

## Costs of civil litigation: The solicitor's duty to ensure that work is done at the lower cost

1 July 2014

Karin Ottesen

### Introduction

1. The high costs of civil litigation continue to be of great concern as can be seen from the current inquiry on access to justice arrangements being undertaken by the Productivity Commission and the Commission's recently released draft report on this.<sup>1</sup> As the terms of reference to that inquiry states, "[t]he cost of accessing justice services and securing legal representation can prevent many Australians from gaining effective access to the justice system."<sup>2</sup>
2. However, two justices of the Supreme Court of New South Wales, Justices White and Nicholas, have already pointed to one way in which the costs of civil litigation in this State may be made more manageable and access to justice made more affordable. These judges have identified that costs may be reduced by the efficient division of work between solicitors and barristers. This is because, generally speaking, solicitors tend to charge fees at a higher hourly rate than do barristers. In view of this, Justices White and Nicholas have said that where work can equally be done by either a solicitor or by a barrister and, where the barrister is more experienced than the solicitor and charges at a significantly lower rate, then not only should the solicitor manage the litigation in such a way that the work is done at the lower cost but that *the solicitor's duty to his or her client* is to ensure that the work is done at the lower cost.
3. This paper examines the cases in which Justices White and Nicholas have commented on the costs benefits of the efficient division of work between solicitors and barristers and considers the solicitors' responsibilities which flow from this.

### Motor Trade Finances

4. In the first case, *Motor Trade Finances Prestige Leasing P/L v Elderslie Finance Corporation Ltd* ("**Motor Trade Finances**")<sup>3</sup> there was an application by the defendants for security for costs.<sup>4</sup> The application was made in respect of the plaintiff's claims for breach of contract and misleading and deceptive conduct in relation to a prestige motor vehicle securitisation venture.

---

<sup>1</sup> See Productivity Commission 2014, *Access to Justice Arrangements*, Draft Report, Canberra, released 8 April 2014 (accessible at <http://www.pc.gov.au/projects/inquiry/access-justice/draft>).

<sup>2</sup> Accessible at <http://www.pc.gov.au/projects/inquiry/access-justice/terms-of-reference>.

<sup>3</sup> [2005] NSWSC 921.

<sup>4</sup> The object of an order for security for costs is to protect a defendant against the possibility that the plaintiff, if unsuccessful, will be unable to meet an order for costs.

5. When considering how much security should be provided, Justice White expressed concern that the proposed division of work between the solicitors engaged in the matter for the defendants, on the one hand, and the defendants' counsel, on the other hand, was not efficient because the solicitors charged a significantly higher rate than did counsel. In particular, his Honour noted that the most junior solicitor involved in the case (who was of some nine years standing) charged more per hour than did senior counsel.<sup>5</sup> His Honour said that the efficient division of work would be a relevant consideration on a costs assessment should the defendants be successful in the litigation and that a costs assessor should consider whether it was just and reasonable for a losing party to pay more for a successful party's costs than would have been incurred had the successful party made "an efficient use of the resources provided by the junior bar."<sup>6</sup>

#### April Fine Paper

6. Subsequently, in *April Fine Paper Macao Commercial Offshore Ltd v Moore Business Systems Australia Ltd* ("**April Fine Paper**"),<sup>7</sup> Justice White made specific mention of the solicitor's duty to ensure that the work is done at the lower cost.
7. *April Fine Papers* was also an application for security for costs. According to Justice White, the application was made in relation to "a typical sale of goods claim where there is an allegation that the goods supplied were defective, with an added misrepresentation claim" and was a case which did "not appear to be at all complex."<sup>8</sup> The plaintiff claimed \$US 477,491.39.
8. The defendant's solicitor estimated that the defendant's costs in defending the claim on a solicitor and client basis would be approximately \$384,500 and sought security at the hearing in the sum of \$275,265 which was said to be the defendant's estimated recoverable costs on the ordinary basis if the defendant was successful.
9. Justice White referred to s 60 of the *Civil Procedure Act 2005 (NSW)* ("**CPA**") which states that the practice and procedure of the court in any proceedings should be implemented with the object of resolving the parties' dispute "in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute."
10. Not surprisingly, his Honour said that the defendant's estimated costs of \$384,500 in relation to a claim of \$US 477,491.39 were "out of all proportion" to the importance and complexity of the subject-matter of the dispute as the quantum or value of the claim was an element of the importance of the subject-matter of the dispute. His Honour further said that if the plaintiff's costs were of a similar level, then the costs of the parties would substantially exceed the claim and yet, as his Honour noted, s 56 of the CPA imposes on legal

---

<sup>5</sup> Above, n 3, at [28].

