particular solicitors, had contributed to the increased cost of litigation. Although Heydon J did refer to such modern equipment as computers and "increasingly sophisticated business machines"[10], no mention was made of the

Internet. The commercial world has had to adjust to the changing marketplace in which contracts are made online. It is true that online contracts and electronic data interchange (EDI) pre-dated the Internet, however the Internet has taken the commercial community and lawyers litigating in the commercial area into another era. Books have now been written on "E-Litigation"[11] and "Electronic Evidence"[12].

8 In Dow Jones & Company Inc v Gutnick (2002) 194 ALR 433 Kirby J said:

80. The Internet is essentially a decentralised, self-maintained telecommunications network. It is made up of inter-linking small networks from all parts of the world. It is ubiquitous, orderless, global and ambient in its nature. Hence the word "cyberspace" (the term was coined by Gibson, Neuromancer (1984) at 51). This is a word that recognises that the interrelationships created by the Internet exist outside conventional geographic boundaries and comprise a single, interconnected body of data, potentially amounting to a single body of knowledge. The Internet is accessible in virtually all places on Earth where access can be obtained either by wire connection or by wireless (including satellite) links. Effectively, the only constraint on access to the Internet is possession of the means of securing connection to a telecommunications system and possession of the basic hardware.

9 The Australian Securities and Investments Commission in its February 2002 report ASIC: Internet and E-Commerce Initiatives expressed the view that the Internet was so widely spread that it pervades the workplace and household to "an astonishing degree"[13]. There is an emergence of an array of online financial products and services and one survey referred to by ASIC found that 65% of respondents expect to be conducting most or all of their financial transactions online within the next 5 years[14].

10 ASIC now provides a series of electronic lodgement and searching services to their clients[15]. Registering an Australian company is now done online in the Electronic Company Registration (ECR) process that "uses smart cards and public key infrastructure (PKI) to generate and authenticate digital signatures, with access to an electronic payment facility"[16]. The service eREGISTERS provides access to view company details, make changes to details, lodge annual return data and pay relevant fees using BPay. ASIC has also developed eLicensing, allowing applicants to "apply for Australian financial services licences over the Internet"[17].

11 These are just some of the services provided by ASIC of which solicitors must now not only be aware but also be capable of navigating for the purpose of making appropriate searches in the process of commercial litigation. It is therefore reasonable to note that had solicitors not kept pace with what Heydon J referred to as the "increasingly sophisticated business machines" and practices the cost of commercial litigation may well have been even greater for those trying to catch up rather than keep pace with such changes. The introduction of any new system will, may I suggest, generate greater costs until that system becomes second nature to its users. At the moment, predicting when that will be is somewhat difficult having regard to the embryonic stages of handling e-commerce disputes in e-litigation.

12 The CourtLink Project of the New South Wales Attorney-General's Department is a project to implement a new courts administration system providing for both paper and electronic lodgement. It is planned to have an Internet-based exchange of information between the Courts and some of the agencies with which they interact. It will include the receiving and storing of electronic documents and a capacity for virtual meetings, for example, enabling call overs to be conducted over the Internet. The Project has commenced in the Supreme Court and implementation has occurred in the Adoptions area in June 2003 and in the Costs Assessment area in early August 2003.

13 The Director-General of the Attorney-General's Department has advised that at this stage the focus of the Project is to ensure that the system is thoroughly tested. The next phase of the implementation of CourtLink will be in the criminal jurisdiction of both the Supreme Court and District Court and it is expected that the system will be implemented in the Commercial List in approximately late 2004.

14 It is well recognised that there has been an increase in the complexity of commercial affairs in the last thirty years and there has been an increase in the time for hearing of commercial disputes in cases litigated in the courts. There is a trend towards the Technology Court with use of the Ringtail Courtbook Database, use of CD-ROM and email for accessing Court documents and real-time transcript[18]. Additionally there is the encouragement given by the Court to practitioners in Practice Note 105: Use of Technology in Civil Litigation.

15 In 1999 the President of the New South Wales Court of Appeal, the Honourable Justice Keith Mason, suggested that the 1998 ICC Rules of Arbitration provided areas where Judges might borrow from ICC initiatives[19]. The President said of Article 24 which fixes a six-month time limit for the Arbitral Tribunal to render its award unless the court extends the time:

What is refreshing about Article 24 is its recognition that the litigants are only concerned with what I can call "start to finish" delay. They don't care whether the fault lies with the lawyer, the Judge or the system as a whole. Indeed, the litigant probably suspects, with good reason, that shifting blame from one player to another assists all to slip through the net. Article 24 places responsibility collectively on all players to ensure that the case moves to its conclusion with a controlled time limit. And it focuses on the end-product[20].

