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**PLEADINGS AND CASE MANAGEMENT<sup>1</sup>**

**by**

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**INTRODUCTION**

- 1 In the abstract the topic, "Pleadings and Case Management", is open-ended. It needs to be made more concrete
- 2 This paper accepts, and builds upon, an assumption that its intended focus is on the conduct of civil litigation in one of Australia's superior courts of record. The conduct of proceedings in the Equity Division of the Supreme Court of NSW, not unnaturally, comes to mind.
- 3 The paper approaches the topic, first, by an appeal to legal history and, then, by an examination of general principles about case management procedures.

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<sup>1</sup> A Revised Version of a paper, similarly entitled, presented in the 2015 Judges' Series of Seminars conducted by the College of Law.

- 4 Whether theory follows practice, or *vice versa*, is a conundrum as fundamental as the question whether a chicken or an egg comes first. We are currently undergoing a process, perhaps merely experiencing a continuation of a perpetual process, of realignment of theories of litigation in a world that values “management”.
- 5 We are all moulded, consciously or otherwise, by the environment in which we live and breathe.
- 6 A Supreme Court Equity judge cannot be unmindful of the origins, including inherent jurisdiction, of the courts of Old England upon which the Supreme Court’s jurisdiction is firmly grounded; the long tradition associated, in Anglo-Australian law, with the historical office of Lord Chancellor in England; perceived deficiencies in any system of common law “rules”, and the distinctive role played by juries in development of claims of “right” in English Courts of Common Law; the vital role played by appeals to conscience in the development of equitable “principles”, justified as necessary to “remedy” deficiencies in the common law, its practices and procedures; and the “managerial” mindset that attends an exercise of Equity jurisdiction, involving disputes about property and personal relationships that characterise much of the work to which Equity practitioners attend.
- 7 A judge of the Federal Court of Australia cannot be unmindful of the setting of the Court in the *Australian Constitution* and under legislation of the Federal Parliament, including constitutional constraints that emphasise the separation of powers (between the executive, legislative and judicial branches of government) in the Australian polity; a need to ground every decision in particular legislation as a source of the Court’s jurisdiction; the importance of written forms of law to the everyday work of the Court; and the absence of a Supreme Court’s “inherent jurisdiction” as a temptation to judicial lawmaking.

- 8 Ultimately, like politics, all law is local. We each come to the topic “Pleading and Case Management” with our own particular perspective. Despite “harmonisation” of court rules throughout Australia there is no guarantee that each jurisdiction (State or Federal) will, or can, think in identical terms about “pleadings” or “case management”. The nature of the business administered by a court can profoundly affect attitudes to both. Formal rules are one thing; their operation in practice can be quite another. Advocates need to know the jurisdiction in which they seek to persuade.
- 9 Much of the work of a Supreme Court judge, especially that of an Equity judge, has an administrative flavour that represents an intellectual challenge to devotees of Montesquieu’s abstract idea of a “separation of powers” in performance of government functions. Not all judicial work has the adversarial flavour of a 19<sup>th</sup> century jury trial. Much of it involves an application of legal standards to uncontroverted evidence of undisputed facts, and the casting of a critical eye over what is, and is not, revealed by parties who apply for relief available only to those who pass through a gateway, unauthorised entry to which Parliament has, by legislation, set a judge as a guard. If statutory criteria are established then, absent an exceptional circumstance, an entitlement to relief ordinarily arises.

### **LESSONS FROM LEGAL HISTORY : LONG TIME PAST AND RECENT**

- 10 An introductory appeal to legal history cannot, here, be passed over by a devotee of the Francis Forbes Society for Australian Legal History.
- 11 Historically, the English courts that provide a template for the Australian judiciary evolved out of a need for “system” in “public administration”. The Crown, once personified in a King or Queen, now identified with the State, delegated duties of government to officials who, in time, took on the now distinctive functions of day-to-day executive government, parliamentary debate about legislation and the judicial determination of disputes in the three distinct, but symbiotic, branches of “government” charged with responsibilities for making decisions in the administration of public affairs.

- 12 Important to a full understanding of modern Australian Law is the story about how, in England, royal judges, assisted by a local juries, established an ascendancy on the part of the Crown over local courts in an evolutionary process that led to recognition of three Courts of Common Law (King's Bench, Common Pleas and Exchequer), leading to established "rules" governing remedies available by issue of a royal writ.
- 13 Equally important to an understanding of Australian Law is the evolution, in England, of the Court of Chancery, itself a product of delegations from the Crown and the evolution of judicial offices subordinate to that of the Lord Chancellor. Equity's development of "principles" to govern the discretionary intervention of its judges in the processes of the common law can be traced in the careers of chancellors (initially trained as theologians, civilian jurists and, only later, common law practitioners) or in the development of law reporting essential to the articulation of "substantive law" principles.
- 14 Common law "rules", articulated by reference to "causes of action" capable of sustaining a jury verdict ("verdict for the plaintiff", "verdict for the defendant", guilty", "not guilty" or some variation of these types of unconditional answers to particular questions), have left their mark on how law is perceived in the Anglo-Australian tradition.
- 15 Until the influence of universities in legal education, and in the presentation of legal literature, began to be felt in the mid-19<sup>th</sup> century Anglo-Australian law was distinctly action-based.
- 16 Action-based, remedy-driven law (preoccupied with obtaining or regulating a jury determination of a claim of right) affected even, implicitly, the concept of a "party" to civil proceedings. In a common law action each party had to be present before the court, a participant in an adversarial contest.

