AN ADDRESS TO THE READERS OF THE BAR PRACTICE COURSE, BRISBANE WEDNESDAY, 24 FEBRUARY 1999

"JUDICIAL CASE MANAGEMENT AND THE DUTIES OF COUNSEL"

There are many cases about the duties of counsel. You can find cases about the duties of counsel not to make unfounded allegations[1]. You can find cases about the duties of counsel not to bicker in court[2]. You can find cases about the difference between discourtesy by counsel and contempt of court[3]; and so the list might go on. All of them are important and I hope that you will give attention to them all. Today, however, I want to mention one relatively recent case in which statements are made about the duties of counsel and attempt to draw out some of the issues that judicial case management presents for counsel.

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1 *Strange v Hybinett* [1988] VR 418.

2 *Hufer v Kinross Milk Transport Pty Ltd & Ors*, unreported, Supreme Court of Victoria, 30 April 1970 at 218-219 per Newton J; *R v Keeth*, unreported, Supreme Court of Victoria, Court of Criminal Appeal, 5 October 1989 at 6-7 per Crockett, O'Bryan and Gray JJ; *Beevis v Dawson* [1957] 1 QB 195 at 201 per Lord Justice Singleton.

3 *Ogden v Lewis* (1984) 153 CLR 682.

In *Ashmore v Corporation of Lloyd's*[4] Lord Templeman said that:

> "The parties and particularly their legal advisers in any litigation are under a duty to co-operate with the court by chronological, brief and consistent pleadings which define the issues and leave the judge to draw his own conclusions about the merits when he hears the case. It is the duty of counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of 10 bad points the judge will be capable of fashioning a winner. In nearly all cases the correct procedure works perfectly well. But there has been a tendency in some cases for legal advisers, pressed by their clients, to make every point conceivable and inconceivable without judgment or discrimination."

All members of the House who sat in this case agreed in Lord Templeman's speech but Lord Roskill emphasized what Lord Templeman said about the duties of practitioners. Lord Roskill said:[5]

> "In the Commercial Court and indeed in any trial court it is the trial judge who has control of the proceedings. It is part of his duty to identify the crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judge's time as

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4 [1992] 1 WLR 446 at 453; [1992] 2 All ER 486 at 493.

5 [1992] 1 WLR 446 at 448; [1992] 2 All ER 486 at 488.

> is necessary for the proper determination of the relevant issues."

Similar statements of the duties of practitioners can be found in a number of Australian cases at trial and at intermediate appellate level[6] but for present purposes, it is convenient to refer to what is said in *Ashmore*. You will see that their Lordships make two points: first that the judge, not the parties, is in charge of the case, and secondly that those who appear for the parties are bound to help the judge to get to the real point of the case as quickly as possible.

These points will have increasing relevance to practice in the courts and it is as well that those about to embark on a career practising in the courts should consider how they are to apply them. Judicial case management is now the norm in the superior courts. The judges seek to control the proceedings in their progress towards trial and, increasingly, at trial. The days when the courts were seen as passive tools controlled wholly by the litigants are days that are past. As Gleeson CJ said in

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6 See, eg, *Coopers Brewery Ltd v Panfida Foods Ltd* (1992) 26 NSWLR 738 at 744 (citing from *Apex Pallett Hire Pty Ltd v Brambles Holdings Ltd*, unreported, Supreme Court of Victoria, Full Court, 8 April 1988); *State Pollution Control Commission v Australian Iron & Steel Pty Ltd* (1992) 29 NSWLR 487 at 493-494 per Gleeson CJ.

State Pollution Control Commission v Australian Iron & Steel Pty Ltd[7]:

> "The courts of this State are overloaded with business, and their workload has, over a number of years, increased at a greater rate than any increase of the resources made available to them. The inevitable consequence has been delay. This, in turn, has brought an increasing responsibility on the part of judges to have regard, in controlling their lists and cases that come before them, to the interests of the community, and of litigants in cases awaiting hearing, and not merely to the concerns of the parties in the instant case. The days have gone when courts will automatically grant an adjournment of a case simply because both parties consent to that course, or when a decision to grant or refuse an adjournment sought by one party is made solely by reference to the question whether the other party can adequately be compensated in costs. There are a number of *Practice Notes* issued in relation to the business of the Supreme Court making that perfectly clear. The flow of cases through the courts of this State is now managed by the judiciary, and not left to be determined by the parties and their lawyers."

Rules of court enable (perhaps even require) judges to take a more active role in controlling the pace of litigation both before and during trial. Rules have always provided for the times within which interlocutory steps may be taken but more and more we see the enforcement of compliance with these times passing from the parties to the judges. No doubt judges have always had some powers to prevent time wasting at trial.

