

# Presentation Of Commercial Cases In The Supreme Court Of New South Wales

COMMERCIAL LITIGATION 2005  
Lexis Nexis Conference  
26 October 2005

## PRESENTATION OF COMMERCIAL CASES IN THE SUPREME COURT OF NEW SOUTH WALES Justice P A Bergin

### Introduction

Any idea that there will come a day when citizens will go about telling each other of the marvel of how just, quick and cheap it is to engage in commercial litigation is a fantasy. [1] Commercial litigation is a far more attractive concept to lawyers than it is to members of the commercial community. With few exceptions [2], members of the commercial community would much prefer to have nothing to do with the Courts of Equity. [3] That preference seems to be engendered not only by the cost of commercial litigation, but also by the far more attractive way of life of transacting business, or doing deals, without the intrusion and restrictions of such litigation.

In New South Wales there are innumerable commercial relationships with millions of commercial transactions occurring each day. In contrast the number of commercial cases commenced in the courts each year is in the hundreds. It seems that commercial entities resort to litigation when the advantages of a particular commercial relationship are no longer seen as outweighing strict reliance on and enforcement of legal rights. At this stage the commercial litigation specialist practitioner is instructed. [4].

The commercial litigation lawyer practices in a landscape that is heavily regulated. In August 2005 the *Uniform Civil Procedure Act 2005* (NSW) (the UCP Act) and the *Uniform Civil Procedure Rules 2005* (the UCP Rules) came into force and the *Legal Profession Act 2004* (NSW) came into force on 1 October 2005. The combined effect of those statutes and rules, includes the requirement (that was previously in place [5] ) that prior to filing "court documentation" [6] on a claim or defence to a claim for damages, the practitioner must certify that "there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law" that the claim or the defence has "reasonable prospects of success". [7]

Facts are "provable" only if the relevant practitioner [8] believes that the material then available to the practitioner "provides a proper basis for alleging that fact [9]. A claim has reasonable prospects of success "if there are reasonable prospects of damages being recovered on the claim" and a defence has reasonable prospects of success "if there are reasonable prospects of the defence defeating the claim or leading to a reduction in the damages recovered on the claim" [10]. Once these requirements are satisfied, the commercial cause in which damages are claimed is able to be commenced and defended.

The possible sanctions for commencing or pursuing a claim or a defence to a claim for damages with no reasonable prospects of success, includes an order for costs against the practitioner [11]. Notwithstanding the possible cost consequences, sometimes quite severe cost consequences, for providing "legal services" [12] to a party in the absence of reasonable prospects of success, to say nothing of the impact on the professional reputation of the practitioner, these provisions must be kept in perspective. Although they impose a demanding standard they should not be seen as part of "an instrument of intimidation". [13]

There are cases that initially present as weak and/or very problematical and yet for one reason or another they are completely successful. Sometimes commercial litigators need to be courageous, but that does not mean that they are delinquent in their statutory duties because they commence or defend what may appear to some to be a weak or problematical case. It should be observed that orders against practitioners under these provisions are rare, a fact that seems to me to rightly reflect the integrity of the legal practitioners of this State and also the proper understanding of the vagaries of litigation.

The options for the resolution of commercial disputes in the Supreme Court include mechanisms other than going to trial or litigating to final judgment. In addition to those professionals with particular technical expertise, there is now a phalanx of retired judges available to accept referral by the Court of the whole or part of commercial causes either for inquiry and report to the Court or for mediation. It is the effective and efficient use of these options that may assist the commercial litigant to achieve a resolution of a commercial dispute that may be seen to be cheaper and quicker than if the dispute is fought to final judgment. With these general observations in mind I will deal with the particular topics upon which I have been asked to address you in relation to the presentation of commercial cases in the Supreme Court of New South Wales.

