Equity

The Hon. Mr Justice P.W. Young

Updated August 1998. Updated August 2007, Carol Webster

What Is Equity?

Before commencing it is necessary to define the term "Equity". Equity is a term that is thought to have some mystery about it. '

Really, there is no mystery about it at all, but because some lawyers have come up through law schools that don't have a subject called "Equity" and hide Equity away in various odd places, a short time should be spent on just what is meant by the term "Equity".

During the middle ages the usual and proper court to which people resorted to solve disputes was that run by the local Baron. Indeed, the King's Court had no jurisdiction at all unless there was a wrong done against the King. That is why the doctrine of the King's Peace developed into the Writs of trespass and trespass on the case to give us all the forms of action of Common Law that we know today both in tort and in contract; the writs of roll. But the King also has jurisdiction as the fountainhead of all justice, so apart from the writs of wrong which developed into what we have as the Common Law today we have certain ancient writs of right, most of which petered out somewhere in the middle ages. In Tudor times other remedies based on the King's obligation to see that right was done developed. Thus we have the prerogative writs, which still exist, as in administrative law, and we have the Chancellor, in the name of the King, stepping in more and dealing with cases where otherwise the subject could not get right. That jurisdiction was exercised through various of the Chancellor courts in the later Middle Ages and early Tudor times including Star Chamber. After the Cromwellian revolution it ended by being vested in the Court of Chancery alone.

The Chancellor’s basic rule was that if something was against “good conscience” then the Chancery should intervene and do right no matter what may have been the situation at Common Law. And so in Chancery Equity was said to vary with the length of the Chancellor’s foot. If the Chancellor thought that a good case existed he would give relief; if not he wouldn't give relief.

Yet over the ages the cases in which the Chancellor gave relief became stereotypes. One of the people we have to thank for this is Lord Eldon who, at the beginning of the nineteenth century, is rumoured to have said on one occasion:

> "Having considered this matter for seventy years I do not think that there is anything to be gained by considering it further. Accordingly I propose to give judgment."

The rumour was fake, but Eldon did delay greatly. The litigants of the time must have cursed him; but he did codify, to a great degree the principles of Equity. Between the beginning of the nineteenth century and, perhaps, the beginning of the 1960's Equity became relatively rigid in form. One knew that there were certain types of cases where Equity would intervene.

The Subject Matter Of Equity Jurisdiction

The traditional fields where Equity would intervene were these:

a. Fraud, undue influence and breach of confidence;

b. Breach of trust;

c. Specific performance;

d. Injunctions to prevent injustice;

e. Injunctions in aid of legal rights;

f. Interpretation of wills;

g. Appointment of receivers;

h. Company problems;

i. Partnerships;

j. Land Law matters, other than ejectment.

This list is not exhaustive. It contains merely the traditional areas in which Equity would intervene.

The Equity jurisdiction is often dealt with in the older text books under the headings: (i) the inherent jurisdiction; and (ii) the statutory jurisdiction; or, alternatively; (i) the exclusive jurisdiction (ii) the concurrent jurisdiction and (iii) the auxiliary jurisdiction. These classifications today have little relevance (although there continues to be some debate about whether injunctions can be granted in the auxiliary jurisdiction to enforce rights other than property rights).

If there is any helpful classification to characterise what is done by our Equity Division today it might be based upon the nature of disputes litigated: (i) property dispute (eg. specific performance equitable interests, easements, restrictive covenants); (ii) family disputes (eg FPA claims) and (iii) commercial disputes (eg companies, partnerships, Mareva injunctions). Whatever classification is adopted two basic propositions must be borne in mind; (i) Equity usually only intervenes where remedies at Common Law are inadequate to do justice; and (ii) Equity acts in personam. These propositions have an elasticity which becomes obvious the more they are examined. Nevertheless they remain fundamental guides to the approach of Equity.

Traditionally, Equity would intervene in a dispute only if there was something about the dispute which meant that Common Law remedies were inadequate. For instance, in a case of breach of contract at Common Law, you only had the writ of assumpsit in trespass and that only sounded in damages; but, with certain types of contracts, damages was not an adequate remedy. The Chancellor took the view that promises were meant to be kept and, if the Common Law did not give an adequate remedy, he would give an appropriate remedy by ordering specific

performance of the contract. It is important to note the way he did this, at least in the earliest period. He ordered specific performance by saying to the defendant;

> "You have made a promise. Promises are meant to be kept. Your immortal soul will be in danger if you do not keep your promises. I the Chancellor (who was originally a bishop) have a duty to safeguard your immortal soul. Accordingly, for the good of your soul, I am going to keep you in my prison until you decide to keep your promise

Of course, as time wore on Equity became secularised. The court put it slightly differently. It now says:

> "We order you to perform your contract. If you don't you will commit a contempt of court and we will keep you in prison, for that contempt of court, until you have paid for your contempt or have done what we order".

"Uses Of Action" In Equity

Equitable remedy is a remedy against the person; it is a remedy in personam. The reasoning of Equity Judges can often be placed in perspective by remembering that Equity, at least historically, has sought to operate on the conscience of parties against whom Equitable relief may be granted. Although vague generalisations are to be treated with caution it is still a helpful guide to Equity practice to ask rhetorically: would it not be "unconscionable" (ie against good conscience) for a litigant to proceed as, in the absence of a court order, he proposes to proceed? In recent years some commentators have endeavoured to unify equitable principles by reference to Equity's attacks on "unconscionable conduct". Such attempts might fail to recognise the diversity of Equity, and they might provide uncertain guides to the resolution of concrete problems, but they do focus attention on the historical origins and philosophical leanings of Equity.

One consequence of the proposition that Equity acts in personam is that it is only if the person against whom an equitable order is sought is subject to the jurisdiction of the court that you are able to maintain a suit against him. This proposition has its limitations but it also means that it doesn't really matter, with some exceptions, where the property the subject of a dispute is located, so long as the person against whom an order is being sought is amenable to the court's enforcement procedures.

It follows from what I have said that when considering whether there is an enforceable claim in Equity you must go through a completely different process from Common Law. Equitable remedies are not linked to the old forms of action at Common Law.

If you are acting for a Plaintiff considering issuing a statement of claim at Common Law, you ask yourself, "Is there a cause of action?" and if there is not, you don't proceed -- if you do the defendant will merely make an application to have the proceedings dismissed with costs.

In Equity you don't have a cause of action in the Common Law sense because it is not a situation where before the nineteenth century one looked to see which was the appropriate writ. Instead the question must be asked "Is there an Equity?" In other words, is this one of the situations where classically or according to more modern authority Equity will intervene? You will have an equitable "cause of action" if: first, there is a Common Law cause of action and the

remedies at Common Law are inadequate: secondly, if, even though there is no Common Law cause of action, the matter is one where Equity traditionally has given relief: thirdly, if some statute gives a right and you need an equitable remedy to fill it out; or, fourthly, the matter can be dealt with in terms of a whole lot of new "equities" that have been discovered or rediscovered in the last thirty years or so.

You should be aware of the tremendous developments in Equity over the last fifteen years or so. Concepts which offered some scope for development include "The Ocean Island Equity" (the pure principle of benefit and burden discussed in Tito v Waddell No 2) [1977], Ch 106); Proprietary estoppel and estoppel by acquiescence (as to which see, for example, Snells Equity 28th Edition). In recent years the High Courts has participated actively in the task of "rediscovering" the beneficial role of Equity. Examples of the High Court's deliberations can be found in a series of cases: O'Dea v All States Leasing System (WA) Pty Ltd. (1983) 152 CLR 359; AMEV-UDC Finance Ltd v Austin (1986) 162 CLR 170; Taylor v Johnson (1983) 151 CLR 422; Legione v Hateley (1983) 152 CLR 406; and Commercial Bank of Australia Limited v Amadio (1983) 151 CLR 447. In Taylor v Johnson, for example, the High Court found an Equity enabling the Courts to deal with cases of unilateral mistake. The influence of Equity learning can be discovered in Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 221. Where the High Court accepted that an action on quantum meruit is based on concepts of restitution and unjust enrichment rather than implied contract. And the recently fashionable concept of "conventional estoppel" owes something to an expansive view of Equitable jurisdiction: Walton Stores (Interstate) Ltd v Maher (1988) 164 CLR 387.

In modern times Equity has found a remedy to get rid of a lot of the old limitations on the Common Law causes of action. That's what Equity is! You have to examine it historically and by reference to the ways in which Equity lawyers have fought to supplement the Common Law: Equity is something which, historically speaking, grew up in the old Chancery Court in England and its successors, including the Equity Division of the Supreme Court of New South Wales.

It is perhaps a matter of some notoriety that the Judicature system was not introduced in New South Wales until the passage of the Supreme Court Act of 1970. It has been said that this involved a great step forward to 1875. The Act came into effect on 1 July 1972. Before that date the Supreme Court’s Common Law jurisdiction was administered under the Common Law Procedure Act and the Court's Equitable jurisdiction operated essentially under the Equity Act. There were two entirely separate forms of pleading and two entirely separate modes of practice.

The well-rounded barrister must have an appreciation of how Common Law rules and Equitable principles interact. It is a mistake simply to say that Common Law and Equity have been "fused" because they may be administered in the same court. The Supreme Court Act has not, itself, abolished the distinction between Law and Equity. The preamble to the Act states that it provides for the concurrent administration of Law and Equity in the court. The two doctrines therefore remain quite distinct and separate (something which can, perhaps, be best appreciated in the context of the District Court and the Local Court where, with limited exceptions, only Common Law jurisdiction may be exercised).

Concurrently with the Supreme Court Act was passed the Law Reform (Law and Equity) Act of 1972. By Section 5 the Act provides that all matters in which there was, immediately before the commencement of the Act, or is, any conflict or variance between Equity and Common Law related to the same matter, Equity shall prevail. To the same effect sections 57-62 of the

Supreme Court Act preserve this clear distinction between Equitable principles on the one hand and those upon which they have been essentially founded historically - the Common Law.

A fairly good illustration of the difference in practice between Law and Equity is the decision of Mr Justice Needham in ASA Constructions Pty Ltd v Iwanov [1975] 1 NSWLR 512. There the facts as stated in the head note were as follows:

"The vendor sold certain land to the first purchaser and later sold the same land in another transaction with a second purchaser. Both purchasers sued for specific performance and the suits were heard together. At the hearing the second purchaser conceded that the first purchaser's priority entitled him to specific performance and sought (restricted his claim to) damages".

Mr Justice Needham rejected the defence of laches which had been maintained by the vendor and made an order for specific performance in relation to the first contract. That left the second purchaser's claim for damages. It was plain that claim was for equitable damages as distinct from legal damages; that is, the second purchaser was claiming damages under section 68 of the Supreme Court Act which, in effect, reenacts Lord Cairns' Act in New South Wales. The distinction between Common Law and Equitable damages can be seen from the way Needham J approached the question of the date at which one assesses those damages. He held that legal damages were not available for the reason that at the time of instituting the proceedings the second purchaser was maintaining his entitlement to enforce the contract. Only after the time the proceedings had been instituted did his cause of action for damages for the loss of his bargain become complete.

The question which arose was whether or not in the circumstances damages should be assessed at the date of judgment or at the date of breach. A common Lawyer would instinctively say at the date of breach, that being the guilty party's time of wrong doing. But Equity says that if the purchaser is going to maintain the contract against the vendor then perhaps the relevant date is the date of judgment. In that particular case, Needham J found that according to his view of the matter and on discretionary grounds it was appropriate to determine the damages at the date of breach. Your client will appreciate that the difference may have considerable significance depending upon whether there is a rising market or a falling market.

This question was also adverted to in Madden v Kevereski [1983] 1 NSWLR 305 by the then Chief Judge in Equity.

The assessment of equitable damages is a matter which has nothing to do with Common Law damages. It is a matter for the discretion of the court, the power to award equitable damages being a power to enable the Court to do complete justice as far as equity considers it ought to be done by supplementing with money the equitable remedy or attempting with money to substitute a remedy. The section (section 68 of the Supreme Court Act) is simply not available when damages in the Common Law sense are an adequate remedy, or when a plaintiff has to rely on a Common Law right to damages for breach of contract.

Locus Standi

When you are briefed for the plaintiff or a defendant in Equity, you have to look to see not only that there is an "Equity", but you must also look at an additional matter (namely, whether the

plaintiff has standing) because there are many situations where there is a right which can only be availed of by certain persons.

That really raises the first and most obvious enquiry which you should make when being confronted with instructions to take part in an equity case. A solicitor may put to you that the brief involved is a claim in equity.

It may be that the solicitor is wrong and that when you look at the facts you will find that in reality there is a straight forward claim at Common Law. On the other hand, of course, you may be offered what seems to be a straight forward Common Law brief only to discover that in fact your client has no standing in that jurisdiction.

To illustrate that proposition: If you were asked on behalf of an unregistered mortgagee of land under the Real Property Act 1900 whether he has a right to claim possession against the mortgagor who is in default, what would your answer be? May I suggest that he has no right to bring proceedings since he has no legal title; his only interest in the land is an equitable interest and, thus, his right is not qua the land but qua the mortgagor himself. His right is therefore a right in personam. To translate that into practical terms, he is entitled to bring an action against the defaulting mortgagor for specific performance of their agreement under which the original loan was granted. In other words, he may seek to enforce his agreement with the mortgagor to make his (the mortgagee's) title good at law so as then to pave the way for him to bring an action at law for possession.

Obviously enough, these are very abstract propositions which have no practical application unless and until the facts are clearly sorted out. You may well be provided with a variety of material - both documentary and oral - and asked to advise whether your client has some standing in Equity.

