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Continuing Professional Education - The 2004 Judges Series. Practical Litigation in the Supreme Court and the Federal Court

The College of Law

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SUBPOENAS, DISCOVERY AND INTERROGATORIES

1 This paper primarily relates to practice in the Supreme Court. *Some references to practice in the Federal Court are given in italics.* Subpoenas, discovery and interrogatories deal with two different general subjects. One is getting out information, establishing what documents exist and tend to prove facts in issue, or contain information about facts in issue. The other is bringing documents to the Courtroom at the hearing so they can be put into evidence. Getting out information is the general subject of discovery and bringing documents to the Court is the general subject of subpoenas. Parties to proceedings have obligations to reveal to their opponents before the hearing the information, including the documents, which they have about the facts in issue; their opponents have a right to compel them to disclose those documents and information. Strangers who are not parties to the proceedings do not have any obligation to reveal, in advance of the hearing, what documents and information they have about the facts in issue. They do however have an obligation to produce documents so they can be put in evidence. In recent decades changes in the Court's practices have come to mean that strangers can be compelled to produce documents before the hearing, not just, as once was the case, at the hearing. What strangers cannot be compelled to do is to say on oath and in advance of the hearing what they know about facts in issue, nor can they be compelled to give discovery and to produce all documents in their possession relevant to facts in issue. They have no obligation to swear that they have produced all such documents. Essentially the duty of a stranger is to produce the documents which the Court orders him or her to produce. The stranger has no obligation and should not be ordered to carry out elaborate or difficult searches and inquiries, or to give detailed consideration to deciding whether some document is relevant to the facts in issues in a case in which the stranger is not a party. The use of subpoenas to compel a stranger to do these things is oppressive, and if asked to do so the Court may set aside a subpoena which has that effect, or may modify the operation of the subpoena.

It is not really appropriate for the parties to litigation to serve subpoenas for production of documents on each other. Sometimes exigencies of time require it. Where there is time for proper preparation the parties should ascertain what relevant documents their opponents have by following the procedures for discovery in Pt.23 of the *Supreme Court Rules* 1970 or O 15 of the *Federal Court Rules. (In what follows, the position in the Supreme Court is described first, and then the position in the Federal Court).* The relatively simple process in Pt.23 r.2 is that a party may require the opponent to produce any number of documents up to 50 if the documents are referred to in any originating process, pleading, affidavit or witness statement, and any other specific document. Then r.2 fixes the times for rights to have the documents produced and inspected. A more elaborate process for discovery is dealt with in r.3; a Court order requires discovery of documents within classes specified in the order and then the opponent must produce a list of the documents falling within the classes and make a verifying affidavit. (These procedures do not apply to personal injury and death claims unless there is a special order under r.5.) These procedures give each party an opportunity to inspect the opponent's documents, and there is no need to serve a subpoena on the other party to bring about production of a document. Such production of a document by another party at the trial can be secured by a notice under Pt.36 r.16, which may be made returnable before the trial, or at the trial.

2 Part 23 applies to proceedings commenced after 1 October 1996. An object of Pt.23 was to simplify discovery procedure by making them relate only to specified classes of documents. Before then

experience was that discovery was very elaborate and disproportionately expensive for the purposes it served. I have heard the view voiced that the process of identifying and specifying the classes of documents to which discovery is to relate makes so much claim on attention and time that there is no real advantage over the old procedure: people say you might just as well discover everything. The introduction of Pt.23 in 1996 has brought about a considerable change in the use made of discovery. Except in very large litigation, the use of discovery seems to have become far less frequent than it was. Part of the reasons for this is that Pt.23 r.1(d) defines the concept of relevance more narrowly than before: it used to be enough that a document contained information which could lead to a chain of inquiry which would produce relevant evidence. It is always important to keep a sense of proportion about the amount expended on getting a case ready, but the basic need to find out what documents the opponent has, and the need to know in advance what you are up against, appear to me to dictate the continued use of discovery, even if it is only in the simple form of a call for up to 50 specified relevant documents.