### Case Management

Case management is hardly novel. In *D'Orta-Ekenaike v Victoria Legal Aid* [2005] 79 ALJR 755, Callinan J said at [375] (endnotes omitted):

It has been suggested that the invention of case management and a gradual departure from conduct of litigation by the oral word exclusively have greatly relieved the burden upon the advocate: that much that had to be done previously, intuitively and initially instantaneously, can be, and is now to a substantial extent done in the calm and reflective atmosphere of chambers. Case management is not however novel. In no fewer than three Australian jurisdictions, New South Wales, Queensland and Victoria, legislation enabling the adoption of special and expeditious procedures in commercial cases has been in force for many years. Available judicial decree there even extended to dispensation with the rules of evidence and compulsion of a party to make admissions with respect to any question of fact relevant to the action. This Australian legislation generally had as its model the rules and practice of the Commercial Court established in the United Kingdom in 1895 as part of the Queen's Bench Division to expedite the resolution of commercial and mercantile disputes. Not only therefore is case management a process which has been available and used for many years, but it is also hardly a process which has significantly reduced the burden upon advocates. In some ways it has increased it. Case management is designed among other things to expedite litigation. Decisions still have to be made quickly and under pressure. The oral tradition has not been abandoned. The provision in advance, of long, written proofs or affidavits of evidence-in-chief which in all probability have been settled by the lawyers for the parties, can make cross-examination more difficult, and indeed its effectiveness, critical to the outcome of the case. Too vigorous a form of case management may be productive of a higher risk of judicial error and the need therefore for even finer judgment on the part of advocates. [14]

As Callinan J observed, one of the purposes of case management is to expedite litigation, that is, to hurry the process along or ensure that it progresses quickly [15]. That purpose is consistent with the "overriding" purpose of the UCP Act and Rules in their application to civil proceedings which is to facilitate the *just, quick and cheap* resolution of the *real issues* in the proceedings [16]. Section 56(2) of the UCP Act provides:

**56(2)** The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or any such rule.

Without embarking upon extra curial discussion of the interpretation of this provision, it seems to me that there is little doubt that in giving effect to the overriding purpose judges will have to strive for balance in deciding what is just, quick and cheap in the circumstances of a particular case. Section 56(3) of the UCP Act imposes a "duty" on a party to the proceedings to "assist the court to further the overriding purpose" and, in doing so, "to participate in the processes of the court and to comply with directions and orders of the court". Section 56(4) imposes an obligation on legal practitioners to ensure that their conduct does not cause their clients to breach the duty imposed by s 56(3). Breaches of the statutory duty by the client or statutory obligation by the legal practitioner may have cost consequences (s 56(5)).

The UCP Act defines the objects of case management as: (1) the just determination of the proceedings; (2) the efficient disposal of the business of the court; (3) the efficient use of available judicial and administrative resources; and (4) the timely disposal of the proceedings (and all other proceedings in the court) "at a cost affordable by the respective parties" [17]. That last mentioned object is to be understood in the light of s 60 of the UCP Act which provides:

**60** In any proceedings, the practice and procedure of the court should be implemented with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute.

A number of questions may arise in relation to the "importance and complexity of the subject-matter in dispute" including the test to be applied in deciding the "importance" of the subject matter? A dispute may not be factually or legally complex but it may involve a jealously guarded commercial reputation of one of the parties that is important to that party. Will that be relevant or is "importance" to be judged rather more objectively? A factually complex dispute may have no elements to it that are important to the development of the commercial law of this State. What amount of costs is "proportionate" in these two instances? How will the case management process take into account what is "affordable by the respective parties"? This assessment would seem to need some evidence with consequential further costs.

Practice Note SC Eq 3 governs cases in the Commercial List (the Practice Note) [18]. The manner in which the cases are managed and the detail of what is expected of practitioners appearing in matters in the Commercial List is set out in the Practice Note [19]. There is provision for cases to be *managed* without the need for the incursion of costs for attending numerous directions hearings [20]. On joint application orders are made by the List Judge in Chambers with the consequence that there is more communication between the respective legal practitioners to settle the timetabling for the preparation of the case. It is true that the costs of those communications would not be incurred if the solicitors simply came along to court and were required to accept a regime imposed by the court. However one would have to compare the costs of the appearances with the costs of the communications to reach a consensual timetable to make an assessment about the relative costs.

In any event it seems to me that it is preferable to have the parties communicating and agreeing to a timetable that the parties believe to be reasonable than to have the court imposing a regime in the directions hearing after sometimes heated argument involving very minor differences in dates for completion of interlocutory steps. There are some exceptions to this approach, particularly those cases in which it is apparent that the parties are not prosecuting the case

diligently. There is also the capacity for the parties to request that there be no directions for a particular period so that they can pursue settlement discussions. [21] Experience suggests that the process of consensual timetabling is more cost efficient in the long term.

