THE DUTY OWED TO THE COURT: THE OVERARCHING PURPOSE OF DISPUTE RESOLUTION IN AUSTRALIA

A speech delivered by the Hon. Marilyn Warren AC, at the Bar Association of Queensland Annual Conference, Gold Coast 6 March 2011.*

> '*The proceedings reveal a strange alliance. A party which has a duty to assist the court in achieving certain objectives fails to do so. A court which has a duty to achieve those objectives does not achieve them. The torpid languor of one hand washes the drowsy procrastination of the other*.'[1]

My earlier paper on the duty owed to the court, as some of you may recall, considered how the commercialisation of the legal industry impacts on the way lawyers discharge their duty to the court. In that paper, I also looked extensively at the content of the duty to the court and how this sometimes conflicts with the duty to the client as well as some recent examples that demonstrate this, such as *Rees v Bailey Aluminium Products*,[2] in which the Victorian Court of Appeal strongly criticised the conduct of prominent senior counsel during a jury trial, the *A Team Diamond* case,[3] and of course, *Gianarelli v Wraith*[4] on advocate immunity. For those of you who may be interested in considering it further, the paper is available on the Supreme Court of Victoria website.

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* The author acknowledges the assistance of her associate Jordan Gray.

[1] *AON Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 (Heydon J) ('*AON v ANU*').

[2] [2008] VSCA 244.

[3] *A Team Diamond Headquarters Pty Ltd v Main Road Property Group Pty Ltd* [2009] VSCA 208.

[4] (1988) 165 CLR 543.

Today, I'd like to explore the other side of that equation and consider how the duty to the court is operating as a matter of law.

In the recent *Thomas v SMP*[5] litigation in the Supreme Court of New South Wales, Pembroke J faced the prospect of a 500 page affidavit, filed by one of the parties to the proceeding, which contained mostly irrelevant material. Doing his duty, his Honour embarked on a close, line by line, examination of the objections which had been made to the affidavit, and noted that it was a 'time consuming, painstaking but ultimately unrewarding task.' After 3,000 paragraphs, his Honour ceased, proclaiming that he 'could go no further', finding it 'inappropriate' to rule on each and every objection. The inappropriateness arose not necessarily from the contents of the affidavit itself - despite this being a problem in of itself - but from what his Honour described as counsel's failure to do right by the court. His Honour said that 'counsel's duty to the court requires them, where necessary, to restrain the enthusiasms of the client and to confine their evidence to what is legally necessary, whatever misapprehensions the client may have about the utility or the relevance of that evidence.' He found that 'in all cases, to a greater or lesser degree, the efficient administration of justice depends upon this co-operation and collaboration. Ultimately this is in the client's best interest'.

Heydon J, writing extra-curially in 2007, observed that 'modern conditions have made [the duty the court] acutely difficult to comply with. Every aspect of litigation has tended to become sprawling, disorganised and bloated. The tendency can be seen in preparation; allegations in pleadings; the scope of discovery; the contents of statements and affidavits; cross-examination; oral, and in particular

[5] *Thomas v SMP (International) Pty Ltd* [2010] NSWSC 822.

written, argument; citation of authority; and summings up and judgments themselves.'[6] With this in mind, Pembroke J's finding that counsel's duty to the client is an obligation subsumed by and contingent upon the duty to the court, is compelling. It is a view that is coming to prominence in many Australian jurisdictions, both legislatively and jurisprudentially.

Most would agree in principle that the inherent objective of the lawyer's overriding duty to the court is to facilitate the administration of justice to the standards set by the legal profession. This often leads to conflict with the client's wishes, or with what the client thinks are his personal interests.[7] We have all experienced for ourselves this classic tug of war in one way or another. Yet whilst we may fall in agreement on the fundamental nature of the duty to the court, *Thomas v SMP*, and many other cases, demonstrate that its application in practice is not always as straight forward as would appear. The burden of being a lawyer lies in the lawyer's obligation to apply the rule of law and in the duty 'to assist the court in the doing of justice according to law'[8] in a just, efficient, and timely manner.

