

**COMMERCIALISATION OF LEGAL PRACTICE: CONFLICT AB
INITIO; CONFLICT DE FUTURO
COMMONWEALTH LAW ASSOCIATION REGIONAL CONFERENCE
THE HONOURABLE T F BATHURST
CHIEF JUSTICE OF NEW SOUTH WALES
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I was recently researching in the dusty recesses of the Supreme Court's rare books library when I noticed something curious. Amidst the essays on trover and trials by ordeal in the earliest English legal textbooks were extended sections on the recovery of legal costs. They were often as long as surrounding sections on crime or contract, and concerned familiar issues like billing, disbursements, time limits, party-party costs and costs assessment. A modern practitioner would be forgiven for thinking these topics came from an annotation to the *Legal Profession Act*, when in fact they came from texts printed as early as the seventeenth century. It was a stark reminder to me that legal practice has been a commercial enterprise from the time the first legal enthusiast charged money for what had previously been a gentleman's hobby.

To the extent that professional duties conflict with financial interests, therefore, we must not forget that this conflict has been

present, as the title of this discussion suggests, *ab initio*. It is inherent in the practice of law as a profession and has been regulated from the beginning. It can also be expected to continue *de futuro*.

Also implicit in my choice of title is the assumption that the “commercialisation” of legal practice creates a conflict between professional duties and financial interest. While “commercialisation” has come to mean other things besides the pursuit profit, nevertheless at the heart of concerns about commercialisation is the question of whether profit motivations compromise the core values and obligations of professional conduct. For example, the rise of litigation funders and mega-firms, the public listing of incorporated legal practices, the increased prevalence of private arbitration, international outsourcing, and the growing role of in-house counsel, all raise questions about how duties to clients and the courts may conflict with business practice, profit incentives and corporate expectations. In a phrase: Profit versus professional ethics.

In this context, it must also be remembered that commercialisation is not some inherent evil, whittling away at the noble heart of legal practice. In the words of James Allsop, President of the New South Wales Court of Appeal:

“The practice of law and an acute appreciation of commercial enterprise have always been intimately related. The principled, well-organised, efficient and profitably-run law firm or counsel’s practice not only generates returns for the practitioner but jobs for associated staff and service providers. Such a firm is well placed to deploy its skill and expertise more widely than the principled, well-meaning but incompetently organised lawyer or firm.”¹

So, three points to frame today’s discussion: First, conflicts between mercantilism and professional obligations have been present since the time of the first legal practitioners and will continue to be grappled with in the future. Second, this conflict between profit and professional ethics is at the core of concerns over the commercialisation of legal practice. Third, commercialisation is not inherently bad or evil; it is a different set of means and ends, which both complement and conflict with the means and ends of professional legal practice.

These three points do not, of course, provide a comprehensive analysis of the issue. It is undeniable that as the practice of law and the world of commerce have increased in complexity and sophistication, so too have challenges to professional ethics.² The grey areas of ethical

¹ James Allsop, President of the New South Wales Court of Appeal, “Professionalism and commercialism – conflict or harmony in modern legal practice?” (Speech to the Australian Academy of Law 2009 Symposium Series, 5 May 2009).

² Of my many judicial and bar colleagues who have recently canvassed this area, see in particular: *Ibid*, Marilyn Warren AC, Chief Justice of Victoria, “Legal Ethics in the Era of Big Business, Globalisation and Consumerism” (Address to the Joint Law Societies Ethics Forum Melbourne, 20

professional conduct have expanded, and professional regulations struggle to keep up. Although I must say that the regulatory and oversight bodies in this State have, in my opinion, done an outstanding job of grappling in a timely manner with each new professional challenge as it emerges. Steve can take a fair share of credit in this regard. Much is also accomplished by forums such as this, where emerging issues are identified and debated freely.

This brings us to today's task: assessing the latest challenges to ethical practice brought about by commercialisation. This is, in my opinion, a two-step process. The first step is to identify what remains constant. Professional duties and standards remain steadfast. These duties – of fidelity, candour, good faith and care – are uncontroversial and universal. The importance of public trust in the profession, and the role of self-regulation also remain critical. However, the modern ethical task is not merely to identify the duties that continue to govern our profession, but to apply them to the changing conditions of modern legal practice.

May 2010); Jim Spigelman, former Chief Justice of New South Wales, "Are Lawyers Lemons? Competition Principles and Professional Regulation" (St James Ethics Centre Lawyer's Lecture 2002) http://intranet/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_291002; and Bret Walker SC, "Lawyers and Money" (St James Ethics Centre Lawyer's Lecture 2005) <http://www.ethics.org.au/ethics-articles/lawyers-and-money>.

