

## **PART 1 – GENERAL PRINCIPLES OF GOOD ADVOCACY**

### **The role of the advocate in the adversarial system**

Our system of civil justice is an adversarial system. Parties argue their case, and at the end of that process, a neutral judge decides the winner. The reason we have favoured this system over any other – the “justice” within it, if you like – is that we believe that the adversarial presentation of competing arguments is the best way of reaching the “correct” result as a matter of law.

Your role as an advocate in this system is very particular. It is not your job to make sure that the “correct” result is reached. You leave that for the judge. Your job is to present the best case that can be made on behalf of your client, and to persuade the judge to accept that case over that of your opponent. To a (qualified) extent, the “right” result for you in any case is that your client wins.

The importance of the advocate’s role in this adversarial process cannot be under-estimated. The practice of law is a messy. Contrary to how you learn your law at university, cases do not emerge from your clients fully formed, with each competing argument identified and perfectly developed. Nor is the answer for the judge, on either the facts or the law, always clear. Cases are usually capable of a number of different interpretations and resolutions.

The job of a lawyer generally is to help their client by bringing some order to the disorder of their commercial affairs. But your job as an advocate is more than that. As I said above, your job is to find within that disorder, the best case that can be made on behalf of your client, and to then “sell” it to the judge. Your job is solely about persuading that judge, in that court room, to find in your client’s favour.

### **The “rules” of advocacy**

The first rule of advocacy is that ultimately there are no rules. There are things that you should try to do – that reflect good practice, and have been proven to be effective – but that doesn’t mean that they will work in all situations. The best examples of advocacy often come when counsel ignore the rules and established practice.

The other difficult thing in talking about the “rules” of advocacy, is that I don’t think most advocates think of the techniques they use as rules (or even possibly techniques). They are not

“tricks of the trade” because you cannot really trick a judge. They are more lessons from experience as to what judges respond well to. Their only validity is if you think that the judge in your particular case will respond well to them.

The one thing that I want you to take from this seminar, is an approach to advocacy in which you think critically and objectively about the process of persuading the judge to favour your client’s case. Advocacy is about moving from a mindset of opinion writing – trying to work out the “right” result in the case – to a mindset where you are focused on trying to convince another party what the right result should be. Advocacy as a subject is about the process of persuasion rather than the substance of the legal problem.

### **Understanding the dynamics of the court**

The starting point for good advocacy is a full appreciation that it is the *judge* you are trying to persuade. Good advocacy is about understanding what your judge is looking for, and giving them what they need in order to decide the case in your client’s favour.

When you consider your judge, and how you are going to persuade them to your point of view, there are a number of basic points you need to keep in mind.

- *The judge wants to “do the right thing”.* Judges must decide any case on the law, but they also want to decide cases in a “fair” way. The reality is that there is a degree of elasticity in deciding what is the law, and even the facts, in any case. What the court is always looking for is the underlying “merit” of the case. If your case has merit – i.e. it sounds like the fair outcome – the chances are that the law can be made to fit that result.

***Tip:** When you are looking at your case, think about how you can present the case as, not just right on the law, but also “fair” in terms of its result. If you can find an underlying merit in your client’s position, don’t be afraid to come back to it again and again.*

- *The judge is intelligent.* Lawyers spend a lot of time criticising judges. Don’t listen to them. The judges lawyers tend to admire are generally those who found in their favour the last time they appeared before them, or who they worked with in practice. The reality is that judges are intelligent and experienced, more than you are.

***Tip.** The judge’s intelligence can work in your favour. Sometimes judges themselves come up with very good arguments. You need to be careful, because arguments that*

*the judge has come up with are generally the hardest to change. However, the intelligence of the judges is something that can be made to work to your benefit.*

- *The judge is busy.* Judges have big workloads. Reserved decisions, involving difficult issues of fact or law, just add to their workload. They will deal with the hard cases when the need to, but they don't want every case to be hard.