- 17 Confronted with problems concerning the management of property disputes (eg, in the administration of estates, in the context of trusts, succession law and the protective jurisdiction of the Crown), and having to deal with parties “absent” from the courtroom (eg., because of a lack of identification, prospective birth, actual death or incapacity for self-management) judges trained in what we, in NSW, now call the Equity tradition, were forced to develop practice rules about parties more flexible than those administered by common lawyers and, through “directions hearings”, to manage the conduct of civil litigation in ways not possible in the conduct of a jury trial.
- 18 A seismic paradigm shift took place in the theory, and practice, of court administration with the progressive abolition of civil jury trials (a process which took root in NSW only in the decade preceding the adoption of a *Judicature Act* system, with the commencement of the *Supreme Court Act 1970 NSW*, in 1972); and with the development of “management theory” in public administration in the years following World War II, coupled with concerns about the economic efficiency of dispute resolution procedures (sometimes attributed to an “access to justice movement”),
- 19 It was part of that shift, and a reflection of it, that everybody began to speak about “case management” (and “alternative dispute resolution” procedures), and became less amenable to management of litigation through disputes about pleadings.
- 20 Nevertheless, to this day, the influence of English legal history can be seen in distinctions drawn between “issue pleading” (characteristic of the Common Law’s formulary system of pleadings, designed to define an “issue” for determination by a jury) and “fact pleading” (characteristic of Equity’s concern to make decisions based upon all the “facts and circumstances” of a case known at the time decision).
- 21 Characterisation of these different types of pleading models as a “Common Law” model and an “Equity” model is overly simplistic, just as is any division of the Supreme Court’s jurisdiction in a binary system of classification.

- 22 The Supreme Court's jurisdictional foundations extend beyond those grounded in the English Courts of Common Law and the English Court of Chancery. They include, for example, a probate jurisdiction derived from English ecclesiastical courts, in which decisions about the validity or otherwise of a will were once routinely submitted to a jury. Traces of an action-based law of succession can still be seen in standard grounds upon which the validity of a will is routinely contested in NSW, with allegations of "a lack of testamentary capacity", "a want of knowledge and approval" and "undue influence (meaning coercion)", with regular allegations of "suspicious circumstances" and occasional allegations of "fraud".
- 23 Simplistic debates about the competing merits of Common Law and Equity systems of adjudication have largely (but not entirely) been displaced by the practical abolition of civil jury trials; the increasingly widespread availability of legislative remedies; the exposure of all lawyers to a diversity of statutory tribunals; the development of "administrative law" principles; and the imposition of management regimes focused upon the elevated importance of an "overriding purpose" identified (in section 56(1) of the *Civil Procedure Act 2005 NSW*) with "[facilitation of] the just, quick and cheap resolution of... real issues in... proceedings", aided by changes in technology, including facilities for photocopying documents, reducing evidence to writing and the preparation and dissemination of written submissions.

## **UNDERSTANDING THE PRESENT BY COMPARISON WITH THE PAST**

- 24 What is meant by concepts like "pleadings" and "case management" in contemporary litigation theory and practice can, perhaps, best be understood by comparing what once was with what now is, noticing shifts in meaning, or emphasis, not readily discernible in abstract definitions of each particular concept. Lawyers tend to do what they do imagining what is now done as always done, incrementally employing familiar language in the adaptation of old concepts to new problems, generally driven by a utilitarian purpose.

- 25 A measure of a change in culture that has taken place can be taken by a backward glance at the *Guide to the Practice of the Supreme Court of NSW*, compiled by me as a junior counsel and published by the Law Book Co in 1989.
- 26 It took the form of an orthodox, elementary, action-based practice text with topical entries presented in alphabetical sequence.
- 27 There was no entry for “case management”, although there was an entry for “directions” that drew attention to the *Supreme Court Act* 1970, section 76A and the *Supreme Court Rules* 1970 NSW, Part 26 Rule 1 (each a predecessor of the *Civil Procedure Act* 2005 NSW, section 56(1)) with an expressed concern for “the speedy determination of real questions”.
- 28 Extended entries dealt with “pleadings” and “particulars”, reflecting litigious battlefields not as commonly fought over now as then.
- 29 With editorial licence (omitting references to particular rules of court), something of the flavour of a different world can be found in the following extract of the entry for “pleadings” :

“... **Purpose...** *The object* of pleadings is to define the issues between the parties to proceedings. Pleadings define the issues in general terms. Particulars control the generality of pleadings, confine the scope of evidence, disclose a party’s case and prevent surprise: *Pilato v MWS & DB* (1959) 76 WN (NSW) 364 at 365-366; *Searle v Mirror Newspapers Limited* [1974] 1 NSWLR 180 at 186, 188-189. Questions as to pleadings... and particulars... cannot easily be disentangled but a pleading must disclose a cause of action or defence as the case may be. Gaps in a pleading cannot be filled by particulars (*H 1976 Nominees Pty Limited v Galli & Apex Quarries Limited* (1979) 30 ALR 181 at 186-187); particulars cannot be used to widen a claim in a pleading: *Grollo & Co. Pty Limited v Hammond* (1977) 16 ALR 123 at 127; *Southern Cross Exploration NL v Fire & All Risks Insurance Co. Limited* (1985) 2 NSWLR 340.

The degree of particularity required ultimately depends on the nature of the case and upon 'the good sense of the thing': *American Flange Limited v Rheem Australia Limited* [1963] NSWLR 1121 at 1126.

Upon the definition of issues by pleadings and particulars usually depends the resolution of any disputes as to discovery..., interrogatories... and the admissibility of evidence, each of which require assessments of relevancy.

Subject to orders for costs and adjournment as may be appropriate, the court will ordinarily allow a party to amend his pleading:... *Heath v Goodwin* (1986) 8 NSWLR 478. In an appropriate case the court may give effect to defences not pleaded (*Sykes v Stratton* [1972] 1 NSWLR 145) and, if evidence is adduced outside the scope of particulars, it may be acted upon: *Dare v Pullam* (1982) 148 CLR 658."

- 30 An even longer entry (here presented in the form of an edited extract) expounded upon the concept of "particulars":

"... **Nature of particulars.** (i) *Functions of particulars.* Particulars may be shortly defined as the details of a claim or defence in proceedings which are necessary to enable the other side to know what case it has to meet: *Osborne's Concise Law Dictionary* (Sweet & Maxwell).

If there is a single function served by particulars it is to ensure that litigation is conducted fairly, openly and without surprises and, incidentally, to reduce costs."

