C7 – Mega litigation and its costs

By Carol Webster

It would have been hard to miss the recent controversy about the cost of big litigation. The long awaited judgment in the C7 litigation attracted significant publicity.

Sackville J delivered judgment on 27 July 2007: *Seven Network Ltd v News Ltd* [2007] FCA 1062 ('the principal judgment'). The judgment was extensive – Sackville J wrote some 1120 pages of published reasons, in 11 chapters; the summary prepared to accompany the reasons for judgment itself ran to several pages.

The case was an example of what Sackville J described as 'mega-litigation': civil litigation involving multiple and separately represented parties that consumed many months of court time and generated vast quantities of documentation in paper or electronic form. His Honour noted the burden imposed by such mega-litigation on not only the parties, but also the court system and hence the community[1].

This is neither the time or place for a review of the judgment. Rather, this note highlights some of the things said about litigation of this size.

Sackville J recorded some of the statistics in the summary:[2]

- the trial lasted for 120 hearing days;
- an electronic database containing 85,653 documents (589,392 pages) was produced from discovery and production of documents. 12,849 'documents' were admitted into evidence (115,586 pages);
- extensive written submissions were filed: 1,556 pages by Seven, in chief, and a further 812 pages in reply (excluding confidential portions and an extensive electronic attachment with about 8,900 pages of spreadsheets); 2,594 pages by the respondents, supplemented by further outlines, notes and summaries;
- pleadings totalled 1,028 pages;
- statements of lay witnesses (admitted into evidence) ran to 1,613 pages. Expert reports admitted into evidence totalled 2,041 pages of text plus what Sackville J described as 'many hundred pages of appendices, calculations and the like'; and
- the transcript was 9,530 pages in length.

His Honour said at paragraph 7 of the summary 'I have not been idle these nine months'.

One of the matters which attracted publicity regarding the Principal Judgment, and then in relation to the subsequent costs hearing, was his Honour's estimate that the parties had spent in the order of $200 million on legal costs in connection with the proceedings.[3]

Sackville J referred to the initial claim suggested by Seven when the case was opened, of more than $1.1 billion in damages, reduced to between $194.8 and $212.3 million by the time of final submissions, subject to grossing up for income tax and pre-judgment interest. His Honour commented:[4]

> the maximum amount at stake in this litigation has not been very much more than the total legal costs incurred to date.
>
> It is difficult to understand how the costs incurred by the parties can be said to be proportionate to what is truly at stake, measured in financial terms. In my view, the expenditure of $200 million (and counting) on a single piece of litigation is not only extraordinarily wasteful, but borders on scandalous.

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Sackville J concluded the summary with 'A Cautionary Tale'[5] referring to the *Duke* litigation[6] which his Honour described as the longest civil trial in recent Australian history, running for 471 days, from 15 June 1994 to 29 September 1997.

His Honour noted[7] that the *Duke* litigation did not finally conclude until 19 November 2004, when a second application for special leave to appeal was refused: ten and a half years after the commencement of the trial, and over twelve years since the commencement of the proceedings; nearly seven years after the trial judge's judgment.

Sackville J suggested that the parties to the C7 proceedings could still bring what he described as 'these protracted and excessively expensive proceedings' to a conclusion by negotiated resolution.[8] His Honour concluded, in paragraph 61 of the summary, 'The alternative to a negotiated resolution may be a reprise of the *Duke* litigation. I do not recommend this course'.

The reference to proportionality recalls the express objects of case management specified in s57 of the *Civil Procedure Act 2005:*

(a) the just determination of the proceedings,

(b) the efficient disposal of the business of the court,

(c) the efficient use of available judicial and administrative resources,

(d) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.

In addition, the Civil Procedure Act s56(1) states the overriding purpose of the Act and Rules: 'to facilitate the just, quick and cheap resolution of the real issues in the proceedings.'

A few months before Sackville J's delivery of the principal judgment in the C7 litigation, the full court of the Federal Court had expressed its concern about what it saw as the extravagant conduct of particular piece of litigation:

> 23 We do not wish to part from this case without observing that the appeal books occupied something like 5,000 pages in ten volumes. Very little of that material was referred to during the course of submissions or oral argument. Indeed, a number of the

volumes were not opened at all during the hearing. Much of this material was completely unnecessary having regard to the trial judge's findings of fact and the nature of the arguments raised on the appeal.