**Tip.** *Make it easy for the judge to decide in your favour. Give them the material that they need to find for your client. Organise it clearly. It is amazing how often the easy answer turns out (miraculously) to be the right answer.*

In terms of the broader dynamics of the court room, and your involvement in that process, what will strike you when you first appear (and it still strikes me now) is how personal a court hearing is. The process of delivering oral submissions is a very personal exchange between you and the judge. There is no where you can hide. It is you, the judge and opposing counsel. You are accountable, and your client's case will be assessed, according to what you say in that court room to that judge.

Understanding these two realities – a focus on persuading the judge, and the personal interaction between the judge and counsel - is in my view the secret of good advocacy. I will try and expand on this throughout the seminar.

However, the two overriding questions that you should constantly come back to are:

- What would a judge think about this argument?
- How would I explain it/defend it to a judge?

### **Argument selection and your theory of the case**

The most important principle of advocacy, in all its forms, is that you must have a clear theory of your case. There is no great science to this. All it means is that you must be able to tell the judge a story about the facts and the law that is attractive and that will result in success for your client. You may even have a number of alternative theories to cover vagaries in the evidence, the law and even the judge.

None of this should be news to you. Clearly, you must have an argument to advocate. The hard thing about developing a theory of the case however, is argument selection. It is not good

enough to have 4 or 5 arguments that you think “may work”. You can’t just “try out” arguments in a court room. What you need to do is commit yourself to 1 or 2 primary arguments that you think will win the case for your client.

This is one of the hardest parts of advocacy. With a statement of claim, or even a written submission, you can raise any number of arguments you think may be possible. But when it comes to an oral presentation of your case, you may have to make some hard decisions as to what arguments you want to rely on. You do not want to be in a court making an argument you think is weak or theoretical.

These decisions over argument selection are hard, because the reality is that some of the arguments you are abandoning may be successful. But the reason you have to do it comes back to the nature of the process, and the personal interaction between you and the judge. Imagine that you have now talked to the judge for 2 hours, going through the reasons you think your case should succeed. You have probably thrashed out the main issues in the case. If you start getting into another potential way of analysing the case, which is just a variation on a theme, all you risk doing is alienating the judge and diluting the strength of your primary arguments.

As I said, this is a hard thing to do. You will spend all your career trying to work out what arguments have a chance with different judges, and in different forums. But at the end of the day, all you can do as an advocate is fall back on your own judgment and assessment.

***Tip.** The basic question I ask myself is whether I think the judge, if not satisfied by arguments X and Y, is really likely to still be persuaded by argument Z. If you can't see that the judge would be, don't waste your time with it.*

## **Be Flexible**

Having just told you to focus your arguments, it is also important to always retain flexibility in your position(s). You always go into a case thinking that you will argue X and Y, but anything can happen in court. A judge might see things differently to you. He or she may focus on something you didn't think was important. A witness may not come up to brief. So as important as it is that you have a clear theory of your case, it is just as important that you retain the flexibility to alter your theory if events make that necessary.

There is clearly a tension between trying to give the judge a clear pathway through the case, and trying to retain the flexibility to move with the direction of the court. Managing this tension is part of the skill of a good advocate. But some tips that you might find helpful:

- If you are filing a written submission prior to the hearing, you can cover a broader range of potential arguments. When you come to the oral argument, you can then focus on what you think is important. If the judge or the evidence goes another way, the material is there for you to argue something different to what you planned.
- Spell out the alternatives clearly, and the circumstances in which each alternative might arise.
- Sometimes it may pay to say very little prior to the hearing, to ensure you are not committed to any particular argument. The nature of the hearing may be such that it could go any of a number of different ways (for example as a result of cross examination).

### **Define your issue early and often**

Probably the most important thing I have learned about advocacy since I started in practice is the value of defining for the court the issue you want it to decide, and getting that issue out there early. This isn't just telling the judge that he or she needs to decide issue X. It is telling the judge the issue, but also placing that issue in the context you believe it arises. Treat the judge like a 5 year old boy playing his first game of soccer. Not only do you need to make sure he is facing the right way. You also need to make sure he is playing on the right field.

