TITLE: **'Promoting the efficient, thorough and ethical resolution of commercial disputes: A judicial perspective'**

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> *Confucian thought holds that going to court is a failure: a failure by the parties in not having regulated their conduct better, a failure in not being able to resolve their differences themselves and in having to resort to a third party to adjudicate. Recourse to the law is something shameful.*[1]

When, notwithstanding this, parties do resort to the courts to resolve their commercial disputes the role of the Court and those assisting the Court is to provide a satisfactory solution to that dispute as speedily and efficiently as is consistent with the requirements of justice.

You will note how I express myself. I would like to spend a moment or two reflecting upon each of the elements of this statement.

The Role of the Court and of those Assisting the Court

The modern approach to commercial litigation is very different to that of fifty, or even fewer, years ago, and it is continuing to change. In those days the practitioners for the parties were indeed opponents. They were gladiators fighting for their clients on a terrain which they established within the limits established by the rules of substantive and procedural law and in the presence of an umpire. This meant that each yielded as little ground as possible and each concealed their strategy so as to maximise the advantage of a surprise attack. And all the while, the umpire impassively observed all, not breaking silence, unless one or other cried foul, until the battle was over and then only to crown the victor.

Modern commercial litigation has more a feeling of cooperation rather than confrontation; it is an endeavour where the practitioners and the Court work together to achieve a result. And so I describe practitioners as persons assisting the Court in its task. In a sense, they have always done so for, without lawyers, adversarial litigation at any sophisticated level is not practicable. I will return to this a little later on.

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[1] D. Gladwell, "*Modern Litigation Culture: The First Six Months of the Civil Justice Reforms in England and Wales"* (2000) 19 CLJ 9

A Satisfactory Resolution of the Dispute

This is, after all, the end result of the court process in commercial litigation. It must be satisfactory. The satisfaction is, of course, that of the clients, the litigants, for it is they whom we all serve, whether we be judges, barristers or solicitors. This means that the parties, especially the losing party, should leave the litigation process with a feeling that they have had a fair go and that the result is logically and morally defensible. There must, too, be a resolution of the dispute. It has been pointed out that, in most commercial cases, this will be the receipt of money, whether by way of damages or compensation or payment due under a contract. Barristers and judges run the risk of overlooking this for we see the job to be complete when a favourable judgment is given. The solicitors here present, and especially their clients, will be aware that this may be but one step in the process of resolution. There remains the task of converting the judgment for a sum into the receipt of that sum. I mention this and the associated step of converting an order for costs into cash in hand, merely to acknowledge the importance of these for the client. Commercial litigation does not end with the judgment.

It is well to remember, too, that the receipt of money after judgment is not necessarily the only resolution which can be described as satisfactory from the litigant's point of view. Hence, the importance of mediation with a view to settlement. In modern commercial litigation mediation is almost inevitable and a very high proportion of cases settle at that stage or soon after.

As Speedily and Efficiently as is possible consistent with the requirements of Justice

I doubt very much whether any here present would tremble at the thought that speed, efficiency and justice were said to be central elements of the litigious process. Nevertheless, a moment's reflection will show that speed is not the equivalent of efficiency. Nor is either of these an end in itself. As lawyers we must subordinate all to the requirements of justice. But even justice is not an unqualified concept. What is required to meet the objective of justice may differ from case to case; it may differ depending upon the amount at stake or the importance of the issue. At the Supreme Court level we pride ourselves on offering to the parties what is sometimes called Rolls Royce justice. This comes at a substantial price and many may begrudge this. Furthermore, it is impossible in a modern environment to overlook the fact that the Court has not unlimited resources and these resources must be applied to all of the cases before it in some fair way. Accordingly, the time is approaching, if it has not already arrived, when the Court will say to a litigant who has deliberately delayed and wasted court resources that enough is enough. The time may come when we must say that we might offer litigants a more modest vehicle for their dispute resolution than a Rolls Royce.

