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Précis Paper

Case Management in NSW: A Judicial Perspective

The Honourable Justice Margaret Beazley AO, President of the NSW Court of Appeal, and Michelle Painter SC discuss case management in NSW under the *Civil Procedure Act 2005* (NSW).

Discussion Includes

- Case management under the *Civil Procedure Act 2005* (NSW): Just, quick and cheap
- The importance of early preparation of a case
- The role of the practitioner in ensuring proper case management
- Tensions between the three aims of "just, quick and cheap"
- The duty on parties under s 56, *Civil Procedure Act 2005* (NSW)
- Costs under the *Civil Procedure Act 2005* (NSW)
- Judicial discretion in case management: Prioritising the interests involved in a case
- Offers of compromise and Calderbank offers

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Case Management in NSW: A Judicial Perspective

1. In this edition of BenchTV, the Honourable Justice Margaret Beazley AO (President of the NSW Court of Appeal) and Michelle Painter SC (Barrister) discuss case management in the NSW Supreme Court. Since the introduction of the *Civil Procedure Act 2005* (NSW) ("the Act"), the Court's focus on the "just, quick and cheap" resolution of proceedings has had an increasing impact on the conduct of litigation. It is important for practitioners and parties to be aware of these priorities and their duties under the Act.

The Overriding Purpose of the *Civil Procedure Act 2005* (NSW): "Just, Quick and Cheap"

2. The introduction of the *Civil Procedure Act* in 2005 reflected a statutory implementation of what the Court had long considered ought to happen in the conduct of litigation. The ability of the Court to control its processes has a significant impact on the resolution of matters before the Court, which in turn affects access to justice and the rule of law.

3. Section 56 of the Act describes the overriding purpose of the Act, which is to facilitate the "just, quick and cheap" resolution of the real issues in the proceedings. This is supplemented by s 57 of the Act, which requires a careful balancing of the interests of parties, the interests of the Court or court administration, and the use of resources leading to a timely resolution, as well as s 59 of the Act, which is focused on the elimination of delay.

4. Justice Beazley emphasised that Part 6 of the Act brings attention to what needs to happen in a court case and explained that if court resources are used inefficiently, there is an impact on every litigant in the court, outside of the parties directly involved in the case. For example, the court's diary is set far in advance, and so a last minute adjournment sought by a party prior to a trial will have significant implications for the allocation of court resources.

The Importance of Early Preparation of a Case

5. Since the introduction of s 56 of the Act, the time of trial by ambush and last minute preparation of a case has passed. The consequence of this is that there will be very few reasons entertained for a last minute adjournment of a matter.

6. Justice Beazley explained that it is expected that all of the very basic preparation for the presentation of a case will be done well in advance, such as ensuring that particulars are in full order, a chronology is prepared, subpoenas are issued, and witnesses are prepared. This does not obviate the need for practitioners to conduct a thorough, last minute "fine tuning"

of their case, but it is anticipated that all work needed to bring a matter on will be concluded in advance of the trial or hearing date, in order to avoid delays.

The Role of the Practitioner in Ensuring Proper Case Management

7. Justice Beazley reminded practitioners that where matters are not prepared properly, and the Court is not minded to adjourn proceedings, it is the litigants who suffer. As a result, ss 56-60 of the Act are fundamental for practitioners to understand and their conduct in not getting matters ready will have a huge impact on a litigant if a litigant is shut out from making an amendment or preparing their case in the manner that may have been necessary.

8. It may be possible to make an earlier application before the Registrar or Judge to have the directions altered. However, as Justice Beazley emphasised, the Court will not allow multiple applications, so applications of this nature must be focused.

9. Poor preparation of cases or multiple applications to adjourn will have reputational implications for practitioners. The Court is much more inquiring about why work has not been done in advance than may have been the case in the past. From a judicial perspective, if a court frequently sees that a particular practitioner is not prepared for his or her cases, it will not reflect well on that practitioner, and spurious applications will come to the attention of the Court when a practitioner is frequently before the same judge making similar applications. In contrast, where a practitioner has a reputation for being prepared and rarely making such applications, the Court may be more likely to entertain an application to adjourn or amend directions.

Tensions between the Three Aims of "Just, Quick and Cheap"

10. Can the three elements of "just, quick and cheap" come into conflict with one another? Justice Beazley considered that the Court's most basic function is to ensure that the administration of justice operates efficiently. The outcome of the case according to the law is the most fundamental aspect, and so long as the Court has regard to this most basic aim, the three aims of "just, quick and cheap" will not contradict one another. It is implied in the terms of the Act that these three aims are only pursued by the Court to the extent possible to effectively administer justice.

11. The High Court, in *AON Risk Services Australia Limited v Australian National University* [2009] HCA 27; 39 CLR 175, made the point that the administration of justice must allow the wheels of commerce to keep turning. Businesses cannot operate if they have outstanding litigation, and a successful result in a litigation that has been delayed is of little utility if the business has gone bankrupt in the meantime. Similarly, a delayed litigation outcome may impinge

upon the justness of the result for an individual. This emphasises the importance of the three aims of "just, quick and cheap", and gives practical guidance as to the possible implications when these goals are not met.

12. To this end, legislative innovations in some fields will allow people to better maintain their livelihood while awaiting the result of litigation. For example, the *Building and Construction Industry Security of Payment Act 1999* (NSW) establishes a scheme whereby participants in the building and construction industry can enforce the payment of a debt and defer the resolution of outstanding legal issues.

