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Litigation And Globalisation

**LITIGATION AND GLOBALISATION
ADDRESS BY THE HONOURABLE JUSTICE P A BERGIN
TO THE NSW YOUNG LAWYERS LITIGATION SEMINAR
SYDNEY
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It was only last week that Chief Justice Gleeson observed that litigation is a perfect example of Parkinson's Law that work expands to fill the available time. [1] However at the same time Chief Justice Spigelman predicted that "business lawyers" may be "bypassed" unless the legal services they deliver are seen to be more cost-effective. Chief Justice Spigelman made that same prediction or warning in 2004 [2], however last week he suggested that the present burden of the cost of discovery in commercial litigation is more than the commercial community is likely to tolerate [3]. Chief Justice Spigelman recounted his experience of senior partners of a law firm claiming that, "for any significant commercial dispute the flag fall for discovery is often \$2 million", a position, the Chief Justice described as "simply not sustainable". I will return to this flag fall claim shortly.

A further aspect of the present litigious landscape is found in the recently published second edition of the NSW Young Lawyers book entitled *A Practitioner's Guide to Civil Litigation*. The Preface to that publication claims that the operation of the *Civil Liability Act* 2002 has resulted in a significant diminution in the quantity of work available to barristers and solicitors with a consequent unsurpassed pressure (both intellectual and financial) on practitioners by reason of the increased competition in all areas of litigation [4]. Although the available work may have decreased the burden on practitioners has increased. [5]

The concern about the cost of litigation spawned and fostered the process of mediation and other additional dispute resolution mechanisms. Practitioners and their clients are advised by the Court on a daily basis to take every step to settle or mediate their differences before embarking upon the process of litigation. Mechanisms have been, and will continue to be, put in place to try to reduce the cost of litigation. These have included the new method of dealing with expert evidence [6] and the introduction of stopwatch trials. [7] The full text of Parkinson's Law includes the statement that "the thing to be done swells in importance and complexity in a direct ratio with the time to be spent [8]. The stopwatch trial mechanism has the capacity to lessen the complexity and time taken in the trial with consequent cost savings. However these mechanisms do not address the cost of discovery in commercial litigation. The constant discussion and concern about this aspect of litigation is not unique to Australia.

There are a number of companies providing "offshore" services that claim to have the capacity to reduce the cost of commercial litigation by providing support services for discovery, for example, Pangea3 based in Mumbai, India and Lexadigm Solutions LLC (Lexadigm), based in Michigan USA, but providing services in the USA and India. Pangea3 advertises itself on its webpage as follows:

"Pangea was the single super-continent that existed before the continental drift that separated the world's seven continents. The second Pangea occurred when mass transportation re-connected people from the separated continents, enabling global commerce. In the third Pangea (Pangea3), the internet and global telecommunications systems have electronically reconnected the continents and their inhabitants, making continental and national borders irrelevant-creating once again, a single super-continent. Today, a professional in India lives with her family in a local suburb, commutes to her office a short ride away and enters the global workplace--interacting and communicating directly and seamlessly with a professional in North America via private fiber-optic cable lines, a global IP infrastructure and other technology systems-- working seamlessly as if the two individuals were in the same office. In Pangea3, the world has re-connected to create a single, global workplace and marketplace."

Pangea3 claims to be the "industry leader in legal outsourcing services" (often referred to in India as "legal BPO"). It claims to offer "electronic discovery, and document review services" to corporations

and law firms at what it claims to be “a radically low cost”. That service includes the analysis and organisation of electronic documents for “relevance, materiality, confidentiality and privilege”.

Lexadigm advertises itself on its web page as follows:

Lexadigm is the premier provider of global legal and patent outsourced services. Our highly skilled teams of attorneys and engineers in India and the United States deliver high quality legal and intellectual property support services to law firms and corporations worldwide at low costs. Our management team collectively has over 50 years of litigation and transaction experience as attorneys and over a billion dollars in transactional experience as business advisors, consultants and principals.

Lexadigm’s services include “document review services” in which it reviews, organises, codes and “synopsizes” documents in preparation for litigation.

