EDO Qld.

Environmental Defenders Office

Using the law to protect our environment.

Sean Ryan

Principal Solicitor

What Judges Want

The Hon Justice Peter Murphy

The Hon Alan Wilson QC

To know, as quickly as possible:

- what the question is
- the right answer to that question

The efficient delivery
of the correct decision
in as many cases as possible

What you want to achieve:

To persuade the court to answer the question(s) before it in the way most favourable to your client.

Page 17, paragraph 68 of the affidavit of Bexley Gordon Hill filed 23 July 2018 will show the Court that this application is groundless, and without merit.
Paragraph 83, at page 22, summarises the respondent’s position.

1) The fifth respondent, Tenterfield Pty Ltd (“Tenterfield”), is a wholly owned subsidiary of the forth respondent, Tenterfield Holdings Pty Ltd (“Tenterfield Holdings”). The sixth respondent, Llareggub Cheese Company Pty Ltd (“Llareggub Cheese”), is also a wholly owned subsidiary of Tenterfield Holdings. Through Tenterfield, Tenterfield Holdings conducts a cheese wholesale business through Sydney Markets and a dairy farming business (collectively, “the business”).

2) As at 1 August 2018 the issued capital of Tenterfield Holdings was held in equal shares by the following entities:

   (a) The applicant, Mr Arthur McGuire (“Arthur”);

   (b) The first respondent, Gin Bros Pty Ltd (“Gin Bros”), the principal of which is Mr Phillip Lunt (“Phillip”)’

   (c) The second respondent, Halitan Pty Ltd (“Halitan”), the principal of which is Mr John Keirin (“John”);

   (d) The third respondent, Koffman Investments Pty Ltd (“Koffman Investments”), the principal of which is Mr David Koffman (“David”).

Your Honour, could I start by taking you to exhibit 17 to the affidavit of Julius Ernest Greenaway filed 12 August 2018?

1. Four people had equal shares in a large dairy and cheese business, Tenterfield Holdings Pty Ltd. They had a meeting on 8 October 2017, at which three of them agreed to buy the shares of the fourth, Arthur McGuire, for $750,000 with the payment to be made on 31 December . Mr McGuire says the other three also agreed to also pay him one-quarter of the retained profits, as at the 31st.

2. While the other three – Phillip Lunt, John Keirin, and David Koffman – agree about the buyout figure, they deny there was any agreement to pay the retained profits. Certainly, it was not mentioned in the share sale agreement later signed by the parties transferring Mr McGuire's shares for $750,000 but he is adamant it was discussed on 8 October, and that all the others agreed, and has brought this action seeking those profits.

The first art of effective advocacy is the framing of the issue so that if your framing is accepted, the case comes out your way.

Second, you have to capture the issue, because your opponent will probably be framing it quite differently.

Third, you have to build a technique of phrasing your issue which will not only help you capture the court but will stick your capture into the court's head so that it can't forget it.

A Lecture on Appellate Advocacy, Llewellyn, (1962) 29 University of Chicago Law Review 627, at 630.

Was the trial judge right to dismiss the plaintiff’s claim?

Did the sentencing judge err?

Garner:

Identify the question that the court must answer; and, use that exercise as an opportunity to deliver, at least inferentially, the answer you contend for.

Example 1

Is an application for further provision from a deceased estate, brought by a son against his late father but not filed until almost a year after the expiration of the time limit for the application had expired (and after most of the estate had been distributed) too late to have the benefit of the discretion to extend time contained in the limitation provision?

Example 2

The time limit for applications for further provision from a deceased estate is nine months from the date of death. The court does, however, have a discretion to extend time. The question for the court is whether an application brought almost a year out of time – i.e. approaching two years after the date of death – and after much of the estate had been distributed should have the benefit of that discretion.

Example 3 – an unadorned recitation of critical facts

Arthur Scargill died on 7 July 2016. His son Frank got nothing under his will. If Frank wished to apply for further provision, the Act required him to do so by 7 April 2017. Frank did not file his application until 24 March this year by which time much of the estate had, in the absence of any application, been lawfully distributed. The Court has a discretion to extend time.

Should it do so?

John Smith will likely be convicted of murder and sentenced to death at next week's trial unless he can lead evidence of his mental deficits. His expert witness on that issue must undergo immediate emergency surgery for a life-threatening cancer condition.

Did the trial court abuse its discretion in refusing to grant Smith an adjournment of his trial?

- Spill the beans on the first page
- Avoid one long sentence
- Include enough detail to tell the story
- Do not include unnecessary detail
- Sound objective
- Save the argument for later
- End with a question mark
- Issue frame for each substantial issue (sub-frame)
- Spend *a lot* of time on this exercise

Introduction

Background

Relevant Facts

The Law

Discussion

Orders

Why is Frank’s Application so Late?

Is the Delay Fatal?

The Discretion is Remedial

Is There Any Satisfactory Explanation for the Lateness of the Application?

Is Frank’s Application Inexcusably Late?

The Discretion to Extend Time Provides an Important Protection for Executors

There are three reasons why the application for an interlocutory injunction should be [granted/refused]:

1. …
2. …
3. …

The [other side's] contentions lack merit because:

1. …
2. …
3. …

Whilst the applicant's argument about misleading conduct by silence may have a superficial appeal, it does not withstand careful scrutiny for three reasons:

1. …
2. …
3. …

Judges value advocacy that helps them easily reach their own decision.

What I have learned in practice is that the most effective advocacy is helpful, clear, brief, thorough, reliable, principled and compelling.

Everything else is a distraction.

Matthew Ryder QC, *A barrister's rhetorical flourishes can be seductive, but eventually they become an irritating distraction* (7 December 2012) Legal Cheek.

What Judges Want – Q&A

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