Case Management

In the new litigation environment all concerned have a new role to play – a role whose nature and boundaries we are all still working out. The modern commercial judge is expected to be familiar with the case before trial and to be pro-active. The image of the judge approaching the case on Day 1 of the trial as a clean slate is no longer acceptable. Litigants who have invested many tens of thousands of dollars in the education of their legal practitioners in the mysteries with which the litigation is

concerned are entitled to feel a little nervous when the person in whose hands their commercial fate lies appears to be a mere tyro. They are no longer tolerating a lengthy introduction of the case to the judge when this might have been achieved simply by the reading of a chronology or even the pleadings. They will be acutely aware that their own legal team might be ticking over by as much as $75 per minute. A phenomenon of modern litigation is the application to the management and trial of major cases of judges who are expert, not only in the law relating to the dispute, but have a general familiarity with the commercial context in which it arises. Accordingly, in the Commercial and Equity Division we have judges who have considerable experience in areas of commercial practice and law assigned to hear cases where their skills are able to be brought to bear.

Moreover, the cry today is increasingly for Case Management. Few here will recall the first tentative steps taken in this direction in 1972 in our Supreme Court by Menhennitt J as the inaugural judge in charge of the Building Cases List. This has been followed in this and other jurisdictions by a variety of such lists for Commercial Cases, Intellectual Property Cases, Major Torts, Corporations Business and other major or complex litigation.

I pause for a moment to wonder why this move took place and why it has been received with so much enthusiasm. In principle, it should have been resisted by all concerned.

It should have been resisted by the judges who have long been taught the virtues of silence and non-intervention in a Court where the adversaries establish their own lines of battle. It runs counter to a trend which every court has seen - that of off-loading matters of practice and procedure as far as possible to masters or registrars and, latterly in the Federal Court, to Federal magistrates. Judges, generally are not very interested in such matters. Moreover, it is a voracious devourer of Court resources; as judge in the Commercial List, I set aside every Friday for directions, that is, 20% of my court time. Is it efficient to have this proportion of judicial resources so employed?

It should have been resisted by the practitioners who thereby pass to the Court the initiative and much of the tactical advantage to be had by working the Rules of Court to suit their case. Incidentally, it might also have been seen by them as a risk to their financial interests, for they no longer control the interlocutory processes.

As it became apparent that the periodic attendance upon the managing judge was a very expensive exercise, it should have been resisted by the litigants who, after all, foot the bill for all of this.

It should have been resisted by commentators and academics. Decisions as to the interlocutory steps to be taken are now to be made by the judge who is, at once, the best and the worst qualified person to make them. The best, because, as a disinterested person with considerable authority he or she can focus on the real issues with the object of achieving a fair result, rather than a winning result. But the judge is the worst qualified because, of all persons in the courtroom, he or she knows least about what is really going on. All the judge has are the pleadings and what counsel have revealed. It is true that he or she can draw upon years of experience as a practitioner, especially, if the practice was in the field of expertise of the case. But, even so, the inferences which are drawn are essentially matters of informed

speculation. And judges are trained, if not required, to act upon evidence, not speculation.

And, speaking of the virtues and other characteristics of judges, it must be acknowledged that different judges have different views of the role of the managing judge and they exercise that role with differing degrees of enthusiasm.

And yet, notwithstanding this, case management must be seen as one of the success stories of commercial litigation. I limit my remarks to this area of practice, not only because it is the subject matter of this conference, not only because it is the area with which I am most familiar, but also because it seems to me that the tide of case management has been more advanced in this area than, say in personal injuries or other torts cases or in crime. But even there, it can be seen to be flowing.

Consequences of Case Management

In terms of the topic of this paper, how has case management affected the Efficient, Thorough and Ethical Resolution of Commercial Disputes? Put another way, what effect has it had on the way practitioners deal with their cases? Put yet another way, what effect has it had on the relationship which has long existed between Bench and Bar in the conduct of litigation?

I am concerned only with the perspective of a judge and that of a judge who has for some fourteen years now been removed from the hurly-burly of private practice. Those who are presently so engaged may see things differently.

The changing role of the Judge

Although my topic is primarily concerned with the impact upon practitioners, it is important that you understand that it is not only there that case management has and will have an impact and risks. It is sufficient that I list the areas which have been or may be affected:

- In order to exercise the function of case management properly it is, not surprisingly, necessary that the judge be familiar with the case. This will usually require more time in preparation than previously.