16 Mason P referred to a then recent international arbitration in Vancouver involving Australian interests that was conducted on a "stop watch" basis. In that arbitration, the hearing time was divided between the parties leaving each free to use its share of the allocated time as it wished, either in examination or cross-examination or addresses. When

the time was up, "it was up"[21].

17 A more recent example is a domestic arbitration in Anaconda Operation v Fluor Australia Pty Ltd conducted before 3 international arbitrators[22]. Although there were preliminary skirmishes in late 1999 in relation to interlocutory relief in the Victorian Supreme Court and the High Court[23], the preliminary conference of the arbitration took place in Scotland on 30 August 2000. The parties agreed to procedural steps in relation to written contentions and witness statements, exchange of expert evidence and discovery. In this latter regard, a fourth arbitrator was engaged to deal with disputes in relation to discovery. The matter was set down for hearing to commence on 28 January 2002 but prior to that time it became clear that additional time would be needed. The arbitration was split into two with the first arbitration taking place on the originally allotted days. It commenced on 28 January 2002 and concluded, as planned, on 22 March 2002. The matter was then adjourned for final submissions with an oral presentation of two days in May 2002.

18 A solicitor with experience in the matter expressed the following view:

A limited time hearing is an enormous advantage in disputes of this nature. It requires both legal teams to narrow their cases and to jettison marginal and poor arguments. While there is no limit to the written material which can be provided to the Tribunal it is important for the parties to closely consider the volume which they expect the Tribunal to read and digest. Any party wasting time at the hearing did so at severe penalty to the presentation of its own case. Accordingly, openings were short and cross-examination surgical. This is in stark contrast to the usual domestic arbitration experience, where openings have been known to go as long as 50 sitting days (i.e. 10 weeks more than the whole of the hearing for the Anaconda Arbitration), and cross examination extended[24].

19 At the 1999 International Commercial Arbitration Conference Mason P also said:

It is the bane of modern commercial litigation that the parties often lose control of the case. The hearing stretches out endlessly and time and cost budgets get constantly revised upwards. Massive pressure descends upon a litigant to abandon or compromise its perceived rights. Exhaustion or fear of bankruptcy drives litigants to mediation, rather than a genuine desire to seek reconciliation. To my experience there have been shocking cases where the costs generated in litigation exceeded the amount in issue by a large factor. This is absurd and intolerable.

Why can't our judicial system take a leaf out of the ICC's book? Why shouldn't we offer litigants the option of something equivalent to a stop watch trial coupled with a commitment by the Court to deliver judgment within a fixed time? If that commitment led to restricting the right to challenge the judgment, as presently exists with an arbitral award, then so be it. This is not the rationing of justice, because the parties would choose to conduct their cases according to this fast track system[25].

20 I trust your experience is not that control of the case is "often" lost in modern commercial litigation. Even if your view is that it does not happen often, that it happens at all should be of concern not only to Judges but also to practitioners. The Court, the legal profession and the commercial community must utilise methods both modern and traditional to avoid loss of control of cases. Your approach may perhaps be more focused having regard to what Spigelman CJ said in 1999:

It is incumbent upon all of us as participants in the administration of justice, to ensure that litigation is conducted as efficiently and expeditiously as possible. For centuries, indeed it was only abolished in the late eighteenth century, the common law had a mechanism known as peine forte et dure, a form of torture inflicted upon a prisoner indicted for felony who refused to plead and submit to the court. Heavy weights were applied to his body until he consented to be tried either by pleading "guilty" or "not guilty", or until he died. This was an early form of case management. It remains a model for some contemporary practices[26].

21 The programme suggested that I would be commenting on how judges perceive the role of the practitioner in commercial litigation and what the judges' expectations are of practitioners. In general, the expectation in this area is similar to all other areas of litigation. As I have said on many occasions, the Court places implicit trust in the practitioner, either solicitor or barrister, who appears in the Court. There is an expectation that the practitioner will be acutely aware of the relevant Rules governing professional conduct[27]. The Court also expects practitioners to be cognisant of Practice Note 100, which governs the administration of cases in the Commercial List. In this regard, I have previously cited Bryson J's approach[28] and it is appropriate to cite it yet again. It is this:
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[29].