The imposition of a statutory obligation on solicitors and barristers that they “must not” by their conduct cause their client to breach a direction given by the court requires diligence in monitoring the progress of the preparation of the case pursuant to the pre-trial timetable. The statutory regime is not intended to foster claim and counter-claim between the legal practitioner and the client as to who was responsible for the non-compliance with the Court’s direction. These provisions are not meant to adversely affect the delicate balance of a legal practitioner’s paramount duty to the court and the duty to the client but there is potential for problems unless practitioners ensure that the timetable set for pre-trial preparation is feasible.

One way to avoid the conflict between your duty to the client and the duty to the Court in this setting is to ensure that the client is made well aware of the “duty” imposed on the client by s 56(3) of the UCP Act and is also made well aware that if there is any prospect of the directions being breached that there will be notification to the List Judge and the opponent so that exposure to a breach of duty can be avoided. The vast majority of practitioners appearing in the Commercial List already comply with the practice of notification. [22]

It has been suggested that the case management provisions of the UCP Act “recognize the importance of case management as a tool for increasing the efficiency of the court system and for reducing the cost of litigation [23]. Some doubt has been expressed as to whether case management reduces the cost of litigation. In the early 1990s the Institute of Civil Justice at the Rand Corporation in California conducted a five year survey of 10,000 cases in 20 Federal Courts in 16 States (the Rand Survey) [24]. The Rand Survey found that judicial case management increased the cost to the litigants but decreased delay in the litigation. In New South Wales, although bare statistics are gathered about the length of time from filing of a claim to final disposition, there is presently no survey or analysis from which one is able to make a judgment as to whether case management increases or decreases the cost of litigation.

Professor Michael Zander, a critic of the Woolf Reforms in England [25], suggested that in managing cases “attention should be directed first and foremost at the small minority of cases that plainly appear to be dragging” [26]. Callinan J suggested that “it may be proper to regard it [case management] in its most radical or intrusive forms as still experimental” [27]. Perhaps a prudent approach is to focus on the findings of the Rand Survey that case management increases the costs to the litigants, in deciding just how much *management* there should be in any particular case.

Although the Court of Appeal has recently observed that “the days when the suit of *Jarndyce v Jarndyce* wound its apocryphal way through the pages of Dickens’ *Bleak House* are long gone – if they ever were” [28] it seems to me that care must be taken to ensure that modern case management does not permit any likeness to the Dickensian description of the consequences of case management given by Mr Jarndyce [29]:

The Lawyers have twisted it into such a state of bedevilment that the original merits of the case have long disappeared from the face of the earth. ... It’s about nothing but Costs now. We are always appearing, and dis-appearing, and swearing, and interrogating, and filing, and cross-filing, and arguing, and sealing, and motioning, and referring, and reporting, and revolving about the Lord Chancellor and all his satellites, and equitably waltzing ourselves off to dusty death, about costs.

### Delay and identifying problem areas

The UCP Act provides guidance as to the meaning of *delay* in litigation. Section 59 provides:

**59** In any proceedings, the practice and procedure of the court should be implemented with the object of eliminating any lapse of time between the commencement of the proceedings and their final determination beyond that reasonably required for the interlocutory activities necessary for the fair and just determination of the issues in dispute between the parties and the preparation of the case for trial.

Thus we see that *delay* in litigation is the lapse of time between the commencement of proceedings and their final determination that is greater than the time considered to be *reasonably required* between those two events to accommodate the *necessary* interlocutory activities. Although the overriding purpose of the UCP Act and Rules is to facilitate the *just, quick and cheap* resolution of the *real issues* in the proceedings, s 58 and s 59 of the UCP Act make plain that in the process of case management the Court *must seek to act in accordance with the dictates of justice* and should also apply the test of what is *fair and just* in considering; (1) what are the *necessary* interlocutory activities; and (2) what is a reasonable time within which to complete those activities.