The objects of particulars are often stated positively as being: to inform one's opponent of the nature of the case he has to meet, as distinguished from the way in which the case will be proved;

- (a) to prevent an opponent being taken by surprise at trial;
- (b) to enable an opponent to know what evidence he should collect; and
- (c) to limit the generality of pleadings.

Stated negatively, the role of particulars is often defined in the following terms:

- (a) It is not the function of particulars to fill gaps in pleadings: *H 1976 Nominees Pty Limited v Galli* (1979)30 ALR 181. Pleadings must, themselves, disclose a cause of action independently of particulars (which merely disclose matters of detail).

- (b) It is not the function of particulars to provide facts upon which to base a defence (*CBA Limited v Thomson* [1964-5] NSW 410 at 415; 81 WN (Part 1) (NSW) 553 at 559) or to widen a claim: *Grollo v Hammond* (1977) 16 ALR 123 at 127.
- (c) A party need not and ought not plead particulars. A party who pleads with unnecessary particularity may thereby restrict himself at trial.

The test of whether a party is able, at trial and in the face of objections, to adduce evidence outside particulars earlier given is whether the discrepancy between particulars and proposed evidence is great enough to amount to an injustice or an embarrassment to an opponent: *Vlasic v Federal Capital Press* (1976) 9 ACTR 1 at 5-6; *Southern Cross Exploration NL v Fire & All Risks Insurance Co Limited* (1985) 2 NSWLR 340. If evidence is, in fact, adduced outside the scope of particulars it may be acted upon by the court: *Dare v Pulham* (1982) 448 CLR 658; *Miller v Cameron* (1936) 54 CLR 572 at 576-577...

(iii) *Particulars distinguished from other concepts.* The role played by particulars often needs to be considered *vis-à-vis* that played by other forensic tools, especially the role played by pleadings, interrogatories and evidence:

- (a) particulars and pleadings: pleadings define issues in general terms. Particulars control the generality of pleadings, confine the scope of evidence, disclose a party's case and prevent surprise: *Pilato v MWS & DB* (1959) 76 WN (NSW) 364 at 365-6; *Searle v Mirror Newspapers Limited* [1974] 1 NSWLR 180 at 186, 188-189.

In general, the degree of particularity required depends on the nature of the case and upon the 'good sense of the thing': *American Flange v Rheem Australia* [1963] NSW 1121 at 1126. Particulars should not be so general as to conceal, rather than frankly disclose a party's case: *Rosenstraus v Muscat* [1965] NSW 302 at 305-6; *McCormack v Gilchrist Watt and Sanderson Pty Limited* [1962] NSWSC 462; *Philliponi v Leithead* [1958] SR (NSW) 352; 76 WN (NSW) 150; *Hameth Pty Limited v Vernon* (1964) 81 WN (NSW) 447 at 448.

A plaintiff cannot avoid giving particulars by inviting the defendant to plead non-admissions: *American Flange v Rheem Australia* [1963] NSW 1121 at 1129. In *Engarch Pty Limited v Ocean Shores Pty Limited* [1970] 3 NSW 204 a defendant who, against the rules, pleaded 'not indebted' was ordered to supply particulars.

Where a statement of claim pleads merely a common money count a defendant should consider serving on the plaintiff a notice to plead facts... rather than a request for particulars as such.... If, after the plaintiff has served an amended statement of claim, there is a need to do so the defendant can still request particulars....

- (b) particulars and interrogatories: interrogatories provide a procedure for discovery of facts (as distinct from documents) before trial. ...

As with particulars, interrogatories may be used to enable a party to know the case he has to meet: *Cameron v Cameron* (1890) 7 WN (NSW) 29; *Bellambi Coal Co. v Barry* [1904] SR (NSW) 748; *West v Conway* (1923) 23SR (NSW) 344; *Cumming v Matheson* (1970) 92 WN (NSW) 339 at 342-3.

Interrogatories differ from a request for particulars in that: (i) their purpose is to assist the case of the interrogator (usually by forcing admissions) rather than to disclose the case he has to meet; and (ii) a party can refuse to answer interrogatories (for example, on the ground of privilege) without limiting proof of his own case.

It is not generally permissible to interrogate as to matters beyond the issues as disclosed by the pleadings and particulars: *Ring-Grip (Australasia) v HPM Industries* [1971] 1 NSWLR 798 at 800; *Grollo & Co. Pty Limited v Hammond* (1977) 16 ALR 123 at 126-7.

Interrogatories in the nature of a request for particulars will not be ordered by some judges except in special circumstances (*Conde v 2KY Broadcasters Pty Limited* [1982] 2 NSWLR 221) but it is not uncommon, at least, for a party to seek to obtain confirmation, on oath in answer to interrogatories, of an admission made in particulars earlier supplied at the request of the interrogator: see also *Hawke v Tamworth Newspaper Co. Limited* [1983] 1 NSWLR 699 at 707.

- (c) particulars and evidence: pleadings and particulars define issues. Evidence enables a tribunal to decide where the truth lies: *Pilato v MWS & DB* (1959) 76 WN (NSW) 364 at 366. There is, at least in theory, a definite distinction between particulars and evidence. A party is entitled to know the case to be met but not be told the evidence that will be called to prove the case: *TPC v Total Australia Limited* (1975) 24 FLR 413 at 417.

A party is not entitled to particulars for the purpose of ascertaining an opponent's witnesses: *R v Associated Northern Collieries* (1910) 11 CLR 738; *Miller v Miller Auto Body Co. Limited* (1922) 39 WN (NSW) 201; *Turner v Dalgety & Co. Limited* (1952) 69 WN (NSW) 228. However, where necessary to give effect to the objects of particulars, a party may be required to disclose the office or name of a witness.

Reference by a party to evidence by which he seeks to prove a claim does not necessarily provide particulars of the claim. An opponent should not be obliged to guess, from allegedly relevant evidence, what is the nature of the case against him: Cf. *Gollin Holdings Limited v Adcock* [1981] 1 NSWLR 691. The supply of a bundle of photocopy documents, some of which may be irrelevant to an ill-defined cause of action, is not of itself a substitute for particulars.