The reason this is so important comes back to an understanding of the perspective of your judge. The judge's job is to make decisions and decide cases. It is what they do day-in/day-out. For you, the case is something that you have worked on for the last 2 years ago. For the judge, it is Monday morning. What the judge wants is a frame of reference. They want to know early on what it is they are going to have to decide, so they can analyse the evidence and submissions against some over-riding question. If you don't give them this frame of reference early on, they'll find a question themselves (and it might be the wrong one!).

Not only do you need to give the court the issue they have to decide, but you also need to get your "spin" on that issue. Don't just present the issue as academic question that the judge

needs to answer, but put it to the judge in a context that favours your client. You need to get the judge to see the issue from your client's point of view.

You generally get two main opportunities to do this:

- In your written submissions, filed prior to hearing; and
- At the start of your oral argument.

Start your written submission with a good introduction. Don't just blandly introduce your argument, and leave all the good stuff until the judge gets to p 12. They may not get there. Make this introduction a true summary of the main points of your argument presented in a compelling way. Try and tell the judge the story of your case.

In terms of oral argument, this should be how you start your presentation. Practice will vary between counsel as to the extent to which they will go through a written submission filed in advance of a hearing. However, **all** good advocates will start their oral presentation with their written submission put to one side. They will want to engage with the judge on their case, talk to the judge about the issues, and make sure the judge understands their perspective.

Sometimes you may not get the opportunity to frame the issue for the court. You have your beautifully prepared oral presentation ready to go, but the judge has already decided that the issue is something different to what you want it to be. Maybe opposing counsel have already defined the issue in a way you don't like. What can you do to get the judge back on the right page?

- You have to deal with it upfront. You can't risk leaving it until you come to that issue in your submission. No matter what the judge might say to you, the risk is that all the judge will be thinking about while you deliver your other submissions is this one point that has been "bugging" them.
- If you do deal with the issue in your written submissions, take the judge to that section, and talk the judge through it. Once you have dealt with it, you can then return to your submission presented in the order you want to present it.
- If the issue the judge is focused on is not the issue you think is important, then you need to work on turning the judge around. Maybe the judge has just got something wrong on

the facts or law. If so, let the judge down easy. Don't embarrass them. Maybe the point is relevant, but only arises at a third level of argument. If so, explain to the judge what your answer is, but push the judge back to the key issues you see arising.

**Tip** – *Questions are the friend of the advocate*

*It is easy to read a submission or give a prepared speech. It is hard to answer questions, particularly those that you didn't anticipate. But questions are your friend as an advocate. They let you know what the judge is thinking. They give you the opportunity to answer the concerns of the court, and to direct your arguments to the points the court is focusing on. There is nothing worse than a judge who sits their quietly throughout your submission.*

### **How do you use the law?**

At university, you only study the interesting and difficult areas of the law. When you start work, you will probably spend a lot of time researching novel areas of the law for your senior counsel. So when you come to your own cases, it is easy to find interesting legal problems, and to conceive of your case as being all about resolving some important point of law.

But any good litigator must think tactically about how they use the law to advance their case. The point is not whether you will enjoy arguing this legal point, or whether you may you're your case reported" as a result of this issue. The only question for you is whether engaging in detailed argument on the law assists your client's case.

For my part, I would always prefer my case to depend on the facts rather than the law. The problem with the law is that, if there is any real dispute about the relevant principles, it introduces a large element of uncertainty into your case. You can lose control of your judge. You don't know what authorities the judge may be attracted to, or in what jurisdictions. Who's to say whether the judge will favour the authorities from the High Court of Australia over those from the Supreme Court of Canada?

Of course, you may not be able to avoid the issue. Indeed, the law may assist you, either in helping you direct the focus away from facts that are not helpful, or in terms of developing principles of law on which you wish to rely. When you get to higher levels of appeal, you will need to find some important principle of law that justifies the further appeal. The only point I am

trying to make is that a good advocate not only thinks creatively about the substance of the law, but also tactically about how they can use the law to advance their client's case.

When you are thinking tactically about the law, think also about how the judge interacts with the law. You can engage a judge on an interesting point of law, but equally, judges can't spend all their time reading and researching every case that comes before them. Judges will often tell you that: "most cases are decided on the facts." This is true. Judges will deal with the law if they have to, but equally they will avoid it if they can.