This leads to the second step necessary to today's task: to engage in fearless, open discussion about how age-old professional ethics should be upheld and reinforced in the modern world. This act is, in my opinion, not only necessary to assessing ethical challenges, but is in itself an exercise of ethical practice.

Ethical conduct, both in personal life and professional practice, is a dynamic behaviour: Lawyers, like all people, do not live in a vacuum. We are not monks, who ensure ethical living by avoiding the world and the challenges it poses. Being an ethical agent means living in and grappling with real world complexities, and making choices about our conduct in real time.

This is not always easy, and we do not always get it right. Nevertheless, we express our ethical code most clearly when we face up to its dilemmas, and, armed with age-old professional duties and informed opinion, attempt to resolve them in good faith.

So it is with the topics I wish to raise for discussion today. I will use the remainder of my time to highlight the competing ethical contentions, as I see them, in relation to two areas in particular, with the hope that my offering will stimulate public debate on their respective merits and risks. I

will discuss first, the phenomenon of mega and cross-border law firms, and second, the rise of litigation funders.

First, the rise of the mega-firm has hit the Australian legal market in a big way. In the last two months alone, two of our biggest firms became even bigger as Mallesons Stephen Jacques, already in the United Kingdom, merged with Chinese firm King & Wood, and Blake Dawson re-branded and merged with the London-headquartered international firm Ashurst LLP. Such mega-firms have the potential to complicate ethical legal practice in a number of ways.

First, the sheer size of these enterprises requires organisational policies that are inherently commercial. A firm with hundreds of partners and thousands of employees will find it difficult, if not impossible, to assess the “skill, professional quality and worth of peers other than through revenue generation.”³ This may not be a problem in a non-legal corporate entity, but creates serious ethical challenges for a law firm. Young lawyers especially have little or no interaction with clients. Rather than taking carriage of a matter and seeing value to the client through work completion, they are motivated to bill as much as possible in the

³ Above n 1.

interests of career advancement. This leaves both client and young lawyer open to exploitation in the pursuit of profit, and conflicts directly with professional duties to act in good faith, with honesty and efficiently in the best interests of the client.

I regret that in some cases young lawyers are left with the impression that the be-all and end-all of legal practice is the billable hour. The ethical future of an industry in which young people are exploited and indoctrinated into a culture in which professional duties may be superseded to personal gain, is of real concern.

Oddly enough, such an approach ultimately is uncommercial. Talented and enthusiastic young lawyers these days are wary of firms governed by the billable hour. They try to avoid them and often will not stay for very long if they find that is the prevailing culture. Believe me also that young lawyers, like their elders, are born gossips. The firms that emphasise the billable hour are quickly identified.

Second, mega-firms are often able to offer full-service legal work to a corporate client, handling everything from acquisitions, tax and governance, to litigation and intellectual property in a one-stop-shop. The potential value add to clients is huge, but the risk of sacrificing

ethical obligations in pursuit of such behemoth revenue generating clients is also increased. Recurring proposals for mergers between accounting and law firms compounds these concerns. A now defunct major accounting firm used to woo prospective clients with a video called "*What We Can Do For You*", which gave examples of how what was euphemistically described as "creative accounting" could help improve the look of the client's balance sheet. The end result was inevitable for both the firm and the few clients who took advantage of this practice. The same problem has the potential to arise with so called "creative legal solutions," as firms compete ever more fiercely for major clients.

Third, and finally for our purposes today, practitioners in mega firms must also face "small cog, large wheel" challenges. Many lawyers working on large-scale projects may have carriage of only one small area. Their ability to assess the over all ethical implications of their work and the larger project, and so decide on an ethical course of action, is therefore compromised.

This paints a fairly dire picture. I hasten to say that I was a commercial barrister for 30 years. In that time I was briefed by almost every major (and mega) law firm in Australia, and by and large dealt with professionals of the highest ethical calibre. The concerns I have voiced

about the mega-firm phenomenon must therefore be balanced by recognition of the value and potential for innovation that mega-firms bring to the legal community.

For a start, the resources of a mega-firm make it ideally placed to train top quality practitioners. They also offer world-class assistance to pro-bono clients and are critical to Australia's public interest advocacy sector. Moreover, the value to the international common law community of assembling outstanding legal minds across jurisdictions, international borders and divergent cultures, to tackle the hardest legal problems of the day, is obvious. From a purely nationalistic view, mega-firms and international mergers also expand the Australian legal market.