Chief Justice Keane has observed some of the conceptual and practical difficulties posed by the duty to the court. In an address to the Judicial College of Australia in 2009, in which his Honour offered perspectives on the torts of maintenance and champerty in the context of modern day litigation, the Chief Justice noted that 'in the traditional conception, the courts are an arm of government charged with the quelling of controversies … the courts, in exercising the judicial power of the state,

[6] The Hon Justice Heydon, 'Reciprocal Duties of Bench & Bar" (2007) 81 ALJ 23, 28-29.
[7] *Rondel v Worsley* [1969] 1 AC 191, 227 (Lord Reid).
[8] Sir Gerard Brennan, 'Inaugural Sir Maurice Byers Lecture - Strength and perils: the Bar at the turn of the century' (Speech delivered at the New South Wales Bar Association, Sydney, 30 November 2000).

are not "providing legal services". The parties to litigation are not acting as consumers of legal services: they are being governed - whether they like it or not.'[9] His Honour went on to observe that 'when lawyers act as officers of the court, they … are participating in that aspect of government which establishes, in the most concrete way, the law of the land for the parties and for the rest of the community.'

The duty to the court seeks to preserve this particular relationship between practitioner and courts – it forms the very foundation of our dispute resolution system. The duty to the court is thus at the core of *all* litigation, be it civil or criminal. Theoretically, therefore, it's purpose should be engrained in the very fabric of our dispute resolution methods, but is it?

We recall the often quoted judgment of Haydon J in *AON v ANU* in which his Honour described the vicious cycle of inefficiency that arises when the objectives of the duty to the court are forgotten – '[proceedings often reveal a strange alliance] … a party which has a duty to assist the court in achieving certain objectives fails to do so. A court which has a duty to achieve those objectives does not achieve them. The torpid languor of one hand washes the drowsy procrastination of the other.'

It seems fitting then to consider the extent to which legislators and courts are attempting to redress the consequences of this 'languor'. Both have readily sought to establish broad principles that encapsulate the duty to the court as the paramount duty for *all* players in litigation. Courts and legislatures are on the same page; from both we are seeing the emergence

[9] The Hon P A Keane 'Access to Justice and other Shibboleths' (Speech presented to the Judicial College of Australia Colloquium in Melbourne 10 October 2009).

of overriding principles which guide judicial intervention in proceedings where time and money are going to waste. At the core of this equation lies the duty to the court.

It is perhaps best to proceed chronologically. First, the High Court's decision in *AON v ANU*. One commentator views the overall effect of the judgment as transforming the judicial role from that of passive decision maker to active manager of litigation.[10] This shift was considered necessary by French CJ as a matter of public policy, his Honour observing that 'the public interest in the efficient use of court resources is a relevant consideration in the exercise of discretions to amend or adjourn.[11] The Chief Justice spoke of the history of the *Judicature Act Rules* and their Australian offspring and noted that these did not make reference to the public interest in the expeditious dispatch of the business of the courts, resulting in this being left to the parties. However, he went on, 'the adversarial system has been qualified by changing practices in the courts directed to the reduction of costs and delay and the realisation that the courts are concerned not only with justice between the parties, which remains their priority, but also with the public interest in the proper and efficient use of public resources.' The plurality, (Gummow, Hayne, Crennan, Kiefel, Bell JJ) spoke of the 'just resolution' of proceedings remaining the 'paramount purpose' of the procedural rules in dispute in the case.

Looking at each of the judgments collectively, the High Court's approach in *AON* was one of objectives. The court held that the adjournment of the

[10] Ronald Sackville AO, 'Mega-Lit: Tangible consequences flow from complex case management' 48 (2010) *Law Society Journal* 5, 48.
[11] See for example, *State Pollution Control Commission v Australian Iron & Steel Pty Ltd* (1992) 29 NSWLR 487, 494–5 (Gleeson CJ).

trial and the granting of leave to ANU to amend its claim was, in those circumstances, contrary to the case management objectives set out in the ACT *Court Procedures Rules 2006*. The purpose of those rules, like most Superior Court rules around Australia, is to facilitate the just resolution of the real issues in civil proceedings with minimum delay and expense.[12]

One immediate consequence of the judgment is that for a lawyer to discharge the duty to the court, when seeking to amend pleadings or other court documents at a late stage in the proceedings, he or she will need to consider and abide by the objective of the procedural rules in question, and to be able to demonstrate how the objective of the amendment is consistent with that purpose.