I think it is always preferable to avoid difficult issues of law. If you can convince the judge that the law is pretty clear in this area, and it is just a question of how the facts are to be applied, that is a good thing.

If the law isn't clear, I also think that it is preferable to show that the difficult legal issue does not necessarily arise on the facts of your case. You should be prepared to debate the law, but it is also smart to give the judge a way "out" if they don't want to get into the debate.

*Imaginary exchange:*

*"Your Honour, my friend's submissions on the issue are very interesting. The difficulty however is that the plaintiff called no evidence on the issue of the value of the property at the time of resale. So even if the court were to find a duty of the scope contended for by the plaintiff, there is no evidential basis for finding that it caused the plaintiff any loss."*

Of course, thinking tactically about the law, doesn't always mean you should avoid it. Sometimes you need that difficult legal principle to establish your case. Other times it can help you move the focus from potential difficulties in your case. You may want to present your case as being about much more than the result between these two parties, and to argue it as an important case raising important points of principle.

*Imaginary exchange*

*"Well of course your honour, the plaintiff could never say that they had direct knowledge of that matter. But the principle that underlies these authorities clearly cannot depend on the extent of the plaintiff's knowledge of the activities of the defendant."*

You can never predict how the law will arise in your case. What I want you to recognise, however, is that the way you approach the law can be as tactical as any other part of advocacy.

## **Preparation is key**

Many people will tell you that the secret to good advocacy is preparation. I disagree. Thorough preparation is simply a pre-requisite. If you are not thoroughly prepared, in terms of having a complete mastery of the facts and the law, you have no business being in a courtroom. So I will make only a couple of comments about preparation.

Preparation is not just mastering the facts and the law. It is just as important to spend some time thinking through your arguments – what you are going to say, what the judge might ask you, and what responses opposing counsel are likely to make. Don't spend all your time preparing the "substance" of your case. Take some time by yourself to think about your presentation, and what the reaction of the judge and the opposing counsel will be.

In particular, think about the weaknesses in your case, and what you are going to say to the judge in respect of those issues. One of the things that constantly amazes me is when counsel are not prepared to answer a question that it is clear was always going to arise. When you look at your case, you will know it has weaknesses and vulnerabilities. If you can spot them, then the chances are that the judge will also. So spend some time thinking through *exactly* what you will say in response to that question. Be prepared for it. It is amazing how often the process of thinking through the issue gives you some insights into how you could "head off" this line of inquiry in the first place.

***Tip.** Discuss your case with other people. Sometimes they might have a helpful insight. Usually they don't, because they simply don't know enough about the case. But the process of talking it through with someone – just talking through your arguments out loud - can often help you come to understand your argument better.*

## **Learn your forum**

There are many different forums in which you will appear; the District Court lists (mainly duty judge), District Court trials (short form and long form), mediations, judicial settlement conferences, associate judge lists (liquidations, bankruptcies, caveats, summary judgments), High Court duty judge list, Chambers applications, High Court trials, appeals etc.

All of these different forums have different rules and practices, as well as particular expectations from the Court or counsel.

The variations between these forums, and the rules of practice that apply, are too varied to list here. The only way you can learn them is to sit in the back of a court room, and observe others. Do what everyone else does. Eventually you will get a feel for what you can do, and what you can't do.

This is particularly important when you are talking about the various list Courts. The potential to severely embarrass yourself in front of your peers is enormous. If you have an appearance in the bankruptcy list next week (for example) take some time to sit in the Court room the week before and learn how it is done. You will often find things that the judge expects you to have done which aren't clearly set out in the rules. You will also be more familiar and comfortable with the forum.

### **You are a product/brand – you must be credible**

It is important to recognise that your most important attribute as an advocate is your reputation and how you are regarded by the court and your colleagues.

A court doesn't care about the brand "Russell McVeagh", "Bell Gully" or the like. It probably cares about the brand "QC", but that is not you. The only brand or reputation it cares about or is impressed by is your personal brand. Everything you do as an advocate reflects on your brand.