‘Standing' raises very vexed questions. All sorts of answers will be given by lawyers to the question "who has standing to bring these particular proceedings?" depending on whether, by philosophy, they are progressive or conservative. There are some traditional rules. If a private right is being asserted, then the private right must be vested in the plaintiff (the plaintiff must be one of the persons who "owns" that private right); if a public right is being asserted, then the Attorney-General is usually the proper plaintiff, but a private individual can be the plaintiff if the public right particularly affects him. These rules are dealt with in Boyce v Paddington Borough Council [1903] 1 Ch 109. See also Wentworth v Woollahra Municipal Council (1982) 149 CLR 672, where the High Court was concerned with a question of whether or not a relator (in what might be called a public wrong case) could be entitled to equitable damages in addition to those other forms of equitable relief more customarily sought such as an injunction or a declaration. There the wrong complained of was an alleged breach of a regulation under the Local Government Act. Their Honours felt that such a wrong could not entitle a relator to damages. The decision has been the subject of some critical discussion; eg. (1983) 57 ALJ 493 and 571.

It is safe, if you think you might be outside Boyce's case, to apply to the Attorney General to commence proceedings. The convention of the Constitution is that if counsel certify to the Attorney General that right cannot be had unless the Attorney issues his fiat, and the person involved undertakes to pay the Attorney General's costs, then almost always the Attorney General will lend his name to the proceedings. These proceedings are called "Relator Proceedings" and they are entitled, for instance, The Attorney General on Relation of Young v Smith.

However, in more recent times people have tended to sue in their own name and the courts have allowed wider classes of people to sue. The matter of standing was one of the matters which was taken up by the Commonwealth Law Reform Commission in its enquiry into access to the Courts. The High Court has commented on it recently because of the various test cases bought by environmentalists, aboriginal groups and others. The cases in which a person has standing are constantly being expanded. While space does not permit us to go into the substantive law on standing, nevertheless if you are a person commencing proceedings you must consider the question: "Who is the proper plaintiff?". See Australian Conservation Foundation Inc v Commonwealth (1980) 146 CLR 493; Day v Pinglen Pty Ltd (1981) 148 CLR 289: Onus v Alcoa of Australia Ltd (1981) 149 CLR 27; Sydney City Council v Building Owner and Managers Association of Australia Ltd (1985) 2 NSWLR 383. Care should be taken in taking principles from administrative law cases over into pure equity suits: see, for example, Consumers Co-operative Society (Manawatu) Limited v Palmerston North City Council [1984] 1 NZLR 1 at 6-7.

Originating Process

Having established the identity of the proper plaintiff the next question is: Do I start by summons or by statement of claim?

I have no precise statistics as to the number of actions commenced by statement of claim as compared with those commenced by summons. From experience I would hazard an educated guess that the vast majority of Equity proceedings have been brought by summons. By "a vast majority" I would not be surprised if the figures showed that more than ninety percent of cases were so commenced. There are several practical reasons for this preferred approach. Some of those reasons are justifiable. Others are not.

The justifiable ones: there are, and no doubt will continue to be, many cases of considerable urgency where, for example, an injunction may be sought at very short notice. Time alone does not always permit the opportunity to formulate the case in a statement of claim. Indeed time may not even permit the luxury of a summons. Secondly, a party may legitimately desire to bring their antagonist before the court at any early stage and may prefer the "short form" of a summons for that purpose. This may be an admirable objective. Use of the summons procedure frequently results in enforced negotiation at an early stage which brings about a prompt and relatively inexpensive settlement. The summons procedure enables that to be done.

However, as a general rule, wherever there is likely to be any material contest as to the facts in a case it is preferable that the plaintiff should plead it in the form of a statement of claim at the outset. In the long run, by so doing they will save, rather than waste time. The whole object of pleadings is to distil the issues between the parties and where pleadings have been properly drawn both the court and the parties have readily accessible documents to which to refer in order to clarify the real nature of their dispute. As often happens in practice where all that is filed is a summons and a gaggle of affidavits one is left to guess the basis upon which the plaintiff asserts his right to relief and the defendant challenges that right.

In short, one can find that a summons case can run for several days without anyone really knowing what the fight is all about. On the other hand, where you have proper pleadings the issues can be easily discerned.

The Uniform Civil Procedure Rules (in particular r 6.3; formerly Supreme Court Rules Part 4 Rule 2) provide in express terms for those actions which must be commenced by statement of claim. Rule 6.4 (formerly Part 4 Rule 2A) provides for those which must be commenced by summons. So far as the latter is concerned it is simply where there happens not to be any defendant.

Subject to those two rules it is left largely to the discretion of the plaintiff as to which mode of proceedings they elect to pursue. A classic example of a situation in which it may be counterproductive to commence proceedings by summons rather than statement of claim is where undue influence is alleged. It can be almost taken for granted that each and every one of the plaintiff's allegations of undue influence will be the subject of a red hot challenge on the facts. It is usually better for all parties to know what those allegations are at the earliest moment and to know the defendant's response to them.

Pleadings - statement of claim

When preparing or settling a statement of claim you must consider:

(a) whether there is an Equity;

(b) whether the plaintiff has standing;

(c) what is the relief being sought;

(d) whether the elements of the causes of action are properly and completely set out.

Then you must direct your mind to the identity of the defendants. This you must do for two reasons; first, because Equity acts only in personam. Second, because an order in Equity will generally only bind people who are made defendants even though the proceedings involve property rights or other questions which could affect "third parties". Thus you must name, or have representative orders made in respect of, all interests you seek to bind.

I should say something more about possible defendants. Sometimes you may be seeking to bind people who are not yet born, or a large group of people. Equity permits that sometimes, where, for instance, you are construing a Will or a Trust, it may be necessary to bind people who are not yet born but who will take an interest thereunder. On other occasions you may have to bind members of a large unincorporated association. In such cases, you must determine who is the appropriate nominal defendant to be appointed by the court's order in such a way that the court thinks that they should be joined, and you have not joined them, when you get to the hearing the court will adjourn the case until they are joined. It can be very expensive to leave out a necessary or proper party when you are considering drafting a statement of claim. You must direct your mind to the questions of whether the Attorney General is the proper party and whether he/she should be the plaintiff or a defendant.

If you have a charity case then almost always the Attorney General must be involved, either as a plaintiff (as protector of charities) or as a defendant (in case the court finds that there is a general charitable intention).

Most of the problems as to parties are the same in Equity as at Common Law. However there is a special problem which you often find in dealing with Wills and Trusts. It is not uncommon for one of the Trustee Companies to have interests on both sides of the record. Yet, procedurally, you can't possibly have the Perpetual Trustee Company as the Trustee of the Jones Estate as the plaintiff, you also can't have the Perpetual Trustee Company as Trustee of the Smith Estate as the defendant. You have either got to find a co-trustee and put them in as a defendant or, if all else fails, name the General Manager, Secretary Chief Executive of the Trustee Company as one of the Defendants and get a proper representative order. See Perpetual Trustee Co v Attorney General (1937) 54 WN NSW 95.

Preparing A Defence

When you act for a defendant to a statement of claim you must go through the same exercise as you would at Common Law. Everyone has their own system. My system is as follows.

You have before you the statement of claim, and the defendant's instructions to what they said the situation is. Don't accept a brief to draw a defence which merely states "Herewith statement of claim. The last day for filing a defence is next Thursday. Please draw a defence" or a version which gets very close to it, "Herewith statement of claim. The last day for filing a defence is next Friday. Will counsel kindly ring our Mr Smith's secretary if he wishes to see the client in conference". Most of those are very sloppy ways of proceeding. What you are entitled to have is a statement from the client as to what the facts are as to which they rely, then if you think it necessary, you can ask the solicitor for a conference to flesh it out. Don't do the solicitors' work for him. It doesn't help in the long run. It just increases the expense so far as the client is concerned. It is far better to have a statement which you can take away with you at night or on the weekend or whenever you do your pleadings. Assuming you have a proper brief, you look through each of the allegations in the statement of claim and you write in the margin: "A" for admit; "D" for deny; some symbol - I use "Z" because Z's are very easy to make -for do not know and can not admit. You might have other symbols as well, such as "CA" for Confess and Avoid.

You then set out your defence:

1) The defendant denies the allegations and each of the allegations in paragraph 2, 4, 6, 8, 10, 12, 48 and 92 of the statement of claim.

2) the defendant does not admit the allegations or any of the allegations contained in paragraph 1, 3, 5, 7 etc of the statement of claim.

(a) Once these have been stated then move on to say:

3) As to paragraph 9 of the statement of claim the defendant says as follows. (Then put in whatever your confession and avoidance is)

4) Then end up in the traditional way. Direct your mind to the peculiarly Equitable defences, such as "No Equity" laches acquiescence and delay", or "Statute of Fraud or Statute of Limitations. Direct your mind to all those usual Equitable defences before you finish drafting your defence.

Of course, when you are drawing the defence you should also turn your mind to whether you need particulars. Particulars are not usual in Equity, but they are fashionable amongst some of the larger firms of solicitors who delay plaintiffs as long as they possibly can by such manoeuvres. If you find that you are a plaintiff and subject to a particular device, give as many of the particulars as briefly and as quickly as you can and make sure that the defendant puts on a defence. If there is to be a squabble about it, get the squabble up before the court as soon as you can. It is very often the defendants who ask for pages and pages of particulars who are in a situation where they can't win and no matter what reply you give they are going to insist that they need more particulars. The only way to stop that is to go up to the court, and have it determined what particulars they are entitled to.

Former Part 16 Rule 7(3) of the Supreme Court Rules (now see Uniform Civil Procedure Rules r 15.10) made plain (and this rule, of course, is applicable not only to Equity proceedings but to proceedings in any division of the Court) that a defendant is not entitled to any particulars prior to filing their defence unless those particulars are necessary or desirable to enable them to file their defence. The rule stipulates that the court shall not make an order for the provision of particulars before the filing of a defence unless the necessity or desirability to which I have referred is made apparent. What the rule simply means is that if the statement of claim has been properly drawn in the first place a defendant should know merely by reading it precisely what case it is that he is called upon to meet. There shouldn't be any necessity for him, in any circumstance, to require the plaintiff to elaborate that which has already been spelt out. Conversely, if the defendant is in the position of not knowing what case it is that they have to meet - and so is induced to seek particulars - then the question arises, “Is the statement of claim properly drawn?" (or, to use the old Common Law expression, "is it demurrable"). If in fact a defendant finds it impossible to plead to a statement of claim it is more likely than not that the statement of claim is deficient in some material respect, so warranting the defendant to move for it to be struck out.

It follows from these considerations that a robust plaintiff is entitled, if his house is in order (ie. if the statement of claim passes muster), simply to refuse to permit any defendant to malinger (by calling for particulars that the defendants neither need nor are entitled to). That is, they may insist on the defence within time, failing which they will move for judgment. On the other hand, a defendant should be quick to seize on any inadequacy that may be apparent in the plaintiffs pleading. But counsel should advise against a defendant prematurely taking out a motion to strike out a plaintiff’s statement of claim which might appear to be deficient.

The Court has often expressed it's reluctance to strike out a pleading, in an absolute fashion, so as to preclude a litigant from maintaining his case. In other words, it will readily permit them to amend without penalty (save as to costs). The sensible course, if you see a flaw in your opponent's pleading, is to draw it to their attention and invite them to attend. If they refuse to do so then by all means move to strike them out.

The matter of particulars is further dealt with in these notes under the heading "Interlocutory Applications".

Other Pleading Considerations

Direct your mind also to whether or not there should be a cross claim. Section 63 of the Supreme Court Act requires the court, as far as it can, to deal with all matters in dispute

between the parties in the one set of proceedings. Thus, if there is a statement of claim in a vendor - purchaser matter seeking performance on the part of a purchaser and the vendor defendant wishes to allege that the contracts have already been terminated because of some default on behalf of the purchaser, and the purchaser lodges a caveat on the title, then there must be a cross claim. The cross claim must seek removal of the caveat because the court has clearly said that to deal with all matters between parties at the same time it must also deal with the question as to whether the caveat remains on the title.

Section 63 also means that you must ask for all the relief that is necessary in the one proceedings. So in a vendor and purchaser case, it is at least in theory impossible to ask for a mere declaration - you must either seek an order for specific performance or an order for damages. You cannot merely ask for declarations as to the state of the contract. I say “in theory" because very often a single Judge in Equity will say to counsel, "There is no problem about the Neeta Phillips Case is there?". See.Neeta (Epping) Pty Limited v Phillips (1974) 131 CLR 286.

Amendment Of Pleadings

Experience shows that in most equity proceedings amended pleadings are filed somewhere along the line, whether before or after the close of pleadings.

This should not be so because if pleadings are well drawn in the first place they do not need amendments. However, quite often further facts appear as you go along or the brief goes to different counsel who approach the matter in some new way. So it is not at all unusual for pleadings to be amended. You may find that pleadings are sometimes amended after several days of a final hearing. Do not be backward in seeking an amendment if you think it will help your client's case. The usual order is one allowing for an amendment and ordering the person amending to pay the costs thrown away be reason of the amendment.

This order will be made unless the person who is opposing the amendment can show that the other side has deliberately set his course on some other line and it would be inequitable for him to be allowed to change that line or, alternatively, such other prejudice will be suffered as to make it inequitable to allow the amendment. Otherwise, although amendments should not take place, do not be backward in asking for them.

It should be clearly understood that if at any time during the course of proceedings (that is to say up to the very moment the Judge either delivers the judgment or reserves for that purpose) it becomes apparent that there is some point that does not emerge from the pleadings but could have a material impact on the end result then the person to whom the point appeals should give careful consideration, no matter how late in the day, to the strength of the point and to the relative costs that may be occasioned by any adjournment following an amendment if they seek one. No one should be afraid to ask for an amendment if failure to do so may preclude one's client from maintaining a powerful argument and indeed a successful suit.

It is particularly distressing to Judges, so I am told, to hint constantly for 3 or 4 days that counsel should amend pleadings and for the hint not to be taken.

There are some occasions where you have thought ahead of the Judge and know that their initial suggestion is wrong, and in a couple of days' time they will realise that, in which case do

not just take the hint to amend. However, in a normal case, if the Judge suggests to you that you should amend to deal with A or B, then it is usually wise to accept this invitation or, alternatively, seriously consider the invitation even if it means an adjournment because the costs of adjournment are cheap compared with losing the whole case.

