

# Using



# in Litigation

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## The Pervasiveness of PowerPoint

Litigation is all about assembling facts, law and argument into a presentable and compelling form. Advocacy is all about persuading the tribunal, judge or jury, to accept your argument.

Microsoft PowerPoint, now on 250 million computers around the world, is the dominant presentation software in the world. It has 95% of the market share, and around 30 million PowerPoint presentations are made every day.<sup>1</sup> Studies in the U.S. have shown that the same material presented with PowerPoint, as compared to being presented in ordinary typed format, is significantly more persuasive.<sup>2</sup> Yet, Australian litigation lawyers, although they are very much in the business of presentation and persuasion, have largely ignored PowerPoint.

## Changes in Australian Legal Presentation

In the Australian legal system there have been changes in the last 20 years aimed at making legal information and presentations more comprehensible. The Plain English movement has led to changes in the format and style of legislation. Many legal documents, most notably in the insurance and banking industry, have been simplified dramatically. The changes, based on the use of clearer formats, shorter sentences, active headings and simpler wording, have all proceeded on the assumption that the comprehension of the reader or listener is fundamentally affected by the format and style of the material, as well as by its content. Getting material into a simpler and more logical format also leads to some content changes, insofar as ►

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## Joe Smith – Biographical details 1

### Early years

- Born 3/1/60 in Manly, Sydney
- Father worked in NSW Transport, had one brother. Moved to Brisbane, 1970
- Raised and educated in Brisbane, from age 10 to 17. Educated to Year 11 at high school.

### Employment history

- 1978, clerk, Brisbane Council
- 1979, Barman, Twin Towns Club
- 1980 – went to Hong Kong worked in odd jobs until he commenced a 10 year career in the real estate industry
- 1980-84 – worked as commission sales agent for Hong Kong Realty
- 1984-90, worked as manager for Kowloon Property Management

“Australian litigation lawyers, although they are very much in the business of presentation and persuasion, have largely ignored PowerPoint.”

## Pleadings Governing principles

- Purpose of Pleading is to define the issues and thereby inform the parties in advance of the case they have to meet
- Statement of claim must contain material facts necessary for formulating a cause of action
- A cause of action is every allegation of fact which P must prove to establish a right to the relief claimed
- A reasonable cause of action is one with some chance of success
- Frivolous means so obviously untenable that it cannot possibly succeed
- Vexatious means an action which is a sham or which cannot possibly succeed
- Embarrassing means that the D cannot understand it.

- For a statement of general principles see *Dare v. Pulham* 148 CLR 658,664; *McKellar v. Container* 165 ALR 409
- 013.02 requires pleading of material facts not evidence
- 013.03 requires effect of document or conversation to be briefly pleaded
- 013.08 allow inconsistent allegations if it is clear that they are made in the alternative
- 02302 allows the whole or part of the pleading to be struck or amended is no cause of action is shown or is the pleading is scandalous, frivolous or vexatious or is embarrassing or is an abuse of process
- In *Meckiff v. Simpson* 1968 VR 62, it was said that “Matter in a pleading will be struck out...only where...the pleading is unintelligible, ambiguous, vague or too general so to embarrass the opposite party who does not know what is alleged against him”.

superfluous or confusing content is deleted along the way.

The format of judgments has also changed very substantially for the same reasons. We now see headings, numbered paragraphs and shorter paragraphs, from courts across the country. The use of written submissions or outlines of argument has seen efforts made by barristers to state their case more succinctly and to get their submissions into a compelling format as well as relying on compelling content.

The dominant software for implementing these changes has been Microsoft Word. PowerPoint cannot be a substitute for Word in many of these areas, but it can be a powerful aid. Presenters in fields other than the law, especially business, finance, and education, have taken up PowerPoint in Australia with similar enthusiasm to their counterparts in the US. Students and teachers at Australian secondary schools routinely give presentations in PowerPoint, lecturers in universities use it as a basic tool.

### Bullet Point Lists

Listeners find it easier to follow an argument or presentation if it is presented in the bullet point form of PowerPoint, and accompanied by its other features, which can be used to highlight and simplify the argument. Bullet lists are also part of Word, but in PowerPoint, they are the basic tools.

Plain English is based on the theory, backed by considerable research, that people are more likely to comprehend a document set out in a readable and logically sequenced format, than in dense prose. A further aspect of this is, that if sentences are kept short, and words simple, comprehension is further enhanced.