The speedy resolution of commercial causes in the Supreme Court was a concept reflected in the *Commercial Causes Act 1903* (NSW) [30]. The Commercial List in 2005 is considered a fast track with cases listed for hearing as quickly as possible taking into account the time reasonably required for the completion of the interlocutory activities. In the main the parties consent to the timetabling for those steps, notwithstanding that a longer time than otherwise might have been expected may be to the advantage of one of the parties. That agreement does not mean that the parties are tolerating *delay* or that the Court is endorsing *delay*. There may be very good reasons that a particular party needs extra time than initially anticipated and the opposing party may well recognize that to argue that such time is not necessary has no merit. It is not usual for the Court to impose a faster timeframe within which to complete the interlocutory steps

than that agreed to by the parties but there are occasions when that is necessary.

Case management in the Commercial List is intended to assist the parties to achieve the final resolution of their disputes as quickly and fairly as possible in all the circumstances of the particular case. There are a number of causes of *delay* that seem to stem from the failure to identify or appreciate the *real issues* between the parties at an early stage of the proceedings. It is imperative to focus on the issues that are “real” and to see if some agreement on those issues is able to be reached at an early stage of the proceedings. When that is done the interlocutory steps are completed far more quickly than if agreement is not reached. It seems to me that cases in which such agreement is reached are those in which counsel are briefed at an early stage. When counsel (and if possible trial counsel) are briefed early there are less amendments sought on the eve of the trial. Experience shows that when counsel are not briefed until the matter is close to trial late applications for amendments to the pleadings are sometimes sought with consequential adjournments and *delay*.

These late applications seem to occur as a result of a closer review of the pleadings and the evidence that has been served pursuant to the timetable for preparation for trial. If an ongoing detailed review of the evidence is made it will be easier to identify problems with compliance with the pre-trial timetable – such as the need for amendment or further discovery by reason of the identification of, or better appreciation of, the real issues between the parties. Once a “problem” is identified, that is once it is clear that an adjustment will need to be made to the timetable so that the real issues can be litigated, it is essential that notification is given to the other party or parties and an effort is made to agree to a new timetable. If the parties agree to a new timetable and there is a need for the vacation of the trial dates, it is essential that you notify the List Judge so that the dates may be allocated in the management of other cases in the List. It is only when agreement cannot be reached that the Court will intervene [31]. It is true that if the trial date is vacated the proceedings will not be concluded until some time later than they would otherwise have been concluded but whether that amounts to *delay* within the meaning of the UCP Act would have to be assessed in the particular circumstances.

The discovery process features regularly as a cause of slowing down the pre-trial process with many motions in relation to categories of documents. Although the amendments to the *Supreme Court Rules* to move away from general discovery to categories or classes of documents were motivated by a desire to reduce the costs of litigation, there are some cases in which those savings are squandered by the costs of the number of interlocutory appearances and arguments in relation to the relevance of the proposed classes, the breadth of the proposed classes and teasing and parsing the various descriptions of the proposed classes. One method of shortening this process is for the parties to mediate their discovery disputes however that will depend upon the extent of the discovery issues. As Bryson JA said, “It is always important to keep a sense of proportion about the amount expended on getting a case ready” [32].

The Rand Survey found that a reduction in the timeframe within which discovery took place significantly reduced the time to disposition and significantly reduced the costs of the proceedings. It was noted that there was a culture of exchanging information without formal discovery and a requirement of good faith efforts to resolve discovery disputes before filing motions [33]. The broad powers given to the Court in s 61 of the UCP Act to give such pre-trial directions as it thinks fit, whether or not they are inconsistent with the Rules, may be used to include in the timetable for the preparation for trial the step for the exchange of information without formal discovery.

If a culture of good faith efforts to assist the Court to bring proceedings to a speedy resolution is adopted by the parties with the assistance of the practitioners, there is every prospect that there will be little *delay* in the proceedings.

### **Referrals to referees**

Rules for referrals to referees were first included in the *Supreme Court Rules* 1970 in 1985, effective from January 1986 [34]. In the last twenty years referrals have been an integral part of the efficient management of commercial litigation in the Supreme Court [35].