- The judge is expected to have more than a passing familiarity with the commercial activities the subject to the litigation. This raises the question of the impact of judicial notice. How much is a judge allowed to know about, eg accounting practices and standards.

- The judge is expected to be more interventionist than previously. Some do this better than others. I well recall a County Court judge, now deceased, before whom I appeared, who always knew better than anyone what the real issues were, and it was in this direction that he required that counsel focus attention. His Honour was almost invariably wrong. Other judges will go to the opposite extreme, being content to defer to the greater familiarity of counsel with the case.

- The old Rules do not always sit comfortably with the new approach. For example, in a summary judgment application the defendant must be given leave to defend if there is a contest of relevant fact. This has permitted many a hopeless case go forward to trial at some cost to the litigants and the Court. Under Rule 24.2 of the UK Rules of Court the Court may give summary judgment where it considers "that the defendant has no real prospect of successfully defending the claim or issue; and there is no other compelling reason why the case or issue should be disposed of at a trial".[2] Our Rules may have to be revisited, as they were under the Woolf Committee in 1999. The recent Commercial List Practice Note is a step in this direction.

- There may be problems on appeal. Very often the managing judge is acutely aware that one party is engaged in tactical manoeuvring, a fact which has come to light over the history of the interlocutory processes. When the judge acts on that perception and makes an order which is appealed it is often difficult for an appellate court to get a real sense of what is going on.

The changing role of the Practitioner

Practitioners, too, have a new and delicate role to play. One of the suggested advantages of a separate bar is that the barrister is two steps removed from the client. This, it was said, enabled counsel to decline in the appropriate case to present arguments or evidence which the client was keen to place before the Court. It was said that this was more difficult for a solicitor who, after all, had the day to day dealings with the client who was funding the whole exercise.

The Court now expects more of practitioners, whether they be barristers or solicitors. They are expected to raise the real issues in the case at its earliest stage so that the interlocutory processes can be directed to them and to enable them to be resolved at trial. This has a number of aspects. The first is what I have long called "Truth in Pleading". The party making an allegation in a pleading should commit itself to that allegation. By this, I mean that the allegation will be set out in specific terms and supported by sufficient particulars. It means also that the party responding to the plea must do so candidly. So, if a plaintiff alleges an agreement in writing with the defendant which is contained in an exchange of letters, I would not accept a mere non-admission without good explanation. The responding plea should either admit the agreement or deny the agreement, specifying whether it is on the basis that the letters were not sent or that the letters did not contain the agreement, or for some other reason.

Likewise, needless issues of law should not be raised. Take the typical claim for damages arising out of the sale of faulty goods or services. This will usually be, in essence, a claim for breach of contract in which the issues as to liability are likely to be issues as to the term of reasonable fitness and its breach. The case will therefore be won or lost on these two issues and the subsidiary issue, whether the purpose for which the goods or services were to be applied had been disclosed. It is regrettably common to see pleaded in the alternative to this the following claims directed to the same end.

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[2] Compare RSC Rule 22.02

- breach of collateral warranty that the goods or services were reasonably fit for the disclosed purpose;
- misleading and deceptive conduct in that the defendant represented that it was competent to provide the services;

- misleading and deceptive conduct in that the defendant misrepresented that the goods and services would be so fit;

- negligent representation that the goods and services would be so fit; and

- promissory estoppel to the effect that the defendant is estopped from denying that the goods and services would be so fit.

I will not prolong this with a discussion of how it is likely in most cases that, if the primary claim fails, it is unlikely that the alternatives will succeed and, further, how each of them may carry serious problems for the plaintiff. For example, the negligence claim may attract a defence of contributory negligence and the representations may be for promissory representations which mean that falsity is not demonstrated merely by showing the deficiencies in the goods or services provided. This multiplication of claims has the further consequence of unnecessarily complicating all of the interlocutory processes and ultimately, the trial. The timorous practitioner inserts claims such as these for fear of missing something and then lacks the courage to abandon them.

