# Inclusion of unnecessary material in appeal books - solicitor ordered not to charge client with more than 50% of the costs associated with the books' preparation

**29 July 2016**

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## Introduction

1. In *Insurance Australia Ltd t/a NRMA Insurance v Milton (No 2)*,[1] the New South Wales Court of Appeal ordered a solicitor acting for an insurer in judicial review proceedings not to charge his client with more than 50% of the costs and disbursements associated with preparing the Blue appeal books[2] because the books included a large quantity of unnecessary material. In reaching this decision, the Court of Appeal rejected an attempt by the solicitor to have the Court reformulate parts of its earlier judgment in which members of the Court had commented about the wastage and proposed orders against the solicitor.

2. The Court of Appeal said that the order made against the solicitor was probably favourable to the solicitor in the circumstances of the case but considered it appropriate given that it was the first occasion on which such an order had been made.

## Background

3. The respondent to the proceedings had been severely injured in a motor vehicle accident. The appellant ("**Insurer**") was the insurer of the at fault vehicle and had admitted liability for the respondent's claim for damages.

4. For the first two years after his accident, the respondent was an "interim participant" in the scheme created by the *Motor Accidents (Lifetime Care and Support) Act 2006* (NSW) which provided care and support for persons injured in motor accidents. If he was not accepted as a "lifetime participant" in the scheme, the Insurer would be liable for his care and treatment.

5. The respondent did not want to be included in the scheme. The Lifetime Care and Support Authority of New South Wales held that he did not satisfy the criteria for lifetime participation in the scheme, a decision which was disputed by the Insurer. The Authority's decision was confirmed by an Assessment Panel and ultimately by a Review Panel.

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[1] [2016] NSWCA 173.

[2] In general, the Appeal Book must be divided into 4 sections including a document section called the "Blue Book": *Uniform Civil Procedure Rules 2005* (NSW), r 51.26. The contents of the Blue appeal book are specified in r 51.29. That rule includes the requirement that the Blue appeal book contain "all documents before the court below … relevant and necessary for the hearing and determination of the proceedings."

6. The Insurer commenced proceedings in the Supreme Court of New South Wales, invoking the Court's supervisory jurisdiction, which is identified in s 69 of the *Supreme Court Act 1970* (NSW), to seek judicial review of the Review Panel's decision.

7. The Insurer was unsuccessful at first instance and appealed to the Court of Appeal.

**The judgment on the substantive issues**

8. The Court of Appeal (Basten JA, Leeming and Simpson JJA agreeing) dismissed the appeal.[3]

9. Leeming and Simpson JJA, however, made some additional observations (with which Basten JA agreed) concerning the costs associated with the preparation of the appeal books. Those observations were set out at [60] to [70] of the Court's judgment.

10. Leeming and Simpson JJA said that the Insurer had provided "an enormous appeal book"[4] which had included four volumes of Blue appeal books totalling 2094 pages and that probably at least ten sets of the books had been prepared. Their Honours commented that "the waste in that course may fairly be described as extravagant"[5] for the following reasons:

    - The Insurer had identified at the outset of the hearing before the trial judge that it would be able to identify the particular documents to which reference would be made, of which there were few, but nevertheless had tendered all documents. The trial judge had indicated, with the acquiescence of the parties, that he would not roam through documents to which he had not been taken. Therefore, there seemed to be no need to reproduce thousands of pages on appeal.

    - Neither at first instance, nor on appeal, did it appear that a party referred to any document in volumes 1, 2 or 4 of the Blue appeal books.

    - Indicative of the failure to comply with the obligation to identify the documents which were relevant and necessary for the hearing and for the appeal, the original decision of the Assessment Panel was not included in the evidence at all, and the decision of the Review Panel, from which judicial review was sought, was not included in any of the Blue appeal books and had to be included, late, in the Orange appeal book.[6]

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[3] *Insurance Australia Ltd t/a NRMA Insurance v Milton* [2016] NSWCA 156.
[4] Above, n 3, at [61].
[5] Above, n 3, at [61].
[6] Above, n 3, at [62]–[65].

11. Their Honours further said:

> "*This is not the first time that the same solicitor acting for an insurer has adopted the course of causing thousands of pages needlessly to be photocopied for judicial review proceedings of this nature: see for example Ali v AAI Ltd [2016] NSWCA 110 at [39]- [40]. In SDW v Church of Jesus Christ of Latter-Day Saints [2008] NSWSC 1249; 222 FLR 84, reference was made by one of us at [35] to 'the exercise of no clinical legal judgment and the abdication of the responsibility that lies upon legal practitioners to apply thought and judgment in the selection of the material to be presented to the court'. It was said at [36] that in such cases:*
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> *'One appropriate sanction, in cases of excess, is an order that, no matter what the outcome of the proceedings, no costs be recoverable from the losing party in respect of the excess, and, further, no costs be recoverable by the solicitor from the client for the excessive copying.'*"[7]