There have been problems of delay in relation to some references. This usually occurs when the hearing of the reference takes longer than anticipated and the referee is unable to return to the balance of the hearing for some months, sometimes many months, because of other professional commitments. Practitioners have to then read themselves back into the matter with obvious costs consequences to say nothing of the disruption to the consideration of the evidence and the work on the report to the Court by the referee. [36]

This problem is being addressed by the Court maintaining a tighter control over the matter for reference, ensuring that the real issues have been identified, all evidence has been served and other interlocutory steps have been completed prior to any referral being ordered. Directions pursuant to UCP Rule 20.20(1) “with respect to the conduct of the proceedings under the reference” enable the Court to assist in avoiding hearings taking longer than allocated. This aspect of referrals requires constant review to ensure that the process is consistent with the overriding purpose of the *just, quick and cheap* resolution of the real issues in dispute. The involvement of the practitioners in this process is integral to its success.

### **Mediation**

The UCP Act and Rules have similar provisions in relation to mediation as contained in the *Supreme Court Act* 1970 and the *Supreme Court Rules* 1970 [37]. However s 33 of the UCP Act now provides to the mediator to whom a court refers a matter for mediation “the same protection and immunity as a judicial officer of the court has in the exercise of his or her functions as a judicial officer”. It will be interesting to see what impact, if any, this provision has on the number of mediators available for referrals of matters for mediation from the courts.

The Practice Note makes clear that mediation is an integral part of the commercial litigation process. Each party must now inform the Court whether they have attempted to mediate the dispute prior to the commencement of proceedings and whether they are willing to proceed to mediation or further mediation. In New South Wales, commercial litigants are well served by experienced mediators including a group of very experienced retired commercial judges who have now become experienced mediators in complex commercial matters. The settlement rate of such mediations is high but it is imperative to find the "ripe" time to refer the matter to mediation. If parties have attempted mediation prior to the commencement of proceedings it is probable that the ripe time for any further attempt at mediation will not occur before all the evidence is served and all parties have a better view of the ambit of the cases they have to meet. The Court depends heavily on the assessments made by the legal practitioners as to the suitable time for mediation.

The Quebec Supreme Court has introduced some innovative procedural changes in relation to mediation in which the judges of that Court act as mediators. This practice has judges facilitating agreement between the parties in purpose built 'courtrooms' with what appears to be a large settlement rate. The judge/mediator is, of course, excluded from taking any further part in the case if it fails to settle. In Quebec, the Court has also introduced judicial mediation into the criminal jurisdiction. In March 2005 Quebec Court of Appeal Judge Madame Justice Louise Otis visited Australia to lecture on judicial mediation. At the beginning of this month a number of judges of the Supreme Court of New South Wales attended an intensive workshop on judicial mediation in the Supreme Court of Quebec. It will be interesting to see whether these innovative practices find favour in New South Wales.

### Focus and using documentary evidence persuasively

Modern commercial litigation sees less of the jury advocacy of years ago and the edict from the Court of Appeal that litigation is now to occur with the "cards on the table", [38] limits the opportunity for the great forensic flourishes that were so much part of the adversarial system of the 20th Century. Michael McHugh QC (as his Honour then was) shared a number of forensic anecdotes with the profession in his paper *Cross-Examination on Documents*[39]. One of those was:

... if you are to use the document on credit, the first thing is to get the witness hopelessly committed to his sworn evidence. That is the first thing; do not let him explain away his sworn evidence, so that he gets himself in a hopeless situation.

I once saw Mr Justice Larkins in a defamation action do that with the greatest skill and most destructive force. Evatt QC and I were appearing for a party who was suing for defamation. There was an article which said that he had been put up for a council election by the Labor Party, and the plaintiff claimed that he was an independent candidate. Now Larkins had in his possession the application form or entry form which had been signed by the President and Secretary of the local Labor Party branch. And having got the witness committed to his story that he now had nothing to do with the Labor Party, he then led him along, the witness not knowing where he was going, seeking his explanation as to how he came to nominate and who signed his nomination, and the witness was led to make the most extraordinary statements since he had not the faintest idea who signed his nomination form. The plaintiff said in the witness box, "Oh, I had the application form in my hand and I was walking through the streets of some suburb in northern Sydney and I saw this gathering outside the hall and I went up to them and asked people if they would nominate me. Somebody came out and said he would, and I don't know who they all were". Of course Larkins had already got admissions that he knew the people involved and cut off every possible explanation. Ultimately when the document was produced, there was an absolutely devastating cross-examination. In fact in all my time at the Bar I have never gone out of Court so completely destroyed as I did at the conclusion of that cross-examination on that day.