If an amendment comes up before hearing, the way in which you go about it is: if the pleadings have not closed you can amend pursuant to Part 20 Rule 2 or if the pleadings have closed you can amend by consent order under Part 20 Rule 1. You get your solicitor to ask the other side whether they consent to the amendment. If consent is not forthcoming, you take out a motion for leave to amend and that motion, in due course, will find itself before the Registrar.

Proceeding By Summons

The vast majority of equity proceedings as a matter of practice are, nowadays instituted by summons. That practice has certain undesirable features for the reasons already discussed, focusing mainly on the non-definition of real issues in proceedings.

Under the Uniform Civil Procedure Rules there is one Approved Form of Summons, Form 3. Under Uniform Civil Procedure Rules r 6.15 all summonses must now specify a “return date”.

A “return date” is a date which the Registry notes on the summons document as being the date on which the matter is listed before the Registrar in Equity.

There were two forms of summonses provided by the Supreme Court Rules, the essential difference between the two being that one has what is known as a return date and the other has not. The 2 forms of summons were Form 6 (with a return date) and Form 7 (without a return date).

Since September 1990, the court had directed (Practice Note 63) that where the summons procedure is invoked a summons without a return date should ordinarily be used.

Exceptions to this (where a summons with a return date was used) include:

- when the proceedings involve a company matter which needs to be dealt with quickly (such as winding up a company) and

- when the Plaintiff seeks an early listing before the court and intends to be ready to proceed at the time appointed for interlocutory or final relief.

In the case of a summons without a return date, Practice Note 63 provided an automatic timetable for the filing and serving of affidavits by each party. At the end of the prescribed timetable period (or earlier if varied by agreement) either party could arrange for the matter to be listed before the Registrar by filing a notice of ‘Appointment for Hearing’ (Form 8) together with a brief affidavit noting what affidavits have been filed and served by each party.

Return Of A Summons

In the case of a summons with a return date (or a summons without a return date where a notice of Appointment for Hearing had been filed) the matter is listed before the Registrar. The

Registrar sits on 4 days a week (the exception is Wednesday) and has 2 lists. A general 'Directions List' at 9:30am and a 'Companies List' at 11:00am on each sitting day.

The return date allocated by the Registry will vary depending on various matters. The earliest date to be allocated will allow for the fact that a defendant is entitled to 5 clear days after the summons is served before the matter is listed before the court. If the plaintiff wishes to bring the matter before the court quicker than that the plaintiff must approach the Duty Judge and satisfy the judge that there is an appropriate reason to abridge that usual time. In other cases, such as winding up cases the return date will be sufficiently far ahead to enable the plaintiff time to comply with the many requirements of the matter such as advertising the summons and lodging prescribed forms.

The Registrar's function in their lists is basically twofold. The Registrar at the start of their list will firstly deal with matters in which a party seeks to have a referral to a judge (e.g. the Duty Judge or the Company Judge) or the Duty Associate Judge (formerly Master) to obtain some form of relief within their respective jurisdictions. Whoever seeks a referral will need to be ready to satisfy the Registrar that the referral is appropriate. This requires addressing matters such as the urgency of the matter, the likely hearing time and whether all documentation to be relied upon or required by the court rules has been prepared and made available. The party may independently approach the Duty Judge (taking upon itself such, if any, criticism as the Judge may make arising from the failure to submit to directions or other order proposed by the Registrar).

Secondly, the Registrar will call through the list to give relief which the Registrar can give (as to which see the Delegations to Registrars under the Civil Procedure Act 2005 – formerly Schedule E of the Supreme Court Rules) or directions.

When all affidavit evidence has been filed and any prescribed notices under the rules have been served the Registrar will place the matter into the appropriate Hearing List (e.g. the General List, the Short Notice List or the Associate Judges' Callover List) for cases to be heard by a judge or Associate Judge. Where further directions are necessary for the completion of interlocutory steps before the matter is ready to be placed in a Hearing List it is customary and indeed proper for counsel to set out the directions sought in a document headed 'Short Minutes of Order'. Pro-forma documents of short minutes of order and documents to place the matter into an appropriate Hearing List are available at the Bar Table.

Evidence

Proceedings commenced by summons usually proceed on affidavit evidence. The threshold proposition to be borne in mind in relation to affidavits is that they provide a convenient method by which the evidence in chief of all the relevant witnesses of the parties to proceedings may be adduced.

The feeling is around, I am sure, that because something is started by summons, somehow or other it is more informal than proceedings commenced by statement of claim. It is in one sense, in that the former Part 36 Rule 4 of the Supreme Court Rules allowed hearsay evidence to be adduced when you have not got a trial by statement of claim. But judges are reluctant to allow evidence on information and belief on a final hearing. Section 75 of the Evidence Act 1995 allows hearsay evidence in an interlocutory hearing if evidence is adduced of the source. Even

when you are using Part 36 Rule 4 or s.75 of the Evidence Act you must state the source of your information (usually the person who gave it to you) and the fact of your belief in the information. The accepted way of dealing with this is to say: "I am informed by Mary Smith, a partner in the firm of solicitors whom I have retained, and I verily believe that .....

In fact, Mr Justice Powell often says that all firms of solicitors should have two clerks - an informing clerk and a believing clerk - and as long as they have the two of them they can make an affidavit on information and belief that comes within Part 36 Rule 4. However, you will be amazed just how many people do not state the identity of the person who provided their information or, alternatively, the fact of their belief. You must have both, the information and the belief, to come within Part 36 Rule 4.

With that exception, the evidentiary rules are the same whether you proceed by summons with affidavits or by statement of claim with oral evidence. In an affidavit the first person should be used for conversation. Opinion evidence is as much taboo in an affidavit as it is in oral evidence. Hearsay, subject to s.75 of the Evidence Act, is as much objectionable in an affidavit as it is in oral evidence. When you are drafting an affidavit, you must be very careful to put the evidence in admissible form. Unfortunately, many people seem to think that all you have to do in an affidavit is to state that you are a party to the proceedings and then set out a tale of woe, admitting nothing, on the basis that somehow or other the Judge will sort it all out - the relevant from the irrelevant, the meaningful from the non-meaningful. However, the way affidavits are to be drawn is in concise numbered paragraphs setting out only admissible evidence.

Where direct evidence is available do not resort to hearsay evidence, for the simple reason that direct evidence has more probity. It is beyond the scope of this lecture for me to endeavour to embark on any discourse on the law of evidence but a few comments may be made which may be of assistance to you. First and foremost, a person is only capable of giving evidence on a subject if the subject matter is the result of their perception via any one of the five senses - I saw, I heard, I touched, I smelt, I tasted. It is rare indeed for any of the latter three to be the subject of evidence, but for the first two - I saw, I heard, are the qualification of a witness (that is to say other than an expert witness). Incidentally, someone can of course say what they heard themselves say, provided someone (who was interested) heard it (or was perceived to do so). It is of no assistance to the Court for. a witness to say either orally or in an affidavit, "on such and such a day, I agreed to buy the defendant's horse", because that of course is the very conclusion that the Court is being invited by that party to reach. They may say, “I had a conversation with the defendant on such and such a day during which I said “.....” and he/she said “.....”. Direct evidence of that kind is the only acceptable evidence and anything that falls short of it will be rejected as the subject of objection. I mention those matters from the viewpoint of the adducing party.

I turn for a moment to the aspect of the objecting party. When an affidavit is being read, you object to it in much the same way as you object to material in oral evidence. Some Judges, when your deponent says, "I read the affidavit of Mary Smith, sworn 1 July 1986, say, "Mr Jones, have you got any objections to any part of this affidavit?", and you say "yes your Honour, I object to paragraphs 3, 27, 49 and 58,” and the Judge says, "well I will read it to myself and when I come to those paragraphs I will rule on them". Other Judges like the affidavit to be read and when the reader is coming to paragraph 3 and the other counsel wants to object, just before they get to the objectionable bit, counsel jumps to their feet and says, "your Honour, I object to the second sentence of paragraph 3 (or as the case may be)".

When an objection is taken Judges behave in different ways. Some Judges rule formally. In other words, if something is objectionable they exclude it; if it is not objectionable they admit it. Other Judges say something like this: "Mr Jones you have a perfectly proper objection. I will exclude that material if you insist on it, but just let me ask Mr Smith something", and then says to the person who filed the affidavit, "Mr Smith, Mr Jones has taken a perfectly proper objection. I do not suppose you could press that, and I suppose you will be asking for an adjournment so that you could cure it, but I suppose I would have to give it to you on the basis that Mr Jones' client pays your costs of the adjournment, but just a minute I will see if Mr Jones still presses his objection", and you are in a sort of blackmail situation - you either have to give up your perfectly valid technical objection or alternatively pay the costs of the adjournment. If you are faced with that situation, you usually give in, unless you feel that your technical objection really is worth pressing. However, there are occasions where, although it may appear a technical objection; it is not really - it is vital to the whole proceedings - in which case you press the objection and sometimes the Judge will find some other solution, because what they are really trying to do is to stop the trial being adjourned through some technical objection. Other Judges will fain ill temper and say, "Oh come off it Mr Jones, have you given your deponent notice of this technical objection?" and if you say, "No your Honour", he will say "Why ever not?". Of course you have absolutely no obligation to notify your deponent of any objection you are going to take. However, if you say, Because I am not bound to do it", he will say "Oh Mr Jones! I am here to do justice and right .....etc .....etc and so they try to keep the trial on the rails. Just be aware that, when you take objections, sometimes you will get a ruling according to Hoyle, other times you will get involved in tactics; remember that sort of thing is going to happen. Usually if a Judge can see that you have some legitimate purpose in your objection, and are not just being difficult for the sake of being difficult, you should be happy.

In summary, do not object to evidence simply because it transgresses the rules of evidence and for no other reason. If there is a matter in an affidavit which is not really in dispute but which is expressed in a form which is objectionable, do not object to it. You gain no points from a Judge by taking capricious objections which really lead nowhere other than to waste the Court's time. Indeed, many a case has been lost by doing so. An objection to the form of an affidavit makes your deponent call a witness who is so transparently honest that the witness wins the case for him!

You should read the article by Mr Justice Bryson on affidavits in (1985) 2 Australian Bar Review 250.

One of the advantages of a trial on affidavits is that one is on notice as to the evidentiary strength of one's opponent's case. In the ordinary course of events if evidence is given orally one often does not know just which witnesses the other side is going to call, what they are going to say and how convincing or persuasive they are going to be. Indeed, one cannot ever be sure as to how one's own witnesses will live up their proofs. One at least knows in a case commenced by summons (with affidavits) who the witnesses are and what they are proposing to say. That also gives the adversary the opportunity to consider at leisure the admissibility of the evidence, as it were in advance.

One can pour over one's opponents affidavits and critically examine whether any crucial parts of them may be inadmissible and prepare a detailed argument as to why they are inadmissible well in advance.

It should be borne in mind that, of course, evidence is a discipline all of its own. There is a welter of authority on various aspects of what evidence can be admitted and what cannot. Do not assume that Judges will be au fait with all the case law (to the last letter) on the law of evidence. Generally, they are well aware of the principles more so than most counsel. But you should not assume that they are infallible. The odd Judge will think, or even believe, that he/she is. That is the best evidence of error. May I offer some references on a few typical questions of admissibility which may be vital in a given case and may warrant your having these references at hand;

(a) On the admissibility of pre-contractual correspondence and other dialogue: Prenn v Simmons [1971] 1 WLR 1381; Reardon Smith Line v Yngvar Hanson Tengen [1976] 1 WLR 989. A careful study of Lord Wilberforce's speeches in both cases will be justified.

(b) On the authority of the company's employee to commit that company to a given course of action or to make admissions on its behalf; Fraser Henleins Ply Limited v Cody (1945) 70 CLR 100.

On the admissibility of a given practice: By way of illustration may I offer this example: Assume that in a probate case the issue is whether or not the testator was aware of what he was doing at the time I signed their Will; the solicitor who drew the Will cannot recall whether or not in a particular case they read it to the testator before the latter signed it but they wish to say that they think they must have done so because that was their invariable practice: Is the evidence admissible? See Connor v Blacktown District Hospital [1971] 1 NSWLR 713.

You may well have involved a number of devious arguments to support objections to your opponent's affidavit. Be prepared for your opponent having done likewise. It may be that you will not have all the authorities at hand to support the admissibility of your own evidence. But when preparing for the hearing of a case on affidavit critically examine your own affidavits for their weaknesses as well as your opponent's for theirs.

There are disadvantages of a hearing on affidavit of which you should be aware. The first is that witnesses are not given the opportunity to "blood" themselves, as it were, in their evidence in chief. For 99% of the people who are invited to go into the witness box it is a novel and daunting experience. If they are called to give their evidence (in chief) orally it gives them an opportunity to familiarise themselves with their surroundings, strange as they may be, to the approach of question and answer, to the position of the Judge and so on. Having given their evidence in chief for 5 minutes or 30 minutes, or an hour, or however long it takes, -by the time they have to face cross examination, they have at least become somewhat familiar with their environment.

In a case on affidavits they do not have that opportunity. They are put into the witness box, assuming of course that they have been given notice to attend for cross-examination, and they are asked by their own counsel, 'Is your name John Smith? Do you reside at such and such? You are an engineer by occupation? Did you swear an affidavit in these proceedings?", and that is the sum total of that witness' evidence in chief orally. They are then confronted straight away with a full frontal assault. You should alert witnesses to that prospect. You should tell them that they should concentrate on questions that are put to them. You should tell them not to answer any question that is put to them unless and until they are fully conversant with what the question means. You should also tell them to be brief and to the point in their answer. Ever so much more so should that advice be given where the case is to proceed on affidavit and they will be thrown into the lion's den without any chance to acquaint themselves with their circumstances.