3 *In the Federal Court, discovery is managed by the Docket Judge to whose docket the case has been assigned on the commencement of the proceeding. No party has a "right" to require discovery: rather, O 15 r 1 makes the leave of the Court a prerequisite. A party seeking leave to give a notice for discovery (Form 21) can expect to be asked by the Docket Judge to explain why discovery is necessary and to justify the ambit of discovery sought.*

4 *The most important rule governing discovery in the Federal Court is O 15 r 2, with which must be read Practice Note 14. Order 15 r 2 in its current form and Practice Note 14 came into effect on 3 December 1999.*

5 *Subject to any order to the contrary, discovery is to be given of:*

> *"(a) documents on which the party relies; and*
> *(b) documents that adversely affect the party's own case; and*
> *(c) documents that adversely affect another party's case; and*
> *(d) documents that support another party's case; and*
> *(e) documents that the party is required by a relevant practice direction to disclose." (O 15 r 2(3))*

6 *The party giving discovery is required to discover only those documents just described of which that party is, "after a reasonable search", aware, at the time discovery is given (O 15 r 2(3)). However, a document need not be disclosed if the party giving discovery reasonably believes that the document is already in the possession, custody or control of the party to whom discovery is given (O 15 r 2(4)).*

7 *In determining what is a "reasonable search", a party may take into account:*

> *"(a) the nature and complexity of the proceedings; and*
> *(b) the number of documents involved; and*
> *(c) the ease and cost of retrieving a document; and*
> *(d) the significance of any document likely to be found; and*
> *(e) any other relevant matter."*

8 *Federal Court Practice Note 14 is as follows:*

> *"1. Practitioners should expect that, with a view to eliminating or reducing the burden of discovery, the Court:*
> *(a) will not order general discovery as a matter of course, even where a consent direction to that effect is submitted;*
> *(b) will mould any order for discovery to suit the facts of a particular case; and*
> *(c) will expect the following questions to be answered:*
> *(i) is discovery necessary at all, and if so for what purposes?*
> *(ii) can those purposes be achieved:*

· by a means less expensive than discovery?
· by discovery only in relation to particular issues?
· by discovery (at least in the first instance - see (iii)) only of defined categories of documents?

(iii) particularly in cases where there are many documents, should discovery be given in stages, eg initially on a limited basis, with liberty to apply later for particular discovery or discovery on a broader basis?
(iv) should discovery be given in the list of documents by general description rather than by identification of individual documents?

2. In determining whether to order discovery, the Court will have regard to the issues in the case and the order in which they are likely to be resolved, the resources and circumstances of the parties, the likely cost of the discovery and its likely benefit.

3. To prevent orders for discovery requiring production of more documents than are necessary for the fair conduct of the case, orders for discovery will ordinarily be limited to the documents required to be disclosed by Order 15, rule 2(3)."

9 Interrogatories are another means of getting out information from the opponent in advance of the hearing. There have been very great changes in the use made of interrogatories in the Supreme Court of New South Wales. They have almost faded away; it is very rare for an answer to an interrogatory to be tendered in evidence. Like discovery, interrogatories were part of Equity procedure until the *Judicature Act* reforms in the United Kingdom, subsequently adopted in New South Wales in 1972 by the *Supreme Court Act* 1970. For 20 years or so after 1972 interrogatories flourished, except in personal injury cases. Great efforts were put into producing elaborate arrays of questions, sometimes many hundreds of questions, which sought to compel the opponent to state the position on oath about as many aspects of the facts in issue as could be thought of. Then an amendment to the *Supreme Court Rules* 1970 Pt.24 r.1 in 1991 greatly changed this practice by limiting the number of questions to 30; more questions can be asked, but leave has to be obtained. An object of this change was to direct the questions to the heart of the matter; on the whole it seems likely that, no matter how complicated the issues are, the most important things that the opponent should reveal can be collected into 30 questions. The remarkable and unforseen result of imposing the limit to 30 questions was that the use of interrogatories almost disappeared.