A practitioner who practises in the new environment must have a number of qualities. First, he or she must be well informed, both as to fact and law. This requires that the necessary work has been put into acquiring this information. Second, he or she must be confident; if you are timorous you will lack the courage to give away any point or concede any fact, however improbable. Third, he or she must have a degree of independence of the client. This is a particularly delicate quality for it is the client's case you are presenting; it is the client's fame or fortune which is at stake; and, very importantly, it is the client who is paying you to speak on its behalf. Moreover, it must not be forgotten that sometimes an unlikely scenario offered by the client turns out to be true.

Practitioners have always had dual duty to the Court and to the client, but in the past conflicts between these duties were fairly rare. I suspect that, in the future, the practitioner attempting responsibly to discharge these duties will more frequently encounter such conflicts. I should add immediately that my experience, especially in the Commercial List, has been that counsel and solicitors who have appeared before me have accepted this new burden and most have accepted that they should play a cooperative rather than a combative role.

My appointed task in preparing this paper is to offer strategies for assisting the Court in understanding the key issues in the case. In the present context I offer the following for your consideration:

- You should ensure that you know what are the key issues.

- You should plead your case in such a way that the key issues are identified.

- During the interlocutory process you should, in correspondence with the other side (especially if the correspondence will be placed before the judge) and in the course of argument in court, bring these issues clearly to the attention of the judge.

Discovery of Documents

Discovery has been, and is increasingly, a serious problem facing commercial litigation. This is a function of the increasing importance and number of documents involving in all commercial transactions. Since the advent of the "paperless office", papers have proliferated. We now of multiple copies of e-mails passing between all manner of persons involved in any transaction as well as the conventional memoranda and correspondence. Questions of privilege now assume greater difficulty since the High Court has put to one side the sole purpose test[3] and has been more ready to acknowledge that privilege may be waived depending upon the nature of the issues in the case.[4]

Two suggestions have been proffered to relieve the parties of this burden of discovery but each has been rejected in this jurisdiction. The first, the abandonment of the *Peruvian Guano*[5] test for the relevance of documents for the purpose of discovery and its replacement by some more stringent test which does not include discovery of documents which only might lead a party along a train of enquiry. In the UK Woolf Rules, this test has been abandoned in favour of one that requires disclosure of documents by a party which "adversely affect his own case; adversely affect another party's case; or support another party's case"[6]. In Queensland, too, a more restrictive test has been adopted.[7] The rule makers in this State have, however, decided to retain the *Peruvian Guano* test, and there is no immediate prospect of change.

The second suggested limitation was to limit discovery by reference to issues. It has sometimes been found convenient in a very large case to make discovery by stages, but this is not common and I understand that, in the County Court where there has been a practice of ordering discovery by reference to issues, this has proved to be unsatisfactory.

This leaves the rather dispiriting result that we must work within the existing environment which is presently causing difficulty.

I will read with interest the paper to be presented by Alexandra Richards QC on Legal Professional Privilege in documents, that by Professor Sallman dealing with

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3 *Esso Australia Resources Ltd v FCT* (1999) 201 CLR 49

4 *Mann v Carnell* (1999) 201 CLR 1

5 Documents which relate to matters in the in the action and those "which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case, or to damage the case of his adversary", *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 at 62 -3, per Brett LJ.

6 Rule 31.6

7 O 35 R 4(1)(b): "documents directly in issue"

the management of the paper trail and that of Joanne Cameron dealing with discovery generally.

Common Mistakes

This is not an easy topic for it is often not easy to characterise as a mistake something that simply went wrong. I understand that the topic asks me to look for more general shortcomings.

To my mind, the most common and annoying mistake made by practitioners in commercial cases is the persistence with points that are either likely to fail or which go nowhere. These clutter up the statement of claim and cause endless difficulties in discovery and at trial in making rulings on relevance. Put another way, the best barristers identify the best points and run with them.

It is a mistake for a practitioner not to be on top of the facts of the case. This is surprising, considering the effort and expense which is applied to the preparation of major commercial litigation. It is very annoying for the judge when counsel is seen to be fumbling about looking for some document, unable to recall names and dates and details, stumbling in answer to a question as to where the client stands on a particular issue or to be less than accurate as to evidence or a fact. It certainly fills me with very little confidence in anything else that that particular lawyer has to say about the case.

The management of documents at trial is an important aspect of trail presentation. Thought should be given to the bets way this is to be done. And when you do so, please spare a thought for the judge who is asked to digest it all on very short notice. It is for this reason that court books are widely used.