24 Moreover, although no doubt the issues were important to the parties, the conduct of this litigation has been extravagant. It concerned a claim for $200,000 that occupied 10 days of hearing before the trial judge and two days on appeal. This expenditure of time and resources, not only of the parties, but also of the court bears no apparent relationship to the value of the interests at stake. The fact that the court has been shown only one attempt to compromise the proceedings on which to base a claim for indemnity costs, or to resist any such claim, is indicative of a lack of any appropriate commercial approach to resolution attempts by the parties with their professional advisers. The court is not able to come to any conclusion as to whether any fault lies on any one of the parties to the proceedings. However, given that [the parties] were parties with some sophistication, it is indeed unfortunate that they were unable to resolve matters or to find a more economical way of litigating what in truth was a very small claim.[9]

Sackville J considered costs questions further, in a costs judgment delivered on 26 September 2007: [2007] FCA 1489, regarding a claim for indemnity costs based on a joint offer of compromise (made in August 2005). Unsurprisingly, the hearing attracted further publicity, with a number of media articles about the costs incurred by a number of the respondents.

In the costs judgment, his Honour set out the total costs incurred by the various respondents, as recorded in their written submissions, totalling $94,561,429.[10] (A number of the respondents resolved their claims for costs against Seven.)

The story does not end here however, even in relation to costs. The application for costs on an indemnity basis was dismissed, but the court is still to hear applications for a gross sum order for costs, as an alternative to taxed costs.

A gross costs order, or lump sum costs order, was made in one of the other recent pieces of large litigation, although the proceedings did not proceed to a concluded hearing and judgment: *Idoport Pty Ltd v National Australia Bank Ltd* [2007] NSWSC 23[11]. On 6 February 2007, Einstein J made a gross sum costs award against the Idoport parties for $50 million.

Statistics can be recounted here as well: Einstein J recorded that 868 pages of affidavit and 33,572 pages of exhibits (in 110 folders) were relied on in support of the application. The judgment records ten hearing days in November and December 2006 on the application.

Einstein J accepted that the case for a gross sum costs order in that case was compelling,[12] bearing in mind the expense and time that would be involved in an orthodox assessment of costs. Costs consultants gave evidence for both parties. Neither of them had ever prepared a bill of costs in the order of $60-70 million.

One of the issues raised was that the NAB parties had adopted a 'Rolls-Royce' approach: Einstein J considered this, but said '…at the least and viewing the matter from *their clients perspective*, that approach was called for in this litigation'.[13]

It remains to be seen how the gross costs applications will proceed in the C7 litigation.

Endnotes

1. Paragraph 2 of the summary.
2. Paragraphs 4 to 6 of the summary.
3. Paragraph 8 of the summary.
4. Paragraphs 9 and 10 of the summary.
5. from paragraph 58 of the summary.
6. *Duke Group Ltd (in liq) v Pilmer* (1998) 27 ACSR 1.
7. Paragraph 59 of the Summary.
8. Paragraph 60 of the Summary.
9. *King v Yurisich (No 2)* [2007] FCAFC 51 at [23]-[24], Sundberg, Weinberg and Rares JJ.
10. [2007] FCA 1489 at [11] and [12]
11. Also see *Idoport Pty Limited & Anor v National Australia Bank Limited & 8 Ors* [52] [2002] NSWSC 18 and *Idoport Pty Limited & Anor v National Australia Bank Limited and 8 Ors* [51] [2001] NSWSC 1081, *Idoport Pty Ltd v National Australia Bank Ltd & Ors* [2002] NSWCA 271; *Idoport Pty Limited v National Australia Bank Limited & Anor* [2005] NSWSC 752; *Idoport v National Australia Bank Limited & Anor* [2006] NSWCA 202.
12. [2007] NSWSC 23 at [118].
13. [2007] NSWSC 23 at [122], emphasis in original.

Gleeson CJ on the cost of justice: an excerpt from 'Some Legal Scenery', delivered at the Judicial Conference of Australia, Sydney, 5 October 2007.

The mega-trial is not a complete novelty. When I came to the Bar in 1963, the case of American *Flange v Rheem* was just getting started. As I recall, it was as at least as long as the *C7* case, although there were only two parties. What is new and more alarming is the length of the ordinary case. For well-resourced litigants, the time of judges is cheap. The government pays for judges; and it pays them much less than many litigants pay their lawyers. It is understandable that some parties and their lawyers adopt a habit of thought which discounts the economic value of judicial services and court time. Judges should be conscious of this, and should be ready to assert their authority where that is necessary to secure reasonable expedition.

…

The facility with which lawyers can produce documentary material, including evidence and arguments in written or electronic form, increases the cost of litigation, and places an additional burden on judges. Judges often find themselves, at the end of a case and with little oral argument, presented with a volume of documentary material on the assumption that they will use it in the preparation of a reserved judgment. Conducting a completely oral procedure is now a luxury that most courts cannot afford, but there is a need to make allowance for the pressure on judges that can come from increasing reliance on written material. There is also, on occasion, a question whether such material has been properly tested and evaluated.