10 The arid interpretation is that in the past interrogatories were not being used to get out information, but to engage and distract the opponent's attention by giving him or her a lot of work to do and a lot of costs to incur, and to promote his or her distaste for the contest. Whatever the true position was, the fashion for lengthy interrogatories has passed. A large influence against the extensive use of interrogatories has been the growth of new practices in which parties are frequently directed to exchange affidavits or witness' statements in advance of the hearing. It seems that parties have learnt to rely on the contents of affidavits or witness' statements to reveal what the opponent's case truly is. Interrogatories should still be considered as a useful tool if they are confined to a few matters of central importance in order to establish what the opponent's knowledge is.

11 *Many of the above observations also apply to the Federal Court. In the Federal Court, as in the Supreme Court, interrogatories are rarely administered. Order 16 of the Federal Court Rules deals with interrogatories. Consistently with the Federal Court's case management system, a notice to answer interrogatories may be given only with the leave of the Court: O 16 r 1. Since leave to administer interrogatories is required in all cases, a numerical limit on the number of interrogatories which can be exceeded only with the leave of the Court would be otiose in the Federal Court.*

12 My main subject is the practice of the Supreme Court dealing with subpoenas for production of documents. This paper is not concerned with subpoenas to attend. As usual, there is much to learn from patiently reading through Pt.37, Forms 46 to 48 of the *Supreme Court Rules* 1970 and Practice Note 51, *and, in the case of the Federal Court, O 27 and Forms 41-43. In both Courts the rules relating to subpoenas are about to be replaced by "harmonised" subpoena rules, which will take effect in the Federal Court on 1 April 2004 and in the Supreme Court on 1 May 2004. Justice Lindgren will speak about the text of the new rules. My subject is general principles which will have an ongoing importance.*

13 Before 1972 practice relating to subpoenas for production was largely established by the judgment of Jordan CJ in *Commissioner for Railways v. Small* (1938) 38 SR NSW 564. That was a Common Law case where the plaintiff claimed damages under the *Compensation to Relatives Act* 1897 for the death of her husband who fell from an electric train. In 1938 the Court would not have ordered discovery in a personal injury or death claim; the power existed, but it was not the practice. The plaintiff's solicitor served a subpoena on the Commissioner for Railways to produce relevant documents. However he only served it with two business days' notice, returnable on the day of the hearing, and called for an

enormous array of documents with which it was, fairly obviously, impossible to comply. It included all documents relating to self-closing doors, falls from electric trains and complaints about the running and control of electric trains. Even though there had only been electric trains for about 11 years, this was an impossibly tall order. Jordan CJ treated the manner in which the subpoena had been dealt with as part of the grounds on which a new trial was ordered.

14 In the course of his judgment Jordan CJ stated some propositions which have largely set the practice since. See pages 572 to 575. A subpoena to a stranger must specify with reasonable particularity the documents which are required to be produced. The subpoena ought not to be issued to a stranger requiring him or her to search for and produce all such documents as he or she may have in possession or power relating to a particular subject matter. It is not legitimate to use a subpoena for the purpose of endeavouring to obtain discovery of documents against a stranger. A stranger ought not to be required to go to trouble or expense in ransacking his or her records and endeavouring to form a judgment as to whether any of his or her papers throw light on a dispute. Where a subpoena is addressed to a party it is still necessary that it should state with reasonable particularity the documents which are to be produced. It is not legitimate to use a subpoena as a substitute for an application for further and better particulars, or for discovery of documents. Jordan CJ contemplated that where there was a need for a party to give discovery there would be discovery, and a subpoena would not be a substitute for it; the subpoena would call for production of specified documents, but the information about the documents would have emerged earlier from the discovery. A party is not entitled to use a subpoena for fishing: to discover whether he or she has a case at all. A subpoena to a party will be set aside as abusive if great numbers of documents are called for and it appears that they are not sufficiently relevant.