I join, too, in the widespread complaint that court books are too often filled with documents of very little relevance and which never see the light of day. The Commercial List Practice Note seeks to codify the test for the inclusion of a document in the court book as being whether any party expects to tender it. And when a document is included in the court book all references to it should be by its court book reference. I deplore the practice of providing the judge with multiple copies of these documents, perhaps as exhibits to witness statements. This is not only wasteful and conducive to confusion; it has the further disadvantage that the value of the court book and of its pagination is lost. To this I would add a personal lament. As one who notes the pages of the court book with cross-references to the evidence and to other documents, the benefit of this may be lost when there are in use a number of copies of the same document.

I have spoken elsewhere about the tricks and traps that await those who prepare witness statements. All I shall say her in the context of a discussion of common mistakes is this. It is a mistake to think that a witness statement is anything other than the written evidence in chief which the witness might otherwise have given in the witness box. In a sense the Court is entrusting to the practitioner who prepares the statement the task of taking evidence from the witness outside the courtroom. If this is understood the ramifications will become readily apparent. The evidence so obtained should be that of the witness, not what the practitioner would like ti to be; it should be in the words that the witness would use, not gentrified so as not to offend the sensibilities of the judge; as evidence in chief, it must comply with the formal

requirements and limitations which the Court would impose on such evidence. Again, in the new Commercial List Practice Note these matters are emphasised.

The Limits of Judicial Intervention

It is very difficult to discuss this topic in the abstract. As I have mentioned, I practised for many years in building and construction cases which were conducted in the Building Cases List What struck me as a barrister in that list was that the parties and their practitioners in a managed case tended to pass much of the initiative to the managing judge. This may be satisfactory to them, but it cannot be denied that the interest and enthusiasm and even the attitude of the managing judge depended very much upon the personality of that judge. In short, some were more interventionist than others. This means, I would think, that the limits of proper judicial intervention will, likewise, differ depending upon the judge whose views are being expressed. What follows, therefore, should be taken as my views rather than those of any other judge or of judges generally. I would suppose that I would be considered an interventionist judge.

I have already mentioned the instinctive resistance which many judges have to case management as a practice whereby the court departs from its traditional role of mere umpire.

Furthermore, when addressing deficiencies in pleadings the judge will be mindful that the case is that of the litigants, not that of the judge. Accordingly, it is for them to decide what causes of action to plead and how to plead them, assuming always that the pleading satisfies the formal and other requirements of the Rules.

The question of the power of the managing judge has been considered by the High Court in 1997 in *Queensland v JL Holdings Pty Ltd*[8] in the context of permitting amendments. This was a case where six months before trial the defendant sought to raise a fresh but arguable defence, The trial judge made mention of the fact that no satisfactory explanation had been offered for the delay in bringing the application and also her concern that the amendment might jeopardise the trial date. Accordingly, leave to amend was refused. The High Court set aside this order observing that the primary objective of a managing judge is to achieve justice and that other concerns, including that of the management of court resources and even the efficient management of a particular piece of litigation, must yield to that primary objective. In principle, that cannot be denied. Nor can it be said, with respect, that the actual decision of the High Court is surprising. What is of concern is the apparent retreat of that court from previous statements which encouraged trial judges to have regard, not only to the interests of the amending litigant, but also to those of the other parties who might lose their trial date and also to the broader interests of the Court in conducting a case management regime and in husbanding its resources.

The *JL Holdings* case is often referred to as the death knell for any effective coercive case management where one or other of the parties is incompetent or recalcitrant. In such a case proper management dictates that the Court can say no in the appropriate circumstances, even where an arguable plea is sought to be introduced. And what is the judge to say if a party, at the last moment and in the expectation that

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[8] (1997) 189 CLR 146

the imminent trial must thereby be adjourned, seeks to add a claim or a defence which, although arguable, does not have much prospect of success or adds little to the existing claims or defences. Should the managing judge refuse the amendment? The High Court decision is said to provide a negative answer. I am not at all certain that this is a correct reading of the judgments. As I have mentioned, as the facts are recited in the report, the decision to reverse the trial judge does not appear surprising; all members of the Court were agreed on this. The amendment was sought a long way from trial and the proposed defence was arguably good. It will only be in extreme circumstances that case management principles might be called upon to shut a party out from presenting an arguable defence.