22 The next topic upon which I have been invited to address you is the things that judges notice about the performance of practitioners in the courtroom. It is interesting to sometimes observe solicitors who do not take notes of what is happening in court. This may be a practice that has been engendered by the easy availability of prompt transcripts or indeed of real-time transcripts. However, it seems to me that the practitioner who takes notes as the evidence is being given, as opposed to reading it on a screen or relying on a transcript to be provided later, is far better acquainted with the nuances of the evidence. It is those nuances and indeed, the detail of the evidence, that is so important in providing advice to the client as to the progress of the case and/or the advantages of settlement negotiations at a particular stage of the trial. If the solicitor is well aware of how the evidence is unfolding, that advice will be far more accurate and reliable. These comments also relate equally to junior barristers who are being led in a case. It is very important for the

junior to make notes of the cross-examination of his or her leader as it proceeds. This will facilitate prompt answers that are asked about a previous question and any suggestions the junior might make in respect of the direction of the cross-examination in the case generally.

23 In commercial cases it is quite common to have numerous folders of evidence on trolleys or on shelves in the court as the trial proceeds. Judges are able to observe whether a solicitor is well acquainted with the contents of those folders. When copies of documents are requested it is easy to see the solicitor who is well acquainted with the evidence and able to produce the document from the correct folder promptly.

24 The hallmarks of an effective commercial litigator include the capacity to prepare the evidence well, to choose a barrister who is appropriate for the case, to know when settlement time is ripe and to have the courage to make difficult forensic choices during the course of litigation. The manner of preparation of the evidence is going to be the subject of detailed discussion with you during the course of the conference, however, may I emphasise that preparation is everything. Trite it may be to say, but it is the facts that make the case. This has been emphasised in so many cases, for instance:

Boardman v Phipps (1967) 2 AC 46

His liability to account must depend on the facts of the case.
(Lord Cohen at 103A).

Each case must depend on its own facts.
(Lord Hodson at 107B-C)

The question whether or not there was a fiduciary relationship at the relevant time must be a question of law and the question of conflict of interest directly emerges from the facts pleaded, otherwise no question of entitlement to a profit would fall to be considered.
(Lord Hodson at 112A-B)

In this case, as Lord Macmillan said in the Regal case[30], the result depends on issues of fact.
(Viscount Dilhorne at 94D-E)

Rules of equity may have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case.
(Lord Upjohn at 123C-D)
(In relation to the principle exemplified in Lord Cranworth's statement in Aberdeen Railway v Blaikie[31]):
But it is applicable, like so many equitable principles which may affect a conscience, however innocent, to such a diversity of different cases that the observations of judges and even in your Lordships' House in cases where the great principle is being applied must be regarded as applicable only to the particular facts of the particular case in question and not regarded as a new and slightly different formulation of the legal principle so well settled.
(Lord Upjohn at 125C-E)

Hospital Products Limited v United States Surgical Corporation and Others (1984) 156 CLR 41

... it must be remembered that any test can only be stated in the most general terms and that the facts and circumstances must be carefully examined to see whether a fiduciary relationship exists[32].
(Gibbs CJ at 72)

Warman International Limited v Dwyer & Others (1994-1995) 182 CLR 544

It is necessary to keep steadily in mind the cardinal principle of equity that the remedy must be fashioned to fit the nature of the case and the particular facts.
(The Court at 559)

LAC Minerals Limited v International Corona Resources Limited (1989) 61 DLR 14

The facts in this case are crucial.
(La Forest J at 18)

Breen v Williams (1995-1996) 186 CLR 71

There is no class of case in which one ought more carefully to bear in mind the facts of the case, when one reads the judgment of the Court on those facts, than cases which relate to fiduciary and confidential relations and the action of the Court with regard to them[33].
(Brennan CJ at 82)

25 You will not know the real prospects of your case until preparation is concluded. Certainly, you will have previously had a view that there were reasonable prospects of success on the material available to you at the time you filed your

client's pleading[34]. However, it is imperative that you know whether witnesses will come up to proof, what documents support the client's case and what claims by the other side can be either disproved or explained so as not to damage your client's case. Thus the need for meticulous preparation. The amount of preparation that has been done is obvious to the Court as the evidence unfolds. This will present itself sometimes in the way in which counsel are able to cross-examine on the facts, or documents are able to be presented immediately to rebut suggestions made by witnesses or facts are left unchallenged if they support the client's case.