The Duty on Parties under s 56, *Civil Procedure Act 2005* (NSW)

13. Section 56 of the Act imposes an obligation not only on the Court and on practitioners, but also on the parties to litigation to ensure that the overriding principles of the Act are complied with. It is important that practitioners convey to clients their duties under this section. The parties are also required, under s 56(3), to comply with the directions and orders of the Court.

14. The High Court's decision in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] HCA 46; 250 CLR 303 provides an example of where the duty of the parties to ensure that litigation is run in accordance with the principles of the Act was not satisfactorily met. In that case, privileged documents were inadvertently provided to the other side, who subsequently refused to return the documents. Significant litigation was generated over the return of these documents and whether privilege had been waived. When the matter reached the High Court, the Court commented on the inappropriateness of the "satellite litigation" that had arisen in the form of multiple interlocutory and appellate hearings that dealt with the return of these documents. The High Court determined that the documents should have been returned and that the refusal to return the documents was not in keeping with the manner in which it is now expected that litigation be conducted.

Costs under the Act

15. Under s 56(5) of the Act, there may be costs consequences for practitioners for failing to comply with s 56 of the Act. In addition, s 56(5) gives the Court the power to take into account a failure to comply with duties by a party or a relevant party (such as a funder or an insurer) in making an order for costs.

16. The Court's power to award costs is integral to its power to control the processes of the Court, to effect compliance with its orders, and to make orders disposing of the proceedings.

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In addition to s 56, the Court has power under s 98 of the Act to award costs, as well as an inherent power to control processes and award costs.

17. Justice Beazley commented that s 56 is not frequently a consideration in costs orders, nor is the Court often required to have recourse to s 99 of the Act which provides a mechanism by which a legal practitioner may be held liable for unnecessary costs. However those provisions do exist and practitioners should be aware of them.

18. In relation to the overriding principle of a "cheap" resolution of cases, practitioners have an obligation under s 56 to run matters in an efficient and effective way by allocating appropriate resources to the case, having regard to what is involved. The Court does not often get involved in the intricacies of charging, however the legal profession should be mindful of the duplication of services, for example the briefing of senior and junior counsel where both may not be required.

Offers of Compromise and Calderbank Offers

19. Under Rule 36.16(3A) of the *Uniform Civil Procedure Rules 2005* (NSW) ("UCPR"), the Court has the power to amend a costs order after judgment is delivered. This means that where an offer of compromise or a Calderbank offer has been made, the parties may make an application for a costs order to be revisited to take into account the offer of compromise or Calderbank offer.

20. A Calderbank offer is made on the basis that a party will ask the Court for a costs order if their offer is not accepted, notwithstanding that the offer did not comply with the rules of the court.

21. Offers made under the Rules of Court (see Part 42 of the UCPR) carry a presumption that, if an offer is made and not accepted, a party is entitled to indemnity costs from the time the offer was made. The Court retains a discretion to make a different order for costs notwithstanding that the offer for compromise was made. In contrast, there is no automatic entitlement to an indemnity costs order in the case of a Calderbank offer; this is a matter for the discretion of the Court.

22. In *Old v McInnes* [2011] NSWCA 410, the terms of an offer of compromise made under the Rules were in issue. The Court determined that an offer of compromise could not include a clause for costs "as agreed or assessed". The UCPR have now been amended to state that an offer must not include an amount for costs or be expressed to be inclusive of costs.

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23. Since this litigation, Justice Beazley commented that the Court rarely sees issues arising where offers of compromise do not comply with the Rules. However, she encouraged practitioners to always refer back to the Rules when making offers of compromise.

24. Offers of compromise that do not comply with the Rules may be seen as an offer in any event, and therefore offers are often expressed as being Calderbank offers in the event that they do not comply with the Rules. Offers of compromise that comply with the Rules are particularly suited to the simple case of an award of money, and in complicated cases or cases involving multiple parties, a Calderbank offer may be more appropriate.

25. The Court may not award indemnity costs where an offer of compromise is made too early, before the party has an opportunity to assess the prospects of success and also the likelihood of the quantum outcome. There is also a tactical benefit in making an offer reasonably close to trial, at the time when the parties are really focused on what the outcome of the litigation is likely to be.

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BIOGRAPHY

The Honourable Justice Margaret Beazley AO

President, NSW Court of Appeal

The Hon Justice Margaret Beazley AO was admitted as a solicitor in 1975 and called to the Bar the same year. She commenced her career at the Bar on the ninth floor of Selborne Chambers, where she was the only woman on her floor at the time, and was appointed Queen's Counsel in 1989. After a successful career at the Bar specialising in equity, commercial and administrative law, she was appointed to several judicial positions, and in 1993, was sworn in as a judge of the Federal Court of Australia. In 1996, she became the first woman appointed to the New South Wales Court of Appeal, and in March 2013, she was sworn in as the President of the NSW Court of Appeal, the first woman to hold this position.

Michelle Painter SC

9 Selborne Chambers, Sydney

Michelle Painter SC was admitted to the NSW Bar in 1998 and took Silk in 2013. Her practice includes commercial disputes, construction, equity and trusts, and she has extensive experience in restraints of trade within the context of commercial and employment law. She also has experience in commissions of inquiry, including the Royal Commission into Trade Union Governance and Corruption. Michelle is the Chair of the Women Barristers Forum, NSW Bar Association.

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