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7 *State Pollution Control Commission v Australian Iron & Steel Pty Ltd* (1992) 29 NSWLR 487 at 493-494 per Gleeson CJ.

And rules permitting the separate trial of questions have been commonplace for many years. Judges have, therefore, always had powers that would permit them to control the course of trial of an action. What seems to be changing is the willingness of the judges to use the powers they have had for a long time to control the course of trial and the addition of extra powers to do so. Thus, we now see rules of court that enable a trial judge to limit times for cross-examination and other steps in the course of trial[8]. It may be that a trial judge has always had those powers but the making of a rule of court seeks to put the matter beyond doubt.

All of these changes can be seen as being driven by the fact that there is too much litigation for the courts to deal with by older, more passive, methods. Whether this is a necessary or sufficient reason for introducing the various changes that have been made in the different jurisdictions in this country or are about to be made in England and Wales following the Woolf report is a paper in itself. I do not stay to examine those questions. For present purposes, what matters is that it is

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8 For example, Rules of Supreme Court (WA), O 29. See also Ipp, "Reforms to the Adversarial Process in Civil Litigation", (1995) 69 *Australian Law Journal*, Part I - 705-730, Part II - 790-821, particularly at 805-810; Ipp, "Managing the Trial Process", a paper delivered at the Litigation Reform Commission Conference, *Civil Justice Reform: Streamlining the Process*, 6-8 March 1996 at 1-3.

inevitable that those who practise in the courts, particularly advocates, will be immediately affected by these changes and will have to adapt to deal with them.

Lest there may be some doubt about it, I should say at once that I consider the adoption of case management techniques inevitable and, on the whole, desirable. I think we must recognize, however, that there are dangers in the courts seeking to take control of what is the parties' litigation. Judges and practitioners must always bear steadily in mind that they are there to serve the needs of the parties, not the parties to serve the needs of the courts. But if all who wish to have their disputes resolved by the courts are to be given reasonable access to the system, the courts cannot afford to be simply passive observers of what parties do. Every case that takes too long to try, every case that is not ready to proceed at the appointed time, affects other litigants who wish to have their disputes decided by the courts.

It is axiomatic that no person should undertake litigation of any kind unless, first, there is some defined objective in doing so, and secondly, that objective is reasonably attainable. If the client is not confronted with those questions and if they are not answered affirmatively, that client should not be

litigating[9]. And those questions must be asked again and again as the litigation goes on and more information becomes available to the client and to the advisers. The answers that should be given to the questions I have mentioned may very well change.

Judicial case management has important consequences for practitioners. To my mind, the most important consequence is that it should remind practitioners that, before they take any step in litigation, they must ask fundamental questions of the same kind as the questions that affect whether proceedings should be started and continued. Thus before taking any step in a proceeding, the practitioner must ask why am I taking this step? What is it that I hope to achieve? Is the objective reasonably attainable? Is it worth the time and the money? And the answers that the practitioner can give to these questions are answers that the practitioner may later have to justify.

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9 Applying these precepts to criminal litigation may seem difficult; the accused has no choice about starting the case. But similar questions must be asked about how the case is to be conducted. It may well be easy to justify a plea of not guilty by saying that the crown must prove its case but if the proof is overwhelming, is that a sufficient reason? If there is to be a trial is it necessary to have every witness called? And so the list goes on.

To explain why it is so important to consider the matters I have mentioned, it is necessary to understand why judicial case management has been adopted. We can accept that the courts have a role in managing litigation brought by parties only if we have first decided that to deprive parties of the control of *their* litigation is a necessary step and that it is a necessary step because the needs of justice require it. If we have decided that case management is a necessary step to take, it follows inevitably that orders will be made which curtail the rights of parties to conduct the litigation as they would wish. In particular, orders will be made that prevent a party taking some step in an action - often for no greater reason than that the step is to be taken beyond the time allowed for it[10]. Whether to make such an order may well present a set of difficult problems for the judge. Why should the party be shut out? Is default on the part of a practitioner reason enough to shut a party out of pursuing an important step in the litigation? Is case