A party is entitled to an outline of the claim against him, which may differ from true facts: *Palmos v Georgeson* [1961] QDR 186. Whilst it may be an objection to the supply of particulars that the party seeking them already knows them (*Lawson v Perpetual Trustee Co.* (1959) 76 WN (NSW) 367) it is an objection which cannot properly be taken merely to avoid disclosure of one's case.

An answer to a request for particulars, "This is a matter of evidence", does not supply particulars: *Broers v Forster* (1981) 36 ALR 605 at 625, 622. Nor does it, of itself, justify a refusal to supply particulars. ..."

- 31 None of this treatment of the topics, "pleadings" and "particulars", is wholly unfamiliar in current litigation practice. However, judges are less accommodating now than formerly of interlocutory disputes about pleadings and particulars.
- 32 "Trial by ambush", as a standard of pre-trial preparation that called for an acute need for instructive pleadings and particulars, has been disclaimed (at least in theory) in favour of a judicial predisposition favouring up-front "show and tell" disclosure of each party's case, the evidence they rely upon and submissions they propose to make. Requirements for the preparation of court books (including affidavits or witness statements and bundles of documents, all duly paginated) have displaced routine concerns about witnesses called

cold. Directions for the service of chronologies, cross referenced to court books, and to written submissions (which are often supplied in anticipation of a hearing without any direction of the court) sometimes, although not always or safely, render pleadings and particulars almost otiose.

- 33 The mindset of *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146, reflected in the *Guide* entry on “pleadings”, according to which an amendment of pleadings was ordinarily allowed upon submission to an order for costs and an adjournment, has given way to the rigour of *AON Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175, insistent upon enforcement of case management imperatives in the just, quick and cheap resolution of real issues. One suspects, though, that the rigour demanded by *AON* is not always, or easily, maintained.
- 34 The deliberate elevation into the *Civil Procedure Act* 2005 NSW of the “overriding purpose” of civil procedure as the just, quick and cheap disposal of proceedings was the centrepiece of procedural reforms that culminated in the Act, and have continued since its enactment. That “overriding purpose” is the fulcrum upon which case management pivots: M Kumar and M Legg (eds), *Ten years of the Civil Procedure Act 2005 (NSW): A decade of insights and guide to future legislation* (Law Book Co, Sydney, 2015), page 3.
- 35 The paradigm shift it embraced involved a deliberate transfer of control over the conduct of civil proceedings, from parties to the courts: judges eschewing their comparatively passive roles in accommodating parties as the active agents in the conduct of proceedings, and insisting upon active enforcement of public interest imperatives in court administration.
- 36 Commencing in NSW in the 1960s, the practical abolition of civil jury trials, which opened the way to the adoption of a *Judicature Act* system of court administration (in which Equity’s tradition of fact pleading, directions hearings in case preparation and final hearings in lieu of jury trials hold sway) paved the way for an almost continuous process of evolutionary reform in the administration of civil justice that has engaged the State’s courts since 1972.

- 37 A change in culture has manifested itself across a broad spectrum, with at least six distinct (complementary, if not interlocking) features able to be identified.
- 38 First, there has been a remoulding of the State's system of courts and tribunals. One feature of that process has been promotion of flexibility in management of the State's three levels of courts (the Supreme, District and Local Courts), including the training of judicial officers through the Judicial Commission of NSW and associated initiatives. Another has been the integration of court administration structures, illustrated by enactment of the *Civil Procedure Act 2005* and the *Uniform Civil Procedure Rules 2005* NSW, together with the development of computer facilities such as Justicelink.
- 39 Secondly, there has been a devolution of decision-making to statutory tribunals, coupled with an integration of such tribunals in the court system. The most prominent example of this is the enactment of the *Civil and Administrative Tribunal Act 2013* NSW and establishment of NCAT.
- 40 Thirdly, processes of change have maintained momentum through promotion of the idea that, as an incident of the development of a national legal system, and a national legal profession, there should be "harmonisation" of court procedures (State and Federal) wherever practicable.
- 41 Fourthly, enactment of the Commonwealth and NSW *Evidence Acts* of 1995 has acted as a circuit breaker in the conduct of civil litigation (although, perhaps, also as a disruptive factor, particularly in the conduct of criminal trials) by pushing aside an accumulation of restrictive approaches to the admission of evidence. Debates about the admissibility of "business records" are now comparatively rare. An expansive view of "relevance" as the fulcrum point for the admission of evidence, coupled with a disinclination on the part of judges to encourage objections to evidence, has perhaps brought judges closer to the mindset of administrative decision makers than was formerly the case.

- 42 Fifthly, “rules of court” and “practice notes” administered by the courts have revolutionised the trial process: (a) They have practically eliminated the procedure for “general discovery” of documents that was once available to parties, by service of an *inter partes* notice upon the closing of pleadings, and approximated to procedures for the issue of subpoenas and the service of notices to produce those discovery processes that remain available; (b) The administration of interrogatories, once a procedure routinely engaged following upon general discovery, is now rarely seen; (c) “Alternative” dispute resolution procedures (engaging the services of arbitrators, referees, mediators and the like) have become so mainstream that they have lost something of the character of an “alternative” decision-making procedure; (d) Compulsory mediation processes, in particular, have become the norm in the conduct of civil proceedings; and (e) Attempts by parties to control agendas in the conduct of proceedings *via* expert evidence have been thwarted by procedures designed to reinforce the independence of “experts”, and to compel them to engage their counterparts, with summary processes, under the control of courts.
- 43 Sixthly, courts have reallocated resources in a way that acknowledges changes in the litigation process. Phasing out of “Masters” (“Associate Judges”), who were accustomed to carry a heavy workload in dealing with interlocutory disputes about pleadings, particulars *et cetera*, provide one illustration in the context of the NSW Supreme Court. Another may be found in the now regular engagement of registrars in the conduct of routine, compulsory mediations.
- 44 Procedures for the conduct of civil proceedings have changed to such an extent that sharp distinctions earlier drawn between the “adversarial system” of common law jurisdictions and the “inquisitorial system” of civil law jurisdictions no longer seem appropriate. When a jury had to be empanelled for a trial set down for a “once and for all” determination of a claim of right on a specified day there was greater scope for an adversarial contest. Now, the concept of a one dimensional “trial”, let alone the common law tradition of “trial by ambush”, has been displaced by hearings before a judge that can

more readily be adjourned from time to time to accommodate the interests of justice by active “management” of proceedings by courts. Profound changes in procedure have required, and heralded, profound changes in thinking.

