

## Law, Society and the Issue of Mega-litigation

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### Abstract

The *Seven Network v News Ltd*, involving a claim of breach of s 45 of the *Trade Practices Act 1974* (Cth) and *Cha v Oh (No 23)* [2009] NSWDC 336 involving a defamation claim, together required nearly 40 interlocutory judgments during the course of the trials. In *Seven Network* these involved questions relating to whether certain documents should be subject to privilege, or whether the reports of various experts should be admitted, while the interlocutory judgments in *Cha* involved procedural questions. Some of the legal problems in *Cha* were created by the plaintiff running out of money due to the length of the case which, in part, was caused by the fact that it involved 14 respondents. The case therefore raises issues as to whether the final award of a relatively modest \$240,000 warranted the long defamation trial. *Seven Network* meanwhile raises issues as to whether the estimated cost of \$200m was justified, particularly as it is tax deductible for the companies, and whether companies should be allowed to use the court system for such litigation.

### Introduction

Two recent civil cases in Australia have highlighted the problems that long cases can create for the courts and the judges hearing them. The *Seven Network v News Ltd*<sup>1</sup> case involved litigation between the Seven Network ('Seven') and virtually every major media organisation in Australia in relation to the granting of television rights for the Australian Football League (AFL) and National Rugby League (NRL). Seven's argument was that anti-competitive behaviour during this period had led to the demise of its pay television network, C7. *Cha v Oh*<sup>2</sup> meanwhile involved a defamation action against 14 respondents in relation to comments made in an Australian based, Korean newspapers that questioned Cha's competence while chairman of the Australian-Korean organisation.

The paper will therefore examine the issues for both the law and society that are created by the meta-litigation aspects of these cases.

### Seven Network v News Ltd

#### *The Seven Network's Claims*

In *Seven Network v News Ltd*<sup>3</sup> Seven's argument was that anti-competitive behaviour during this period had led to the demise of its pay television network, C7. In regard to

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<sup>1</sup> [2007] FCA 1062.

<sup>2</sup> (No 23) [2009] NSWDC 336.

<sup>3</sup> [2007] FCA 1062.

the anti-competitive behaviour Seven claimed that, during the period 1999-2000, when the AFL pay television rights were awarded to News Ltd, Foxtel had refused to negotiate with C7 for it to be carried on Foxtel. This conduct, Seven claimed, was designed to harm C7 and to favour the interests of Fox sports who were C7's competitor, with the purpose being to 'kill' C7.<sup>4</sup> Secondly, there had been a consortium that included News Ltd, Foxtel, PBL and Telstra, who made an agreement (the 'Master Agreement'), the objective of which, Seven claimed, was to deprive C7 of the pay television rights to the AFL and NRL, two 'marquee' sports which were essential to C7's continued existence as a sports channel.<sup>5</sup> According to Seven, the effect or likely effect of the Master Agreement was to substantially lessen competition in the wholesale sports market channel, the AFL pay rights market, the NRL pay rights market, and the retail pay television market.<sup>6</sup> This, therefore, would have involved a contravention of s 45(2)(b)(ii) of the TPA.<sup>7</sup>

#### *The Case History*

The *Seven Network* case involved a total of 22 respondents which is one of the reasons why the trial required 120 sitting days. During the original trial there were a total of 15 interlocutory judgments, mainly involving whether certain documents should be subject to privilege or whether the reports of a number of experts should be accepted as evidence.

#### *The Decision*

Justice Sackville, however, held that there was a need to distinguish between the ruthless nature of competitive business, and actual anti-competitive behaviour, and that it was the former rather than the latter that had been exhibited. Thus, there had been no breach of s 45 of the TPA in this case. Despite Justice Sackville's obvious attempt to make the decision 'appeal proof', an appeal was made, fulfilling his Honour's prophecy as to 'the virtual inevitability of an appeal.'<sup>8</sup> The Full Court of the Federal Court, however, upheld Justice Sackville's decision.

