Junior counsel: brief them early and often

In a usual case of commercial litigation, counsel, at least junior counsel, should be briefed early, according to at least one judge of the New South Wales Supreme Court.

Amidst all the calls for controls on the costs of litigation, White J's recent comments in *April Fine Paper Macao Commercial Offshore Ltd v Moore Business Systems Australia Ltd* [2009] NSWSC 867 provide a timely reminder about how commercial litigation should be conducted.

The matter came before the court on an application for security for costs. There was no dispute that the plaintiff should provide security for the costs. The issue was how much. The defendant sought security in the sum of $275,265. That was the estimate of the recoverable costs, on an ordinary basis, of an estimated full costs of $340,000. The plaintiff offered security of $35,584 up to the completion of discovery with liberty to apply for further security thereafter.

The case involved a claim for $US477,491.39 for paper sold and delivered to the defendant. The defence raised various issues including non-compliance with a specification and merchantable quality. The case did not appear to his Honour to be a complex case.

The defendant's solicitor estimated the defendant's costs in defending the claim on a solicitor and client basis would be approximately $384,500. The judge observed that such costs would be out of all proportion to the complexity and importance of the subject matter of the dispute and referred to the provisions of section 60 of the *Civil Procedure Act 2005* (NSW) which provides:

> 60 Proportionality of costs
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> 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.

The judge was critical of the defendant's solicitor's 'excessive' estimate of costs for discovery and inspection of documents. He questioned the need for issuing subpoenas as well as the estimated costs of $10,500 for doing so. Importantly, his Honour observed that both solicitors' affidavits reflected 'a common and misguided approach to preparing commercial litigation', namely leaving obtaining relevant documents until discovery and not taking statements of evidence until preparation of the case for hearing. His Honour observed:

> Such an approach 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. Such an approach can sometimes prove fatal to the client's case, through no fault of the client. The assembly of relevant documents and the taking of statements of evidence should be done at the earliest possible stage so that pleadings are prepared with the benefit of proofs of evidence and the client's documents. Thus in preparing their case, although the solicitor has had conferences with four witnesses, it seems they will have to be interviewed again in order to prepare witness statements as well as there being conferences again with counsel before the hearing. Without witness statements and all the relevant documents of the client, the solicitor or barrister will often be uncertain as to what documents might be required from the opposing party, or from third parties, with the result that wide-ranging demands for documents are made. In other words, and speaking generally, a case will not assume its proper focus until those essential preparatory steps of obtaining and organising documents and taking proofs of evidence are taken.
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> No doubt that throws a heavier burden of costs to the earlier stage of preparation of proceedings but the approach saves costs in the long run. In particular, it minimises the risk of the real issues not emerging until late in the process.'

In relation to the briefing of counsel, his Honour said:

> 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.

To illustrate his point, White J referred to the defendant's solicitor's hourly rate of $440 for a legal practitioner admitted in July 2004 with limited litigation experience. By comparison, junior counsel who was admitted as a legal practitioner in 2002 and after almost six years of practice was admitted to the bar in June 2008, charged only $250 per hour.

The judge repeated his observations in *Motor Trade Finances Prestige Leasing Pty Ltd v Elderslie Finance Corporation Ltd & Ors* [2005] NSWSC 921 at [28] and [29] that a costs assessor should consider whether it is just and reasonable for a losing party to pay more towards a successful party's costs than would have been incurred if the successful party made efficient use of the resources of the junior bar.

The judge required security of $130,000 in stages - $85,000 for work to be done up to four weeks before the hearing and $45,000 thereafter.

By Phil Greenwood SC