Thus, I am by no means "anti" mega law firm. Rather, I wish to highlight the core ethical challenge of the modern mega-firm, which, as I see it, is to instil not merely ethical *corporate* culture, but ethical *legal* culture, firm-wide. Mega-firms must not confuse themselves with their corporate clients. The onus is on them to be uncompromising in placing professional duties above the pursuit of profit, and instilling these values in the young lawyers whose careers they will help shape.

The second and final topic I wish to raise for discussion today is the rise of litigation funders. Litigation funding brings concerns about commercialisation of the legal profession into sharpest relief, because at first glance the aims of litigation funding stand at complete odds with the aims of ethical legal practice. Litigation funders exist solely to profit from the generation of litigation.

Litigation funding was very recently illegal in Australia under the common law torts and crimes of “maintenance” and “champerty”. These prohibitions were relaxed in 1995, and in 2006 the High Court clarified that litigation funding is no longer against public policy in New South Wales.⁴ In the few short years since, the litigation funding industry in Australia has come to be worth more than 50 million dollars annually, and is growing fast. A few litigation funders, such as IMF (Australia) Ltd, are even listed on the Australian Securities Exchange. Prospective investors can peruse a colourful website with page long summaries of active cases, and both class action claimants and investors are solicited.

In a recent paper, the NSW Law Reform Commission explained that litigation funders take control of major decision-making in the cases they fund, most often by instructing the solicitor and reserving the right to

⁴ *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd* (2006) 229 CLR 386.

settle claims based on a commercial assessment of the profitability of the case.⁵ I must say this was not fully borne out in the litigation funding agreements I saw over the years, which always sought to preserve the solicitor-client relationship. That said, they did impose substantial limitations on the client's customary role in the control and management of the case, most importantly in relation to settlement.

Litigation funding is advocated on the basis that it promotes "access to justice, spreads the risk of complex litigation and improves the efficiency of litigation through introducing commercial considerations that aim to reduce costs."⁶ These are valid considerations. I will not dwell on them, mostly because I expect John is better placed to speak of the practice's virtues. This is also an area in which the regulatory and oversight bodies in New South Wales are paying close attention. Nevertheless, the following concerns surrounding litigation funding remain.

The first, and most pressing concern is that litigation funders, which advocate litigation where they see the potential for profit, do not owe duties to the court in the same way that lawyers do. This concern

⁵ New South Wales Law Reform Commission, "Security for Costs and Associated Costs Orders", Consultation Paper 13, May 2011, [3.13].

⁶ Michael Legg, "Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions — The Need for a Legislative Common Fund Approach" (2011) 30 *Civil Justice Quarterly* 52, 52.

has been in part addressed by recent amendments to the *Civil Procedure Act 2005* (NSW). These amendments impose obligations on a person who provides financial assistance to any party to proceedings and exercises control over the conduct of the proceedings. Funders therefore have obligations not to cause a party to breach its duties to assist the court to facilitate the just, quick and cheap resolution of the real issues in the dispute, and to take reasonable steps to resolve or narrow the issues in dispute.⁷

Nevertheless, it remains that litigation funders have, as their primary concern, the pursuit of profit by means of litigation (or settlement), while remaining one step removed from the oversight and inherent regulatory jurisdiction of the court.

A key area in which this arrangement causes concern is in relation to costs. In the ordinary course, the court regulates and sanctions the conduct (or mis-conduct) of parties and practitioners by making orders as to costs in the proceedings, and often pre-emptively orders security for costs. In this way, a party who successfully defends an action is relieved of the full burden of their legal costs, and a party who unnecessarily brings, delays or complicates litigation may be penalised

⁷ *Civil Procedure Act 2005* (NSW) s 56(4), s 56(6), s 56(7).

with costs orders against them, even if they are ultimately successful in the matter. As funders are non-parties to litigation, however, the court has previously not had the power to award costs against them.⁸ This begs the question: what good are funders' obligations to the court if sufficient enforcement in the form of costs orders are unavailable?

In 2008, the New South Wales Court of Appeal held that a court "should be readier to order security for costs where the non-party who stands to benefit from the proceedings is not a person interested in having rights vindicated."⁹ In that case, Justice Hodgson, with whom Justice Campbell agreed, said that "courts should be particularly concerned that persons whose involvement in litigation is purely for commercial profit should not avoid responsibility for costs if the litigation fails".¹⁰

This is especially so in cases where the claimant, otherwise backed by a litigation funder, would be unable to satisfy an order for costs themselves. Not all funders indemnify claimants for adverse costs orders, and even those that do cannot be pursued by the defendant

⁸ *Jeffery and Katauskas Pty Limited v SST Consulting Pty Ltd* (2009) 239 CLR 75.