15 What has actually taken place in practice has never, in my experience, conformed in a pure way with what Jordan CJ said. Lawyers who conduct personal injury litigation have always been markedly averse to discovery. I cannot fully explain why, but it would often be true that the plaintiff has next to nothing to disclose while the defendant has extensive documents which could bear on negligence. Scatter-shot subpoenas have always been popular, in spite of their susceptibility to being attacked and set aside.

16 One of the inconveniences of subpoenas under the old practice, remarked on by Jordan CJ in *Small's case* was that at the beginning of a trial, while the jurors (if any) were waiting around and all the concerned wanted to get on with the case, time was taken by a procession of persons called to answer subpoenas. They each told their stories; yes they did produce the documents, they did produce some of them, no they had no documents, they had had a fire, or whatever the story was. Then there would be discussion about whether there was any good reason why documents should or should not be inspected, and time would also be taken to inspect the documents just produced. The time used was expensive, with all parties, their lawyers, witnesses and the Judge in attendance, and little was being achieved. Stumbling prologues postponed the drama. The *Supreme Court Rules* 1970 *and the Federal Court Rules* made the innovation of providing for production of documents to the Registry in advance of the hearing. This brought about large changes in the practice of litigation, in the impact of subpoenas on third parties and in the volume of documents which are required to be produced. It does not seem that such large changes were foreseen; but the use of subpoenas has expanded greatly.

17 As the documents are produced in advance, and by and large the strangers who produce them do not object to inspection by the parties, time is available to inspect documents in advance and copies can be made. As a result the amount of time, effort and cost which can be put into subpoenaing and inspecting documents in advance have expanded greatly, with the consequence that the time, effort and cost which actually are put into them have expanded greatly. This has given rise to what I think of as the Subpoena Industry, a very large effort, which requires a great deal of attention from the Court's officers in the Registry, and imposes responsibility on the Registry for huge volumes of documents, a steady tide in and out, with the need to record movements, keep track and be responsible for other people's valuable documents. It was not like this in the old days; the documents produced were handed to the Judge's Associate at the beginning of the trial and either went into evidence or were handed back by the Associate at the end of the trial, giving the Registry no trouble.

18 The rise of Xerox copiers and lever-arch binders has contributed a large part to the growth of the Subpoena Industry. Another large part has been the Court's recognition of the claim of justice of persons required to make searches and produce documents to be paid for their expenses and loss. This entitlement is now recorded in the *Supreme Court Rules* 1970 Pt.37 r.9 *and the Federal Court Rules*, O 27 r 4A. Some large commercial enterprises which receive many subpoenas do not seem to have any sense of oppression or resentment about being confronted with very wide ranging calls for documents requiring searches and detailed attention of staff; as they are paid for this it is a profit

centre. The motivation which used to apply to set aside a subpoena which made excessive calls and imposed a need to search out papers, give consideration to relevance, copy volumes of papers and produce them, with a lot of attention by staff, no longer operates; instead the recipients of subpoenas do the work and send the bill. These bills have sometimes been extremely large. I have been told that banks sometimes give the solicitor who served the subpoena running reports on how much work they have done and how much the bill is now, and ask whether they are to perform further work at the same rate. I was once told that a solicitor had been billed for $14,000 by a bank which had not yet completed its searches. I do not know how common such large charges are, but I have come to think that many labourers in the Subpoena Industry are more or less happy in the service, being given large tasks and sending large bills for doing them.