The second disadvantage of a hearing on affidavits is that affidavits are rarely prepared using the witness' own language. They are prepared by lawyers. Lawyers tend to use their own phraseology. Take care when settling affidavits to avoid any undue use of formality in language. If you are calling - and I do not mean this expression offensively -an ill educated builder's labourer then you should not use (in his evidence in chief) lawyer's tags such as "hereinafter called the company", because the witness simply would not know what that phrase meant. Try to formulate the affidavit so far as it can be done in the witness' own words. Make sure of course that before they are called to be cross-examined they are familiar with their affidavit. Indeed, make sure, may I emphasise, that before they swear it, they are familiar with it and agree with every word of it.

If you are in a situation where somebody else has drawn the affidavits or you come late into the brief, and some part of the affidavit is ruled out on a matter of form, never feel backward in asking for leave to call oral evidence to supplement the affidavit. Mr Justice Rath never allowed supplementary oral evidence to be given except where there had been a technical objection to an affidavit, in which case even he allowed it. Several of the present Judges in the Equity Division take the same view. The other Judges are a little more free and easy in allowing oral evidence to be led. You should ascertain the practice of the Judge before whom the matter is listed, but beware in case your proceedings are transferred to another Judge.

Every now and then a sly opponent will not read one of their affidavits. If that happens and it is an affidavit by a party, you may read part of it yourself as an admission against them. If it is an affidavit by a non-party, you can read it, but, if you do read it, it may be that your deponent will be able to cross examine the deponent on the affidavit. Beware of that risk.

It is a nice point as to whether or not you should read an affidavit of an opposing party. You may tender it as an exhibit in the, proceedings, but nothing turns on that. The fact that you read it or tender it does not mean that you are calling the party as a witness rendering them liable to be cross-examined by their own counsel.

The Court practice as to whether affidavits are filed in the Registry or handed up in court has varied over time. Currently the Court Rules require that the originals of most affidavits not be filed in the Registry. Sometimes affidavits filed in the Registry are ‘lost in the system’. Accordingly, it is prudent to have a spare ‘clean copy’ of a filed affidavit available in court to hand up to the Judge in case the affidavit that you wish to read is not in the court file.

Hearing On Statement Of Claim Proceedings

I should make reference to the way in which an equity case commenced otherwise than by summons (that is to say an equity case commenced by Statement of Claim) proceeds at the hearing. First there are, in all likelihood, no affidavits on the file. Certainly, there should not be any affidavits on the file unless, perhaps, there has been an interlocutory application in the proceedings.

The plaintiff, by their counsel, briefly opens the case by addressing the Judge on the contents of the pleadings and the issues that arise from it. They may of course, and invariably do, make reference to the defences that the defendant may raise in their defence, and, if there is a cross-claim on the file, they will almost invariably draw the Judge's attention to that and to the

relevant factual and legal issues that arise. Having outlined the nature of the case they may give to the Judge an outline of the evidence that they propose to call in the Equity Court. That is a relatively rare occurrence. Ordinarily, having opened the case, one simply proceeds to call one's first witness, second, and so on. In other words, one does not have that common law overtone of a jury address – “I will call so and so, who will prove to you .....,” “I will call Mr so and so who will prove the following .....”. In the Equity Court all that is necessary in the opening of a case is to outline in essence what are the matters in dispute between the parties both factually and legally. That is not to say, however, that one cannot take time over an opening. Indeed, it may well be very profitable to give the Judge a detailed outline of the sort of evidence that will be adduced. In that regard I do not mean to suggest that you would say – “I will be calling Mr Smith who will say this...". It may be appropriate, however, to make reference to documentary material that has emerged, and that might ultimately be expected to find its way into evidence.

A lengthy opening is normally only to be found in a lengthy case. In one case that was set down to proceed for 5 weeks, Hughes QC opened for a whole day. The opening was so compelling as to bring about a settlement over the ensuing weekend. The defence simply surrendered (it "flew the white flag") on the Monday morning.

After the opening the Plaintiff simply calls their witnesses and takes from them their evidence in chief in the ordinary manner. Each witness is of course susceptible to cross-examination and may be re-examined again in the usual fashion.

When the plaintiff’s case is closed the defendant goes through the same process. They may decide to give the Judge a brief outline of the defence they intend to maintain to the extent to which the plaintiff's counsel may not have already done so. They may wish to correct something that the plaintiff's counsel has said. However, if they elects to open they invariably do so in a fairly brief fashion and, then, proceed to call their witnesses to adduce their evidence in chief, let them be cross-examined and, then, re examine them.

At the end of the defendant's evidence the plaintiff is, of course, at liberty to adduce evidence in reply and the order of events is much as I have described them.

The final addresses are taken almost invariably in the following sequence: plaintiff, defendant, plaintiff in reply. Note carefully that word "almost”. The Judge may consider that in the particular case they prefer to hear the defendant first. Be prepared for this. However, if Counsel have told the Judge in advance that they have agreed that the Judge would best be assisted by their addresses being presented in a particular order, the Judge is unlikely to "rock the boat.

Those special rules (as to who goes first) which apply in the Common Law Division have no place in Equity. An Equity Judge will be concerned to ensure that each party has a full opportunity not only to advance their own case but to comment critically on their opponent's case. It has been said that the Equity Division is the "the whispering Division" and that Equity counsel are incapable of robust cross-examination. That is not necessarily the case. The Equity Division is as much about flesh and blood as the Common Law Division.

Hearing Of Summons Cases

Now we will deal with the proceedings on summonses generally.

A summons will usually be returnable before the Registrar's Court at 9.30am. It will in due course be processed into one of the Equity Division Hearing Lists. It is not the purpose of this paper to talk about how the Registrar's list works or the Associate Judge's list works, but try to be very considerate when you are appearing in lists like that where you have a large number of matters listed and a lot of practitioners waiting around after you to deal with their matters. Do not spend a long time doing your mention and hold everybody else up.

Endeavour, as far as possible, to work out in advance with your deponent what is to happen in your matter so that it can be quickly and expeditiously disposed of. That will assist the due administration of the Court's business as well as paying due courtesy to your fellow members of the profession.

When the summons comes on for hearing the way to approach it is to give your opponent notice that any deponents of affidavits that you want to cross-examine should be available for cross-examination. Notice is usually given in advance of the hearing by solicitor's letter.

When the case is called on, you tell the Judge the date of filing of the summons and the general nature of the summons. If you do not know the date the summons was filed because it is not in your brief ask the Judge's Associate to check the Court files - make sure that you have got the date. Some Judges pre-read affidavits: some like having them read aloud in Court. Find out what is the practice of the Judge before whom you are to appear.

Thus you might say, "Your Honour, the summons was filed on 6 April 1998 and it seeks specific performance of a contract for the sale and purchase of land at Narrabeen. My client is the vendor, the defendant is the purchaser", giving a brief resume of what the case is about. Then you might say, "Your Honour, the first affidavit is the affidavit of the plaintiff, John Smith, sworn on 1 April 1998". You might then read that affidavit, reading it out aloud until a Judge says, "yes Mr Jones, I have read that affidavit", in which case you go onto the next one. Watch the Judge because they are going to be writing as you say, "I read the affidavit of John Smith, 1 April 1998". They have to pick the affidavit out of the Court file, look at it and write down in a notebook, "Jones reads affidavit of John Smith, 1 April 1998. So watch the Judge write before you start to read.

If you are led, many Silk like their junior counsel to read the affidavits. And if junior counsel is reading the affidavits some Judges ask him to argue questions of admissibility as the affidavit is read. Your leader can bail you out, but many in fact do not do so, trusting in your ability. So, if you are junior to a Silk in an equity summons do not think you are simply going to sit down all day and simply hand your Silk books.

If you read an affidavit you may have to argue points of admissibility of evidence. Check with your Silk before you get into the Court room. Find out if they are one of those who like to have juniors read the affidavits. Some judges read affidavits to themselves either before they come onto the bench or whilst sitting. Again, know your Judge because your timing as to when you will need to have your Witnesses at Court will be greatly affected by a Judge reading the affidavits himself.

After all the affidavits are read, and documents tendered, the cross-examination takes place. Before the cross-examination takes place, the person who reads the affidavit calls the witness into the box and says: (1) "Is your full name Anne Jillian Smith?" (2) "Do you live at 14 Toorak Road, Surry Hills?" (3) "Are you a secretary by occupation?" (4) "Have you sworn an affidavit in

these proceedings dated 1 April 1998?" Sometimes the deponent is asked "...and do you tell His/Her Honour that what is in that affidavit is true and correct?" Such a question is objectionable: see AWA Ltd v Radio 3XY Pty Ltd (unreported McLelland J 21 June 1991).

Every now and again, a client or the witness says to you in your chambers. "Well I have checked through my records and I have found that I swore in paragraph 13 of my affidavit that I said "on 3 March"... I have checked through my diary and I have found that it was really the 7th". If someone says that to you, it is appropriate to address the error when the witness is sworn and before cross-examination commences. For example, "Now, do you wish to tell His/Her Honour something about paragraph 13?"; answer, "well your Honour, I thought it was correct at the time when I swore the affidavit, but I checked my diary and I can see that the conversation I thought was on the 3rd March was really on the 7th".

The cross-examination on an affidavit takes place in much the same way as it does on oral evidence. You should not assume, however, that cross-examination of deponents is a God-given right to you. Some Judges just will not allow it. Mr Justice Rath, in an interlocutory matter, considered that cross-examination of deponents was something within his discretion and, seeing that all he had to determine was whether there was a serious question to be tried, he did not have to evaluate questions of credibility - there was no reason why he should listen to cross-examination. Most Judges do permit cross-examination of all deponents but, remember, it is not necessarily so.

Urgent Applications

The Equity Judges usually allot themselves 2 week periods in which to act as "Duty Judge". The name of the Duty Judge will be known to all barristers' clerks and is posted on the notice board next to the security desk on Level 3 of the Supreme Court. Whilst the Duty Judge is available 24 hours a day, no application should be made to them otherwise than between the hours of 10.00am and 4.00pm unless it is in a matter which is so urgent that it cannot wait until ordinary Court hours.

The Duty Judge exists for the purpose of giving immediate relief in urgent cases and the daily list will probably involve some six or more cases in that category. It is thus not usually feasible for them to be able to spend a whole day on one matter. However, on occasions, other Judges have settlements and assist the Duty Judge. Counsel should always be fully prepared to deal with a matter in the Duty Judge list at length because it suits the clients and the Court to get rid of disputes quickly and, indeed, it usually suits counsel not to have to work up a case over and over again.

In theory the Court is open 24 hours a day. It may happen that you are asked to get an injunction at 6.00pm, 7.00pm, 11.00pm, midnight, 2.00am etc. This can be done. What you do is to endeavour to find the Duty Judge by going up to Court or by telephoning them. If you cannot find them see if you can find any other Judge in the Equity Division still working in the Court Building. You can usually find at least one there until 7.00pm. If you cannot find a Judge in the Court Building then you ring the Duty Judge at their home and, by arrangement, you go to see them at their home. They will usually have at home sufficient letterhead and a seal of the Court to be able to grant you an injunction there.

Never feel backward in ringing up the Duty Judge at their home. That is what they are there for. However, you can be quite sure that if you make a frivolous application to a Duty Judge at their

home at midnight then relations between you may not be so cordial in the future. One finds out who the Duty Judge is by looking in the Court List (also in the Sydney Morning Herald) which lists the name of the Duty Judge each day. The Judges can usually be found by just looking in the telephone book. Most of them have their addresses there. If a Judge's address is not there then the thing to do is to ring up someone who knows the Judge. Usually some Silk will know where he/she lives. By a series of telephone calls you can usually find out where he/she is.

Interlocutory Applications (most commonly made in Equity)

Directions Hearings

Part 26 of the Supreme Court Rules (now Part 2 of the Uniform Civil Procedure Rules) was amended in 1984 to widen the scope of pre-trial directions hearings. Whenever a party or the Court considers it necessary, proceedings may be placed in the list and directions given to endeavour to get the trial on as quickly and cheaply as possible.

If proceedings are listed for directions counsel should have a preliminary discussion amongst themselves to try to settle a timetable for pleadings and/or affidavits and to give consideration as to whether discovery and interrogatories are necessary or advisable. Draft minutes of directions should be worked out so that the Court only has to deal with matters of difference. Not only does this save Court time but, with a 9.30am directions hearing, counsel will be able to get to their 10.00am hearing without fuss.

Motions for expedition

These are usually made by Notice of Motion. In the Equity Division (unlike in the Common Law Division) a motion for expedition must be heard by a Judge where the relief in the proceedings seeks order that can only be made by a Judge). Such motions are returnable on a Friday and are heard by the Expedition Judge. A Notice of Motion for expedition should usually be supported by an affidavit giving a brief resume of the case and the reasons for urgency. Counsel who appear on the motion should be in a position to answer the Judge's questions about the case and to give him a realistic estimate of the length of the hearing. The Judge may conduct a readiness hearing as they hear the motion and may either give a hearing date or refer the file to the Registrar to fix a date. Some Judges have been known to hear and determine proceedings forthwith. Another possibility is that the Judge will refer the case to the Registrar or a Associate Judge to conduct a readiness hearing.

While the Court ordinarily seeks to meet the convenience of the counsel in fixing a hearing date, when proceedings have been expedited it may take the view that a hearing date should be fixed without regard to the convenience of counsel. In any event, if there are any special limitations on the availability of parties or witnesses, counsel should bring them to the attention of the Judge who orders expedition or, at least, the Judge (or Registrar) who fixes the hearing date. It is prudent, but not always necessary, to have a short affidavit setting out the limitations, and the reasons for limitations, on the availability of parties or witnesses - particularly in cases involving great urgency or where the Court may otherwise be inclined "peremptorily" to fix a hearing date.

