

Beyond wasting trees

By MELISSA FENTON and NIGEL WATSON

Recent cases in NSW and Victoria show courts' willingness to hold solicitors personally liable for excessive costs.

In a decision delivered by RS Hulme J in *Harris v Villacare Pty Limited* [2012] NSWSC 452, following the hearing of an application for preliminary discovery, his Honour had cause to query whether the incurring of costs for excessive documentation should be borne by the solicitors personally. Significantly, the judge's concern was the volume of material that had been filed by way of supporting affidavit by the defendant's solicitor. The affidavit was four-and-a-half pages long and attached 78 pages of annexures separated by 25 dividers.

Section 56 of the Civil Procedure Act

The judge referred to s.56 of the *Civil Procedure Act* and emphasised its requirement that the parties identify each relevant component of the "real issues in the dispute or proceedings". Hulme J was critical of the affidavit and went so far as to describe 90 per cent of it as "a waste of paper" that failed to address the real issues in dispute.

Although the judge did not find any "serious neglect, serious incompetence or serious misconduct" by the actions of the defendant's solicitor, he was of the view that costs had been incurred "without reasonable cause".

The quantum of the costs was small in this case. However, it was apparent that the judge wanted to impress on the solicitors involved the significance of the "overriding purpose" of the *Civil Procedure Act*.

Applying your mind

Notably, the judge opined: "One of the most important tasks of lawyers engaged in litigation is to sort the relevant

from the irrelevant and to make the judgments enabling this to occur. Experience over 40 years shows that, increasingly, this is not being done and the Court and the parties are obliged to deal with, as occurred here, 50 or so pages and in other cases hundreds of pages when, at the most, one or a much smaller number would do. Although the circumstances are different, one only has to reflect on the number of occasions when, of hundreds of documents included in the 'Tender Bundles', only a relative few are referred to to illustrate the point.

"There will be compelling reasons for the judiciary to enforce the civil procedure regime and impose high standards on practitioners to avoid incurring excessive costs ..."

"Whether the change in practice is inspired by a greater fear of being sued, or the fact that charging for time or copies often rewards an increase in the size of the task or in the volume of paper, or simply avoids having to make decisions, there can be no doubt that the courts are being deluged with material that years ago would not have passed solicitors' desks or counsel's chambers and should not now."

It is evident that legal practitioners are expected to, and in fact must, use reasonable endeavours to ensure that the costs incurred in connection



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with a proceeding are reasonable and proportionate to the complexity and importance of the issues and the amount in dispute. The courts are revealing a willingness to examine the level of representation and the relevance of the material filed with the court.

If the practitioner is found in the conduct of proceedings to have breached the overarching obligations, the practitioner personally may be ordered to pay the extra costs incurred by the other party, and prevented from recovering those extra costs from the practitioner's own client.

The Victorian experience

Following the trend in NSW, the Court of Appeal in Victoria recently delivered a judgment which was the first occasion in which it had considered the overarching obligation of practitioners under the *Civil Procedure Act 2010* (Vic). The Victorian Act is expressed in similar terms to NSW's civil procedure regime and describes the solicitors' obligation "to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute".

In *Yara Australia Pty Ltd & Ors v Oswal* [2013] VSCA 337, the court found that the legal practitioners acting for the applicants in an unsuccessful appeal had breached their overarching obligations to use reasonable endeavours to

ensure that the costs incurred were reasonable and proportionate to the complexity and importance of the issues and sums in dispute.

In this case, the applicant had filed and served on the other parties a folder of documents comprising over 2,700 pages and to which reference was not made at the hearing of the appeal. The court considered that "much of this material was either peripheral to the application or entirely unnecessary".

Reasonable endeavours

The court accepted that the solicitors for the applicant had breached their overarching obligations and ordered the solicitors to indemnify their client for 50 per cent of the respondent's costs incurred as a result of the unnecessary excessive or unnecessary quantum of the application books, and disallowed the applicant's solicitors from recovering 50 per cent of their costs of preparing those books from their client.

The Court of Appeal decision has already been followed by a number of Victorian judges at first instance, and we can be confident that this is likely to become increasingly recognised as an important decision.

It follows that in times when the costs of litigation are significant, there will be compelling reasons for the judiciary to enforce the civil procedure regime and impose high standards on practitioners to avoid incurring excessive costs and to protect against inappropriately wasting the court's valuable time. □