CATALYST FOR CHANGE?

Legal developments and shifting society

Introduction

1 How many times, I wonder, do any of us recall, let alone recite, the oath we took on the day we were admitted as a practitioner? We each swear to:

> "… truly and honestly conduct [ourselves] in the practice of a Lawyer of the Supreme Court of New South Wales and to faithfully serve as such in the administration of the laws and usages of this State according to the best of [our] knowledge, skill and ability."

2 I also wonder how much of Sir Laurence Street's admission day speech we remember, except, perhaps for some of us, those famous words when at least one baby inevitably cried, "Don't leave madam, everyone is welcome".

3 Sir Laurence had much to say that is worth remembering, particularly in relation to what it is that we do as lawyers. As he said: "[s]ervice is the ideal, and the earning of remuneration must always be subservient to this main purpose".[1] Roscoe Pound once characterised a profession as entailing the pursuit of "a learned art ... in the spirit of public service", a quote from his book *The Lawyer from Antiquity to Modern Times.*[2]

1 *Re Foster* (1950) 50 SR (NSW) 149 at 151.

2 R Pound, *The Lawyer from Antiquity to Modern Times*, (West Publishing Co, 1953) 5.

4 How many Monday mornings, or Tuesday mornings for that matter, do we feel as idealistic as that, as daily and weekly work in a pretty tough profession grinds on, against a backdrop of budgets and the ubiquitous quota of billable hours. There needs to be something more to sustain us.

5 I often wonder what causes a person to decide to be a surgeon rather than a dermatologist, or a podiatrist rather than a chiropractor. Likewise with the law. I think to sustain our interest in the law we need an innate love of what we do: an innate love of the law. I am not sure which part of the brain activates it, but it would be an undoubted shame, for ourselves and for the people we deal with as clients, and in my case, as litigants, if we were unable to maintain that love of the law.

6 For myself, I think there are two sustaining aspects of what I do. The first is the intellectual challenge. The other thing I love about the job I do is the extraordinary range of stories and personalities I come across. I will come back to that.

7 Legal practice has undergone drastic change, and rightly so. In this day and age, *Bleak House* can safely be relegated to its rightful place as a great English novel which had some very useful insights into human nature. To practice law "*a la* Dickens" should now be a matter of pure fiction.

8 The landscape of litigation in particular has changed. No doubt, that has much to do with the modern emphasis on the efficiency and efficacy of litigation – in the State sphere, exemplified by the

phrase "just, quick and cheap" in s 56 of the *Civil Procedure Act 2005* (NSW). The fact that, as a matter statute, the just, quick and cheap resolution of proceedings became the overriding purpose of the *Civil Procedure Act* has had a significant impact on the conduct of litigation.

9 Since the introduction of the Act in 2005, s 56 has been cited by 653 cases in the Supreme Court, including the Court of Appeal. That is more than once a week, not taking into account the summer breaks in Law Term. I would have thought that there might have been a peak period when, as with any new regime, there is a flurry of activity before everyone gets into stride. Not so with s 56 where, in 2014 and 2015, the occasion for its citation was three times as high as in any earlier period.

10 Section 56 is now fundamental to the operation of the justice system. It affects adjournment applications, applications for amendments of pleadings, and interlocutory applications that are made more than once: for example in the case of stay applications and applications to extend a limitation period.

11 Courts have always been jealous to confine the circumstances in which second applications can be brought. However, there is a view that s 56 may place further, or perhaps it might be said, tougher, albeit discretionary, constraints on the Court acceding to such applications: see, for example, *Levy v Bablis* [2012] NSWCA 128 at [19]-[20].

12 The High Court has also spoken on these issues. Everyone will know *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27; 239 CLR 175. More recently, in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] HCA 46; 250 CLR 303, parties who undoubtedly thought they were merely being appropriately adversarial, were told by the High Court that "*satellite interlocutory proceedings*" did not fulfil the requirements of the overriding purpose of the Act. In that case, privileged documents were inadvertently released to the other side in the course of discovery. In the Court of Appeal there was a very technical argument about waiver, of which the High Court said at [63]:

> "In reality, there was no question of waiver sufficient to be agitated before the Court. The documents disclosed during the discovery process were privileged, and Norton Rose's claim that disclosure occurred by mistake was not disputed. Any allegation of waiver was going to turn on a legal, technical argument tangential to the main proceedings, and should not have been made."

13 I have always wondered why that case went as far as it did. The issue had arisen in 1987 in a case before Rogers J: *Hooker Corporation v Darling Harbour Authority* [1987] 9 NSWLR 538. The Court of Appeal in *Expense Reduction*, however, considered that it offered no assistance. The High Court was clearly unimpressed with that view.

14 You might ask what is going on here: why is the Court placing so much emphasis on what is almost a slogan, the "*just quick and cheap*" administration of justice? It is precisely because the courts

cannot afford to allow it to be a mere slogan. There are a number of reasons for this, not least of which is the duty to abide by the injunction placed on the Court, the legal practitioner and the client to work towards the just, quick and cheap administration of justice, with costs consequences in the case of the practitioner and the client.

15 There are other reasons, which include the very important economic consequences of drawn out litigation. This was referred to in *Aon*. How can a developer, or a purchaser from a developer, organise their financial affairs if a case is in court for half a decade?

16 There is another aspect – and this is my personal observation – s 56 is the resolution of a tussle between court and practitioner of long pedigree. The underpinning principle expressed in s 56 has been around for centuries. However, there have been times when practitioners either have, or at least considered that they could, 'run the list', in the sense of things being done in the practitioner's time and at the practitioner's convenience. That is not the present position, at least in the Court of Appeal. Counsel's convenience is a listing consideration, not a listing requirement.

17 Respect for the rule of law includes basic respect for each and every individual in society. When I sit in the Court of Criminal Appeal, for example, I always address 'the prisoner' by their name: Mr Smith or Ms Arvidson, for example. Respect for those we deal with – other practitioners, junior members of the profession, staff

and litigants – is integral to the maintenance of respect for the institutions of justice and the rule of law.

18 Let me return to Law Week, a week of particular engagement by the profession with the community. It might be apparent from what I have said thus far that I consider the most important service we can render to the community is to do our work well, efficiently, and without exorbitant charging, including charging for sitting on a matter without progressing it properly.

19 It would be sad, however if that were all that our service as professionals entailed. It is truly a delight, therefore, to address you all this morning in the lead up to National Law Week, being, as it is, a week to promote public understanding of the law and its role in society. This morning, and Law Week in general, should serve as a reminder, and indeed, a celebration of, the broader role that we, and our profession, play in society. Community service as part of the legal profession is fundamental if we are to maintain respect for the rule of law.