Applications for Particulars

A letter should first be sent to your opponent noting the particulars you seek. If there is no satisfactory response, a notice of motion should be filed and served so as to enable a ruling on any dispute. There is a positive distinction between what are proper particulars and what are matters of evidence. For example, if a plaintiff is suing on an oral contract it is proper to ask them by way of a request for particulars, who was present when the relevant conversation or conversations took place, when and where that conversation did take place, and the substance of what is said to have been said. It is not, however, permissible to ask whether the opposing party had a contemporaneous note or did any other thing that might have been probative of their version of the events.

Order in Default of Pleading

The normal procedure, here again, is to have your solicitor write a warning letter to your opponent before an application is made to the Court. The letter should say, in effect "You have not put on a pleading. If you do not file and serve a pleading within a further 14 days we will move the Court for final orders". If there is no response to a warning letter you may take out a notice of motion for orders in accordance with the statement of claim, supported by an affidavit, annexing the letter and evidence to establish what if any response has been given and evidence to the effect that no defence has been filed.

A default order is not made as a matter of course. If the Court can see from the defences filed by other defendants that there is a real question as to whether the plaintiff is entitled to relief it may feel disinclined to grant an order or judgment in default of pleadings. See Part 16 of the Uniform Civil Procedure Rules (formerly Part 17 of the Supreme Court Rules) and the annotations thereto to Ritchie.

The existence of procedures for orders in default of pleading (Uniform Civil Procedure Rules Part 16) and for orders admissions (Uniform Civil Procedure Rules Part 17, formerly Supreme Court Rules Part 18) point out how vital it is to plead correctly. A properly drawn pleading should result in a Judge saying, if the other side do not file a defence, that every material allegation is deemed to have been admitted so that the plaintiff is entitled to succeed without reference to any other material.

If you are able to move for an order on admissions, do so; do not try to prove the case as well. Some counsel have attempted to do so, their clients have been disbelieved and there has been a verdict for the other party.

The rules lay down timetables within which certain steps should be taken. In addition to that, invariably in a case commenced by statement of claim the Court will, if the parties ask it, give directions for those procedural steps to be completed by certain given dates. Those directions are more often honoured in the breach than in the observance. In practice the Court takes a somewhat resigned but liberal attitude towards parties who fall into arrears. I am not suggesting that you should make a habit of it, but I am suggesting that if you are behind in complying with a timetable your default is unlikely to be fatal unless it has been so persistent as to stretch the patience of the Court beyond tolerance. To put that proposition in the obverse, if you are not in default but your opponent is, do not feel as though you will readily get a judgment against your opponent for their sins; you will have to demonstrate that the default has been either contumacious or so persistent as to be utterly unacceptable.

Summary Judgment

A plaintiff may apply for summary judgment under Uniform Civil Procedure Rules r 13.1 (formerly Division 1 of Part 13 of the Supreme Court Rules). The division does not, in terms, apply only to proceedings commenced by statement of claim, in practice, its application is so limited. In proceedings commenced by summons a plaintiff more usually seeks a final hearing on affidavits filed in the proceedings generally than summary judgment as such.

An application for summary judgment should comply with the formal requirement of r 13.1 that there be evidence of the facts on which the plaintiffs claim is based and evidence by the plaintiff or some responsible person of a belief that the defendant has no defence to the claim.

An application for summary judgment is not uncommonly made in the hope that, if it fails, expedition of the final hearing might nevertheless be ordered. At least two problems should be considered before you adopt such a tactic. The first is that it may backfire. Costs and time spent on a summary judgment application might deplete the plaintiff's financial resources, expose them to cross-examination, delay preparation for a final hearing and fail to interest the Court in the prospect of an expedited hearing. The second problem (at least in the Equity Division) is that whereas a Associate Judge may (and usually does) hear an application for summary judgment they are not usually at liberty to expedite proceedings. In the Equity Division (unlike the Common Law Division) questions of expedition where the relief in the proceeding seeks orders that can only be made by a Judge are dealt with by the Judges to the exclusion of Associate Judge.

Discovery and Interrogatories

The Court Rules dealing with Discovery & Inspection and Interrogatories are set out in Parts 21 and 22 of the Uniform Civil Procedure Rules (formerly Parts 23 & 24 of the Supreme Court Rules). For proceedings commenced after 1 October 1996, new rules have the effect that general discovery is no longer available as of right by notice. Now a more limited entitlement is given. This is invoked by the party seeking discovery nominating for inspection documents referred to in an originating process, pleading, affidavit or witness statement or nominating a limited number of other specific relevant documents – see r 21.10. For any additional entitlement application may be made to the court for an order under r 21.2. In many cases you should ask for discovery; and you should ensure that your solicitor inspects the documents produced on discovery and sends you a photocopy of any documents they think are useful in the case. Counsel should not get involved with the inspection of documents except in very rare cases.

The procedures involved in discovery and interrogatories can be useful weapons. They can also be extremely wasteful. Before determining that a given case warrants the cost, time and trouble that these procedures necessarily involve, careful consideration should be given to the objective that is likely to be achieved by having appropriate orders made. If you have a case where there is a large volume of documents, prima facie discovery should be ordered. But where, for example, the issue in the case is essentially what was said in a given series of conversations and the documents are all a matter of public record it may be that discovery is a somewhat hollow and pointless exercise. Similarly, interrogatories can be useful but they have to be treated with caution. I can do no better than to read a short passage from the judgment of Mr Justice Myers in the American Flange case on this topic as to what are the relevant principles dealing with the administration of interrogatories in Equity. The case has as its full title American

Flange and Manufacturing Company Inc -v Rheem Australia Pty Limited (No.2) [1965] NSWR 193. It may be remembered as a marathon case at least for its day. At p.195 His Honour said this:

"Before dealing with interrogatories there are certain principles which should be . stated. The rules of this Court are virtually silent as to the principles upon which interrogatories may be allowed; and in pursuance of Rule 6 of the Equity Rules the English practice in this respect has always been held applicable and has always been applied in New South Wales. The general principle was stated in Halsbury: "Interrogatories are in the discretion of the Court and will only be allowed when they are necessary for disposing fairly of the cause or matter or for saving costs." They must of course be limited to facts that will support the case of the interrogating party or cut down the case of his opponent. There are a number of decisions; which define with reasonable accuracy the permissible scope of interrogatories.

In Marriott v Chamberlain 17 QBD 154 at 163 Lord Esher MR said: "The law with regard to interrogatories is now very sweeping. It is not permissible to ask the names of persons merely as being the witnesses whom the other party is going to call and their names not forming any substantial part of the material facts; and I think we may go so far as to say that it is not permissible to ask what is mere evidence of the facts in dispute that forms no part of the facts themselves. But with these exceptions it seems to me pretty nearly anything that is material may now be asked. The right to interrogate is not confined to facts directly in issue but extends to any facts, the existence of non-existence of which is relevant to the existence or non-existence of the facts directly in issue."

Mr Justice Myers then proceeded to give the following illustration:

> "Let it be supposed that the defendant is sued for a debt and pleads that at the time of the loan the plaintiff was an unregistered money lender. The fact directly in issue in that state of the pleadings would be whether the plaintiff was an unregistered money tender- that is a person carrying on the business of money lending. It would therefore be permissible for the defendant to interrogate the plaintiff asking whether he did at any time carry on the business of money lending. That would be interrogation to the fact directly in issue, he could however, also interrogate the plaintiff by asking whether the plaintiff had made loans to a number of specified persons. That would be an interrogation as to facts the existence of which would be relevant to the existence of the fact directly in issue because if a sufficient number of money tending transactions could be proved they would or might establish that the plaintiff was carrying on the business of money lending.

However, interrogatories in such a case would not be permissible as to facts which would be relevant to showing that the plaintiff did lend money to a particular person; for example, he took a promissory note, because that would be interrogation as to evidence and not interrogation as to facts, the existence of which would be relevant to the existence of the fact directly in issue."

His Honour went on at p196 to elaborate on those principles. I will not read all that is written there, but I commend the reference to you as being a succinct exposition of the relevant principles dealing with the administration of interrogatories. There are many interrogatories which are asked which plainly could not survive any challenge at all, but enormous amounts of time, effort and cost are continually devoted to the formulation of all manner of questions. In short, do not make the mistake of considering interrogation as a form of written

cross-examination. It is not. To determine what is and what is not permissible read and re-read Mr Justice Myers' judgment. There, if I might just round off the reference, Mr Justice Myers was concerned with the large number of interrogatories which had been prepared with painstaking care by Mr Rath QC (as he then was); indeed I understand that Mr Rath devoted no less than 3 weeks for the preparation of those interrogatories. Mr Justice Myers struck them all out.

After discovery, interrogatories should be administered if you need to get admissions. You may also be able to get admissions by issuing notices to admit facts or notices to admit documents. You should turn your mind to whether they would be useful tools. You put on interrogatories after you have had discovery and inspection in most cases because the rules are that you cannot interrogate on a matter which is properly a matter of discovery of documents and in any event you usually need to have the documents so you can interrogate.

The practice on interrogatories is set out in the standard practice books, as to what you can interrogate about. The modern form of interrogatory tends to be:

> "Look at the document annexure hereto and marked "A" and answer the following questions:
>
> 1. Who signed on behalf of the defendant?
>
> 2. When was it signed?
>
> 3. Does not the defendant admit it was signed by an authorised officer of the defendant?"

If there are any problems about interrogatories which cannot be sorted out between counsel and solicitors then again a Notice of Motion is taken out.

On interrogatories be a little careful. Each jurisdiction seems to have its own rules. It is a little misleading now to rely on cases which were decided in New South Wales before the Supreme Court Act. It is very misleading to rely on ACT cases and there is even some difference between the Equity Division and other fora such as the Commercial Division as to what is allowed and what is not allowed and what form interrogatories should take. If you are drafting interrogatories it is usually best to have a look at a couple of precedents that are floating around your floor to see the general format that they take in the Equity Division.

If you are preparing a timetable for the conduct of interlocutory steps rather than relying on the procedures for which provision is made in the rules (in proceedings on pleadings) it is sometimes wise to have the proceedings mentioned after the time allowed for inspection of documents on discovery and before any order is made for interrogatories. There is no settled procedure in the Equity Division. In some cases it is simply inviting delay and unnecessary costs to interrupt the flow of interlocutory steps by an unnecessary Court mention; in other cases parties compelled to consider specifically whether or not interrogatories are required may come to realise that none are required.

Security for Costs

An application for security for costs can be made to the Associate Judge either pursuant to s.1335 of the Corporations Law or Uniform Civil Procedure Rules r 42.21 (formerly Part 53 of

the Supreme Court Rules). In most cases there will be no need to invoke the inherent jurisdiction to which Mr Justice Holland referred in Rajski Computer Manufacture and Design Pty Limited [1982] 2 NSWLR 443. However, in the rare case when it might be necessary to invoke the Court's inherent jurisdiction your application must be made to a Judge rather than a Associate Judge. The Associate Judge's powers are limited by Part 60, and Schedule D, of the Supreme Court Rules.

An application for security under s.1335 of the ,Corporations Law is available where the plaintiff (against whom an order for security is sought) is a corporation. The provisions of r 42.10 of the Uniform Civil Procedure Rules are of broader application. They are usually invoked where the plaintiff (against whom an order for security is sought) is either ordinarily resident outside New South Wales or suing in a nominal capacity. The rule (ie. rule 2(1)(a) in Part 53, now see r 421.10(1)(a) of the Uniform Civil Procedure Rules) which requires residents outside the jurisdiction to provide security has been held to be constitutionally invalid insofar as it purports to apply to residents within the Commonwealth: Australian Building Construction Employees v Commonwealth Trading Bank [1976] 2 NSWLR 371.

Perhaps the most important point to be borne in mind on the subject of security for costs is that if you propose to apply for security you must do so promptly. The Court will not look kindly on an application made at the heel of the hunt. If a defendant has allowed a plaintiff to pursue their action, as it were, to the door of the Court, the Court will immediately inquire of the defendant as to why it is that they have allowed so much money to be spent and so much time to be outlaid before taking a tactical step which could bring the whole action to an end.

An application for security is made as is virtually every application in Equity, after you have written a letter to the other side's solicitors indicating that you are going to make the application and asking whether the other side is prepared to provide security for costs, giving some estimate of the costs involved. A Notice of Motion for security asks for an order that the other side provide security in a nominated sum (and in a form acceptable to the Court) and that, until the security is provided, further proceedings be stayed.

The evidence in support of the motion should show the inability of the other side to meet the costs sought and/or their foreign residency, the general nature of the proceedings and an estimate of the time likely to be taken on the hearing as well as an estimation of the costs involved.

The Court will always look into the merits of the case. It is concerned that the provisions of the Rules and s1335 should not be used to close the door of the Court on an impecunious plaintiff who might otherwise have a strong claim. Both parties to a motion for security should, for that reason, be careful to put on evidence going to the merits and the strength of their respective cases.

If you are a defendant making an application for security on the basis of the plaintiff's (alleged) impecuniously, you will of course be confronted with the task of demonstrating that the plaintiff is without financial resources. Ordinarily, that task may be assisted (if not fulfilled) by subpoena. However, care should be taken to ensure that subpoenas are not so wide as to be susceptible to an application to have them set aside. You should be careful to frame subpoenas addressed to bankers and alike for production of specific records and not merely for the production of any records they may happen to have that bears on the plaintiff's standing.

The form of an order for security for costs is set out in the back of Ritchie's Supreme Court Practice.

Particular Types Of Proceedings

Proceedings for Injunction

These are invariably commenced at short notice and on an urgent basis. Your first notice of them may be a solicitor on the telephone saying "We must get an injunction within the next 2 hours". Such a request places a fair strain on all concerned. It involves quick decisions; it involves a quick appreciation of the relevant facts, and a quick judgment of the relevant law. Despite the need for speed, despite the overriding urgency, don't get press-ganged into precipitous action that you may later regret. Particularly bear in mind fundamentally that an injunction will only be granted where damages are inadequate.