26 The final area upon which I have been asked to address you is the area of the "common pitfalls" into which practitioners may stumble. One of the areas that causes problems is the process of discovery. Although the new regime has the parties agreeing on categories of documents it is appropriate to recall what Macfarlan J observed in Ferguson v Mackaness Produce Pty Limited [1970] 2 NSWR 66:

It has been said frequently by judges in the Commercial Court of England throughout the whole of the time since that Court was established, and by other judges here, that the solicitors on whom this obligation is cast, carry a particularly heavy burden requiring not merely advice to their clients when their clients seek advice but an active participation in ensuring that the clients undertake what they are obliged to do by the order. In fact, so seriously is this obligation of the solicitors regarded that English judges on a number of occasions have said that failure to discharge them can well be considered to be professional misconduct. It is therefore, I hope, clear from what I have said that it is not sufficient for a solicitor simply to enquire of his client or of a principal, if he himself happens to be an agent only for the principal's solicitor in another State, if he has any documents and request that he send any documents that he has to him; the obligation extends much further, namely, to the extent that the solicitor is obliged to make an appraisal of the case and form his own opinions as to what document probably are in existence and actively to seek out from the client or his interstate or foreign principal whether or not those documents exist. It is only, indeed, in that way that the obligation of the solicitor can be properly discharged[35].

27 It is, may I suggest, sensible to write to the client setting out the obligation in respect of discovery where categories of documents have been agreed or ordered by the Court or, general discovery has been pursued by the parties. Do not make the mistake of assuming that all relevant documents have been produced to you. If after reviewing the documents that have been provided to you, you are of the view that there may be some documents that have not been produced then it is your obligation to press the client for such documents to ensure that there is compliance with discovery obligations.

28 A common pitfall seems to be the making of an assumption that documents for the agreed bundle have been copied in the way that you have directed. May I suggest that you always check the agreed bundle very carefully before it is tendered. Check that it is in appropriate chronological order, that the documents have been copied properly and legibly and that they match the index. The index should be provided with appropriate cross-referencing to other relevant evidence in the case. It is when such an index is not prepared that the practitioner stumbles into the pitfall of including documents in a bundle that will not be the subject of any evidence and will simply add to the cost of the case unnecessarily.

29 Volume can be daunting but it is so important that you know why each document is in the bundle and what use is to be made of it in the case. Do not stumble into the pitfall of having agreed to a document going into the bundle and only finding out during the trial that it is very damaging to your client's case. If it is damaging then it is likely that such an assessment could have been made before the trial. If there is pre-trial appreciation of the potential damage, action may be taken to gather evidence to neutralise or properly answer the effect of the document or advise settlement discussions, depending upon the extent of the damage to the client's case. To have to scramble to recover during the trial when caught by surprise through lack of appreciation of the effect of a document in the agreed bundle is a very unsatisfactory position into which to place the client. Do not suffer this pitfall. It can, and should, be avoided by proper preparation. It is very important that the legal practitioner keeps control of the case. It is imperative that your clients have the benefit of your hands on the reins of the case so that control is not lost.

30 I have on previous occasions referred to the Court's expectations of practitioners who appear before it[36]. As I have said, "in some jurisdictions in the USA there is a prominently placed checklist for practitioners on the bar table. One Judge's expectation[37] 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. "[38]

31 Although I have, as requested, referred to a number of pitfalls, may I say that the practitioners who litigate regularly in the Commercial List are in my experience most impressive and competent professionals. It is the example of those professionals that guides the younger and less experienced lawyers as they develop in practice. It is the willingness of the more senior lawyer to spend time with the more junior lawyer giving appropriate guidance, particularly in complex commercial litigation, that will ensure that professional excellence remains an appropriate goal for which to aim. Its achievement will ensure not only that control of the case is maintained but also that your professional lives will be more enjoyable.