Commercial litigators in the USA, the United Kingdom, Canada and Japan are “outsourcing” their discovery (and other legal tasks) to these less expensive jurisdictions where lawyers, paralegals and researchers provide services at a third or half the cost that would be incurred if the work were done in their own countries. International electronic transfer of documents involves a number of security risks and there are serious concerns about privacy and the quality of work. [9] One litigation firm in Texas has set up its own subsidiary office in Hyderabad primarily to complete discovery. This approach enables the legal firm to have more control of the quality of work as well as addressing the major concerns about confidentiality and privacy.

It is apparent that Australian law firms are taking up these commercial opportunities with one large firm setting up office in the Philippines that provides a 24 hours word processing, clerical and technical support service to its lawyers around the world. Other smaller firms are also experimenting with new possibilities, however it is apparent that at this stage the offshore provision of services by Australian law firms is of a non-legal nature limited to administrative tasks, library management, translation, printing and the like.

Recent research suggests that the annual worldwide spending on legal services is \$250 billion, with the USA spending \$170 billion, leaving \$80 billion for the rest of the world. [10] These “outsourcing” companies have been clever to seize a commercial opportunity to assist others to reduce their litigation costs. Lexadigm has recently identified a number of matters which need to be addressed including: malpractice issues; attrition and resulting potential conflicts of interest; so-called “cultural gaps”; quality of work; export control issues; and uninterrupted delivery of legal support services. [11] These are serious issues that are made more complicated by a lack of presence of the law firm in the foreign country. It is apparent that the employees of the outsourcing companies “migrate” from one service provider to another over which the company providing the outsourcing support services has little control. This creates further real problems for the law firm who has contracted with the outsourcing company in terms of maintaining confidentiality of clients’ instructions.

I should return to the “flag fall” claim in an attempt to put it in perspective. The world of commerce has changed dramatically in the last 15 years. The “internationalization of the market for CEOs” has driven large increases in Australian CEO salaries [12]. Not only have CEOs been able to increase their salaries to unsurpassed levels but other members of the commercial sector, such as bankers, have also been able to achieve multi million dollar annual incomes and/or bonuses. [13] We are dealing with a market place in which many millions of dollars of business are transacted on a daily basis with many thousands of commercial transactions occurring each day in the commercial community in New South Wales. In relative terms a mere handful of those transactions is the subject of litigation in the Commercial List and Technology & Construction List of the Supreme Court. However there has been a 24% increase in the number of cases filed in those Lists in the period January to March 2007 compared to the same period in 2006. Seventy percent of those cases filed in 2007 include claims for liquidated damages totalling more than \$72 million. The other 30% of cases for unliquidated amounts would take the total claims over \$100 million. From these raw figures it can be seen that commercial claims made in the Court have increased and the amounts in issue are very large. Litigation in these Lists involves only the most difficult cases that lawyers, their clients and mediators are unable to settle. The rate of settlements seems to be linked to the health of the economy and at the moment settlements rates are reasonably high.

There was apparently no disclosure to the Chief Justice of the amounts in dispute in the cases under discussion in the flag fall claim. The use of the expression “flag fall” suggests that \$2 million is the very

least that will have to be paid by the client to litigate the commercial cause. There will no doubt be cases that involve many thousands of documents, indeed in some cases many hundreds of thousands of documents. The burden of spending money on discovery may be an incentive to seek a commercial rather than a curial outcome but that is simply a fact of life. If commercial parties litigate serious disputes for many millions of dollars that may involve serious consequences for the future of public and/or private companies then it would seem ill advised to scrimp on one of the most important aspects of the preparation of the case. Electronic discovery is utilised in the more complex cases in the Lists and this approach seems to me to be the way forward for the discovery process generally.

Notwithstanding that problems have been identified to which I will make reference shortly, it is my experience that the profession and the commercial clients work hard to ensure the most cost effective and cost efficient method of conducting litigation in the Lists. However the profession needs to take heed of the Chief Justice's warning. I am not suggesting that all discovery should be outsourced to Mumbai but on the other hand I am suggesting that the profession needs to find ways to control the costs of the litigious process. If that means restructuring the make-up of the "team" so that the Mumbai factor (doing things for one-third of the cost) is taken into account by the use of cheaper labour then it is probable that the by product will be an increase in the amount of work for the firms. This is focusing on doing the same work but at cheaper rates and recognises the economic law of cost and demand – that the lower the cost of a service or commodity, the greater the demand. No doubt, in time the increase in demand will increase the cost of the service. That is why the profession needs to find ways not only of doing the same work at cheaper rates but also finding more innovative ways of doing the work differently.