In rejecting the submission that the ability to amend court documentation at any time is a procedural right of the parties, the court explicitly stated that a considered approach to the objective of the procedural application in question is necessary. So, being able to account for the reason for the delay and demonstrate that the application is made in good faith may be relevant to a lawyer's exercise of the duty to the court. Other factors which may be taken into account by the court in assessing such applications might be the prejudice to the other parties in that litigation, or in other litigation awaiting a trial date, the costs of the delay, or the status of the litigation.

The language and directions of the High Court in *AON* corresponds to the language and purpose of recent and fundamental legislative developments in Victoria, and federally.

[12] *AON v ANU* (2009) 239 CLR 175, at footnote 153.

The Victorian *Civil Procedure Act 2010*, which came into operation on 1 January this year, is the first Victorian Act to be directed solely, and in broad terms, to civil procedure in Victoria. The Act establishes an 'overarching purpose' which also applies to the rules of court. The goal of the overarching purpose is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in the parties' dispute. The overarching purpose may be achieved by court determination, agreement between the parties, or any other appropriate dispute resolution process agreed to by the parties or ordered by the court.

Of course, aspirational statements of this kind are not unfamiliar. Rules advocating efficient and just determination of disputes have existed in many of the Superior Courts in the States and Territories for years.[13] The fundamental difference being that here, the overarching purpose is a legislative command to which the courts are to give effect in the exercise of their powers.[14] This imperative takes a number of novel dimensions. Specific obligations are imposed upon a greater range of participants, with greater specificity as to their obligations than has ever been seen before. The obligations apply equally to the individual legal practitioner and to the practice of which they are a part,[15] to the parties themselves, any representative acting for a party, and anyone else with the capacity to control or influence the conduct of the proceeding.[16] Furthermore, s 14 of the Act states that a legal practitioner, or a law practice engaged by a client in connection with a civil proceeding, must not cause the client to contravene any overarching obligation.

[13] Eg Rule 1.14 of the *Supreme Court (General Civil Procedure) Rules 2005*
[14] *Civil Procedure Act 2010* (Vic) (CPA) s 8
[15] CPA s 10(1)(b)-(c)
[16] CPA s 10(1)

Under this Act, a legal practitioner is in a different position to a practitioner refusing to act on an instruction which conflicts with their common law duty to the court. Whereas previously, the advice to the client in such a context would have been that the law did not allow the practitioner to follow that instruction, the advice under the new Act would likely be that the instruction is contrary to the client's own obligations, with the secondary advice that the practitioner is bound to ensure that the client does not contravene that obligation.

The Act provides broad powers to the courts in relation to breach of the overarching obligations. The most common means by which a contravention is likely to be dealt is by taking the contravention into account when making orders in the course of the proceeding, most frequently in the form of costs orders.

Critical to our present discussion is s 16 of the Act, which directs that each person to whom the overarching obligations apply has a paramount duty to the court to further the administration of justice. The primacy of the paramount duty to the court is intended to ensure that the rulings and directions of the Court are not second-guessed in the name of overarching obligations.

Similarly, at the Federal level, *the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 (Cth),* introduced into Federal Parliament on 22 June 2009, incorporates an 'overarching purpose' principle into the *Federal Court of Australia Act 1976.* Section 37M of the Federal Court Act now provides that the overarching principle is to facilitate the just resolution of disputes according to the law as quickly, inexpensively and

efficiently as possible. Under s 37N, parties have a duty to conduct the proceeding in a way that is consistent with the overarching purpose, and their lawyer has an obligation to assist them in fulfilling this duty.

Consultation is underway for further reform in the Federal Court. In a submission from the Commercial Bar Association of Victoria in response to the Australian Law Reform Commission Consultation Paper of November 2010 on discovery in the Federal Courts, the Commercial Bar has submitted that the Federal Court Rules be amended so that unless otherwise ordered, discovery not be permitted. The submission discusses some of the pitfalls of current discovery practices and its impact on efficiency and costs in dispute resolution, and argues for the adoption of new rules that oblige a party seeking discovery to show 'good cause' before any order for discovery is made. The onus would then fall on the applicant for a discovery order to establish that discovery is actually *required* in the circumstances of the case.