There has been some difficulty in recent years over the proper formulation of what a plaintiff must show by way of facts to secure an interlocutory injunction. The basic Australian test for many years was whether the plaintiff could make out a prima facie case, see Beecham Group Ltd v Bristol Laboratories Pty Limited (1968) 118 CLR 618 and Shercliff v Engadine Acceptance [1978] 1 NSWLR 729. However, in England in American Cyanamid Co v Ethicon Limited [1975] AC 396, a lesser test was adopted. In more recent years, single Judges of the High Court have indicated that the real inquiry is whether there is a serious question to be tried, and that it is wrong to be misled by over-strict application of verbal formulae from past decided cases, see A v Hayden (No. 1) (1985) 59 ALJR 1, 5, approving what McLelland J had said in Appleton Papers Inc v Tomasetti Paper Pty Limited [1983] 3 NSWLR 208. See also Australian Coarse Grain Pool Pty Ltd v Barley Marketing Board of Queensland (1982) 46 ALR 398.

Provided that damages are not an adequate remedy for the plaintiff and that the plaintiff has shown a strongly arguable case, then the plaintiff must also show that provided they give the usual undertaking as to damages (see Uniform Civil Procedure Rules r 25.8, formerly Part 28 r 7 of the Supreme Court Rules), the balance of convenience favours the grant of an injunction rather than the refusal of it. In a recent English case, Francome v Mirror Group Newspapers Ltd [1984] 1 WLR 892, the English Court of Appeal indicated that the phrase "balance of convenience was really inappropriate and a better phrase would be "balance of justice". Again, this is just getting into verbal formulae.

If the issue on the interlocutory injunction proceedings involves a question of law or a question of construction which will almost certainly not be affected by proof of surrounding circumstances etc, then the Judge hearing the interlocutory application may, in his direction, decide the point of law or construction involved, Karaguleski v Vasil Bros & Co Pty Limited [1981] 1 NSWLR 267, and see ACOA v Commonwealth (1979) 53 ALJR 588 and Meagher Gummow and Lehane, 3rd Ed (2172). On the other hand, the Judge may consider that it is better to leave the question to the trial. Counsel should be prepared accordingly, to argue questions of law in case the Judge considers that they should deal with them.

Procedurally you prepare a summons setting out the orders you seek and you have affidavits prepared setting out the evidentiary material upon which you can have an injunction granted, at least for a short period. Then you ring up the Duty Judge's Associate and you find out what time

it is convenient for the Judge to mention it in their list. If you cannot get the Judge's Associate, just put your robes on and go up to the Duty Judge's Court and wait until you have your turn. We dealt with this partly last time when we were dealing with Notices of Motion for injunction.

It is much the same sort of thing for injunctions by summons. When it is your turn, the Judge will ask you what you are moving for. You ask for leave to issue the summons and ask for the orders 1, 2, etc in the summons up until the return day or that you be given leave to serve short. As you know, generally speaking, summonses have to be served 5 clear days before their return, so the Judge may say, "Well, nothing is really going to happen to you till Wednesday. I will give you leave to serve this summons by 10 o'clock tomorrow and make it returnable for 10 o'clock on Tuesday. I won't give you an ex parte injunction". When it is a serious matter he will give you an ex parte injunction BUT remember in order to get an ex parte injunction, one must give an undertaking as to damages.

Undertakings as to damages should not be given lightly. I had one case where we obtained an ex parte injunction stopping the front page of the Mirror being published in later editions, but before we did that we had to explain very carefully to the client, the cost involved in replacing the front page of a statewide paper, and impress on the client that if it was subsequently found that he shouldn't have got the injunction he would have to pay that cost. In actual fact, the Mirror just substituted - "Judge Bans Mirror', for what they previously had on the front page and sold more papers anyhow. Don't just think that because the Judge says, "Do you give the usual undertakings to damages?" you just nod your head. Explain to the client, preferably personally, if not make sure that the solicitor has, as to what it is all about.

That is of course fundamental to the granting of an interlocutory injunction (whether ex parte or inter partes). What is the undertaking as to damages? You will find the form of it set out in r 25.8 of the Uniform Civil Procedure Rules but shortly it means this. The plaintiff must undertake to the court that in the event that at the trial it is found that the plaintiff, was not entitled to the interlocutory relief granted, they must pay the defendant the damages that the defendant has suffered by being injuncted in the meantime. It must be appreciated that those damages can be very substantial. Because the undertaking is an undertaking to the court it carries with it the sanction of contempt. In other words, if the interlocutory injunction was in due course dissolved at the trial, if the defendant later made out his damages and if the plaintiff failed to pay them, then the plaintiff would suffer the consequences of any contempt - namely if a natural person, imprisonment or if a corporation, sequestration.

You normally find that there is a lot of paperwork to be done in connection with getting an injunction. Don't be trapped, even if it's 6 o'clock at night, into going up there by yourself - always have a solicitor or their clerk with you. Normally the Judge notes on the papers that leave is given to file a summons and “injunction in accordance with paragraphs 1, 2 and 3”. The Judge’s tipstaff will usually accompany the solicitor to the Registry with a record of the Judge’s notes and the court file – it is not counsel’s job to do that work. Normally the directions that are given or impliedly given, are that a Registrar or Deputy Registrar prepare and seal urgent order to go to the defendant, as well as other directions for communicating the injunction. It may help to have a form of order typed out ready to be signed by the Registrar. If it is after 4:30pm you must pay an opening fee as well. If it is likely to get into the after 4.30pm period, you need to alert the Registry that something is going to happen. These are procedural matters for you to direct your solicitor rather than doing yourself.

So far as counsel are concerned, it cannot be pointed out too strongly that it is necessary for there to be the utmost candour in making applications for injunctions. Sometimes, things move so quickly that you haven't got affidavit evidence. The Judge will say, "Mr Smith, what about X?", and you will say from the Bar table "your Honour, I am instructed on X as follows.....". If that happens to you, and you omit to tell the Judge something that is relevant, then almost as of right the defendant will have that injunction dissolved or not continued. This is because the rule is that, if there is any lacking of candour on the part of the person applying for the injunction, he will be said to have unclean hands and the injunction will be dissolved or alternatively it will not be continued. It is most important that you tell the Judge everything when you are applying for an injunction and hold nothing back.

The relevant principle has been enunciated or re-stated in Thomas A Edison Ltd v Bullock (1912) 15 CLR 679, 681 by Sir Isaac Isaacs in the following terms at 681-682:

“Dalglish v Jarvey (1850) 2 Mac & G. 231; 42 ER 89, a case of high authority, establishes that it is the duty of a party asking for an injunction ex parte to bring up unto the notice of the court all facts material to the determination of his right to that injunction. And it is no excuse for him to say that he was not aware of their importance. Uberrimae fide is required and the party inducing the court to act in the absence of the other party fails in his obligation unless he supplies the place of the absent party to the extent of bringing forward all the material facts which that party would presumably have brought forward in his defence to that application, unless that is done the implied condition upon which the court acts in forming its judgment is unfulfilled and the order so obtained must invariably fall".

So that if upon the return of a summons in which you have sought and obtained an ex parte order the court's attention is drawn to the existence. of facts of which your client was or ought to have been aware which go relevantly and materially to the question of your entitlement to an injunction, the very existence of those facts and the very fact that your client has not divulged them to the court on the ex parte application will of itself constitute ground for the Judge to dissolve the injunction without more. You may of course renew your application for an injunction, but you do face the prospect that, having failed once to acquaint the court candidly with all the relevant and material facts, your client may be regarded as lacking in cleanliness of hand.

We will assume that you have got an injunction and that lasts then until the return day, ie. the date when the matter is next to come before the Registrar, the Associate Judge or the Judge. Very often you must get an injunction quickly on very skimpy material; sometimes on rank hearsay, sometimes on hearsay two or three times removed. Don't make the mistake of hoping that the defendant on the return day will have so little time that he will ask for an adjournment himself and will get his adjournment only on terms that he gives some sort of undertaking.

Nasty counsel, like myself, who appear for defendants sometimes have their juniors working all night producing 15 affidavits in strictly admissible form to answer the plaintiff, and then when the plaintiff gets to his feet on the return day, there they are, all he/she has got is an inadmissible affidavit based on the 4th degree hearsay and there are fifteen beautiful affidavits on the part of the defendant. The plaintiff is then in an intolerable position - he can't ask for an adjournment without losing his injunction; if he goes on, he is going to lose the whole proceedings. He is beautifully trapped, merely because he hasn't prepared by getting on all his material in admissible form before the return date. And of course it is not a case of them saying to the Judge, I want an adjournment so that I can answer this material", because the onus is on them,

they are the moving party, as to why the injunction should be continued. So if there is an adjournment, they just miss out because they haven't got an injunction in the meantime.

The injunction application will, after it has been filtered through the Registrar's list, go to the Duty Judge. The Registrar will not grant any adjournments on the basis that, if an adjournment is granted a person really hasn't had their right to ask for an interlocutory injunction.

Remember, when you are in the Duty Judge's list, they have a lot of work to do, because a lot of work has been sent to them without warning. It is very interesting to watch Duty Judges at work. They usually have a two week period and generally speaking in the first week they are usually happy and jolly, and in the second week they show signs of strain. So understand that the Duty Judge will be under a great deal of pressure and, getting towards the end of the rostered period term, especially, you must be properly prepared. Indeed at any time you should be properly prepared. If you are properly prepared you will get an easy run. If you go up there and say., I want the injunction Judge", the Judge says, "What's your Equity?", and you say I don't know, but I'll find one somewhere", you won't get a very good hearing. Nor, will you if you act, as one Judge told me when he was just about to go off to lunch, someone called out to him "Hey you, are you the Duty Judge? I want to make an application". It is essential, if it is a big list, to get your procedure right and make sure that you have got a proper case.

Application for Appointment of a Receiver

Really, these are much the same sort of thing as injunction applications. What you really want to do is to preserve property by putting it into the hands of an independent person whilst the dispute is being heard. A receiver is almost always appointed as receiver and manager of property.

The most usual case where you will move for appointment of a receiver is a partnership dispute. Some Judges don't like appointing receivers. The reason they don't like appointing receivers is because receivers are expensive. The receiver is an accountant - they charge an hourly rate: if it's a Trustee Company, sometimes a percentage. So, even though the books tell you that you get a receiver almost as of right, if you come before some of the Judges, they will try and talk the parties into some sensible arrangement, so the parties will be saved from paying large expenses which may be incurred by letting a receiver in. But, if your client really does want a receiver, they are usually entitled to one as of right (in a partnership that is). So just keep plugging courageously ahead. The same sort of thing happens on Section 66G applications which we will come to shortly.

As mentioned, perhaps the most common place occasion for the appointment of receivers is a partnership proceedings. Indeed, in such proceedings it is usually proper to apply for a receiver and not an injunction. Most Judges will severely criticise counsel who do not realise this. In more recent times, with the incidence of corporate trading trusts, the Court's practice has been to invoke its jurisdiction to appoint receivers over such corporations as a means of effecting a winding up of the trust itself.

You may find reading some of the works on the subject of receivership or court appointed receivership's, the expression "with or without security" cropping up. What that simply means is that a court appointed receiver is ordinarily only appointed with security; they will only be appointed without security if the defendant, or the party opposing the application consents, in which event the court will dispense with the security. You may ask; "security over what, and in

what form, and to what extent? The security which the court requires is a security from the receiver equal in value to the sum total of all the assets the subject of the receivership. That security is invariably provided in the form of a bond issued by some insurance company. Such bonds don't come cheaply and you may find that the requirement to provide security presents a very large practical impediment to the appointment of a receiver. The court has, however, devised a means of overcoming the practical difficulty. There is a panel of liquidators; called the "A" List. That panel comprises a number of chartered accountants in the city who have been appointed having regard to their experience in the affairs of winding up companies, receivership's and the like. The "A List" recognises their appointment as effectively available to take on board any court ordered liquidations or receiverships. They support their enrolment on the panel by providing an all encompassing bond so that the court will appoint them receivers without security as a matter of course. However, as a consequence, if you seek the appointment of an "A List" liquidator you take your choice with whatever marble happens next to be in line to fall out of the barrel, and I might say from practical experience that not all "A List" liquidators are fine examples of their craft. You will find in some texts on the subject of partnership a reference to the practice of the court to appoint one of the partners (ie. in the case of a partnership dispute) as receiver.

With utmost respect to such text-writers, insofar as they are making reference to the Supreme Court of New South Wales, they are utterly wrong - the court has never, so far as I am aware, from practice and/or on research appointed a partner as receiver of the partnership of which they are a member. So don't be misled by such texts or references.

A receiver may, however, be authorised to employ the members or employees of a partnership in an endeavour to contain costs. The important thing to remember is that the receiver, in that situation, is the boss". They are an officer of the court.

Proceedings for Specific Performance

It has only been a recent innovation that these have been able to be done by summons. When I first came to the Equity Bar, anyone who tried to get a specific performance suit otherwise than by Statement of Claim would be laughed out of town. But nowadays it is common to have summons for specific performance. The orders sought are:

(i) Declarations of the existence of a valid contract

(ii) An order that the contract be specifically performed

(iii) Directions for the implementation of that order

(iv) Damages in addition to or in lieu of specific performance

It is very easy to be ambushed if you are the plaintiff in a summons for specific performance, because the defendant never has to say on which of a hundred possible technical points they are going to defend the case. Very often, the evidence will only be an affidavit by the solicitor, attaching all relevant correspondence, and an affidavit by the plaintiff who says he is ready, willing and able and hereby offers to perform the contract. The plaintiff doesn't know what use the defendant is going to make of that correspondence, what technical points he is going to raise, and (naughty me), I have been able to ambush plaintiffs time and time again, by bringing out some point that has never occurred to the plaintiff's solicitor.