19 An effect of this is that one of the things that Jordan CJ said could not happen tends to happen, that is, strangers are compelled to give discovery. On the face of things a subpoena that calls for production of "all documents relating to" a subject matter is contrary to one of Jordan CJ's rules; "A stranger to the cause ought not to be required to go to trouble and perhaps to expense in ransacking his records and endeavouring to form a judgment as to whether any of his papers throw light on a dispute which is to be litigated upon issues of which he is presumably ignorant."(at 573) In the Court's practice now, a call for documents "referring to" or "relating to" some subject matter is not necessarily the hallmark of an oppressive subpoena; the call must be considered in the circumstances, including the circumstances of the recipient and its capacity to produce documents.

20 What is required is reasonable particularity (*Small* at 575). "Reasonable" is not a dogmatic word. In *Waind v. Hill & National Employers Mutual General Insurance Association Ltd* [1978] 1 NSWLR 372 at 382 Moffitt P for the Court of Appeal gave an exposition of what is meant by using a subpoena for the purpose of discovery. Moffitt P said: "The essential feature of discovery in this connection … is that the person to whom the subpoena is addressed will have to make a judgment as to which of his documents relate to issues between the parties. It is oppressive to place upon a stranger the obligation to form a judgment as to what is relevant to the issue joined in a proceeding, to which he is not a party. …a subpoena can only properly be used for the production of documents described in particular or general terms which does not involve the making of such a judgment. It does not follow, however, that because the party who issues a subpoena is unaware of the precise description of a particular document, or whether a particular document or documents is in the possession of the witness, or even whether it exists, or is unaware of its contents, that the subpoena, or even a subpoena in general terms, amounts to the use of the subpoena for the purpose of 'discovery'." In my understanding, even though the words in a subpoena are general and may require some decision by the recipient going further than simply recognising that the document is the one described, the use of a general description is not oppressive unless it requires the recipient to form a judgment about relevance to issues, or about some other matter which is so complex or difficult as to be oppressive. A call to an employer for all documents relating to the employment of and wages paid to the plaintiff during a stated period involves forming some judgment, but the exercise is probably not difficult, and can be fulfilled by getting out the personnel file and wages records. The question is, what is reasonable, and involves an appraisal of the task imposed.

21 There are limits to this. Once the requisitions in a subpoena stray into an expression like "all documents relating to" the ground is becoming a little shaky, but it is not necessarily quicksand. A subpoena may be oppressive, and may be set aside for that reason, if the exercise it requires the recipient to perform is simply too large and elaborate, even if it does not involve any real difficulty in the exercise of judgment and making decisions. There are reasonable limits. To take an example from *Small's* case, a call for all files relating to falls from electric trains extending to back 10 or 11 years could not survive the challenge.

22 However what is required is a challenge. By and large recipients of subpoenas which are excessive do not respond by applying to the Court to set them aside; the usual response is more along the lines of making some kind of attempt at compliance, putting the onus on the person who issued the subpoena to ask the Court to compel further effort; and if the subpoena is vulnerable, the party issuing it is unlikely to do this.

23 In *Southern Pacific Hotel Services Inc v. Southern Pacific Hotel Corporation Ltd* [1984] 1 NSWLR 710 at 719-720 Clarke J made a restatement of the requirements of reasonable particularity and what constitutes an oppressive subpoena and said: "If a court is called upon to rule that a subpoena is an abuse of process … it will need to carry out an exercise of judgment upon the particular facts in each case, including but not limited to the terms of the subpoena, bearing in mind the need to balance the reasonableness of the burden imposed upon the recipient and the invasion of his private rights with the public interest in the due administration of justice and, in particular, that all material relevant to the

issues be available to the parties to enable them to advance their respective cases. There is, in every case, a clash between these competing interests and whilst the balancing exercise … must be carried out, it is the latter interest [due administration of justice] which is predominant. If the needs of justice require or could require that a stranger be obliged to carry out a very burdensome task in the collection, transportation and production of a large number of documents, then a subpoena calling upon the stranger to produce those documents will be upheld."

24 In my opinion the net result of this is that it would be very difficult to say confidently, on the basis only of the terms of a subpoena, that it would be set aside. To some degree this may help to explain the general habit of compliance.