## **GENERAL PRINCIPLES IN “PLEADING A CASE” IN CASE MANAGED COURT PROCEEDINGS.**

### **Case Management, Problem Solving and Advocacy**

- 45 In a court system governed by a case management theory, relieved of an obligation to submit proceedings to a process of determination at a trial appointed for a single day, the best advocacy will be that which displays to the court a preparedness, and ability, to work with the court (not against it) in identification of problems to be solved (“real questions”) and a range of reasonable solutions realistically available on a fair assessment of material facts.
- 46 The observations of Sir Owen Dixon in one of his first addresses as Chief Justice of the High Court of Australia, reproduced in *Jesting Pilot* (Law Book Co, Sydney, 1965) at pages 250-251, lend themselves to adaptation to first instance judicial proceedings notwithstanding their focus on appellate advocacy:

In advocacy [in an appellate court, before several Judges], you learn many things. Not the least of all that candour is not merely an obligation, but that in advocacy it is a weapon. You learn, too, that it is not case law which determines the result; it is a clear and definite solution, if one can be found, of the difficulty the case presents – a solution worked out in advance by an apparently sound reconciliation of fact and law. But you may learn that the difficulty which has to be solved must be felt by the Bench before the proper solution can exert its full powers of attraction. It is only human to underestimate the value of the solution if it is presented to you before you are completely alive to the nature and difficulty of the problem which it solves, and the judges who were more than human are long since dead.

May I remind you that good advocacy never takes its eyes of the court and it remembers the Greek precept... “Nothing too much”. This is sometimes called tact. But, after all, tact is only good taste in action.

- 47 The very best advocates not uncommonly advance their client's cause by engaging with the court in identification of a problem, fairly laying out a range of possible solutions and, then, stepping back from debate with just a hint that the interests of justice favour a particular outcome, not over-selling it but allowing the judge freedom to make a fully informed choice. Very disarming.

## **Pleadings**

- 48 **When are pleadings required?** Rules of court generally prescribe particular types of proceedings as required to be commenced by statement of claim or summons, leaving other cases to be commenced by either form of originating process.
- 49 In principle, the desirability of pleadings will generally turn upon: (a) whether there is a need for, or utility in, a process of dialectic to identify disputes of fact, as often is the case on a common law claim for damages or for possession of land, or on a claim in equity for a breach of trust; or (b) whether a particular type of case (eg, a claim in debt) might ordinarily lend itself to procedures for entry of a default judgment, available upon a default in filing a defence to a statement of claim but not generally available in proceedings commenced by summons.
- 50 Proceedings in which the sole or principal question at issue is, or is likely to be, one of construction of a written instrument or some other question of law, or in which there is unlikely to be a substantial question of fact in dispute, are generally regarded as proceedings in which pleadings are not required.
- 51 Courts generally have power to order that proceedings proceed by way of pleadings, or that any requirement for pleadings be dispensed with, to accommodate the due administration of justice in a particular case.
- 52 **Why are pleadings required?** A system of pleadings (whether in the character of issue pleading, fact pleading or some other type) is important to orderly, judicial decision-making, viewed from the perspective of every participant in the decision-making process.

- 53 At its best, it promotes clarity in identification of the jurisdiction of the decision-maker invoked, and in the working out of the nature and scope of practical decisions available for the determination of disputes. It helps in the establishment of boundaries between participants in the process, necessary to ensure procedural fairness and to avoid unrealistic expectations. It aids definition of the objectives of parties and management of conflict. By exposing “facts in issue” it provides a touchstone for identification of evidence bearing upon a just determination of questions in dispute.
- 54 Well-crafted pleadings will serve these objects. At their worst, though, poorly crafted pleadings (sadly, sometimes deliberately) obscure real questions in dispute or deflect interlocutory processes into a morass of costly disputation.
- 55 In an age in which comparatively few cases are fought out to finality on issues primarily identified in pleadings, there is a tendency for judges to turn, first, to claims for relief (set out in the summons or a pleading) to identify the nature of the case to be decided and, then, to written submissions to find out what the lawyers propose to argue that the case is about before, thirdly, turning to allegations of fact made in pleadings to check that the case to be presented is within, and therefore available on, the pleadings.
- 56 **The proper approach to the preparation of a pleading** can be summarily stated in the abstract. A pleader should identify each “cause of action” (using that expression in the modern sense as embracing a common law cause of action, an equity and statutory criteria for a particular claim) or defence, as the case may be, and all the facts material to each cause of action or ground of defence (but no other facts), and ensure that each cause of action, and each ground of defence, is transparently connected with a claim for relief made, or opposed, in the proceedings.
- 57 This requires an appreciation of the elements of a cause of action or a defence (the facts required to be proved to establish, or defeat, an entitlement to a remedy), the jurisdictional foundations of equitable principles and the operative terms of legislation called in aid.

58 **Technical requirements of a pleading** in a particular court are generally established by the governing statute, or subordinate rules, of that court. There is no substitute for a close examination of the particular legislation to ensure compliance in a particular case.

59 The following, edited extract from the “pleadings” entry in the 1989 *Guide* provides a convenient illustration of the types of “rules” (now generally found in *Part 14* of the *Uniform Civil Procedure Rules 2005 NSW* (“UCPR”) that generally govern “fact pleading”:

**“... Rules of pleading...”**

*(i) General rules:*

(a) A pleading shall contain, and contain only, a statement in a summary form of material facts on which [a party] relies, but not the evidence by which those facts are to be proved....