32 I am sure the programme at this conference will provide you with some very valuable suggestions to enable you to be well equipped to identify and avoid the possible pitfalls of litigation. I wish you a very enjoyable and successful conference.
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1 Paper delivered at the Lexis Nexis Butterworths Practice and Procedure in Commercial Litigation Conference, Sydney, 26 August 2003.
2 K.F. O'Leary and A.E. Hogan, Butterworths, 1976.
3 S 5 Commercial Causes Act 1903 (NSW).
4 s 6.
5 Sweet and Maxwell Limited 1923.
6 P 19.
7 Glover v Australian Ultra Concrete Floors [2003] NSWCA 80, Sheller, Hodgson and Ipp JJA, 24/4/2003 and Nowland v Marson Transport Pty Ltd (2001) 53 NSWLR 116.
8 The Role of the Equity Bar in the Judicature Era, No Mere Mouthpiece: Servants of All, Yet of None, Lexis Nexis Butterworths (2002), p 72.
9 Ibid.
10 Ibid.
11 Allison Stanfield: Lawbook Co (2003).
12 Alan M. Gahtan: Carswell (1999).
13 Australian Securities and Investments Commission, ASIC: Internet and E-Commerce Initiatives, 2002 at p 1.
14 Ibid.
15 The electronic lodgement service to lodge annual returns and make changes to company data is known as EDGE.
16 Op. cit., note 13 at p 3.
17 Ibid at p 4.
18 See Technology in the Court Room - 2001 - [Friend or Foe?]: the Honourable Justice C. Einstein.
19 In his keynote address at the International Conference on International Commercial Arbitration on 9 March 1999: "Changing Attitudes in the Common Law's Response to International Commercial Arbitration".
20 Ibid at p 4.
21 Ibid.
22 Paulsson, Uff QC and Naughton QC.
23 Fluor Daniel Pty Ltd v Anaconda Pty Ltd (No 2) [1999] VSC 405, unreported, Warren J, 20 October 1999; Anaconda Operations Pty Ltd v Fluor Daniel Pty Ltd (2000) 16 BCL 230; Transcript Fluor Daniel Pty Ltd v Anaconda Operations Pty Ltd and Ors M129/1999, 17 December 1999, Hayne J.
24 Procedural Efficiency in International Arbitration, Andrew Stephenson, Insights, Clayton Utz, July 2003, p 8.
25 Op. cit., note 19, at p 4. See Stadium Australia Management Limited v Sodexho Venues (Australia) Pty Limited [2003] NSWCA 234, 21/8/2003, Beazley, Hodgson and McColl JJA, in particular at pars [49] to [52] where the Court of Appeal stressed the need for finality of arbitral awards. However, see Energy Brix Australia Corporation Pty Limited v National Logistics Coordinators (Morwell) Pty Limited (2002) 5 VR 353 at pars [13] - [22] and [38].
26 "Opening of Law Term: Just, Quick and Cheap - A Standard for Civil Justice", address by the Honourable JJ Spigelman at the Opening of Law Term Dinner at Parliament House, Sydney, on 31 January 2000.
27 The New South Wales Barrister's Rules, the Law Society of New South Wales Professional Conduct and Practice Rules made pursuant to the Legal Profession Act 1987 (NSW).
28 "A Judicial Perspective on what the Court expects from legal practitioners in equity and commercial litigation", 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.
29 The Hon. Justice J Bryson, Affidavits (1999) 18 Australian Bar Review 166.
30 Regal (Hastings) Limited v Gulliver and Ors (1967) 2 AC 134 at 153E.
31 (1854) 1 Macq. 461, 471 (Cited by Lord Upjohn at 124A).
32 Referring to Phipps v Boardman [1967] 2 AC 46 at 123, 127.
33 From In Re Coomber [1911] 1 Ch 723 at 728-29, per Fletcher Moulton LJ.
34 In line with the requirement to file a Certificate pursuant to s 198L of the Legal Profession Act 1987 (as amended). For an interesting discussion on the background to the introduction of this statutory requirement and its impact see "Reasonable Prospects of Success": B. Walker SC, Medico-Legal Society Inc Scientific Meeting - 12 March 2003.
35 P 68.
36 "Interlocutory Procedures", paper delivered to the College of Law CLE on 28 November 2000 and "A Judicial Perspective on what the Court expects from legal practitioners in equity and commercial litigation", paper delivered on 26 July 2003 to the Law Society of New South Wales Specialist Accreditation Business, Property, Wills, Advocacy and Commercial Litigation Annual Conference.
37 Justice Gormon Houston of the Alabama Supreme Court, as reported in "Making Your Appeals More Appealing", Susan S. Wagner, 59 Ala Law 321.
38 "A Judicial Perspective on what the Court expects from legal practitioners in equity and commercial litigation" at par

[42]