⁹ *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance* [2008] NSWCA 148, [51], [61].

¹⁰ *Ibid.*

directly.¹¹ In these circumstances, a defendant who has successfully defended a claim may be unable to recover any of its legal costs. While the Court of Appeal has held that security for costs may be ordered where a litigation funder is involved, this is dependant on first, knowledge by the parties and court that a litigation funder is involved,¹² and second, a pre-emptive security for costs order being sought and made.

An extraordinary example of this was in proceedings between the National Australia Bank and Idoport Pty Ltd, where the later company, funded by an overseas entity, sued the NAB for US \$29.3 billion. The funder withdrew its funding midway through the trial, and refused to make a security for costs payment. The end result was that the proceedings were dismissed as a consequence of the failure to provide security. It was a term of the order dismissing the proceedings that no fresh proceedings making the same claims could be instituted until the plaintiff paid the costs of the NAB in the first trial, which were ultimately assessed at \$63 million. The costs, to my knowledge, have never been paid, and the solicitors and barristers who acted for the plaintiff did not receive a significant portion of their fees. Whether or not there was any

¹¹ Section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) does not cover litigation “funders”, as opposed to “insurers; *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance* [2008] NSWCA 148 at [52].

¹² As to the complexities regarding disclosure of litigation funding agreements, see *Green*, *ibid*, at [11], and above n 5, 66.

impropriety in what occurred is not the point. It simply shows what can happen when things go wrong.

It appears that the courts in Australia governed by the Uniform Civil Procedure Rules now have the power to order costs against third parties in any event,¹³ however this power is yet to be tested, and the circumstances under which it can and should be exercised remain unclear.

Two recent cases shed further light on the present state of regulation of the litigation funding industry. In 2009, the Full Court of the Federal Court of Australia held in *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd*¹⁴ that a litigation funding agreement relating to a class action suit constituted a managed fund agreement, which was therefore subject to regulation under the *Corporations Act* 2001. The second case, *International Litigation Partners Pte Ltd v Chameleon Mining NL*¹⁵, was decided only last year. The New South Wales Court of Appeal held that the litigation funding agreement in that case was primarily a facility for managing financial risk, and therefore a financial product also regulated by the *Corporations Act*.

¹³ Above n 5, 68.

¹⁴ [2009] FCAFC 147.

¹⁵ [2011] NSWCA 50.

While it is of course desirable that litigation funding be regulated, some have argued that the regime imposed on financial product providers by the *Corporations Act* is too onerous and inappropriate to litigation funding, such that impecunious litigants will be discouraged from litigating valid claims altogether.¹⁶ The Federal Government began consultations on reforming the *Corporations Act* to alleviate this burden following the decision in *Multiplex*, however no reforms have yet been adopted. In the interim, an exemption under the *Corporations Act* has been issued for litigation funders. *Chameleon Mining* is currently awaiting hearing in the High Court. If nothing else, these cases indicate the need for and complexities surrounding the regulation of the litigation funding industry.

Finally, litigation funders commonly insist upon sole power to settle the cases they fund. At the very least, they reserve the right to withdraw future funding if the client does not accept their view. This really leaves the client little choice. A litigation funder's consideration in exercising this discretion is a commercial assessment of profitability, not the vindication of rights or the wishes of claimants. While corporate litigants may make settlement decisions according to similar principles, the many individual

¹⁶ James Mayanja, "Enhancing Private Enforcement of Australia's Corporate Continuous Disclosure Regime: Why Unshackling Litigation Funders Makes Eminent Sense" (2010) 25 *Australian Journal of Corporate Law* 48.

claimants in a class action suit, who are common users of litigation funders, may not.

The conversations to be had surrounding the ethics of litigation funding and its regulation are only just starting to be had. Myriad other issues will inevitably be raised. For our purposes today I think it suffices to say that the entrance into the legal market of entities that exist solely to profit from the promotion of litigation marks the dawn of a new era in the commercialisation of legal practice, which must be watched, debated and regulated very, very carefully.

The rise of mega-firms and of litigation funders are only two of the more pressing issues facing modern ethical legal practice in the context of commercialisation. As I have said, there are many others. I will conclude this discussion, therefore, by reiterating what I believe holds true for all challenges to ethical legal practice. First, such conflicts are ever present. However, so too are the ethical duties and obligations imposed upon every practitioner. Second, openly discussing and debating the resolution of these conflicts is, in itself, an expression of ethical practice. Indeed, it is an essential act, on which the continued effectiveness of professional duties depends.