The submission notes that the present Federal Court Order 15 Rule 3 already provides the court with a discretion to order that discovery will not be required, or limited, but that in reality, the leave requirement is a formality rather than a substantive limitation on a party's ability to obtain discovery.[17]

So, we see both the courts and legislatures attempting to draw *all* parties in civil litigation away from unnecessary distractions to focus on the overarching purposes of dispute resolution, that is, the just, efficient,

[17] Finkelstein J, 'Discovery Reform: Options and Implementation' (2008), prepared for the Federal Court of Australia, Adelaide March 2008, at 2. The Commercial Bar Association also makes recommendations about the adoption of special discovery Masters in the Federal Court, and the adoption of US style depositions, subject to certain safeguards.

timely and cost-effective resolution of the real issues between the parties under the umbrella of the paramount duty to the court.

So far, my observations have been rather sanguine. I wonder whether it will all be smooth sailing from here and what problems are likely to be encountered in the application of these principles. Previously, the civil procedure reforms proposed pre-action protocols which the new Victorian government are in the process of repealing.

I wonder also whether such hope might be found in criminal matters, or matters involving self-represented litigants. I'd like to explore these questions by reference to three examples: civil penalty proceedings brought by ASIC, the exercise of the prosecutorial duty, and civil litigation involving self-represented litigants.

Late last year in the *Morley v ASIC*[18] case, the NSW Supreme Court of Appeal (Spigelman CJ, Beazley and Giles JJA) overturned a finding that seven former non-executive directors of James Hardie had breached their duty to the company. At trial, ASIC contended that the former directors had breached their duty to the company by approving the release of a statement that misleadingly asserted that asbestos claims would be fully funded. The Court of Appeal found that the regulator had failed to prove that fact. To do so would have required the calling of a key witness of central significance to the critical issues in the proceedings, which ASIC – a model litigant owing the obligation of fairness - had decided not to do.

[18] [2010] NSWCA 331

Applying the *Briginshaw* test, the court found that 'the duty of fairness cannot rise higher than that imposed on prosecutors with respect to their duty to call material witnesses. In that respect … the court will not [readily] intervene [but that] the ex post facto assessment of the decision not to call a particular witness must be taken in the overall context of the conduct of the whole of the trial.' Whether a tribunal of fact is reasonably satisfied may include regard to any failure to provide material evidence which could have been provided. This state of mind turns on the cogency of the evidence adduced before it. Relevant to the cogency of the evidence … is the absence of material evidence of a witness who [should] have been called …. absent [which] … the a court is left to rely on uncertain inferences.'

So, the duty to ensure a fair trial is an element of the duty to the court just as the duty to assist the tribunal of fact to establish the necessary state of mind is also. The application of the *Briginshaw* test in this instance really was the court's way of requiring ASIC to fulfil its duty to the court; 'the duty of fairness and a fair trial cannot rise higher than the duty to the court … such duty forming part of the overarching duty in favour of which all conflicts are resolved.' It is for legal practitioners to identify what the duty to the court will be in any given instance. Each case is different, each set of circumstances presenting their own set of challenges.

Picking up on the Court of Appeal's analogy with prosecutorial duties, I'll turn to a criminal example, the recent appeal judgment of the Victorian Court of Appeal in *AJ v R*.[19]

[19] [2010] VSCA 331.

It is well-established that the prosecutor owes his or her duty to the court and not the public at large or the accused.[20] The general duty being to conduct a case fairly, impartially and with a view to establishing the truth.[21] The appeal concerned the trials of AJ for various sexual offences allegedly perpetrated against XN for which he had sustained a number of convictions. The appeal was brought on several grounds, mostly asserting error on the part of the trial judge. A second criminal matter, the matter of Pollard, was also relevant to the AJ appeal. XN was also the complainant in that matter. In the AJ appeal, two further grounds of appeal were added days prior to the appeal. The grounds were added because the applicant's lawyers obtained additional material that demonstrated that the prosecutor in Pollard's trial was also the prosecutor in the second and third of AJ's trials. The material also showed that Pollard had stood trial on a number of sexual assault charges in which XN was the alleged victim, for some of which he sustained a conviction.

In the course of Pollard's trial XN was cross-examined concerning a large number of text messages, including messages of a pornographic or sexually explicit nature, that it was alleged she had sent to the accused. In the AJ trial, XN denied sending all but one of the text messages – a denial which could have been demonstrated as false if she had been cross-examined. XN was not cross-examined on the issue in the AJ trial as counsel had no grounds for doing so.