(b) A party shall plead specifically any matter which, if not pleaded specifically, may take his opponent by surprise ....

*(ii) Particular rules and exceptions in cases generally:*

(a) A pleading shall be divided into consecutively numbered paragraphs each of which, so far as convenient, deals with a separate matter...

(b) A pleading shall be as brief as the nature of the case admits ....

(c) A party shall not plead the general issue.... Nor, in proceedings for the possession of land, may a defendant simply plead that he is in possession of the land by himself or his tenant....

(d) So long as he is aware of [a] need to verify his pleading [if particular rules of court so provide] and to ensure that that pleading is not in an embarrassing form..., a party may plead facts or law in the alternative... but shall not in any pleading make an allegation of fact or law inconsistent with a previous pleading of his....

A party may withdraw any matter in his pleading at any time... but, in the case of an admission, only with the consent of the party consent of the party who has the benefit of the admission or with the leave of the court.... A party may amend his pleading: without leave, once before the parties are closed.... or, with leave, at any time....

(e) A plaintiff may plead a common money count... subject to the defendant's right to serve a notice to plead facts... within the time limited for the serving of a defence...[,] following which the plaintiff has [a prescribed time) within which to serve an amended statement of claim pleading the facts in full....

(f) A party may plead any matter notwithstanding that it has arisen after the commencement of the proceedings, but a cause of action which is pleaded [may, under particular rules of court, have to] have been complete at the time the statement of claim or the cross claim (as the case may be) was filed...

(g) Unless the precise terms of a document or spoken words [are] material, only the effect of the document or words shall be stated....

(h) A party generally need not plead a fact if it is presumed by law to be true or the burden of disproving it lies on his opponent....

(i) Unless the occurrence of a condition precedent is of the essence of a cause of action, it need not be pleaded by the person relying upon its occurrence... but it can, and should, be pleaded by an opponent who alleges its non-occurrence.

(j) An amount shall not be claimed for unliquidated damages....

(k) A defendant who relies on contributory negligence shall plead it ....

(l) A party may by his pleading raise any point of law.... a specific statutory provision, if relied upon, should ordinarily be pleaded....

Although all issues of fact and law are ordinarily determined at the trial or final hearing, a preliminary question of law (and, less frequently, a question of fact) may lend itself to separate determination [under rules of court authorising that to be done] or in proceedings... for a declaration.

(m) A defence, to a liquidated claim, of tender before action is not available as a defence unless and until the amount has been brought into court....”

60 **The Course of pleadings.** Under modern rules of court the course of pleadings does not run beyond a statement of claim, defence and reply without leave of the court (rarely sought or given), with the intent and effect of limiting the extent to which exhaustive forensic battles can be waged (as they once were) over “pleadings” rather than the evidence-based merits of a dispute.

- 61 **Old terminology explained.** Abolition of a right to plead “the general issue” reflects the adoption, in a *Judicature Act* setting, of Equity’s “fact pleading” model, and a rejection of the Common Law’s “issue pleading” model.
- 62 An illustration of the old common law mode of pleading, involving a pleading of “the general issue”, can be found in the *Common Law Procedure Act 1899* (NSW), section 67 and the *Third Schedule*. There can be found forms of pleading designed to facilitate the determination of litigation by the verdict of a jury at a trial in which a single, compendious allegation might be made by a plaintiff, to which a defendant might plead “the general issue” by alleging that “he never was indebted as alleged”, “he did not promise as alleged”, or “the alleged deed is not his deed” *et cetera* (in a contract case) or that “he is not guilty” (in a tort case): Lindsay, “Understanding Contract Law through Australian Legal History: Whatever happened to assumpsit in New South Wales?” (2012) 86 ALJ 589 at 612-613.
- 63 An Equity style “fact pleading” requires a narrative statement of alleged material facts and a direct engagement (with an admission, denial, non-admission or some other form of traverse) with each statement, based on the theory that “the facts in issue” in a case should emerge from such a dialectic, exposing questions for judicial determination.
- 64 The concept of “a common money count” currently finds reflection in the *Uniform Civil Procedure Rules 2005*, rule 14.12, the first two subsections of which are here reproduced:

**“14.12 Pleading of facts in short form in certain money claims**

(1) Subject to this rule, if the plaintiff claims money payable by the defendant to the plaintiff for any of the following:

- (a) goods sold and delivered by the plaintiff to the defendant,
- (b) goods bargained and sold by the plaintiff to the defendant,
- (c) work done or materials provided by the plaintiff for the defendant at the defendant’s request,
- (d) money lent by the plaintiff to the defendant,
- (e) money paid by the plaintiff for the defendant at the defendant’s request,

- (f) money had and received by the defendant for the plaintiff's use,
- (g) interest on money due from the defendant to the plaintiff, and forborne at interest by the plaintiff at the defendant's request,
- (h) money found to be due from the defendant to the plaintiff on accounts stated between them,

it is sufficient to plead the facts concerned in short form (that is, by using the form of words set out in the relevant paragraph above).

(2) The defendant may file a notice requiring the plaintiff to plead the facts on which he or she relies in full (that is, in accordance with the provisions of [these rules] other than this rule)....

65 Historically, these "common money counts" enabled Lord Mansfield to infuse the common law with equitable principles, and to develop that area of the law we now know as the law of restitution. A plea of "money had and received" (heavily relied upon by Lord Mansfield) remains a potent restitutionary device.

66 **Pleadings in a multi-layered litigation process.** Formal "rules of pleading" remain important even if, in many cases, the availability of written submissions and the like downplays the practical importance of pleadings in a particular case. Advocates need to ensure that, in a case proceeding on pleadings, pleadings conform to, and justify, the case conducted at first instance. Otherwise there is a risk, on appeal, that an appellate court will determine that findings made by the primary judge were not open on questions identified by the pleadings for determination.