However, there is a way to stop yourself being ambushed, and that is to make sure that your solicitor write to the other side saying, "We assume that the issues in this case are (a), (b) and (c), please confirm". If the defendant's solicitor won't do that, then when the matter is mentioned before the Associate Judge to give a date, you say, "We think the issues are (a), (b) and (c)", and the Associate Judge will say to the defendant "Are they?", and if the defendant says, "Ah, well", the Associate Judge will make sure that the issues are defined before the matter goes to Court again. The Judges have said that if plaintiffs allow themselves to be ambushed in this way and have to get an adjournment, then they normally will have to pay the costs of the adjournment because of their stupidity in not having the issues defined.

That however is not an invariable rule. If that does happen to you, ie. that you find yourself on the hearing of a summons and in ambush, then there is just no two ways about it, you have just got to ask for an adjournment. It is far better to pay the costs of one day than for the whole proceedings. However with proper precautions, unless you have a late passed brief, it shouldn't happen to you.

In recent years the advent of Readiness Hearings and "Statements of Questions in Dispute" (colloquially known as "Statement of Issues") have minimised, but not eliminated, the potentiality for ambush.

Proceedings for Dissolution of Partnership

Ritchie para [14007] in Volume 2 sets out the necessary documentation. The proceedings are in two parts. Firstly, the matter goes before the Judge to work out whether there is partnership, what are its terms, and whether it has been dissolved. The Judge makes the appropriate declarations and then orders the parties to take accounts before the Associate Judge.

The Issues (whether there is a partnership, what are its terms, whether it has been dissolved, and so on and so forth) are often the subject of heated dispute between the parties where a partnership has collapsed. A clear and concise statement by the plaintiff of what they contend to be the answers to those questions, and a clear and concise response by the defendant in the form of defence will be both time saving and ultimately, one would hope, expense saving in the resolution of what are invariably very difficult and thorny cases. You will find that if you are briefed in a partnership squabble and particularly that if you are briefed in a partnership squabble between solicitors, your clients will want to go into interminable detail as to the various incidents that have brought about the final collapse of the partnership. The golden rule is "keep the eye on the ball". When asked to draw or settle affidavits in those proceedings try to confine your attention to the critical issues that are really in dispute; muck-racking or mud-slinging in affidavits is rarely helpful, and is frequently counter-productive.

The second stage is that someone takes out a Notice of Motion for Directions under Part 436 of the Uniform Civil Procedure Rules (formerly Part 49 of the Supreme Court Rules), to take accounts before the Associate Judge. The Associate Judge gives directions which appoint one party as the accounting party. The accounting party must then file accounts. The other party can cross-examine them on those accounts (that's not usual but possible), then the other party can file surcharges and falsifications. Surcharges are indications that there is some matter in the accounts which ought not to be there. Then the Associate Judge tries the issues raised by the surcharges and falsifications, and in due course certifies what the true accounts are between the parties.

Will Construction Cases

Here, there is a dispute as to what the Will means. Suppose the Will says, "I give my daughter Phoebe all my black and white cattle, and my son John all my other cattle". What the words "black and white cattle" could mean, include:

(a) all cattle which are pure black and all cattle which are pure white, or

(b) cattle which have some black on them and some white on them but not cattle which are not all pure black or pure white, and

(c) you could say, or some other and if so which cattle (in case you can't work out whether there is some other alternative but you think there might be)

Then you take out a summons. Normally, the Trustee of the Will is the plaintiff and a counsel who represents one of the defendants argues for pure black plus pure white, some other counsel argues for piebald and away you go. The Judge makes the appropriate orders that on the true construction of the Will and in the events which have happened: "The gift to Phoebe Smith of black and white cattle means ……..". This usually involves no animosity between the various disputants; it is really a sort of intellectual exercise for everyone. The Trustee's counsel's role is to assist the Judge. They usually read the Will and the affidavits, but present no argument. The argument is presented by the competing defendants, the theory being that if the Judge is informed by the two defendants of all possibilities and all relevant cases then he/she will be in the best position to evaluate the Will. However, there sometimes come situations where, by mischance or otherwise, there is no one physically present to argue for a particular point of view, in which case counsel for the plaintiff Trustees assists the Court by making that argument.

Moreover if it is contended, on behalf of the next of kin that a gift fails (for one reason or another) with a resultant intestacy (wholly or in part) the trustee must resist that contention and fight to uphold the validity of the Will.

I don't wish you to misunderstand what I say about "assist the Judge". You do not assist the Judge by merely giving in or by putting forward your own feelings about the matter. The genius of our system is that the Judge should have placed before him the whole of the pertinent facts and the whole of the relevant authorities by one counsel putting forward the best facts and authorities for one side and the other counsel putting forward the best facts and authorities for the other side. Strictly speaking, if this exercise is done properly, all the Judge has to do is to choose which are the appropriate facts and what is the applicable law. Under this adversary system, there is no room for any Judge going off on any frolic of their own.

Indeed, as Professor Lucke says in his article "Judicial Impartiality and Judge made Law" (1982) 98 LQR 29 at 56, this system "seeks to ensure, through the use of highly-trained specialists representing each party, that no consideration relevant to the position of either party, no argument pertaining to the justice of their positions, will be overlooked. The Judge is best informed through a process of debate and argument in which he has every right to participate".

So just because you are "assisting the Judge" does not mean you do not put forth your best foot for your client. However, it occasionally happens that a client who is made a representative party, indicates that they does not want you to put any arguments for the position in which their

interest lies because of their friendship for another party. A representative defendant, as opposed to an ordinary defendant, cannot take this line, and if they are not willing to instruct you to put forward the argument for the particular interest, then the system falls down and usually there is no alternative but to approach the Court to appoint an alternative representative defendant.

Proceedings to Remove Caveats

Really, caveats are only put on title to give time, so that a person won't be surprised, particularly by something being registered, without knowledge.

Proceedings regarding a caveat will usually come before the court in a couple of ways. A registered proprietor may request the Registrar General to issue a lapsing notice to a caveator. That places the onus on the caveator to approach the court for an order under s.74K Real Property Act to extend the caveat within a period of 21 days after service of the notice. On the other hand, if the registered proprietor wishes to have the caveat removed quicker than that, the registered proprietor may approach the court for an order under s.74MA Real Property Act to remove the caveat.

In either case the approach of the court is similar to the questions that arise on an interlocutory injunction application: cf Martyn v. Glennan [1979] 2 NSWLR 234. The main issues being:

(a) is there a seriously arguable case that there is a caveatable interest ?

(b) where does the balance of convenience lie ?

Issues as to the form of the caveat which once used to assume importance no longer do so because of the direction to the Court under s.74L, Real Property Act to disregard, in proceedings as to the validity of the caveat, the failure of the caveator to strictly comply with the requirements of the Act as to form of a caveat. Where an issue as to form does arise a useful summary of the principles is contained in the judgment of Holland J in Kerrabee Park v. Daley [1978] 2 NSWLR 222.

The claim in the proceedings for extension of the caveat may seek extension as a final order. It may be coupled with other orders by which some form of equitable relief in the nature of a declaration or specific performance of the interest is claimed.

Proceedings to Appoint a Trustee under s.66G of the Conveyancing A

The general rule is that, any co-owner has virtually a right to have jointly held property sold: R Fettell (1952) 52 SR NSW 221.

There are a few exceptions to that. The discretion to refuse a sale enables the Court to refuse an order for sale only where the order would be inconsistent with some proprietary right or some contractual fiduciary obligation see: Williams v Legg (1993) 29 NSWLR 687; Re Buchanan – Wollaston's Conveyance [1939] Ch. 738. For example, a sale may be refused if it is found that the property was bought jointly for a specific purpose such as to run a service station as a partnership for a period of ten years. Secondly, if there is a Family Law Matter, the Judge in Equity will usually grant a short adjournment so that the relevant proceedings can be

commenced in the Family Court, which has far more discretionary power over the property than the Equity Court has. It will only be a short adjournment to enable that to be done.

The expression "co-ownership" is defined in s.66F to mean "ownership whether at law or in equity in possession by two or more persons as joint tenants or as tenants in common". The expression “in possession" plainly does not mean in "de facto" possession but means "in possession" as distinct from "in remainder". Equal ownership is by no means necessary to invoke jurisdiction under s.66G. It is sufficient for the plaintiff to have an interest as co-owner as defined, however infinitesimal that interest may be. Thus, if a person had a one in a million share in the title of the Opera House they could ask the court to order that the Opera House be sold and that its proceeds divided, and whoever had the other .999999 share could not resist the application, otherwise than on the very limited grounds mentioned above.

In short, s.66G entrenches a statutory right, in the part-owner of a property to have that property realised if they so desire. Bear in mind however the differences between the situation contemplated by s.66G(2) and s.66G(3). Where the property is vested in trustees or personal representatives then the order for sale is an order directed to them; where it is not, s.(3) applies and it is necessary to obtain the assistance of a trustee company or trust corporation (to use the language of the Act), or two natural persons who are prepared to act (no doubt they would be anxious to do so because the remuneration is lucrative) as trustees. For the detailed procedure on a s.66G I commend reference to Neville & Ashe. Just to round off that topic bear in mind that s.66I enables the Court to approve of one or both of the co-owners bidding for the property and it is appropriate whether you are for a plaintiff or a defendant to formulate the relief that you seek to incorporate a s.66I order.

Normally in a s.66G application you would realise that the inevitable result is that there is going to be an order for sale, so on the return day of the summons, you try and negotiate a sale out of Court with the other co-owner, so that you will save the Trustee's commission of at least 5% of the sale price. (This is unless there is some special factor about the matter, perhaps in some of these de facto cases where one person or other alleges that the whole property is held by trust for them). You will normally try and settle 66G on the basis that the property will be put into the hands of an estate agent that both parties trust, for sale, putting a reserve on the property, and that the order is that both parties will sign the contract if the estate agent finds the purchaser for the reserve or greater, and that the costs of everybody will be paid out of the proceeds. The Associate Judge has power to deal with 66G applications.

Proceedings for me to sell etc by Trustee under s.81 of the Trustee Act

S.81 is designed to allow the court to confer power on a trustee to do things which the trustee by the instrument of the trust, be it an inter vivos settlement or will, is not empowered to do. A good illustration of the breadth of the jurisdiction conferred by the section is to be found in Re A.S. Sykes (Deceased) and the Trustee Act [1974] 1 NSWLR 597.

There briefly, the trustees of an estate under which there existed a life interest which at that time would have upon the death of the life tenant given rise to a liability to pay death duty under s.102(2)(g) of the Stamp Duties Act, desired to establish what is called a "Johnson's case" scheme by effectively selling the life interest to a Canberra incorporated company in consideration for certain shares. (For details of the Johnson's case "scheme" refer to [1956] A.C. 331). Shortly stated the trustees quite boldly informed the court that they desired an order under s.81 for the purpose of revenue avoidance, and the court said "By all means". Whether

prevailing mores (or "morals") on the subject of tax avoidance and the like would necessarily see the discretion exercised in the same way today may be a moot point. But the case illustrates nonetheless the very wide discretion which the court has, or at least had, then assumed to itself for the purpose of s.81 applications.

These applications are dealt with by the Associate Judge. The court will approve an expedient dealing, but prefers to approve a concrete situation. Accordingly, if your Trustees have got no power to sell it is not much use going to the Court and saying "Give us power to sell". The court won't normally do it. What you do is to first arrange a sale and probably even enter into a contract conditional upon the approval of the court, and then file an affidavit which annexes the contract, annexes an opinion of the Trustee that it is a proper contract and annexing two valuations, by proper valuers that the sale is at a proper valuation. This is usually the minimum material necessary before an order under s.81 can be made.

Proceedings for Judicial Advice by Trustees

This happens under s.63 of the Trustee Act. You would want to look particularly at Part 70 Division 2 of the Supreme Court Rules which are fairly fully annotated. These notes will tell you when you can apply for judicial advice and when you can't. Generally speaking, the power to give advice under s.63 is limited to situations where there is no doubt at all about the meaning of the instrument under which the Trustees are acting, but they need to perform some discretionary act. The most frequent case is where a trustee wonders whether they should settle litigation or whether they should compromise a claim made against them. The Trustee lists the facts in a document called "statement of facts", usually annexes counsel's opinion and asks whether he/she would be justified in settling the litigation etc. Some people seem to think that judicial advises are a panacea for all Trustees' problems, it isn't. The Judge won't advise on the interpretation of the instrument - that has to be done by summons for construction as in a Will construction case. Nor will the Judge really feel that it is their duty to advise professional trustee companies, just to save them taking risks. An application by a Trustee Company so that they can't have any possibility of anyone making a claim against them, won't be viewed with favour by the Judges. They may say, “You are a Professional Trustee Company and you are paid to make proper decisions. Don't come running to me".

Ensure as far as circumstances will permit that the statement of facts that you present to the court is absolutely and unquestionably correct. And indeed if there is any doubt at all about that then err in favour of some other procedure than that is provided for in s.63. I say this because invariably advice under s.63 will affect the rights and interests of some persons beneficially interested in the trust, and the rules provide that the advice and the statement of facts upon which it is founded be given to those persons who are affected by the advice. The rules go on to provide that in the event that any such person is disgruntled (for want of a better word) with the advice they have the right to come back to the court and endeavour to persuade the Judge that the Judge was wrong (in giving the advice as he/she gave it). Now if it transpires in such circumstances that a beneficiary can point to some error in the statement of facts the Judge will not only be somewhat less than pleased (or less than gruntled) to tell the world at large that he/she was wrong, but he/she will be decidedly displeased with the counsel who led him into error by placing before the Judge a false set of facts.

Hence, as I have said, if there is any doubt at all as to whether you have the facts crystal clear then take the precaution (or the better course) of instituting proceedings for a declaration, naming those persons who may be affected by the advice or the outcome of the proceedings as

defendants so as to give them the opportunity not only to put before the court their version of the facts but also of course any arguments which they may wish to advance on the relevant law.