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<sup>4</sup> Ibid, [83].

<sup>5</sup> Ibid, [84]-[85]. As Justice Sackville noted, it was also claimed that C7 were denied access to Telstra Multimedia's hybrid fibre coaxial cable, but in the end it had played a minor part in the proceedings.

<sup>6</sup> *Seven Network v News Ltd* [2007] FCA 1062, [90].

<sup>7</sup> Ibid, [92]. The New Zealand equivalent is s 27 of the *Commerce Act 1986* (NZ).

<sup>8</sup> Ibid, [2107].

*The Megalitigation Issues*

During, and also at the conclusion of the trial, questions were raised about the cost of the lengthy trial and the fact that the estimated \$200m costs were going to be tax deductible.<sup>9</sup> In his judgment, meanwhile, Justice Sackville went to considerable lengths to warn about the dangers of what he described as ‘mega-litigation’, namely civil litigation involving many parties in a case that runs for many months and therefore imposes a burden on the court system and thus the community.<sup>10</sup> With 120 sitting days,<sup>11</sup> 12,849 documents amounting to 115, 586 pages being admitted into evidence,<sup>12</sup> it was without doubt a ‘mega- case.’ The \$200m cost of the litigation was, in his Honour’s opinion, ‘not only extraordinary wasteful but borders on the scandalous’.<sup>13</sup>

While Justice Sackville noted that much of the cost of mega-litigation is generated by the discovery process,<sup>14</sup> it is also characterised by ‘heavy, unthinking reliance on expert reports’. Thus, his Honour was of the opinion that courts may need to restrict the volume of expert evidence.<sup>15</sup> It should also be noted that Justice Sackville rejected in whole, or in part, a number of these expert reports on the grounds that the experts being used did not have sufficient expertise in the relevant market, namely the Australian pay television market.

One of the experts Seven Network sought to use was Roy Salter, a Principal of the Los Angeles based Salter Group.<sup>16</sup> While Justice Sackville acknowledged that Salter had relevant work experience in the United States, Canada, France, Germany, Italy and Brazil, his experience in Australia was limited, and ‘there was nothing to indicate that Mr Salter has particular knowledge of or substantial experience in the Australian media industry,’<sup>17</sup> The report also made ‘no attempt to show that market, regulatory, or business conditions that obtained from in the seven countries, excluding Australia,

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<sup>9</sup> Vanda Carson, ‘Taxpayers to have a stack in huge costs of C7 case’, *The Australian*, 8 September, 2006, 25. See also Chris Davies ‘Seven Network v News Ltd: The Interlocutory Stage’ (2006) 13 *James Cook University Law Review* 260-267, 265-266.

<sup>10</sup> *Seven Network v News Ltd* [2007] FCA 1062, [1].

<sup>11</sup> *Ibid*, [6].

<sup>12</sup> *Ibid*, [15].

<sup>13</sup> *Ibid*, [18].

<sup>14</sup> *Ibid*, [19].

<sup>15</sup> *Ibid*, [23].

<sup>16</sup> *Seven Network Ltd v News Ltd* [2006] FCA 500, [1].

<sup>17</sup> *Ibid* [2].

referred to in Mr Salter's report, mirrored conditions prevailing in Australia in 2001.<sup>18</sup> It was also held by Sackville J that 'it was also impossible to ascertain whether Mr Salter's opinion is truly based on specialised knowledge.'<sup>19</sup> Salter's report was therefore rejected.<sup>20</sup>

Another expert for the Seven Network was that of Kevin Kinsella, who had been employed by British Sky Broadcasting from 1989-2000,<sup>21</sup> before holding the position of Senior Vice-President with News Corporation Europe until early 2002.<sup>22</sup> Justice Sackville noted that in section 5 of his report, Kinsella had explained what he felt drove pay television subscriptions,<sup>23</sup> but despite that section being 45 pages long, only a few references were made to the Australian television industry.<sup>24</sup> His Honour was also of the opinion that Kinsella lacked specialised knowledge about Australia's pay television industry, and the significance of sports rights to Australian pay television retailers.<sup>25</sup> All but Appendix 3 of the report was therefore rejected, with Justice Sackville J stating that he questioned whether the opinion expressed there would be relevant or helpful.<sup>26</sup>