The use of bullet point lists accompanying an oral argument is a logical extension of Plain English. It is easier to remember 5 or 6 bullet points set out in logical sequence, than a couple of pages of conventional prose making the same points. The person taking a single page of bullet points away, is more likely to

glance at it to refresh her memory than if she had a couple of pages of prose to read.

### Why Use PowerPoint to Improve Content Delivery?

Professor Clifford Nass of Stanford University now gives lectures using PowerPoint because his students requested him to do so. He says that PowerPoint "lifts the floor of public speaking: a lecture is less likely to be poor if the speaker is using PowerPoint".<sup>3</sup> He says that "What PowerPoint does is very efficiently deliver content... what students gain is a lot more information – not just facts but rules, ways of thinking, examples".<sup>4</sup> In other words, bullet points impose a discipline on the speaker, keeping him or her on track and ensuring that there are substantial points to be made, not just verbiage.

### Why Should Litigation Lawyers Use PowerPoint?

The reasons that drive the use of PowerPoint in fields outside the law, apply equally to lawyers and especially to litigation lawyers. In the US, litigation lawyers routinely use PowerPoint.<sup>5</sup>

The reasons for the use of PowerPoint by litigators can be summarised in the following bullet points:

- Getting your material into a presentation form ("PowerPointing" it) helps you crystallize your arguments.
- The PowerPoint presentation will highlight weaknesses which can then be rectified.
- The format can be conveniently used to set out the factual assertions on left side of a slide and the evidence backing the assertions on the right side.
- The format can be used in the same way to set out the legal principles relied on, on the left side and the legislative provisions or case references on the right side.
- The format is useful in working with witnesses and clients to ensure that you are on the same page (to

## Reasons for the collapse of the business

- Rapid increase in flow of funds for investment.
- Insufficient management time and expertise to handle increase in volume
- Unexpected adverse changes in the market
- Poor investment decisions made by management under pressure
- Directors misled by management

- See 30/6/99 Financial statements
- For fund growth see Chart in Exhibits JK p. 14. See also financial statements for 30/6/98
- See Transcript p.32
- Transcript p.89
- See cash flow statements in exhibit JK p.17.

It was dark

"I was walking home from the station at about 7.00 p.m. on Friday 15th June. **It was dark.**

As I was walking down Wilson Street towards Clifton Street. I was about 100 metres from the corner when I noticed someone behind me. I did not look around. He then suddenly grabbed my bag.

I struggled for a minute to try to hold on to it but he pulled it free and ran off into the dark. **It happened so quickly.** I was very frightened. He was about 6 feet tall and thin, with short hair.

I was shown a number of photos by the police on 18th June but **I could not recognise anyone.** Then on 25th June the Police showed me a photo and I think that was the person."

It happened so quickly.

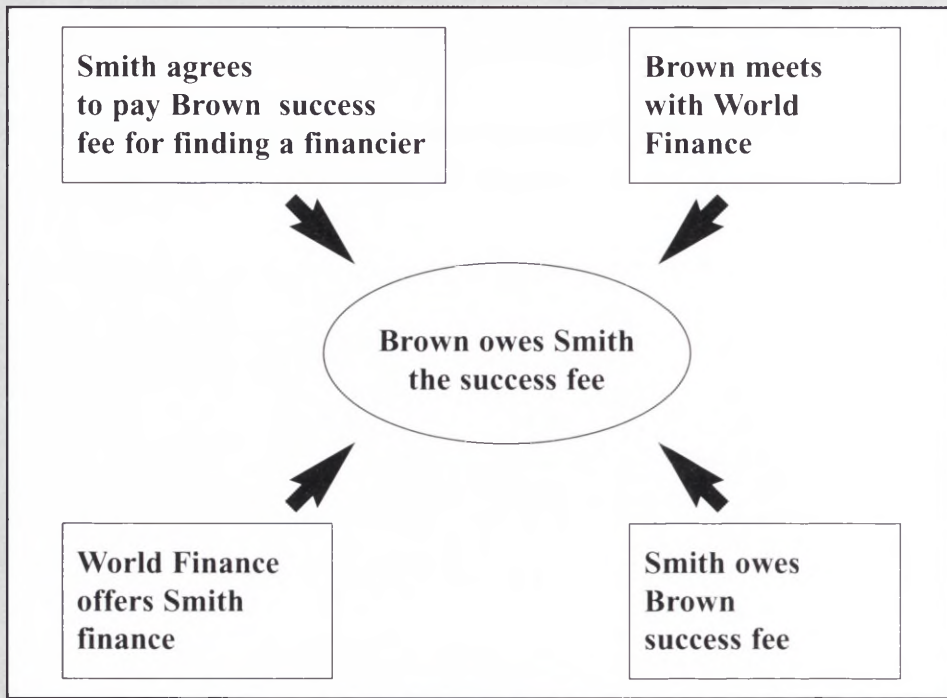
I could not recognise anyone.