<sup>6</sup> Above, n 3, at [29].

<sup>7</sup> [2009] NSWSC 867; (2009) 75 NSWLR 619.

<sup>8</sup> Above, n 7, at [6].

practitioners a duty to assist the court to further the overriding purpose of the CPA of ensuring that civil litigation is conducted in a way which facilitates not only the just and quick but also the “cheap” resolution of the real issues in the proceedings.<sup>9</sup> His Honour then said, referring to *Skalkos v T & S Recoveries Pty Ltd*,<sup>10</sup> that the principle of proportionality of costs under s 60 of the CPA would be relevant to an assessment of costs.

11. His Honour criticised the approach taken by the solicitors for both parties to the preparation of the matter for hearing, stating that their affidavits reflected “a common and misguided approach to preparing commercial litigation” which “too often involves duplication of work, delays the identification of the real issues in the proceedings and results in late applications for amendments to pleadings” and which could “sometimes prove fatal to the client’s case, through no fault of the client.”<sup>11</sup> His Honour then said that:

*“In a usual case of commercial litigation, counsel, at least junior counsel, should be briefed early. Where there is work that can be done either by the solicitor or by junior counsel, and, as often happens, junior counsel is more experienced than the solicitor and charges at a significantly lower rate, then the solicitor’s duty to his or her client is to ensure that the work is done at the lower cost. That general statement is, of course, subject to the ability of the individual legal practitioners involved. But very often one sees work done by a solicitor in a firm which could be done equally well or better at a fraction of the cost by junior counsel with considerably more experience as a litigation solicitor and with more expertise.”<sup>12</sup>*

12. The defendant’s solicitor in the case was a solicitor of about 5 years’ standing and charged an hourly rate of \$400 exclusive of GST. In contrast, junior counsel, who had almost six years of legal practice prior to being admitted to the Bar and apparently just over a year’s experience as a barrister at the time of the proceedings, charged only \$250 per hour. Justice White commented that the defendant’s solicitor should not be criticised “for using counsel too much. If anything, the criticism would be that counsel is not used enough.”<sup>13</sup> His Honour then repeated his observations in *Motor Trade Finances*<sup>14</sup> that a costs assessor should consider whether it was just and reasonable for a losing party to pay more towards a successful party’s costs than would have been incurred had the successful party made efficient use of the resources of the junior Bar.<sup>15</sup>

<sup>9</sup> Above, n 7, at [6]-[8]. See also *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2013] HCA 46 (French CJ, Kiefel, Bell, Gageler and Keane JJ) at [56] where the High Court confirms the duty of legal practitioners to assist the court in furthering the overriding purpose of the CPA, as stated in s 56.

<sup>10</sup> [2004] NSWCA 281; (2004) 65 NSWLR 151.

<sup>11</sup> Above, n 7, at [22]-[23].

<sup>12</sup> Above, n 7, at [26].

<sup>13</sup> Above, n 7, at [27].

<sup>14</sup> Above, n 3.

<sup>15</sup> Above, n 7, at [27].