67 **Strike Out and Summary Disposal Applications.** The close connection between a well-pleaded case and a meritorious case can be seen, in practice, in the ordinary association of a motion to strike out a defective pleading (UCPR rule 14.28) with a motion for summary disposal of a case deemed frivolous, vexatious or otherwise an abuse of process (UCPR rule 13.4).

68 The two forms of motion are nevertheless distinct: *Brimson v Rocla Concrete Pipes Ltd* [1982] 2 NSWLR 937. A strike out application focuses upon whether a pleading is properly formulated, not on whether a case is weak. A summary disposal application can draw strength from the weakness of an opponent's case, including available evidence.

## Written Submissions

- 69 What has been said of a pleading can equally be said of written submissions (in that there should be a clear identification of each cause of action or ground of defence relied upon, the findings of fact urged upon the Court in relation to each and an explicit connection of each to a claim for relief made, or opposed, in the proceedings), except that:
- (a) there is no utility in simply repeating “facts” pleaded, unless they are presented in the form of proposed findings of fact cross referenced to evidence in support of such a finding; and
  - (b) unlike a pleading, written submissions can, and ordinarily should, set out legal propositions (as propositions, not discursive observations about law), accompanied by references to legislation and case law that support the case advanced, and signpost the case advanced.
- 70 Given the prominent role played by written submissions in most modern-day hearings, my practice is to invite advocates, at the beginning of a substantive hearing, to hand up to the bench a clean, signed and dated copy of their written submissions – in a form conveniently able to be marked for identification and, as such, to be identified in the transcript. This is particularly helpful in proceedings in which there is a complexity of issues or the possibility that at the conclusion of the hearing judgment will be reserved.
- 71 Insightful written submissions, cross referenced to a court book, provide a useful guide to decision-making, a point of reference in the preparation of a reserved judgment.
- 72 With that in mind, written submissions should be prepared on the basis that they include reference to a party’s core propositions, cross referenced to core evidence, in support of a case open on the pleadings and specific orders sought.

## Evidence

- 73 In each case, an advocate must be familiar with any legislation (including, but not limited to, the *Evidence Act 1995*) and any practice notes bearing upon the admissibility of evidence.
- 74 That said, in civil proceedings there are two basic questions the answers to which inform debate about the admissibility of particular evidence:
- (a) is the evidence “relevant” to a fact in issue?
  - (b) is the evidence “probative” of a fact in issue?
- 75 Explicitly, each of these questions depends vitally upon identification of “facts in issue” and, hence, upon mastery of any pleadings filed in the particular proceedings.
- 76 In some civil cases, the practical effect of the *Evidence Act 1995* has been to abolish technical rules of evidence that formally dominated adversarial battlefields. A more relaxed attitude towards the admission of evidence that may have a rational bearing upon a determination of fact (coupled with flexibility and power by discretionary exclusionary provisions found in sections 135-136 of the Act) reinforces the idea that, in civil proceedings, there are only the two fundamental “rules of evidence” that operate under an overriding necessity to respect a need for procedural fairness.
- 77 In the dynamic of a contested hearing, debate around an application of “rules of evidence” can depend in large measure upon procedural norms.
- 78 Unlike in former days, affidavits are not now routinely read aloud, word for word, with objections taken as the passage of an affidavit subject to objection is about to be read. Instead, objections are routinely dealt with (generally on written notice to each opponent and the Court so that they can be marked-up in affidavits) in advance of any consideration of an affidavit as a whole and,

rulings on objections having been given, an affidavit is formally “taken as read” without more. The experience of judges is that, generally, a hearing needs to progress, as soon as may be practicable, to the stage when witnesses are called to give oral evidence if the hearing is to be conducted efficiently and, in any event, if prospects for settlement are to be maximised.

- 79 This process of objections is not uncommonly used by bench and bar alike to explore the real questions in dispute at the hearing. A common experience is that, once the practical parameters of a case are made manifest to all participants in a hearing, in the course of dealing with objections, competent counsel will refrain from taking every available objection, recognising the marginal utility in doing so. It often seems that advocates need to take the measure of each opponent, and the judge, before settling into a pattern of presenting arguments, comfortable that the terms of debate have been tacitly agreed upon.
- 80 In this way, the process of taking and ruling upon objections may operate as a supplement to, or substitute for, definition of questions in dispute by reference to formal pleadings.
- 81 There are two sides to the coin here. On one side, it is a mistake to assume that a case can be presented outside the pleadings. On the other side, it is also a mistake to assume that it is only *via* pleadings that questions for determination by the Court are defined or refined.
- 82 On a hearing presented primarily on affidavit evidence the equity tradition is formally to read all affidavits, on both sides of the record and to receive documents separately tendered at the outset of the hearing, before proceeding to allow cross examination on the affidavits, rather than formally to read each witness’s affidavit(s) immediately before the witness’s cross examination or any supplementary oral evidence in chief pursuant to a grant of leave. This leaves little or no room for a defendant to make a common law style “no case” submission at the end of a plaintiff’s case.

- 83 In some cases (eg., where there is an allegation of fraud) a judge might insist that evidence in chief be given orally even if it covers the same field as an affidavit, or affidavits, earlier filed and served.

### **Court Books**

- 84 The preparation of many, if not most, civil proceedings ordinarily begins with: (a) identification of a remedy to be sought or a legitimate forensic purpose to be pursued in proceedings; and (b) a compilation of all available documentation bearing upon proof of a case dedicated to pursuit of that remedy or purpose.
- 85 Having worked backwards (from “remedy” to proof of a cause of action) in preparation, a competent advocate must ensure that the evidence and submissions to be placed before the Court for decision are assembled in a convenient, orderly form - the presence of which is generally essential to the presentation (in a “forward” sequence of facts, cause of action and remedy) in a persuasive manner.
- 86 Whether or not the subject of a formal requirement of the Court for its preparation, modern advocacy generally demands that there be a “court book” (presented in a secure folder, indexed, paginated and tabbed) containing:
- (a) a procedural outline identifying material court process (by dates of filing) and affidavits (by their dates of swearing or affirmation), including annexures and exhibits.
  - (b) the underlying documents: originating process, pleadings, affidavits and any other form of written evidence relied upon.
  - (c) a list of objections to evidence.
  - (d) written submissions directed to each application before the Court.