Your reputation will be built up over the course of your practising life. A senior practitioner who is well regarded will always have an advantage over you. That is not just because of their skills as an advocate but because of the reputation that they have. The judge will likely know them, either from practice or previous cases. At the very least, the judge will have heard about them from other judges (judges are apparently appalling gossips about counsel). The judge will know that this counsel usually presents arguments that are considered and well thought-out. They will know if they should have their clerk standing by, ready to double check every reference to the law (or find the references that are missing). They will know that if they are told that a timetable cannot be met, a hearing date needs to be changed, or a genuine mistake has been made, that statement can be accepted on its fact. The result is that they tend to get indulgences/allowances that you (or I) would never get away with.

It is difficult to build a good reputation, and very easy to get a bad one. All you can do to gain a good reputation is to act honestly and professionally in doing your job as an advocate. However, you need to realise that the reputation I am talking about here is your reputation with the court, and your fellow practitioners. It is not your reputation with your clients. The two are

not the same thing. But there is no doubt that personally, professionally and financially, the most important reputation for you as an advocate is your reputation with the Court.

### **Good advocacy and “winning”**

At the start of this seminar, I suggested that the “right” result in litigation is that your client’s case is accepted. That is probably how most advocates feel about litigation, at some level. We freely talk about having a “win” or a “loss”. The result is, of course, the only thing the client is ultimately interested in.

However, you must always bear in mind that, at the end of the day, you are not the result. This is not your dispute. It belongs to the client. Your job is to present the best case that can be made on behalf of the client. That is all that can be done on their behalf.

## **PART 2 – WRITTEN SUBMISSIONS**

### **The types of advocacy – written submissions and oral submissions**

For the modern lawyer, there are really two forms of advocacy; written submissions and oral submissions. Most of this seminar has focused on oral advocacy. But in the modern environment, written submissions are almost as important.

I think that written submissions and oral submissions have slightly different purposes and a good written submission is not necessarily a good oral submission. Oral advocacy is your opportunity to interact directly with the judge. It is your opportunity to present your case on your own terms, and to answer the questions that the judge has. The role and purpose of written submissions, however, is less clear.

To understand their role I think you need to keep two things in mind:

- For most hearings, written submissions are required to be filed in advance of the oral hearing. You can expect the court to have read them before you appear. So they give you an opportunity to introduce your case to the court before you appear in person.
- Most decisions by the court are reserved. It is rare for the court to give an oral judgment. So depending on what other commitments the judge has, it may be many months before he or she comes to write their decision. As good as the oral argument

was it may well be forgotten by that time. So your written submission is probably the best record of your argument the judge will have when it comes to writing his judgment.

There are probably two schools of thought as to what is the purpose of a written submission. Many see it as simply a record of the oral argument that will be made. Oral argument will then (essentially) involve counsel just reading or paraphrasing what they have already said in writing.

For my part, I see the written submission as being something slightly different. I view it as a written document that has a life and logic of its own. It is a comprehensive document, and ensures the court has a full summary of your argument, with all the necessary detail. It can be more comprehensive than you could ever be in oral submissions.

It also gives you freedom when delivering your oral submissions. It allows you to focus on the key parts of your case. It allows you to “gloss over” those bits you would rather avoid (but have to deal with). It saves you getting bogged down in boring or non-controversial detail.

In my view, the written submission is the formal written record of your argument. It should be comprehensive with all relevant sources and material included. It becomes the source document for your oral submission, from which you can draw from as required. Your written submission is the book. Your oral submission the poem.

### **Opening and closing statements at trial**

What I have said above, in terms of written submissions, applies in the aggregate. You want a full written record of your argument before the court at some time. With an interlocutory application or an appeal, you get only one chance. However, at trial, you get two opportunities; your opening and your closing statements. There is in this context scope for you to present your argument (both in its written form and more generally) in the way that tactically best advantages your position.

Opening statements by a plaintiff offer the most opportunity for variation in terms of how you want to present your case to the court. For a plaintiff, you have the opportunity to frame the case for the court. Your opening statement is usually filed before the hearing. The defendant will not usually file any statement prior to trial. So your opening, together with the pleadings, is probably all the judge will know about the case before it starts. That is a tremendous advantage for you.