12. Their Honours indicated that, during the hearing of the appeal, the Court had raised the issue as to whether it was right that, whatever the outcome of the appeal, either party should have to bear the costs of the photocopying and that senior counsel for the Insurer had obtained instructions that "we are not, whatever happens, going to seek costs for preparing the Blue books". Their Honours considered that these instructions fell short of an unequivocal undertaking by the Insurer's solicitor in relation to charging his client, as opposed to not seeking costs from the other party.[8]

13. However, their Honours also considered at [70] of the judgment that the position might not have been made sufficiently clear to the Insurer's solicitor and, accordingly, proposed to give the solicitor 14 days to make any submissions as to why an order should not be made that none of the costs and disbursements associated with photocopying the Blue appeal books should be charged to his client, and to the extent that such costs or disbursements had already been paid or might be paid in the future, that the client receive a refund. Their Honours said that power to make such an order could be found in s 99 of the *Civil Procedure Act 2005* (NSW) and/ or the supervisory jurisdiction with respect to legal practitioners.

14. Accordingly, the orders made by the Court of Appeal at that time included the following orders and directions:

> "*(4) Direct that the [Insurer's] solicitor file by [a date 14 days later] any written submissions with respect to the matters raised in [70] of the judgment of Leeming and Simpson JJA, failing which proposed order (5) will be made.*
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> *(5) Unless the [Insurer's] solicitor files written submissions as provided in order (4), order that the [Insurer's] solicitor –*

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[7] Above, n 3, at [67].
[8] Above, n 3, at [68]-[69].

*(a) not charge his client with any of the costs and disbursements associated with preparing the Blue appeal books;*
*(b) to the extent that such costs or disbursements have already been paid or might be paid in the future, reimburse the client for that amount; and*
*(c) give the client written notification of the terms of this order.*

*(6) Direct that order (5) not be entered until directed by the presiding judge.*"

**The judgment on the costs associated with the preparation of the appeal books**

15. The Court of Appeal subsequently addressed, on the papers, the issue of the costs associated with the preparation of the appeal books. The judgment was given by the whole Court.

16. The Court of Appeal said that written submissions had been filed on behalf of the solicitor in question and that these opposed an order in the form of order (5) of the earlier judgment and requested that the proposed orders "be removed from the published judgment" and that the whole of the reasons of Leeming and Simpson JJA set out at [60]-[70] of that judgment "be revised and amended appropriately."[9]

17. The Court of Appeal then made the following preliminary observations:

- The submissions had been prepared by senior counsel who had appeared for the Insurer and were said to be submitted *pro bono publico* and with the consent of the Insurer. There was a potential conflict of interest between the Insurer and its solicitor and, as it further appeared, between the Insurer and senior counsel and between senior counsel and the solicitor because the submissions indicated that senior counsel had advised as to what material should go into the Blue appeal books.

- The request to reformulate the earlier judgment and orders apparently resulted from a view that the Court "has sent a strong message here in its judgment about appeal books and costs and unnecessary expense in the preparation of appeals", together, perhaps, with a concern that the Insurer's solicitor "should not be singled out". At the same time, it was submitted that what the Court had already said "should be sufficient to change the present practices that, to some extent, appear intractable." These statements were internally inconsistent because, if the existing practices were "intractable", then it seemed that the "strong message" had not yet been received. Furthermore, the impact of the "strong message" would be diluted if the Court agreed (assuming that it had the power to do so) to the request to remove the parts of the judgment which conveyed that message.[10]

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[9] Above, n 1, at [2].
[10] Above, n 1, at [3]-[5].

18. The Court of Appeal then addressed the following four submissions made on behalf of the solicitor "by way of justification or excuse."[11]

*The "relevant and necessary" test*

19. One submission was that the requirements of r 51.29(1)(b) of the *Uniform Civil Procedure Rules 2005* (NSW) that the Blue appeal books must contain "all documents before the court below ... relevant and necessary for the hearing and determination of the proceedings" was an imprecise and uncertain test.[12]

20. In response to this submission, the Court of Appeal said that to suggest that experienced legal practitioners had difficulty with the application of the test "defies comprehension".[13] The Court further said that, by analogy with s 55 of the *Evidence Act 1995* (NSW),[14] what the test entailed was that:

> "*the universe of relevant material is limited to that which could rationally affect determination of the issues raised on appeal. Within that broad ambit, a cull of all those which are not 'necessary' for the purposes of the proposed arguments is required.*"[15]

21. The Court of Appeal observed that, as a practical matter, the process of selection of documents at first instance would depend mainly, if not exclusively, on the available grounds of review. The Court went on to identify some points of principle, by way of example, in relation to the grounds of review available under s 69 of the *Supreme Court Act 1970* (NSW).[16]