25 There is a conflict of authorities about whether a party, as well as the recipient of the subpoena, can apply to the Court for an order setting it aside on grounds of oppression and of lack of reasonably particularity. Pt.37 r.8 of *Supreme Court Rules* 1970 *and O 27 r 9 of the Federal Court Rules* give standing to "…any person having a sufficient interest…" and New South Wales authorities favour the view that a party can buy in to the controversy. Other states have other practices.

26 If the subpoena does not fail the test of reasonable particularity and is not oppressive, there is a further important control on its usefulness. It is not enough to compel a stranger to produce documents to the Court; little is achieved unless the party issuing the subpoena can also inspect the documents, and do so in advance of the hearing. Although earlier case law suggested that the documents must be produced to the Court before the question of allowing or withholding inspection can be embarked on, a qualification has crept in and this is not always treated as essential to produce the documents before debating inspection. (see *NSW Commissioner of Police v. Tuxford* [2002] NSWCA 139 at [21 & 22]). At this point another important control also depends very largely on whether the stranger takes an initiative. It is quite common for strangers to produce documents to the Court which appear remarkably important to them, yet make no objection to inspection by the parties. In part this attitude may be justified by reliance on controls on the use of information obtained under the doctrine in *Harman v Secretary of State for the Home Department* [1983] 1 AC 280; the information may not be used for purposes other than the conduct of the proceedings, although this control ceases when the information is put into evidence. Even if there is no objection there is still room for the Judge to impose control on inspection on his or her own initiative; the limited grounds for this were referred to by Moffitt P in *Waind* at p383: "There may be good reason why he may, or indeed should, refuse inspection of irrelevant material of a private nature, concerning a party to the litigation, or, concerning some other person who is neither a party nor the witness." One sentence in Moffitt P's judgment at 383 has not taken root in the practice; his Honour said: "Indeed, no doubt, [the Judge] will normally defer inspection by a party who has not issued a subpoena until his opponent has an opportunity to use the documents in cross-examination". The practice does not accord with this statement. Where inspection of documents is allowed it is almost always allowed to all parties, unless there is some limit arising from client legal privilege, or from a claim of confidentiality. If access is restricted there is a need to give notice to the party or parties on whom the restriction is imposed.

27 As explained by Moffitt P the law has a choice between restricting the Judge to allowing access to documents only to enable them to be tendered in evidence, or to allowing access to enable parties to ascertain facts in the documents. Moffitt P said at 385: "The crucial question in relation to the exercise of the discretion to permit inspection in the second step is whether the documents have apparent relevance to the issues." And "Once the judge has that opinion, inspection will normally be allowed, notwithstanding that the document is not admissible as it stands, and notwithstanding that the party seeking inspection has not given any undertaking to tender it, or use it in cross-examination." In other cases Moffit P's test has been given the name "legitimate forensic purpose". See *Maddison v. Goldrick* [1976] 1 NSWLR 651 at 666 and *R v. Saleam* (1989) 16 NSWLR 14.

28 The effect of these changes in practice since 1938 has qualified the general statement, often found in authorities, that a subpoena cannot be used for the purpose of obtaining discovery from a third party. To a limited extent production and inspection of a third party's documents can be compelled for the purpose of ascertaining information relevant to litigation.

29 The essence of the Subpoena Industry is compliance. Relatively few strangers served with subpoenas, even very extensive subpoenas, actually make applications to have them set aside or modified. They make some accommodation with the party who serve the subpoena; or they just comply and send in their bills. Client legal privilege, whether of a party to the litigation or of some other person, is a frequent source of objection to inspection; otherwise the extent of compliance is remarkable. Solicitors who conduct litigation are aware of the large scale of effort and attendance required by the current practice. It is very common that, quite early in litigation, many subpoenas for production are

issued, and a large burden of attendance and expense is incurred as documents are inspected in the Exhibits office and copies are obtained. This large field of activity has grown out of what was, early in my legal experience, a small incidental part of legal practice.