The aim of the introduction of the mechanism for categories of documents in discovery was to reduce the cost of discovery. This was initially counter-productive with numerous interlocutory applications in relation to the appropriateness of the categories. It is now rare for such interlocutory applications to proceed. There are and will be cases where it is probably cheaper to proceed by way of general discovery. It is important to maintain that flexibility to ensure that each case can be dealt with in the most cost-effective manner.

Some of the problems that have been identified include cases in which lawyers are asked to attend upon the client's office and go through every single document that the client holds in relation to communications with the opposing party in a commercial dispute. The cost of that process is obviously going to be large if a person charging partner's rates or senior associate's rates is the designated person to go to that office. It will also be large if a "team" of more junior lawyers go in to complete the task. The clients should be warned that if they embark on such a process the costs of such a *carte blanche* approach may not be recoverable even if the client is successful in the litigation. The profession has to restrain itself in this regard and introduce some common sense into the process of discovery. It is imperative to focus on the pleadings in the case to define the real issues between the parties. It is also imperative that the client is assisted with an understanding of the types of documents that have to be produced. The solicitors will need to write to the client setting out with surgical precision the nature of the client's obligation to discover documents in the proceedings and the date range and types of documents that need to be delivered to the solicitors, preferably in electronic form.

Another problem that has been identified is the content of the Court Book [14] . Time and time again the Court finds that it is only one-half (and many times far less) of the documents in the Court Book that are referred to for the purposes of determining the real issues between the parties. One way of curtailing costs of this process may be that in matters that are litigated to final judgment, the recoverable costs for the production of the Court Book will be limited to the percentage of those documents that are actually relied upon, however such an approach would certainly need to be handled with care to ensure that unfairness is avoided.

It is strategic for the critics to focus on commercial litigation because, as some cynics say, "it's just about money". However that approach belies the reality of the importance of the commercial environment to the health of our economy. The economy survives in part by reason of those in commerce being able to do business in a civil and orderly fashion whilst competing to maintain the edge over their competitors. The structure that enables the commercial community to operate in this way includes the capacity for it to resolve its disputes as quickly and effectively as possible. Commercial litigation in the Supreme Court usually involves very large amounts of money. The process will at times be costly but the word "cheap" in the expression *just, quick and cheap* must be understood as a relative expression.

On present indications the cost of discovery could be reduced by 75% if law firms are willing to utilise 'legal labour' in a country that pays lawyers/paralegals/researchers a fraction of the income that is

paid to lawyers in this country. That is one way of reducing the cost of discovery in commercial litigation. It has its obvious ethical problems but with innovation and having a presence at the place at which the discovery process is to occur, such concerns can be either diminished or removed. This is what happens in commercial enterprise where companies reduce their costs by having work done offshore.

I understand that the law firms are doing more of the work that junior barristers were previously briefed to do. This seems to be as a result of the reduction in the amount of work available in the litigation area. That is a step that has driven the cost of the remaining work up. As the *Practitioner's Guide to Civil Litigation* records, it is cheaper for the client if a barrister is briefed earlier in the process [15]. It may mean less billable hours for the firm on a particular case but it will deliver a more cost efficient and cost effective service to the client and make the firm more competitive. It is imperative that counsel is involved at the time the pleadings are settled. The pleadings are a most important step and set the ambit for discovery in the case. The experience is that when counsel is briefed later, there are applications for amendments with trial dates being vacated because the true extent of the issues had not been appreciated until counsel was briefed. Not only is the barrister relatively less expensive than having a number of solicitors work on the same problem but there is also a resource available to the firm as the case proceeds through the various steps in the litigious process about which you are going to hear a great deal today.

One of the realities of our legal system is that some aspects of the law are uncertain which is reflected in the diversity of judicial opinion in the highest courts [16]. That uncertainty means that an ascertainment of the level of costs involved in the litigious process is difficult. Mention has previously been made of the "tyranny of the billable hour" and the lack of justification of the time costing system that rewards inefficiencies. [17] The profession may well find that it must return to marked briefs, whereby a barrister is asked to provide services for a particular figure, irrespective of the time that is necessary to invest in the performance of those services. Solicitors' costs should follow suit with the jettisoning of the inefficient method of time costing.