Another was:

In some cases, particularly commercial cases, you may want to contradict the very statements in a document. There may be some representation, for example, made in the document. Here of course the ordinary techniques of cross-examination apply. You seek to obtain admissions as to facts and other documents which can ultimately be used to force admissions out of the witness that the statement in the document is untrue.

Also remember, as *Alchin's* case shows, that any document can be used no matter who produced it, to obtain an admission. I once saw J W Smyth absolutely destroy a witness when he had nothing to cross-examine the witness on but a *Law Almanac*. A police sergeant had sworn that it was a bright moonlit night at the time an accident happened. Our client was charged with culpable driving and Smyth had said to me a couple of days before, "Go and find out whether it was a bright moonlit night", and I am afraid I was a bit negligent; I had not done it. So as the witness was in the witness box, Smyth turned to me and said "Have you found out if it was a bright moonlit night?" and I said "I'm sorry Jack, I haven't". He seemed somewhat annoyed and said "well go and get a *Law Almanac*". In those days the *Law Almanac* used to have the moon phases in it and the solicitor went out and got one. Sure enough the moon rose about 11 o'clock in the morning and set about four o'clock in the afternoon, so it couldn't have been a bright moonlit night. That was all Smyth had. So having got the policeman hopelessly committed to swearing it was a bright moonlit night he then took the almanac up to him and in that deadly voice of his he said "Have a look at that, having seen that do you still swear that it was a bright moonlit night?", and the witness, the police

sergeant, said "No Then Smyth said to him "Five minutes ago you swore to me that it was a bright moonlit night, and now you have just sworn that it wasn't a bright moonlit night haven't you?". "Yes", said the witness. "And one is contrary to the other'?", "Yes". "Which is false?" and the witness said, "It was false when I swore it was a bright moonlit night." Of course the cross-examination just went on and on. The policeman went red, and finally he was reduced to total speechlessness. It is an interesting illustration of how you can use any document.

With the cards on the table approach, sophisticated forensic skills are needed in complex commercial litigation. These days the agreed bundle of documents is usually carefully analysed by the parties and although there are still cases in which documents from the bundle are devastating to a party's case, there are fewer opportunities for the "absolutely devastating cross-examinations". However there certainly are such cross-examinations. These usually occur when counsel have the contents of the important documents at their fingertips with a clear focus on the aim and purpose of the cross-examination, without the need to have long pauses whilst juniors or solicitors rummage through folder after folder looking for the relevant documents. There is little value in simple reading slabs of documents to a witness. Ask the witness to silently read a specific portion of the document and then put the propositions necessary to establish the point of the cross-examination. An efficient cross-examination is regularly an effective cross-examination. That of course means a very sharp focus on preparation. You must know every aspect of your client's case and the case made against your client, where its strengths are and where its weaknesses may be and how you are going to deal with them.

It is imperative that the trial judge follows the cross-examination on the documents. When there are many folders of documents in evidence it is usually very helpful to have a separate folder of the pertinent documents on which you are cross-examining to hand up to the bench to enhance the impact of the cross-examination (even though that may involve duplicate copying). It is your role to ensure that the trial judge is fully aware of the case your client makes and it is imperative that during the hearing the focus is on persuading the trial judge that the merits are with your client's case. It will depend on the approach adopted by the individual judge but an efficient opening highlighting the issues and any particular documents that you feel should be read by the judge before you embark on your cross-examination can be very effective. The use of the separate folder of pertinent documents is also effective in submissions. Remember that when the trial judge reserves judgment you want to make it as comfortable as possible for the judge to find a way through the documents that leads to a favourable view of your client's case.

You may find the following observation in Richard Du Cann's book *The Art of the Advocate* [40], worth remembering:

Finally, the advocate should not only seek to persuade his [her] audience, he [she] should also seek to please himself [herself]. He [she] must not get these priorities in the wrong order. The advocate who performs an intellectual war dance of triumph in celebration of his [her] own speeches while he [she] is delivering them is unlikely to persuade anyone to adopt any view except to convince them of his [her] own overweening conceit. But if by a speech which is finely wrought and well delivered he [she] can arouse the interest and secure the minds of his [her] audience and he [she] will secure a pleasure for himself [herself] which can be found in no other occupation.