Justice Sackville then stated that, like many of the expert reports prepared for the case, Kinsella's reports were excessive in length, the first being 143 pages, the report in reply being 89 pages, with a third supplementary report being 73 pages.<sup>27</sup> It was further noted by his Honour that the courts had 'repeatedly warned about the potential waste of resources involved in the preparation of elaborate expert reports that may turn out to be of little assistance or no assistance in resolving the issues before the court.'<sup>28</sup>

In regard to providing a possible solution to the mega-litigation problems highlighted in the case, Justice Sackville suggested that separate trials on liability and relief would

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<sup>18</sup> Ibid [23].

<sup>19</sup> Ibid [25].

<sup>20</sup> Ibid [34].

<sup>21</sup> *Seven Network Ltd v News Ltd (No15)* [2006] FCA 515, [7]

<sup>22</sup> Ibid [8].

<sup>23</sup> Ibid [11].

<sup>24</sup> Ibid [12].

<sup>25</sup> Ibid [23].

<sup>26</sup> Ibid [32].

<sup>27</sup> Ibid [2].

<sup>28</sup> Ibid [3].

have deferred the need for expert reports, and also given the experts a firmer foundation for their opinions and calculations when they did prepare them. However, as his Honour pointed out, ‘ultimately the only effective restraint might be for the parties to recognise that large scale litigation is generally a very blunt and disproportionately expensive means of resolving major commercial disputes.’<sup>29</sup>

His Honour Sackville also suggested that the boards and shareholders of the companies involved in such litigation also needed ‘to take a more critical and sustained interest in the proceedings.’<sup>30</sup> His Honour’s final comment on the matter was a cautionary tale about the longest civil trial in Australian legal history, *Duke Group Ltd (in Liq) v Pilmer*<sup>31</sup> which had taken ten and half years from the time the trial commenced to when special leave was refused by the High Court.<sup>32</sup> This was given as a warning about the dangers of the present case being taken further on appeal which, despite such warnings, it subsequently was.

One final comment that should be made is that Justice Sackville took early retirement soon after his judgment was handed down, and while he stated that this was not the primary reason, it still was a relevant factor in this decision. Therefore, one aspect of meta-litigation that needs to be kept in mind is the impact the length of the case may have on the judge.

## **Cha v Oh**

### *The Plaintiff’s Claims*

Bob Chae-Sang Cha sued fourteen defendants, the first being Jik Il Oh, for defamation in relation to newspaper articles that had been published between the period of December 2000 and 4 May, 2001. At the time Cha was President of the Year 2000 Sydney Olympic Australian-Korean Supporting Committee, though he resigned on 25 March, 2001. In these newspaper articles criticism had been made of ‘a series of asserted deficiencies in the plaintiff’s management of the Committee in general and his keeping of accounts in particular.’<sup>33</sup> As noted by Judge Gibson, Cha

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<sup>29</sup> Ibid, [28].

<sup>30</sup> Ibid.

<sup>31</sup> (1998) 27 ACSR 1.

<sup>32</sup> *Seven Network v News Ltd* [2007] FCA 1062, [72].

<sup>33</sup> *Cha v Oh* (No 22) [2009] NSWDC 300 at [1].

was 'a Korean motor mechanic with limited English,'<sup>34</sup> a factor that contributed to the problems of the case.