- (e) a chronology (or, as appropriate, a statement identifying principal documents), cross referenced to evidence in the court book.

87 Sufficient copies of a court book should be prepared to enable a copy to be retained for the court record (and for the use of witnesses), a working copy for the judge and a copy for each party.

88 The importance to a judge of attention to detail in the logistics of case presentation should not be overlooked by advocates.

89 Points of irritation for a judge which underscore this observation are found in frustrations attending a requirement, forced upon a judge by poor preparation of an advocate:

- (a) to search for pleadings, notices of motion, written submissions and affidavits in a disorderly court file (as almost all court files generally are) unaided by a court book directed to the questions to be decided by the judge;
- (b) to deal with voluminous documents in a court book lacking pagination, an index or tabbed dividers; or
- (c) to manage affidavits neither paginated nor stapled or otherwise duly bound.

90 This problem is greater than it once was, ironically, because the Court now allows documents to be filed electronically, a consequence of which is that, in practice, a judge might have no forewarning or copy of documentation referred to by advocates. A prudent advocate will have a “hard copy” of every document to be relied upon and will be congenially compliant with a request that a missing document be handed up to the bench.

## **Draft Short Minutes of Orders**

- 91 In the early years of practice, a modern litigation lawyer might well be confused by references to “short minutes of orders” (an expression not expounded in any modern legislation and rarely touched upon in practice books) notwithstanding that much court business is transacted by reference to draft, or competing drafts, of short minutes.
- 92 Quite apart from considerations of convenience to a judge in choosing between this form of order, or that, in entertaining debate about what the court should, or should not, do, the concept of “short minutes” can serve a profoundly important function.
- 93 An advocate who prepares draft short minutes will be required, himself or herself, to crystallise a case for presentation to a judge, and to view that case from the perspective of a judge (who, ultimately, can only “speak” through formal orders).
- 94 The following, final extract from the 1989 *Guide* provides sufficient elaboration of this topic:

### **“SHORT MINUTES OF ORDERS**

Before enactment of [the *Supreme Court Act 1970*], an order of the court was formally recorded in a ‘minute of order’ which recited the court process, appearances and evidence leading to the order made by the court. Under [modern NSW rules of court] the preliminary detail is not required. The general form of a ‘minute of order’... simply records, in short form, the order of the court.

‘Short minutes of orders’ are used with comparative informality to record a wide range of judgments and orders and to ‘note’ agreements made between parties. They may record either interlocutory or final business.

There is no prescribed form of short minutes of orders but, as a matter of practice, such documents generally follow [the prescribed form of a ‘minute of order’], omitting reference to the entry of orders and providing for signatures by parties or their legal representatives in lieu of (or in addition to) the provision for signature by a representative of the court.

Where, in the preparation of proceedings, parties are required successively to file and/or serve affidavits or pleadings or to take some other step (such as the inspection of documents) the practice of the court often is to invite one or other or both of the parties to embody in short minutes a timetable for those steps to be taken. Parties attending a directions hearing should, prudently, prepare short minutes (setting out the relief they seek) in anticipation of the court's orders.

On publication of reasons the judgment the court may invite the parties to 'bring in short minutes' (ie. to draft short minutes) to give effect to the court's reasoning; the court may then adopt the draft orders (with or without amendment) and resolve any remaining disputes between the parties.

Well-drafted short minutes can save court time, define outstanding issues between the parties, and provide a convenient record of the court's decision. Where possible they should be typed. However, recognising the exigencies of litigation, the court may accept (legible) handwritten documents.

Agreements for the compromise of proceedings in whole or part are often embodied in a document styled either 'Short Minutes' or 'Terms of Settlement'. Nothing necessarily turns on the title, or form, of such a document.

Whilst short minutes may provide a draft form from which a formal minute of order... may be prepared for entry [pursuant to rules of court] they are not a substitute for a formal minute."

- 95 These observations remain pertinent, but cannot escape the electronic age in which we live. Court orders are generally now "entered" when posted on a court's computer record (in NSW, "Justicelink"), with the consequence that a heavy administrative burden can fall upon a judge, and his or her staff, in the preparation of lengthy orders unless a party provides a form of orders ("short minutes") in electronic form adaptable by the court.

## **CRAFTING A JUDGMENT**

- 96 A tiresome burden for most judges – if only because of the constancy of a judge's workflow – is the preparation of written reasons for judgment. The burden is an inescapable part of judicial life on a superior court and, for those at least who enjoy writing, it is not without its compensations. However, the almost universal need to prepare judgments in a form that can be published

electronically on the judiciary's "Caselaw" website involves a requirement for attention to detail not experienced in former times, and administrative burdens not only for the judge but also for his or her staff.

97 An advocate who presents his or her case mindful of these burdens (by presentation of submissions in a short, logical format and by formulation of orders able to be adopted, or adapted, by the Court) is an advocate whose presence will be warmly appreciated by judge and staff alike. These things do matter.

98 This is not commonly understood by less experienced advocates, unfamiliar with the logistical constraints operating on the Courts. A competent, experienced advocate will, by due performance of his or her duties, cultivate a reputation for timely assistance in easing judicial burdens. Management of the judge is, perhaps, an advocate's equivalent of a judge's insistence on case management of the proceedings! When bench and bar work constructively together there is, not uncommonly, a symbiotic relationship in operation.

## **CONCLUSION**

99 The scale of business undertaken by courts, and the workload of judges, is of such a dimension that "case management" philosophies of court administration are unlikely to be discarded any time soon.

100 Each participant in court proceedings needs to accommodate that reality, and to endeavour to understand it from the perspective of each other participant in order to promote the proper administration of justice.

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