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10 See, eg, *Coopers Brewery Ltd v Panfida Foods Ltd* (1992) 26 NSWLR 738 at 744 (citing from *Apex Pallett Hire Pty Ltd v Brambles Holdings Ltd*, unreported, Supreme Court of Victoria, Full Court, 8 April 1988); *State Pollution Commission v Australian Iron & Steel Pty Ltd* (1992) 29 NSWLR 487 at 493-494 per Gleeson CJ; *Ketteman v Hansel Properties Ltd* [1987] 1 AC 189; *Ashmore v Corporation of Lloyd's* [1992] 1 WLR 446; [1992] 2 All ER 486. Cf *Sali v SPC Ltd* (1993) 67 ALJR 841; 116 ALR 625; *Jackamarra v Krakouer* (1998) 72 ALJR 819 at 824-825; 153 ALR 276 at 283-284; *Macquarie Bank v National Mutual* (1996) 40 NSWLR 543; *State of Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146.

management being used as a discipline for the legal profession or is it being used to advance the interests of justice? What are the relevant interests of justice - justice between the particular parties or between users of the courts more generally? How are these latter interests to be balanced?

Once an order is made that prevents a party from pursuing the litigation as that party (or its advisers) would wish, how are those advisers to explain to the party concerned what has happened? If the advisers have not met a time limit, why is that so? What is the explanation that is to be offered in such a case other than *mea culpa*? Putting aside cases of default, if a party is to be shut out from pursuing some step (like full discovery of documents or administering interrogatories) for some reason other than default in meeting a time limit, why is that order to be made? Parties will seldom, if ever, be satisfied if they are told no more than that an order has been made. Why has the order been made? To explain that to the client, the adviser must know why the step was to be taken. If the adviser does not know what was to be achieved by taking the step and has not sought to put those reasons before the judge managing the case, the adviser has little hope of explaining to the client why that step has been foreclosed by order. And if the step in question had no identifiable and reasonably attainable purpose, what business was it of the adviser to be seeking to pursue it?

Practitioners face more difficult questions when courts impose limits on time spent in court at trial. We all know that the best advocates have a considerable ability to go straight to the heart of a case, put the most persuasive arguments in support of it succinctly and logically, and then sit down. But they are the best advocates precisely because they stand apart from others. Not all counsel will be of that standard. Let me illustrate the kinds of difficulty that counsel may face by reference to proposals that counsel should have limited time in which to cross-examine. I see some difficulties in judges fixing times for the cross-examination of witnesses. I do not know that these difficulties are insuperable but it is as well to recognize some of them. One must begin from the premise that a reasonable time for cross-examination will be allowed. How is that reasonable time to be fixed? Counsel know (or should know) more about the facts of the case than the judge will ever hear in evidence. Counsel will often have much more information that affects how to cross-examine a particular witness than the judge will ever see. Any fixing of time for cross-examination will be done in ignorance of these matters. It is possible, then, that the imposition of a limit on the time spent examining a witness may penalize the party for whom that advocate appears. Is that right? Is it right to penalize a party because the chosen advocate is not competent? The answer that some offer to these difficulties is that the power should be

reserved for cases of deliberate obstruction, but differentiating between deliberate obstruction and slow or poor advocacy is not always easy. And showing that an elaborately planned course of cross-examination did not lead to the result that counsel may have hoped for, is a long way away from showing deliberate obstruction of the court's processes.

Again, I do not wish to spend time analyzing these particular questions. Rather, I want to look at the consequences for practitioners of the existence of powers of this kind. Their most basic consequence is that the fundamental questions remain. Can you explain why you want to follow a particular path in court? Do you know what it is you want to achieve by doing so? Is what you want to achieve reasonably attainable? What will it cost in time, and therefore money, to achieve it? If the practitioner cannot answer these questions, he or she will not be able to persuade the judge that the proposed course should be permitted. And counsel will be unable to justify his or her conduct of the case when it is questioned after the event. Questioning the course taken by counsel in a case may well become increasingly common. It may come in many forms - actions for negligence, proceedings for professional misconduct, inquiries about whether costs should fall on the practitioner rather than the party, and so on. All of these will focus attention upon why counsel followed a particular course.

And in the end, what is being said in *Ashmore* is that practitioners must be able to justify their conduct. It is not right "to advance a multitude of ingenious arguments in the hope that out of 10 bad points the judge will be capable of fashioning a winner"; it is not right "to make every point conceivable and inconceivable without judgment or discrimination". Counsel must apply their own judgment and their own discrimination in pursuing their part in the process of litigation. And they must be prepared to justify the choices that they make. If they do not apply judgment and discrimination, their clients suffer and therefore the whole legal system suffers. The system exists for the determination of the disputes that parties bring to it - no matter whether the party is a powerful corporation, the state or an individual. It does not exist for the benefit of any other participant in the process. Therefore the practitioners must be able to explain why it is that they have sought to use the system in the way that they have and to justify their use by reference to the needs and interests of their client. No other justification will suffice.