In the search to find ways of reducing the costs of litigation the English courts have proposed a Settlement Protocol whereby a judge may target particular cases if it is believed that the parties will be assisted by that judge taking on a mediator role. The cost savings for the judicial intervention as mediator are obvious. The case is within the Court system; the judge who manages the case is fully aware of the issues between the parties from very early in the litigious process; the judge is aware of the developing evidence and its possible strength (albeit untested in the early stages of the process); the judge can see the weaknesses in one side's case or the other (albeit untested in the early stages of the process) and there is no extra cost to the parties. The proposed Settlement Protocol in England allows the judicial officer to take on that role and if it is unsuccessful in achieving a settlement that judicial officer will have nothing further to do with that case. This is truly a very innovative step and one aimed at reducing the cost of litigation and no doubt the delay in litigation. However it has some serious problems. Judges are appointed to judge the cases that come before them. It is true that the modern judge is more intrusive, particularly in the area of case management. However case management is consistent with the role of the judge in making sure that cases are heard in open court in a manner consistent with the rules of court. Mediation is in many ways a secret and confidential process where parties are encouraged to compromise their legal claims to obtain the best commercial deal available to them in the circumstances. It seems to me that once a judge starts brokering secret deals with commercial parties there is a serious problem with the perception of the impartiality and/or independence of that judicial officer.

There is no doubt that globalisation of legal services provides an opportunity for the reduction of the costs of litigation. Its development has inspired a search for ways to structure legal services to make them cheaper and more competitive, whether that is done onshore or offshore or by a combination of both. This restructuring will I hope avoid the prediction made by the Chief Justice.

Notwithstanding this rather gloomy backdrop, today's conference is aimed at providing you with a comprehensive overview of all major aspects of litigation. The papers to be presented will guide you through the litigious process with an emphasis on practice and procedure. I am sure that you will find them both invigorating and instructive.

End Notes

1. *The State of Judicature*. 35th Australian Legal Convention. Sydney. 25 March 2007.
2. Address at the opening of the Law Term Dinner 2 February 2004.
3. *Access to Justice and Access to Lawyers*. 35th Australian Legal Convention. Sydney. 24 March 2007.

4. At page vii.
5. For instance the requirements on practitioners to certify that in a claim (or a defence to a claim) for damages there are reasonable grounds to believe (on provable facts and a reasonably arguable view of the law) there are reasonable prospects of success. The *Civil Procedure Act 2005* and the *Uniform Civil Procedure Rules 2005* impose on the practitioner a requirement, additional to all the ethical requirements practitioners have to their clients, to assist the Court in the achievement of the just, quick and cheap resolution of the disputes before the Court.
6. Practice Note SC Eq 3 – pars 43-44.
7. Practice Note SC Eq 3 – pars 39-41.
8. C. Northcote Parkinson, *Parkinson's law: The Pursuit of Progress*, London, John Murray (1958).
9. Globalised Law Report: outsourcing to India: ABC Radio January 2007.
10. Forrester Research as reported in the Lexadigm – *Practical and Ethical Considerations of Legal Outsourcing* presented at Harry Phillips American Inn of Court the University Club of Nashville, Nashville Tennessee. 20 February 2007.
11. Lexadigm article 20 February 2007 pages 11 to 14.
12. *The distribution of top incomes in Australia*. AB Atkinson and Andrew Leigh. Discussion paper 514 ANU Centre for Economic Policy Research March 2006.
13. *Executive plunder – super rich are back* John Garnaut Sydney Morning Herald, 23 May 2006 reporting on the payment of \$21.2 million to Macquarie Bank's Chief.
14. Formerly known as "Tender Bundle".
15. *A Practitioner's Guide to Civil Litigation* – Chapter 18.
16. The Honourable AM Gleeson AC, Chief Justice of the High Court of Australia, a *Core Value*: Judicial Conference of Australia's Annual Colloquium, 6 October 2006, Canberra.
17. Address at the opening of the Law Term Dinner 2 February 2004.