However, you also need to be cautious in your opening statement. You don't know exactly what the evidence will be, and you don't necessarily know the approach that will be taken by the defendant. So you need to be flexible, and present your case a level of generality such that you don't risk having to change your position in closing. For these reasons, and as a very general rule, plaintiffs tend to give shorter more general openings, and more detailed and lengthy closings.

There is always a temptation, when you are opening a case for the plaintiff, to try and "keep something up your sleeve", and save a "king hit" for your closing when the other side will not be able to respond. There may often be some advantage in playing your cards close to your chest. But just remember, if you don't refer to an argument or even a key authority in closing, you risk being criticised by the court or opposing counsel. If the defendant has been prejudiced by your lack of disclosure, you may not be allowed to refer to that argument at all.

For a defendant, the situation with an opening is slightly different. The court already knows the plaintiff's case, and you have probably had to show your hand in your cross examination of the plaintiff's witnesses. There is probably less to be gained by keeping it close to your chest. You are now in the heat of the case – the issues are forming – and you need to start engaging with the judge on what you say is relevant. You may also need to re-direct the judge to the issues you want the judge to focus on.

One choice that does arise for a defendant on opening is whether they put their detailed argument in their opening statement or their closing statement. Sometimes you may want to have a detailed opening so that your closing can be short. There may be presentational reasons for this, but there are also likely to be tactical reasons for this. You may suspect that the plaintiff is expecting you close all afternoon (for example). If you are finished by 3.30, however, the plaintiff may have to start their closing and may not be ready.

Your closing statement is usually the full, detailed presentation of your case. The evidence is now "closed" and it is usually in the context of the presentation of closing arguments that the detailed engagement with the court takes place. Your closing will usually be more fulsome than your opening. You will cover the law in greater detail. You will try and draw out the key facts that emerged during the trial.

## **Suggested structure for arguments**

As an appendix, I have attached a suggested structure for submissions in an interlocutory application, an opening statement and a closing statement.

## **PART 3 – PRACTICAL POINTS**

### **Some truths about litigation**

- Everyone is nervous before court, and if you are not, you should be.
- You can't "wing it". If you think you can, you are either Clarence Darrow, or you are about to be proven badly wrong.
- The only "reality" that matters is the reality in that court room.
- There is nothing wrong with writing down everything you want to say in long hand. We all do.
- Everyone takes a loss personally.
- There is nothing wrong with keeping your submission short and to the point. It can be a very powerful way of making the point that the case is simple, and the judge will appreciate it.

### **Tips for the younger advocate**

- Don't beat yourself up that you are not getting into court. There is just not as much civil litigation as there used to be, and the litigation that there is very different to the old style "ambush" scenario.
- Be very careful taking directions from your seniors as to what can realistically be achieved at any hearing.

- If you don't know what to do, stand it down and talk to someone. We have all been there before, and we know what we are going through.
- Observe others doing it.

## **SCHEDULE A: SUGGESTED STRUCTURE FOR WRITTEN SUBMISSIONS**

### **Suggested structure of submission for interlocutory hearing**

#### *Introduction*

- Think about how you want to present your case/application:
  - Is it a “simple” case – can you be short and cut straight to the argument? If that is how you want to present the case, then perhaps your introduction should be very short and matter of fact.
  - Is it something that you need or want to develop a broader context for. For example:
    - Do you have some underlying merit you want to emphasize to the Judge?
    - Are you concerned by your underlying merit (so you may want to set the scene in a broader way).
- Try and make an impact – attract the attention of the court.
- Make sure you “hit” all the key points in your argument. Don’t leave them until you get to the main argument.

#### *Summary of issues*

- If your introduction was more discursive, it may be helpful to bring the court back to the key issues that will need to be decided. Explain to the court how (and when) that issue will be dealt with. Give the court a road-map for your submission.
- If your introduction was more direct and to the point, it may not be necessary to do this. The issues may well be clear.

#### *Review the evidence / background*

- What evidence/background is relevant to your application?

- List for the court the sources for the evidence – e.g. the affidavits the parties have filed.
- **Don't** do an exhaustive summary of the evidence if it is all set out in one of the affidavits or one of the briefs of evidence. Just refer the court to those paragraphs.
- **Do** summarise the key issues you want the court to take from the evidence.