use an Americanism), and to ensure that you have grasped the points they are making.

- The format is useful for communicating between solicitors and counsel and between senior and junior

counsel i.e. the forensic strategy can be grasped very quickly.

- The format is very useful for use as notes for advocates in court, as it provides clear outlines in bold print, which are easier to refer to ►



than handwriting or a Word document.

- The PowerPoint format enables you to readily compose relationship charts, time lines, and use text document treatments, to simplify and emphasise your argument.
- PowerPoint slides can be used to hand up as exhibits to the court as a guide to your argument.

### Some Practical Examples of the Use of PowerPoint for Litigation Lawyers

#### Enhancing Basic Text

The PowerPoint software has a number of alternatives for standard text slides. It also has hundreds of alternatives for bullet shapes. The basic formats can be used as to order your information and make it easier to read by adjusting the shape and size of the lettering, putting a box around some of the text, adjusting the shape and size of the bullets, and using subheadings.

There are three examples in this article of how to use PowerPoint to enhance basic text. The "Joe Smith - Biographical details" slide contains typical background information used in a plea in a criminal case. Rather than dictate this sort of information to the judge,

or read it into the transcript, the information can be put into a number of PowerPoint slides. The slides can then be tended as an exhibit. It saves a judge time in making notes of what you're saying, it allows you to control presentation, and enables you to elaborate on the key points.

The second example of enhancing basic text is the slide dealing with pleadings. This slide provides an example of the convenience of being able to set out the general principles on the left side, and the authorities for the principles on the right hand side. This sort of slide is useful in developing your argument and presenting it in court, rather than using the slide as an exhibit.

The third example, "Reasons for the collapse of the business", sets out the key facts you wish to establish on the left side, and the evidence supporting the assertions of fact on the right side. This

#### Footnotes:

- <sup>1</sup> The background material on PowerPoint is drawn from the article, "Absolute PowerPoint" in May 28th issue of *The New Yorker* p76
- <sup>2</sup> *New Yorker* p87
- <sup>3</sup> *Ibid*
- <sup>4</sup> *Ibid*

is another example of the format being used to develop a coherent argument and may also be useful as an exhibit.

#### Text Document Treatments

An example of a text document treatment is the slide dealing with the victim's statement regarding a robbery. Here, the use of what PowerPoint terms of "Callouts" highlights the points the advocate wishes to make, in relation to the statement. It is the equivalent of a text highlighter but more striking.

#### Relationship Charts

An example of a relationship chart is the slide dealing with a claim for a success fee. It is in the form of what is sometimes called "The-All-Roads-Lead-To-Rome" chart.<sup>6</sup> PowerPoint has a large number of different charts.

#### Trying It Out

I have just given a short introduction to the possibilities of PowerPoint for litigators. PowerPoint is used in its animated forms, and more graphical forms, for commercial and educational presentations. For lawyers, the use of animation and graphics would usually be a distraction rather than an aid. But in its basic form, as indicated above, it is very useful. It is also easy to learn and comes with the usual auto-wizards to get you on your way.

Ironically most lawyers have PowerPoint installed on their computers as part of Microsoft Office. But they are not likely to have opened it. Prepare a couple of slides and then email them to a colleague. The chances are that he or she will be able to open and print them. Once they've done that, they will become familiar with the software. ■

<sup>5</sup> The National Institute for Trial Advocacy, which is based at the Notre Dame Law School, has published a very useful text on the subject. *PowerPoint for Litigators* by Siemer, Rothschild, Stein, and Solomon, NITA, 2000, 436 pages.

<sup>6</sup> *PowerPoint for Litigators*, p104