### **Avoiding conflicts of duty to the client and to the Court**

In considering the future of the legal profession in the world of multi-disciplinary partnerships Chief Justice Gleeson said:

The role of a lawyer as an officer of a court is the primary basis upon which lawyers can claim to share in the principal attribute which distinguishes a profession from a business. In *Shapero v Kentucky Bar Association* (1988) 486 US 466 at 488, Justice Sandra Day O'Connor of the United States Supreme Court said:

"One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market."

The source of the ethical obligations of a lawyer is the role he or she plays in the administration of justice. These obligations, in a variety of ways, are supposed to temper their selfish pursuit of economic success. Current developments in relation to professional behaviour, discipline and organisation, driven to a large extent by the demands of competition policy, present some challenges to this theory [41].

I suggest that one should not construe the use of the word "selfish" in these statements as pejorative. It is important that you have economic success so that you are able to look after yourselves and your families but it is important that along the way you do not lose sight of the solemn promises you made on your admission to practice to faithfully serve in the administration of justice. I suggest that in the commercial litigation setting, it may help to avoid conflicts if your client is made aware from the commencement of the relationship that you are an officer of the court and you have that paramount duty to the court whilst at the same time serving your client's best interests.

In a recent speech Mr BW Walker SC claimed that the work of commercial lawyers has a diminishing connection with justice, let alone an involvement in its administration [42]. Without debating the merits of that claim as it applies to commercial lawyers generally, it is not true of commercial litigation lawyers. It is true that legal professional life is now



more complex and greater regulation is more burdensome however, it seems to me, that avoiding a clash of conflicts of your duty to the client and your paramount duty to the court would be the least of your burdens. Your paramount duty to the court is so clear. That is the easy part.