30 It should be noticed that Pt.37 r.2(2) of the *Supreme Court Rules* 1970 requires leave to make a subpoena returnable before the hearing of proceedings. ***(****Under O 27 r 6 of the Federal Court Rules, leave is required to use subpoenas. Leave may be given generally. The return date will usually be fixed as a term of the giving of leave. If no return date is so fixed, subpoenas may be made returnable at 9.30 am on any Wednesday before the Registrar.)* It is for this reason that it is so common in direction hearings to ask for an appointment for return of subpoenas; when the Judge or the Registrar makes such an appointment it is treated as leave to issue as many subpoenas as one chooses returnable at the appointment. If the Judge or the Registrar does not give leave, leave can still be obtained in the Registry where leave is given on undertakings which include an undertaking to inform other parties that subpoenas have been issued and that they also have the opportunity to issue subpoenas. A minor battleground is the question of whether this undertaking requires the other parties to be informed of the names of the persons subpoenaed. Some argue that they are not obliged to tell their opponents to whom the subpoenas are directed, only that they have been issued. I do not know whether that this battle has been resolved. It is however open to the opponent to appear at the return of subpoenas and find out to whom the subpoenas were directed; so I do not think that there can be any ground for keeping secret, or for not disclosing on request, the identity of the persons to whom subpoenas are directed. It is worth noticing Pt.37 r.11 which enables the party issuing the subpoena and the recipient to make arrangements to modify the time for production. They do not need a Court order to do this.

31 Contests over subpoenas have become an interlocutory battleground in Supreme Court *and Federal Court* litigation. Formerly fashionable disputes over discovery interrogatories and particulars seemed to have faded away. Registrars sit four days a week for the return of subpoenas, and are kept busy with contests about production of documents. In most cases the parties to the litigation are those who engage in the contests; however often where there is some association between the stranger subpoenaed and a party to the litigation, the stranger takes the initiative to attack the subpoena. Except in circumstances like that few strangers would wish to engage in disputes and incur the risk of costs. Claims based on client legal privilege are a fairly common subject of argument. Occasionally there are claims to public interest immunity: for example, *Cassaniti v. McEntee* [2000] NSWSC 1202. Otherwise most attacks on subpoenas are based on the ground that the subpoena is oppressive in some way. A subpoena can be oppressive because it imposes an unreasonable burden, does not call for documents with reasonable particularity, or calls for too many documents or too much effort. A subpoena can be oppressive because of the nature of the task it imposes; if to an unreasonable degree it requires exercise of judgment and making decisions about relevance by the stranger. It may be set aside because it is a fishing expedition: for example, *Travel Compensation Fund v Blair* [2002] NSWSC 1228, *Cotie v Cox* [2003] NSWSC 4. In cases like these the requisitions in the subpoena and the evidence put forward by the stranger about the practical difficulty of complying simply have to be sorted through, and the Court has to reach a view on whether or not the call is reasonable.

32 Many disputes are about access to and inspection of documents. The “legitimate forensic purpose” test is applied, and it is plainly very dependent on the facts and circumstances of the particular case. Sometimes the Judge may inspect the documents himself or herself, without showing them to other parties, to form a view about whether there is some legitimate forensic purpose in allowing inspection. It is often contended that a subpoena is oppressive because of the commercial or other confidential nature of the information. Claims of this kind must also be dealt with by applying the broad legitimate forensic purpose test to the instant facts, again sometimes with inspection by the presiding Judge. There is as I mentioned earlier an obligation restricting parties to use information gained through interlocutory process only for the conduct of the proceedings; but naturally enough many persons whose private documents are subpoenaed do not have much confidence in this restriction. It is very difficult to prove who leaked information, and as we all know, we are living in a period when public morality about respecting other people’s private information and confidences is at a very low ebb. The Court often responds to claims of confidence by taking special measures to restrict access to and inspection of documents to named lawyers, or named executives of a litigant, on the basis of written undertakings relating to and limiting the use of the material. See for example *Wilson v State of New South Wales* [2003] NSWSC 805. It is not common for Courts to simply refuse inspection on the ground that the information is confidential, if the claim to inspect the document passes the legitimate forensic purpose test.