In the Pollard trial however, the prosecutor did not herself accept XN's denials. She conceded that the complainant had lied. In fact, defence

[20] *Canon v Tahche* (2002) 5 VR 317, [58]; see also the discussion on the role and responsibility of a prosecutor in *Richardson v The Queen* (1974) 131 CLR 116 and *The Queen v Apostilides* (1984) 154 CLR 563.
[21] *Whitehorn v R* (1983) 152 CLR 657; *Canon v Tahche* (2002) 5 VR 317.

counsel and the Crown came to an agreement about which images had been sent by XN, as it was common ground in that trial that her denials were not to be accepted as she was not a credible witness.

The court found that in the circumstances of AJ's appeal, the prosecutor's failure to alert trial counsel to the circumstances of Pollard's trial and, in particular, to the fact that she (the prosecutor) did not believe XN's denials of having sent a large number of text messages to Pollard, constituted a significant breach of her duty as a prosecutor. Had the Pollard file been disclosed to the defence lawyers prior to AJ's trials, it would have yielded information which could potentially have been of forensic use to the applicant's counsel. Ultimately, the court found that the conduct of the prosecution in failing to disclose that information led to a miscarriage of justice.

The prosecutorial duty to the court is an important part of the administration of justice. It is integral to the duty owed to the court and in some cases, it is for the courts to enforce. In 2010, Western Australian Chief Justice, the Hon Wayne Martin, referred a DPP lawyer to that state's legal watchdog after his Honour declared that his failure to disclose evidence during a murder trial was a serious departure from professional standards.

The duty of defence counsel to the court is the same at a conceptual level as that of other practitioners; if counsel 'notes an irregularity in the conduct of a criminal trial, he must take the point so that it can be

remedied, instead of keeping the point up his sleeve and using it as a ground for appeal.'[22]

What the *AJ* case demonstrates is that a lawyer must always acknowledge the way in which the vulnerability of the other parties may affect his or her duty to the court. In that case, the vulnerability came from the applicant's ignorance of the relevant information. This problem is particularly acute in litigation involving self-represented litigants. In that context, a similar trend of requiring counsel to account for the court's duty as 'manager' of the litigation process is emerging. Earlier this year in the *Hoe v Manningham City Council*[23] case, Pagone J of the Victorian Supreme Court considered an application for leave to appeal a planning decision of the Victorian Civil and Administrative Tribunal in which the applicant was self-represented. He was not legally qualified and did not have legal qualifications. Throughout the proceeding, issues arose as to the applicant's identification of a question of law which, in the words of his Honour, did not have the 'advantage of careful consideration of a legally qualified lawyer'. The respondent's counsel maintained that the applicant had failed to identify any error of law.

In dismissing that submission, his Honour noted that the question of law could have been 'identified with greater elegance [but that] the initiating process [did] contain the proposition that the Tribunal's decision contained an error in law.' The applicant was complaining that the facts found did not fit the legal description required by the Planning Scheme in question.

[22] *Gianarelli v Wraith* (1988) 165 CLR 543, 556 (Mason CJ).
[23] [2011] VSC 37.

The judge acknowledged that some of this applicant's submissions appeared to take issue with the facts as found by the Tribunal, but that did not detract from the force of the principal complaint that the provisions of the Planning Scheme did not apply to the facts found by the Tribunal. The view adopted by the Associate Justice, who had refused leave to appeal, that Mr Hoe's complaint involved no question of law was encouraged by those representing the Council.

Now, the judge did not go so far as saying that counsel breached his duty to the court, however, the observations his Honour makes about the duty to the court in the context of his case, where opposing counsel encouraged an interpretation of the applicant's claim which ultimately did not assist the court in the exercise of its duty or to come to the correct conclusion, are worthy of note. His Honour said:

'The duties to the administration of justice of adversaries, their representatives and the Court come into sharp focus when a party is not legally represented. In such cases the duties of litigants and their representatives to the Court and the duties of the Court itself in the administration of justice require careful regard to ensure that the unrepresented litigant is neither unfairly disadvantaged nor unduly privileged. A litigant may in some cases also be expected to act as a model litigant where, for example, the litigant is the Crown, a government agency or an official exercising public functions or duties …