#### END NOTES

- [1] Adapted from Professor Michael Zander who said: "The idea that there will come a day that citizens will go about telling each other of the marvel of how cheap and swift and simple it is to engage in civil litigation is a fantasy" in *The Woolf Report: Forwards or Backwards for the new Lord Chancellor* C.J.Q 1997, 16 (JUL), 208-227
- [2] There are some corporations that regularly resort to litigation but that seems to be more because of the nature of the particular enterprise carried on by the corporation rather than a preference for the litigious way of life – for instance, banks and property developers.
- [3] The Commercial List is administered in the Equity Division of the Court.
- [4] s 306 *Legal Profession Act* 2004 as to how and when a client first instructs a "law practice" as defined in s 4(1) of that Act.
- [5] Previously the *Supreme Court Act* 1970, the *Supreme Court Rules* 1970 and the *Legal Profession Act* 1987.
- [6] s 347(4) *Legal Profession Act* 2004.
- [7] s 347(2) *Legal Profession Act* 2004.
- [8] s 345(1) *Legal Profession Act* 2004.
- [9] s 345(2) *Legal Profession Act* 2004.
- [10] s 345(4) *Legal Profession Act* 2004.
- [11] s 348 *Legal Profession Act* 2004; s 99 UCP Act 2005; See *Lemoto v Able Technical Pty Ltd & 2 Ors* [2005] NSWCA 153.
- [12] s 4(1) *Legal Profession Act* 2004.
- [13] *Degiorgio v Dunn (No 2)* (2005) 62 NSWLR 284, Barrett J at [27].
- [14] The example given of the judicial error in applying too vigorous a form of case management was the failure to allow an adjournment of a trial because the trial date had been fixed for some time in the case management process. See endnote [549] of the judgment with reference to *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146.
- [15] Some rules of evidence have been said to be based on case management principles dealing with practicalities such as the avoidance of multiplicity of actions and the protection of efficiency and cost effectiveness of the trial process. They have been referred to as case management rules or rules for convenience. *R v Lawrence* [2002] 2 Qd R 400 at 416; see the discussion in *R v Nicholls v the Queen; Coates v The Queen* [2005] HCA 1 (3 February 2005) per Gleeson CJ [39] -[56].
- [16] s 56(1) of the UCP Act.
- [17] s 57 of the UCP Act.
- [18] Formerly Practice Note 100
- [19] In England there is "The Admiralty and Commercial Courts Guide" the latest edition of which was produced in February 2002 by the Admiralty Judge, the Hon Mr Justice David Steel and the Judge in Charge of the Commercial List, the Hon Mr Justice Moore-Bick. Although this "Guide" is quite lengthy by comparison with the Practice Note, much of what is contained within it has been in place - in one form or another - in the Commercial List in the NSW Supreme Court for many years.
- [20] Paragraph 22 of Practice Note SC Eq 3.
- [21] Paragraph 7 of Practice Note SC Eq 3
- [22] Paragraph 21 of the Practice Note.
- [23] The Honourable Mr Justice Hamilton *Civil Procedure Reform: Gradualism or Revolution?* Vol 17 No 7 Judicial Officers' Bulletin, August 2005; The Honourable Justice Ipp *Ethical Problems with Judicial Activism* Conference organized by the National Judicial College Beijing 12 October 2004; Shanghai 19 October 2004. The observations in this regard were limited to case management being "designed to achieve cheaper ... justice".
- [24] JS Kakalik et al *Implementation of the Civil Justice reform Act in Pilot and Comparison District*.MR-801. *An Evaluation of Judicial Case Management under the Civil Justice Reform Act* MR-802. *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice reform Act*. Executive Summary; JS Kakalik et al; *Just, Speedy and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice reform Act* MR-800
- [25] See endnote ii. .
- [26] *Woolf Report: Forwards or Backwards for the new Lord Chancellor* C.J.Q 1997, 16 (JUL), 208-227
- [27] *D'Orta-Ekenaike v Victoria Legal Aid* [2005] 79 ALJR 755, endnote [548]
- [28] *Lemoto v Able Technical Pty Ltd & 2 Ors* [2005] NSWCA 153, per McColl JA at [95] with whom Hodgson and Ipp JJA agreed.
- [29] Charles Dickens *Bleak House* Ch 8.
- [30] s 6 *Commercial Causes Act* 1903 (NSW)
- [31] Practice Note SC Eq 3 par 21.
- [32] *Continuing Professional Legal Education – The 2004 Judges Series. Practical Litigation in the Supreme Court and Federal Court* – College of Law 25 February 2004
- [33] Professor Michael Zander *Does Case Management Work?* 1997 New Zealand Law Journal 151
- [34] Part 72; now Part 20 Division 3 of the UCP Rules.
- [35] In committing the "sin of self quotation" ( Spigelman CJ in [The Principle of Open Justice: A Comparative Perspective](#), delivered at the Media Law Resource Centre Conference London, 20 September 2005) see: [A Judicial Perspective on what the Court expects from Legal Practitioners in Equity and Commercial Litigation](#) Law Society of New South Wales Accreditation Business, Property, Wills, Advocacy and Commercial Litigation Annual Conference. Leura 26 July 2003; [Commercial Litigation; Tips for Success and traps for the Unwary: A Judge's Perspective on Case Preparation](#) Lexis Nexis Butterworths Practice & Procedure Conference. Sydney 26 August 2003; [Methodology and Management of Construction Disputes in the Supreme Court of New South Wales](#), Construction and Infrastructure

Seminar Law Council of Australia. Law Institute of Victoria, 5 May 2004. (all available on the [Supreme Court Speeches](#) page)

[36] It is rare that there is operative delay by referees but when this occurs the parties and the court must act to rectify the problem; *Krivoshev & Anor v Royal Society for the prevention of cruelty to Animals* [2005] NSWCA 78 per Giles JA at [123]-[124]; *Alamdo Holdings Pty Ltd v Australian Window Furnishings (NSW) Pty Ltd* [2002] NSWSC 487.

[37] Ss 25-34 of the UCP Act; Part 20 Division 1 of the UCP Rules.

[38] *Glover v Australian Ultra Concrete Floors*, [2003] NSWCA 80 par [60]; *Nowlan v Marson Transport Pty Ltd*, pars [20]- [36] and [40]-[46].

[39] (1986) NZLR 309

[40] Penguin Books 1964 at page 181 – with amendments to make it more gender balanced.

[41] *The Changing Paradigm* 26 October 1999. NSW Womens Lawyers Asscoiation.

[42] "Lawyers and Money" the St James Ethics Centre Lawyers Lecture, 18 October 2005, first published on <http://www.ethics.org.au> on 24 October 2005.