33 Another claim of oppression to which Courts have yielded is the claim that a person who is himself or herself an expert and has a body of expertise in his or her head should not be compelled by subpoenas to attend and give evidence. Solicitors who collected bodies of expert or useful opinion relating to a particular class of business are not compelled to produce their documents for the use of

another solicitor to conduct litigation in which the expert solicitors are not engaged. On the other hand a client whose expert solicitor had terminated the retainer was allowed to compel production of the solicitor's collection of documents recording expertise relating to the subject matter of his lawsuit. See *ZN v Australian Red Cross Society* [2002] NSWSC 697.

34 First instance judgments on questions arising out of challenges to subpoenas find their way into the Court's bank of judgments at the rate of about 8 or 10 a year, usually in variations of the subjects I have mentioned. If you find yourself in a contest over a subpoena it would be useful to browse through the first-instance judgments of the last two or three years and get a feeling for the way the tests are actually applied. It is rare for these problems to find their way to the Court of Appeal, although in *Tuxford* the Court of Appeal considered a District Court subpoena for production of documents on an application for certiorari. This decision is significant for showing just how industrious and misguided people who draft subpoenas can be. The litigation arose out of a claim for damages by police officers arising out of their treatment in various ways by more senior officers. The subpoena called for a production by the Commissioner of Police of documents in 66 numbered paragraphs with many subparagraphs identifying persons in the police service who might have documents and the offices where the documents might be located. The calls were related to a number of different police operations. There were calls for all documents, the originals and all copies, relating to a particular subject matter, and evidence given by the Commissioner estimated that there would be over a million documents and that hundreds of police officers might hold copies. It appears from the judgment of the Court of Appeal that there was no showing that there was a legitimate forensic purpose for such extensive calls. The Court of Appeal said: "[17] No attempt was made, either in the District Court or in this Court, to justify the demand for the production of all of the copies of these documents, and on this ground alone, given the numbers of documents involved, and the fact that they are or may be located in so many places, means that the subpoena was oppressive."

35 This was a recurrence of broadly similar events which I have seen a number of times over the past few decades in which a subpoena is drafted in terms which make its calls as extensive as possible, limited only by the imagination of the person drafting it, apparently without advertence to the fact that the Court exercises control over inventing enormous tasks and imposing them on the opponent. The Court of Appeal's judgment repeated and endorsed a number of propositions essentially based on *Small's* case and stated the law in what are, for New South Wales, classic terms, including endorsement of the legitimate forensic purpose test. The Court of Appeal referred to the test stated in *Small's* case that a party is not entitled to issue a subpoena for the purpose of fishing, meaning endeavouring not to obtain evidence to support the party's case but to discover whether the party had a case at all, or to discover the nature of the opponent's case. The Court of Appeal treated the wide-ranging call extending to 66 paragraphs as not requiring consideration in detailed paragraph by paragraph. The Court of Appeal removed the application to set aside the subpoena into the Court of Appeal and quashed the subpoena. In doing so they adhered to the classic law on setting aside subpoenas.

36 I will close with a short Latin lesson. "Subpoena" is an English word and its plural is "subpoenas." As a plural, "subpoenae" is not Latin, English or any other language, not even (for Googlers) Klingon or Elmer Fudd. Before 1972 a subpoena to attend was called *Subpoena Ad Test,* which was short for *ad testificandum,* meaning "to give evidence," and a subpoena to produce documents was called *Subpoena Duces Tecum,* which means "bring with you." This may help you when reading old law reports, but there is no need to use the old names any more.