*Review the relevant law*

- What law is relevant to the application? Again, think about how you want to present this application:
  - Do you see it as involving the application of settled legal principles? If so, a couple of key cases – the leading authorities – are all you need.
  - Does it involve more difficult issues of law? If so, tell the Judge the “story” of the law. For example:
    - What is the basic principle?
    - What is the particular issue that has arisen with that principle?
    - What are the authorities/responses to that problem that you want to rely on?
    - Why are the alternative responses (relied on by your opponent) wrong?
    - **Do** refer to a number of authorities that support your position. There is nothing wrong with giving the judge references if the judge wants to look into the issue further.
    - **Don't** put all those authorities into your bundle of authorities. Only put into the bundle your key cases.

### *Apply the facts to the law*

- Make your detailed argument. Tie the facts of your application into the relevant legal principles.

### *Deal with the arguments your opponent has made*

- Address the points raised by your opponent.
- Focus on the points in their notice of application/opposition. They are the points that are before the court. If they have raised further points, address them as well but point out that they were not raised in the formal documents.

## **Structure for opening**

### *Introduction*

- Same as above, but with more of an emphasis on attracting the attention of the court. You need to capture the judge's interest.

### *Clearly define the issues*

- Define the issues for the court by reference to the pleaded causes of action. This section should be specific. Only those issues raised on the pleadings are before the court. Anything else is irrelevant.
- At trial, Judges are interested in pleadings points. If an issue raised by the other side is not in the pleading, point that out and object.

### *Review the relevant evidence*

- Review the relevant evidence in an over-view. You cannot take the judge to the briefs of evidence – they are not in evidence at that point. What you need to do is summarise in submission form what the evidence will be. Keep it general at this stage.
- If your first witness gives a narrative, you may not need to say much at this point other than summarising the key points. If the relevant facts will be found in the evidence of a number of witnesses, you will need to draw it all together for the court.

- If there are documents relevant to the case – e.g. contracts, letters etc - take the judge to them. The importance of the document may not be apparent to the judge when the witness is giving their evidence – all they will likely refer to is a document number. You need to give the judge the opportunity to consider the key documents before the process of witness examination starts.

#### *Summarise the relevant law*

- You should refer the judge to the relevant legal principles and the key cases. You usually don't debate difficult questions of law in opening. All you want to do is draw the court's attention to the key legal principles you will be relying on.

#### *Introduce your evidence*

- Give the court a road-map for the presentation of your case. Who are the witnesses you will call? What order will you call them? What basic topics will they cover?

### **Structure for closing**

#### *Introduction*

- By this stage there is probably not much you need to say in your introduction. The scene has been set. Your introduction now can be more short and to the point. What are the issues that the Court needs to decide, and how do you say they should be dealt with.

#### *Review the relevant evidence*

- You should have a thorough and comprehensive review of the relevant evidence. Remember, the judge will be familiar with the evidential issues by this stage. What you need to focus on are the key conclusions you will invite the Court to draw from the evidence.
- You also need to get into the submission references to the relevant extracts in the cross-examination. The transcript of evidence from trial will be long, and you can have no guarantee that the Court will review it when coming to write the final decision. If there are parts of that evidence that you want to focus the Court on, you must give the Court a clear reference.

### *Argue the law*

- You need to be prepared in closing to deal with the law thoroughly. This is where the high level debate with the Court on the legal issues will take place.
- Try and avoid overburdening your bundle of authorities of cases with only marginal relevance. If you have 30 cases in your bundle, the chances are that the Court won't read any. If you have 5 cases in your bundle, there is a prospect that the judge will at least open it.
- Don't overburden your submission with long quotations. Instead, if there is part of the case you want the judge to refer to, take the judge to the case itself, and take them through the relevant extracts. If the case is important, judges generally like to know a little bit more about the case – the facts and other material – rather than just being asked to accept the quotation at face value.

### *Relief*

- Set out clearly for the Court the relief you are claiming in your case, particularly if you are the plaintiff.