### *The Case History*

The trial commenced in May 2007 and involved a 68 day hearing in the NSW District Court, with the jury then taking nearly four weeks to determine the imputations. This had followed unsuccessful appeals made by the third defendant, Yoon Shin Lee, to the NSW Court of Appeal<sup>35</sup> and then High Court,<sup>36</sup> with Lee then settling. It is also worth noting that the first defendant, Oh, died after judgment had been made against him, while the seventh defendant, Hak Soo Cho, was successful in the jury trial

### *The Decision*

Judgment was in favour of Cha for the total of \$240,000 against the second and fourth defendant concerning seven publications by the second defendant and nine by the fourth and fifth defendants.<sup>37</sup>

### *The Mega-litigation Issues*

As Judge Gibson stated, it was a 'lengthy and complex defamation trial,'<sup>38</sup> noting that Cha had spent \$175,000 on legal fees in 2009 alone. He had then tried, unsuccessfully, to borrow money which created problems with finding new legal representatives,<sup>39</sup> his lack of English meaning he could 'do very little to represent himself.'<sup>40</sup> It also meant that legal representatives, such as Mr Ricky Lee, were coming 'into the matter only for the last few weeks of the hearing this year,'<sup>41</sup> and meant that leave was sought to re-list the matter, which was refused. Judge Gibson also pointed out that she had to take two weeks out of her leave to the purposes of preparing the case so that a judgment 'could be handed down no later than September of this year.'<sup>42</sup> What was also pointed out by Judge Gibson was that one of the

<sup>34</sup> *Cha v Oh* (No 21) [2009] NSWDC 130 at [11].

<sup>35</sup> *Yoon Shin Lee v Cha* [2005] NSWCA 279

<sup>36</sup> *Lee v Cha* [2006] HCA Trans 132

<sup>37</sup> *Cha v Oh* (No 23) [2009] NSWDC 336, [1].

<sup>38</sup> *Cha v Oh* (No 21) [2009] NSWDC 130, [1].

<sup>39</sup> *Ibid*, [3].

<sup>40</sup> *Cha v Oh* (No 21) [2009] NSWDC 130, [11].

<sup>41</sup> *Ibid*, [5].

<sup>42</sup> *Ibid*, [8].

problems of the case was that, being a district court judge, she did not have the same support resources that a supreme court judge would have had.

### **Conclusion**

Justice Sackville's suggestion of separate trials on liability and relief that would have deferred the need for expert reports, and also given the experts a firmer foundation for their opinions and calculations when they did prepare their reports, is one that could be adopted to provide a solution to part of the mega-litigation problem highlighted in the case. Another one might be to put a limit on the size of expert reports. It should also be noted that Justice Sackville was not the only one to raise such concerns, and one outcome of the case being the suggestion that these mega-litigation cases involving big companies should be settled by arbitration, and not in the tax-payer funded court system.<sup>43</sup> It should be noted, however, that such calls came from the Institute of Arbitrators & Mediators Australia which could be considered to have a vested interest in such a proposal.

The mega-litigation issues in *Cha v Oh* case are more complicated, though again the large number of defendants was one reason for its length. The plaintiff's lack of money, unlike the Seven Network also contributed, while there may also have been a cultural aspect to the case in that, being of Korean extraction, personal reputation was of the highest importance to Mr Cha. It is also suggested that another factor in both cases is the fact that s 45 of the TPA and defamation are two of the more complex areas of law which is why lengthy trials are more likely in cases involving these areas.

The final question for consideration is whether there is a practical way of actually preventing such lengthy cases without reducing the opportunity of people being able to obtain justice. Mediation in the *Cha* case and arbitration in the *Seven Network* case are two obvious possibilities, but like all forms of alternative justice it does not provide the full legal opportunities that the court system provides.

As an overall summary, the author would suggest that the length of the *Cha* case was due to the combination of a number of unavoidable factors and, for justice to be

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<sup>43</sup> Chris Merritt, 'Black comedy of Seven saga cues call for private battles to quit public courts', *The Australian*, 3 August, 2007, 29.

served, probably needed to be heard. The Seven Network's weak case on the other hand does raise a question as to whether such a case costing over \$200m was justified, and Justice Sackville perhaps should have had the power to demand that it be heard by an arbitration panel after a preliminary, committal type hearing established that its likely length and subsequent huge cost did not justify if being heard by the court.