Family Provision Act Applications

A Family Provision Act came into force on 1 September 1983 with respect to persons who died on or after that day. The Act repeals and as it were, replaces, the Testator's Family Maintenance and Guardianship of Infants Act in so far as that legislation provided for relief out of deceased estates. The first substantive alteration that the F.P.A. introduces is to enlarge the class of persons eligible to make application. They are now defined to include, and I will paraphrase the legislation - wives, widows, de facto's, divorcees, children as before (and I will come back to that), and "a person who was at any particular time wholly or partly dependent upon the deceased person and who is a grandchild of the deceased person or was at that particular time or at any other time a member of a household of which the deceased person was a member".

The Act goes on to provide in ss.7 and 8 the substantive basis upon which the court may grant relief. There is a temporal change (under the T.F.M. Act the period within which an application ought to have been made is 12 months from the date of administration or probate), under the F.P.A. the period for application is 18 months from the date of death. Both time limits may be extended by the Court on cause being shown, but the F.P.A. also in s.8 seems to give would-be applicants a right to have a “second bite at the cherry”. It also in s.7 places a critical date for the determination of the applicant's merits as being the date of the hearing of the application rather than the date of death.

So, if a person at the time of the testator's death is penniless but by the time of the hearing has won a lottery, he or she may by reason of that latter windfall be disqualified. Legislation of this kind raises all manner of philosophical (and perhaps political) debate. It is beyond the purpose and function of this paper to delve into such issues. But you may find, in practice, especially in this field that clients desire to discuss issues of that (philosophical or political) kind. There is one fair answer that can be given in that circumstance, ‘I am a lawyer not a moralist you resolve the latter problems as you see them. I will endeavour to deal with the former'. I just should make reference to and mention several other characteristics which will in due course fade away but may well remain alive for the next several years. First, the T.F.M. Act will still apply to the estates of persons who died before the F.P.A. came into being, so that where the date of death was prior to 1 September 1983 the T.F.M. Act is still your source of jurisdiction. Secondly, in Hogan v Hogan [1981] 2 NSWLR 768, the Court of Appeal (subsequently confirmed by the Judicial Committee) has held that the Children Equality of Status Act gives illegitimate children right of application under the T.F.M. Act if the deceased died on or after the introduction of the first mentioned legislation viz 1 July 1977. In other words, if your applicant's parent died after 1 July 1977 then you have got to be certain that he/she was married. It is obvious that the question is alive only for the purposes of the T.F.M. Act in that obviously the F.P.A. (as I have said) will apply where death occurred on or after 1 September 1983. That problem will almost certainly fade away into obscurity in the foreseeable future.

Generally with relation to T.F.M. or F.P.A. proceedings may I make these suggestions. At first you will find them difficult cases, they are invariably intra-family squabbles. There will be emotional factors that will come into play, and there will be (as with partnership disputes) a great desire by the parties to adduce immaterial or inconsequential evidence. So far as you are able, suppress the litigant's desire in that regard and confine your formulation of the evidence to what

is essentially relevant having regard to the decided authorities and the statutory principles. One tip in relation to T.F.M/F.P.A. proceedings - don't as a general rule, cross examine the plaintiff unless you have some very substantial material to put to him or her. You will find that in this context cross examination will almost certainly be counter-productive and that it will serve only to flesh out the bare bones of what is on its face a fairly dry and unimpressive affidavit. You may be opposed to a middle aged or elderly widow who deposes to the fact that she was married to the deceased 40 years or so prior to his death, that she mothered his two or three children, that she was a loyal and devoted wife and so on. Unless you have very accurate instructions and, may I suggest, strong corroborative material with which to challenge those apparently correct propositions then don't do so because you will find that the plaintiff will look better and better as you ask each and every question.

The way to go about commencing such an application is to issue a summons (usually within 18 months after the date of death), supported by an affidavit showing the status of the plaintiff as an eligible person, the size of the estate and how the estate would descend if no order was made under the Act. It is good practice for the plaintiff's affidavit to set out in the first one or two paragraphs a summary of the relevant facts including date of death, date of probate, date of marriage (if it is a widow's application), number of children, names of children, value of estate, etc. so that the Associate Judge or Judge can see pretty quickly a thumbnail picture of the case that he/she is dealing with.

Vendor and Purchaser Summonses

This used to be a specific kind of animal, it is now usually dealt with as a summons for declaration. If you want to look at it more precisely Volume 42 of the 4th Edition of Halsbury paragraphs 230 and following covers the type of matters that can be dealt with under Vendor and Purchaser summonses.

Declaratory Orders

These account for a third to half of all summon matters in the Division. Declarations have become very popular in the last 20 years, but don't assume that you can always get a declaration whenever you have got a problem because the High Court has said that the Court has a duty to deal with all relevant matter arising between the parties in the dispute at the one time and it is not proper merely to make a declaration dealing with part only of a dispute Neeta (Epping) Pty Ltd v Phillips (1974) 131 CLR 286. Thus one cannot get solely a declaration that a contract has been breached. You have to seek a final order, either an order for damages or an order for specific performance, to finish it all up. However the Judges in the Equity Division don't mind people saying "Your Honour this is the kernel of the problem, if your Honour would make a declaration on this and stand the matter over generally? The parties will be able to work out the ancillary orders". They won't give you a declaration unless you indicate it will finally solve the dispute. Declarations can't be gotten on hypothetical issues, or sometimes on future issues. You can't for instance, get a declaration as to whether you would be entitled to rescind a contract. What you have got to do is to actually rescind the contract and then ask if your rescission is proper. So you won't normally get a declaration, that a notice to complete is valid or invalid. Declarations are only made as to the ultimate legal result of the parties' acts, not the steps by which they are taken. It is also extremely difficult to get any declarations that a Magistrate has miscarried in a criminal matter or that procedure in some other Court has broken down. To get a declaration you must get over both the jurisdictional hurdle and also the discretionary hurdle. If the Court considers that no real purpose would be gained by granting a declaration, or that

granting the declaration would only impede some process in some other court, you just won't get one. Apart from that, declarations can be got in a whole range of cases as to interpretation of statutes, interpretation of rules, contracts, insurance policies and a lot of administrative law matters.

Reference should be made to Young on Declaratory Orders for a concise statement of all relevant principles and authorities.

S.89 Applications under the Conveyancing Act in respect of Covenants/Easements

S.89 covers declarations that easements and covenants no longer exist, as well as applications for their extinguishment or modification. The Associate Judge has power to deal with them. A special procedure is usually worked out. Most applications under s.89 of the Conveyancing Act are non-contentious - eg. there is a covenant which would have been put on a title 40 years ago requiring that the walls only be of brick and stone and for the last 20 years there has been a fibro building there that no one has taken any objection to, however now your client is buying and a building society has said "There is a covenant there. We are not going to lend until you get it off", and so you have got to go through the routine. The routine is to take out a summons to extinguish the covenant under s.89, put up one of the grounds of s.89 as to why the Court should make an order, and then go before the Registrar. The Registrar may refer the matter to the Associate Judge, sometimes the Registrar will retain the matter and give directions as to the service of the Notice on the people who have got the benefit of the covenant and the local Council. In the precedent section of the Supreme Court Practice pages 11 and 12 behind guide card “Precedents” the standard forms are set out (which you modify to suit) and normally the directions are given that the Notice be sent to the nominated persons. Twenty-one days are allowed for objections. The plaintiff complies with the directions and then files an affidavit showing compliance with the directions and no reply has been received from objectors in which case the matter is sent to the Associate Judge as a short matter and the Associate Judge makes the orders. However, if objections are received, the objector then becomes a party and it is very, very difficult indeed to win such a case where it is objected. I have lost cases on behalf of the objectors, but I have never won a case where my client has been trying to get rid of the covenant and there has been an objection. It is possible, but it has never happened to me. About 85% of these cases go through without any objections.

As a general rule one set of costs will only be allowed to objectors. Broadly speaking it means the amount of costs which one solicitor acting for one objector would fairly be assessed at.

Now if you are moving to have a covenant varied or extinguished and the neighbours all decide to gang up on you and to come along and have their own say, they will do so at their own risk as to costs. If there are ten of them then they will probably only get 1/10th of their costs. Indeed if you are asked to advise on the "other side of the fence" (ie. the neighbours), advice them first that their prospects, if the covenant is an old one, are pretty remote (depending of course upon the analysis of all the relevant facts) and secondly, that if they intend to oppose the application they should do so as one and not as a scattered gaggle of disgruntled suburban dwellers.

Property (Relationships) Act Applications (formerly the De Facto Relationships Act)

This Act came into force on 1 July 1985. It applies to any relationship of the defined type which continued past that date which (unless there is a child of the union) has lasted for at least two years.

The bulk of the cases in Equity under this Act are for adjustment of property rights under s.20.

The Court must be furnished with full details as to what property is owned by both the plaintiff and the defendant and how that was acquired and what contribution each party made to that acquisition.

The proceedings must under the Rules be commenced by statement of claim.

What Judges Expect Of Counsel

Judges expect that counsel will do their job. That is, that they will;

if asked to advise before proceedings are brought, direct their minds as to whether their client has any proceedings that can be properly brought; and advise the client as to what proceedings should be brought.

if counsel is brought into a matter only on hearing, counsel must direct his or her mind as to whether the proceedings are appropriate and whether there is evidence to support the allegations being made.

It is most important that counsel "Do the sums for the customer". A good rule of thumb is taking into account (a) any details of the other party's financial position, and (b) the likely difference between the client's own party and solicitor and client costs if successful, is the maximum amount likely to be gained in the proceedings in hard cold cash at least twice the amount that will possibly be lost if the litigation fails. Also beware of the "Rumpole Factor". Is it a case where the client may succeed in litigation but the result in his or her life afterwards may be hard to bear.

Judges suffer particularly at directions hearings. Although these are usually listed at either 9.30am or after 4 pm in order to enable counsel to attend yet still be able to conduct a hearing between 10.00 and 4.00, often counsel delegate the brief to some other barrister who has not read the brief, does not know what the matter is all about, does not know how many witnesses are likely to be called, whether the case is ready or not ready for hearing etc. This effectively nullifies the effectiveness of any directions hearing.

Counsel should actually get to Court on time. Whilst Judges do know that every now and again without any fault of counsel, counsel may be jammed, it is most annoying to a Judge and to counsel's opponents when a barrister consistently takes on too many briefs so that the barrister is not present at a time when the case is called on for hearing.

Particular care is needed in injunction cases. Too often there is an appearance by a very junior barrister to seek continuation of an injunction and that barrister;

- has not realised that an undertaking as to damages will be required and so has not taken the appropriate instructions to give same, or

- seeks to mention the matter on behalf of some other barrister or solicitor as well whom he or she informs the Court consents to the injunction. Because of the drastic consequences that can flow to the client, the Court insists that the client's own representative consent to the

injunction either orally or by short minutes of order signed by that counsel or solicitor, and that some barrister or solicitor likewise proffers the undertaking as to damages.

Statutory summonses (ie summonses where the Court is empowered by statute to give relief if certain preconditions are made out such as variations on the restrictions imposed by covenants etc) usually involve the barrister presenting the case having to go through a series of well recognised steps. Judges expect counsel to know those steps, and if they do not know them, to find out from practice books, their Associate Judge or from other barristers. A well presented application on a statutory summons should be able to be dealt with, if uncontested, in a few minutes, the Judge or Associate Judge merely checking the documents to make sure that all the "i's" have been dotted and the "t's" crossed.

Evidence given by affidavit is subject to the same rules as oral evidence. Judges expect counsel –

- to ascertain and cure formal defects in their own evidence as long before the hearing as possible;

- to ensure that each element of the equity sought to be established (or the defence, as the case may be) is proved by admissible evidence.

Affidavits are not pleadings. The affidavits should not contain statements such as "I have read paragraph 4 of the affidavit of Joshua Smith and in response thereto say that I do not know and cannot admit the truth of the same". The solicitor should be directed by counsel to serve proper affidavits containing only evidence as long before the hearing as possible. It would be handy to read notes by experienced counsel on how to prepare affidavits such as that by Bryson QC (as his Honour then was) in (1985) 1 Australian Bar Review 250 and Young, "Civil Litigation" p 113.

In modern litigation, Judges are under considerable pressure to deal with cases in the least amount of time. Accordingly, Judges expect that counsel will so organise themselves as to minimise –

1. wasted time through having to seek an adjournment to examine subpoenaed documents etc during the hearing;

2. requesting adjournments to settle cases because negotiations have only commenced a couple of minutes before 10 o'clock on the first day of the hearing;

3. the futile fumbling of papers because their brief is not sufficiently organised to be able to find material instantly (see 10 below);

4. adjournments because it has only just been realised that a vital witness is unavailable or the affidavits are defective;

5. long-winded cross examination which challenges witnesses on points that really are not in dispute between the parties.

6. to avoid futile fumbling;

7. make sure your solicitor has complied with the rules re affidavits, particularly the one that requires all affidavits to be paginated (including the annexure section);

8. make sure your copy of the affidavits is appropriately noted against parts you object to and why you object to them.

9. Where authorities are to be cited, lists of authorities must be provided to the Judge's tipstaff preferably the night before, but certainly not later than 9:15 am on the day of the hearing.

10. If legal argument is to be presented, it is most helpful and shortens the case if a precis of it is handed up to the Judge at the time counsel gets to his or her feet to present the argument. Not only does this allow the Judge to leave off taking detailed notes to concentrate on the argument, but it also shows the Judge the direction in which the argument is leading and so avoids unnecessary sarcastic remarks such as "Really, X, where is this argument going?"

In cross examination, remember;

- a cross examiner has no licence to torture;
- a cross examiner has no licence to insult;
- a cross examiner has no licence to misrepresent the evidence;
- a cross examiner should not ask a witness which of two positions he or she adopts if those two positions are not exhaustive of the possible positions;
- Judges tend to "switch off" during long, seemingly purposeless cross examination.

Finally, it must be remembered that Judges rely very heavily on counsel for the administration of justice. Counsel's individual reputation for honesty, integrity, reliability and accuracy has to be earned and has to be maintained. It is only if Judges can continue to have faith in counsel's presentation that our present system of justice can survive, at least in its existing form.