22. The Court of Appeal then concluded as follows in relation to this submission:

> "*That said, the immediate issue is the selection of documents for inclusion in appeal books. Where a document has not been relied on or referred to by any party at first instance, nor by the primary judge, and is not sought to be relied on by the appellant on appeal, it is not a document which should be included in the appeal books. It is self-evident that it is not 'relevant and necessary'.*
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> *... This Court's reasons on the appeal observed that it was clear prior to the commencement of the hearing before the primary judge that neither party proposed to rely upon any of the documents exhibited to the affidavit, save for a small minority, and the primary judge indicated (with the parties' acquiescence) that he would not rely on documents to which he had not been taken. There could be no doubt that thousands of pages of documents were reproduced which were neither relevant nor necessary for the determination of the appeal. That excess was coupled with the failure to include in the*

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[11] Above, n 1, at [6].
[12] Above, n 1, at [6].
[13] Above, n 1, at [7].
[14] Section 55 explains what is relevant evidence in a proceeding.
[15] Above, n 1, at [7].
[16] Above, n 1, at [8]-[12].

> *appeal books the very decision from which judicial review had been sought, being the document which, above all others, was relevant and necessary.*"[17]

*Judicial preference for material*

23. Another submission made on behalf of the solicitor was that judges at first instance had on occasion required the inclusion of all material before the decision-maker. The Court of Appeal, however, commented that the context and the nature of the issues had not been identified in respect of any of the cases which were referred to in support of this submission.[18]

24. The Court then concluded as follows:

> "*Whatever the circumstances of the individual cases, it may be accepted that there will be occasions on which a selection of relevant and necessary material errs on the conservative side and the material prepared for the hearing may need to be supplemented. That possibility does not undermine the principle explained above. In general, the proposition that all the material before the administrator should be placed before the reviewing court must be rejected.*"[19]

*Use of material by other parties*

25. A further submission made on behalf of the solicitor was that other parties could object to a reduced version of the documents before the decision-maker.

26. The Court of Appeal said that the response to that submission was the same as that in relation to judicial preferences. The Court went on to say that if there was material in the record which provided an answer to a ground of review raised by an applicant, then the respondent would not be precluded from seeking to tender that material at first instance, or to supplement the appeal books on an appeal.[20]

27. Furthermore, the Court said that it would be wrong for an applicant to exclude material which could reasonably be considered relevant and necessary because the material did not support a submission the applicant wished to make. The applicant was not to abandon the selection process "on the unprincipled basis" that another party might have other views about what should be put before the Court.[21]

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[17] Above, n 1, at [13]-[14].
[18] Above, n 1, at [15]-[17].
[19] Above, n 1, at [18].
[20] Above, n 1, at [19].
[21] Above, n 1, at [20].

*The question of selection was considered*

28. The final submission made on behalf of the solicitor was that the question of whether a selection should or should not be made had been the subject of consideration by both solicitors and counsel when preparing the case.

29. The Court of Appeal's response to this submission was that, if that was the case, then the decision reached had been "plainly wrong."[22] The Court observed that it was not disputed that three of the four volumes of the Blue appeal books had not been opened on the appeal or that there was no practical difficulty in identifying documents which should have been excluded. In light of this, the Court considered that it was not necessary or appropriate to inquire into the decision-making process of those who had prepared the appeal books.[23]

*Court of Appeal's overall conclusion*

30. The Court of Appeal made it clear that while, in general, the necessary selection process might involve an exercise of professional judgment and so result in costs to the client, there still remained the general obligation to limit the material to be tendered. The Court said that in every case brought before the superior courts, it was necessary to give consideration prior to the trial to the identification of relevant and necessary evidence and that the same consideration had to be given for the purposes of judicial review. While the steps of identifying grounds of review, advising on the prospects of success and preparing written submissions in support would involve legal practitioners in making an assessment of what material was, and was not, necessary, the Court considered that it was unlikely that significant additional costs would be incurred in the selection process required for the preparation of the Blue appeal books.[24]

31. The Court of Appeal acknowledged that in the case before it some material was required to be included in the Blue appeal books and concluded that, although probably favourable to the solicitor, as this was the first occasion on which an order of the kind proposed had been made, there had to be some reduction in the costs to be worn by the solicitor. The Court indicated that the solicitor was not being "singled out" and "visited with" an adverse costs order. As the earlier judgment had explained, this was not the first time that the issue had been raised. The Court also made it clear that the proposed order was not one requiring the solicitor to pay the costs in issue, but rather was an order that, as between the solicitor and the client, the client should not wear some of the costs.[25]

32. Accordingly, in place of order (5), the Court made the following order:

> "*(5) Order that the [Insurer's] solicitor –*

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[22] Above, n 1, at [21].
[23] Above, n 1, at [21].
[24] Above, n 1, at [24].
[25] Above, n 1, at [22], [23], [25].

*(a) not charge his client with more than 50% of the costs and disbursements associated with preparing the Blue appeal books;*

*(b) to the extent that such costs or disbursements have already been paid or might be paid in the future, reimburse the client for that amount; and*

*(c) give the client written notification of the terms of this order.*"

K Ottesen 29 July 2016