The majority confirmed that the earlier decision of the Court of Appeal in *Cropper v Smith*[9] and its own decision in *Clough and Rogers v Frog*[10] remain good law. In the former case Bowen LJ said this:

> " … the object of courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases… . I know of no kind of error or mistake which, if not fraudulent or intended to overreach[11], the court ought not to correct, if it can be done without injustice to the other party… "[12]

It will be noted that this passage offers three cases where an arguable plea might not be permitted, fraud, overreaching and incurable prejudice. That case management is not to be added to this list is apparent from the following statement of the majority:

> Case management, involving as it does the efficiency of the procedures of the court, was in this case a relevant consideration. But it should not have been allowed to prevail over the injustice of shutting the applicants out from raising an arguable defence, thus precluding the determination of an issue between the parties.

Kirby J in a separate concurring judgment, however, was more ready to accept that the issue not simply a choice between a course which would punish a recalcitrant or dilatory party and that which accords primacy to the role of the Court in hearing all arguable issues which the parties want to raise.

The orthodox view is, therefore, that, absent fraud or overreaching, any amendment should be allowed providing it is not bad in substance or in form and further providing that another party suffers no prejudice which cannot be cured by an adjournment and an order as to costs. An argument that nowadays an order for costs may not be an adequate healing medicine for the strain, anxieties and false hopes which the amendment may cause[13] was rejected by the High Court, but not on any basis of

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9 (1884) 26 Ch D 700

10 (1974) 4 ALR 615; 48 ALJR 481

11 Shorter OED: to gain an advantage over, get the better of, to outdo; now always in a bad sense. Example: "He never made any bargain without over-reaching (or, in the vulgar phrase, cheating) the person with whom he dealt" Fielding

12 (1884) 26 Ch D 700 at 710-1

13 Based on a dictum of Lord Griffiths in *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 220

principle; rather on the basis that the litigants in the *JL Holdings* case were not shown to have suffered any such strain or anxiety.

The danger of the majority view, in my opinion is that it effectively removes from the managing judge the one powerful tool of management which may be used in the exceptional case. It happens so often that the tactics and history of the conduct of a party which is known to the managing judge is not apparent to or is explained away before the appellate court.

This approach will apply to all manner of interlocutory matters. The managing judge may take the view that the proper course in a given case is quite different from that which all parties want to pursue. Whose case is it? The judge might form the view that a pleading will cause difficulty at trial when no party complains. Should it be struck out? The judge might take the view that there should be cut-off date beyond which no more parties may be joined. This is particularly important since the recent amendments to the Wrongs Act which provide for several liability for defendants. In the area of building cases where this has been available for some years the power to impose a cut-off date has been useful to prevent defendants from adding extra defendants one by one , thereby increasing costs and delaying the trial.

Experience in England following the passing of the Woolf Rules, has been to give to the managing judge a good deal of latitude in these matters and the court of Appeal has been generally supportive. A fundamental feature of these rules is the inclusion at the outset of a clearly stated overriding objective[14] and an equally clear statement that of the general case management powers of the Court.[15] It will be interesting to see whether this attitude will find its way to our jurisdictions notwithstanding the decisions were given against a background of rules which differ significantly from those in Victoria.

Conclusions

I fear that I have strayed from the topic which was entrusted to me. If I may offer a plea in mitigation it would be this. The value of conferences such as this is that they provide a forum for practitioners to explore the law as it affects modern commercial litigation. Such an exploration tend to have a centrifugal focus. Speakers tend to examine the fuzzy edges of their specialty and this is entirely proper. I have in my own way sought to direct your attention to the edges of current practice. I commend to each of an examination of the basic principles of the Woolf reforms in England because change in this area is inevitable and it is in the results of many of the experiments offered in those reforms that the attention of those who will be responsible for change in this jurisdiction will be looking.

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[14] Rule 1.1. Compare Commercial List Practice Note para 1.4

[15] Rule 3.1. Compare Commercial List Practice Note para 1.7 and RSC Rule 1.14