The right of a litigant to have a fair and just hearing may require such assistance as diverse as listening patiently to an explanation of why something may not be given in evidence … the Court's task is to ascertain the rights of the parties and can ordinarily look to the legal

representatives of the parties to assist it in the discharge of that task. The Court relies upon the assistance it receives from the parties, and their representatives, in doing justice between them. It is, after all, the parties who have knowledge of the facts and the interest in securing an outcome. It is the parties who have the resources, in the form of evidence and knowledge, needed to be put to the Court for an impartial decision to be made. Public confidence in the proper administration of justice, however, may be undermined if the Courts are not seen to ensure that their decisions are reliably based in fact and law. That may require a judge to test the facts, conclusions and the submissions put against an unrepresented litigant and to assume the burden of endeavouring to ascertain the rights of the parties which are obfuscated by their own advocacy. It may require a judge to focus less upon the particular way in which the case is put by the parties and more precisely upon the decision which is required to be made.' (citations omitted)

At the centre of all this is the paramount duty to the court and the just, efficient and timely management of disputes, the court's ultimate purpose. Ultimately, the following points resonate:

- Following *AON v ANU* – a practitioner's duty to the court may no longer be viewed as a static obligation. A practitioner will need to factor the purpose of rules of court and procedure in the exercise of his duty to the court and to the administration of justice.
- Civil procedure reforms in Victoria and federally create obligations on *all* parties to litigation to adhere to a set of overarching purposes that aim to ensure the just, timely and efficient resolution of disputes. These objectives are subject to the paramount duty to the court.

- Recent case law demonstrates that in civil litigation, criminal proceedings, or proceedings involving self-represented litigants, the key aspect to retain is that the nature of a lawyer's duty to the court will change in colour and form according to each dispute, the stage of the proceedings and the circumstances at hand at each stage of the litigation. What the court needs to achieve to deliver justice in any particular case may be a relevant consideration.
- It is critical to remember that the duty is not confined to the determination of the particular dispute at hand and may require a departure from the traditional adversarial duties of counsel and legal practitioners.
- The duty to the court is now the paramount duty on *all* participants in litigation, be it civil or criminal.

On that point, the passage of Richardson J of the New Zealand Court of Appeal in *Moevao v Department of Labour*[24], frequently cited with approval by the High Court,[25] is most apt:

'the public interest in the due administration of justice necessarily extends to ensuring that the court's processes are used fairly by state and citizen alike. And the due administration of justice is a continuous process, *not confined to the determination of the particular case*. It follows that in exercising its inherent jurisdiction the court is protecting its ability to function as a court of law in the future as in the case before it. This leads on to the second aspect of the public interest which is in the maintenance of public confidence in the administration of justice. It is contrary to the public interest to allow that confidence to be eroded by a concern that the

[24] (1980) 1 NZLR 464 at 481.
[25] *Jago v District Court (NSW)* [1989] HCA 46; (1989) 168 CLR 23, 29-30 (Mason CJ); *Williams v Spautz* (1992) 174 CLR 509, 520 (Mason CJ and Dawson, Toohey and McHugh JJ).

Court's processes may lend themselves to oppression and injustice.' (emphasis added)

This really is the heart of the matter. De Jersey CJ has said extra-curially that public confidence in the judiciary and the courts, and the threat of losing it, is an important consideration for the administration of justice.[26] As Brennan J observed: 'A client – and perhaps the public – may sometimes think that the primary duty of [a lawyer] in adversary proceedings is to secure a judgment in favour of the client. Not so.'[27] The foundation of a lawyer's ethical obligation is the paramount duty owed to the court. The reasons for this are long-standing. It is the courts who enforce rights and protect the citizen against the state, who enforce the law on behalf of the state and who resolve disputes between citizens, and between citizens and the state. It is the lawyers, through the duty owed to the court, who form the legal profession and who underpin the third arm of government, the judiciary. Without the lawyers to bring the cases before the courts, who would protect the citizen? Who would enforce the law? It is this inherent characteristic of the duty to the court that distinguishes the legal profession from all other professions and trades.

[26] The Hon Chief Justice de Jersey AC 'Aspects of the evolution of the judicial function' (2008) 82 ALJ 607, 609.
[27] *Gianarelli v Wraith* (1988) 165 CLR 543, 578 (Brennan J).