## Ashington Capital

13. The case of *Ashington Capital Pty Ltd v Parissen Capital (Project X) Pty Ltd*<sup>16</sup> was another application for security for costs, this time before Justice Nicholas. His Honour said that the approach to be taken to such an application had been explained by Justice White in *April Fine Paper* and summarised this approach as follows:

*“The legal representatives of both parties have a duty to ensure that the litigation is conducted in a way which facilitates the just, quick and cheap resolution of the real issues in the proceedings ...; the principle of proportionality of costs under s 60 of the ...[CPA] is relevant; ...where there is work that can be done either by the solicitor or by junior counsel, and, as often happens, junior counsel is more experienced than the solicitor and charges at a significantly lower rate, then the solicitor's duty to his or her client is to ensure that the work is done at the lower cost... . Ultimately, the matter is very much one of impression...”<sup>17</sup>*

## Solicitors' responsibilities

14. Although Justices White and Nicholas addressed the solicitor's duty to ensure work is done at the lower rate in the context of commercial litigation and were dealing with interlocutory applications, their Honours' comments are clearly equally applicable to the conduct of civil litigation in general.
15. Indeed, even prior to *April Fine Paper*, the now Chief Justice of the Federal Court of Australia, Justice Allsop, when President of the New South Wales Court of Appeal, had expressed the view that a legal practitioner charging for “necessary work done in a wasteful fashion” could be in breach of the fiduciary duty of honesty and, if done intentionally, would be preferring his or her interests to his or her duty to the principal.<sup>18</sup> His Honour gave, by way of an example, work being undertaken within a firm of solicitors where the retention of a member of the independent Bar to do the work at a cheaper rate would have been productive of a better or the same quality of service. His Honour went on to say that:

*“A solicitor, at least one who recognises that the choice is available and who does not have at least a bona fide view (and probably one that is reasonably held) that she or he can do a better job than the bar may well breach his or her fiduciary duty by preferring his or her own interests to the client. Where is the fiduciary loyalty in having the client pay more for the same or worse service?”<sup>19</sup>*

16. His Honour, however, recognised the difficulty involved in trying to identify when work is being done in a wasteful fashion because the client often does not know that they are

<sup>16</sup> [2012] NSWSC 410.

<sup>17</sup> Above, n 15, at [15].

<sup>18</sup> Allsop, J “*Professionalism and commercialism – conflict or harmony in modern legal practice?*” Australian Academy of Law 2009 Symposium Series, 5 May 2009, at [39]-[41].

<sup>19</sup> Above, n 18, at [42].

paying more for the same or worse service (the so-called problem of information asymmetry) but, as his Honour noted, increasingly “[l]awyers are being watched, checked and reported on.”<sup>20</sup> Certainly, cases such as *April Fine Paper* and the other cases discussed above show that the courts are prepared to tackle this issue when it comes to their attention and, with more active case management by the courts, it can be expected that it will come to their attention more often. It should also be noted that one of the draft recommendations made by the Productivity Commission in its draft report on access to justice arrangements is the development of a central online portal which provides consumers with information of typical prices for a range of legal services so that they can assess if the quote they receive from a legal practitioner is excessively expensive relative to other (anonymous) suppliers.<sup>21</sup>

17. So what are the responsibilities of a solicitor with the carriage of a civil matter where there is work that can be done by either a solicitor or a barrister? Well, it seems to follow from the comments made by Justices White and Nicholas (and also from the comments by Chief Justice Allsop, when President of the New South Wales Court of Appeal) that they would include the following:

- The solicitor should, at an early stage of the matter, give consideration as to whether the work or some of the work that may need to be undertaken can be done more efficiently and more cheaply by a suitably experienced barrister.
- If the work can be done more efficiently and more cheaply by such a barrister, then full information should be provided about this to the client, including a warning that the client, if successful in the litigation, may not be able to recover from the losing party any disproportionate costs incurred.
- The solicitor should then ensure that the work is in fact done at the lower rate.

If the solicitor does not do this, then the solicitor may be in breach of his or her duty to the client.

K Ottesen

1 July 2014

#### Copyright

© This paper is subject to copyright which is retained by the author. Apart from any use as permitted under applicable copyright law, this paper may be reproduced in whole or in part for study or training purposes, subject to the inclusion of an acknowledgment of the source. Reproduction for commercial use or sale requires prior written permission from the author.

#### Disclaimer

This paper is intended only to provide a summary of the subject matter covered. It does not purport to be comprehensive and is not to be relied upon as legal advice. Readers should obtain their own legal advice.

<sup>20</sup> Above, n 18, at [56].

<sup>21</sup> Above, n 1, draft recommendation 6.3.