THE SOLICITOR'S LETTER

P. J. Booth[1]

1. The solicitor's letter is one of the most powerful tools in the legal armoury and used daily. The letter must be carefully crafted, well written and be able to survive curial scrutiny. It is for that reason that it is worth spending some time on the elements that are often overlooked or are misunderstood.

THE ADDRESS AND TITLES

2. All letters must be correctly addressed in order to elicit a response from the correct person or organisation. In the case of a corporation, the letter, for the purposes of effecting service of a legal document, can be addressed to the registered office of the company[2] or to the head officer of the company.[3]

3. Insofar as the letter is not by way of service of originating process or other document upon a corporation, it should be addressed to the company secretary or to a named person.

4. In all cases where the letter is sent to a corporation, Government department or other organisation, it should be addressed to the office to which it is intended to be sent. For example, it should be addressed to *"The Marketing Manager"*, *"Company Secretary"* or *"Chief Financial Officer"*. If the name of that person is known then it should, in addition, be marked *"Attention Mr W. Smith"*. The reason being that the letter is to be sent to the officeholder, rather than to the individual whose identity may change.

5. The opening salutation, *"Dear"* varies in different circumstances. If the letter is addressed to an individual the first occasion should be the more formal address of *"Dear Sir"* or *"Dear Madam"*, as the case may be. Subsequent correspondence can sometimes be in the form of the recipient's name (*Dear Mr Smith*) but never on a first name basis. The latter introduces a degree of informality which is inconsistent with the remainder of the letter and unnecessary.

6. When the letter is addressed to another firm of solicitors which trades as a partnership, the correct form of salutation is that of *"Dear Sirs"*, the reason being that the partnership name (e.g. *"Smiths"*) is a trading or business name for those individuals

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[2] *Corporations Act* s. 109X(1)(a).
[3] *Supreme Court Rules* 6.04(a).

who trade under or by reference to it. As in the case of a corporation or organisation, however, the particular person to whom the letter is intended should be identified as *"Attention Mr W. Smith"*. This will ensure, together with the firm's file reference information, that the letter is received by the intended person within the firm.

THE HEADING

7. Legal letters should always include a heading. If it is in relation to existing proceedings then the title of the proceeding and its Court file number will form the operating heading (e.g. *Smith v Jones – Supreme Court proceeding no. 1234/16*). If your client in the plaintiff then the matter will be referred to as Smith v Jones. If your client is the defendant, the matter will be referred to as *"Jones ats Smith"*. The acronym *"ats"* means *"at the suit of"*.

8. A common practice is to preface a heading with the letters *"Re:"* (for example, *"Re: The Amended Statement of Claim"*). In my view this is undesirable for a number of reasons. First, most do not know what the letters mean. Is it an acronym, an abbreviation or something else? It is often said, by those using it, that it is an abbreviation of the word *"regarding"*. That is half correct, but not completely. The Oxford Dictionary[4] describes many meanings for the letters *"Re"* including the following:

> *"[Ablative of L. rēs thing, affair.] In the matter of, referring to. Now freq. apprehended as a preposition and used in weakened senses to mean 'about concerning'."*

9. It can be seen that *"Re"* is, in fact, an abbreviation of the Latin word *"Res"* which has a particular meaning in Latin. Once the meaning of the word is properly understood, the reasons for not using it are equally clear. First, do not use a word when you do not know its meaning. Secondly, do not use abbreviations, for example *"etc."*, another itself an abbreviation of a Latin expression (*"etcetera"*). Thirdly, do not use any other language but English when writing a letter, certainly not a long dead language of another country. Lastly, it is unnecessary. Simply use a correct title and that is sufficient to identify the subject matter or purpose of the letter. Do not use headings, words or sentences which are not necessary. They only add to the complexity and length of the letter. Efficient use of simple language is much more effective than prolixity, repetition and verbosity.

[4] Second Edition.

STRUCTURE

10. The letter must have an overall structure. It must have a beginning, a middle and an end. If it does not then the point of the letter will be lost and its utility will be minimal.

The beginning

11. The beginning should be as simple as referring to the particular letter, document or issue to which you respond (*"We refer to the Amended Statement of Claim dated …"*). It can then go on to state the purpose of the letter. This should be clear and unambiguous. *"The purpose of this letter is to record our observations in relation to the Amended Statement of Claim…"* Think carefully about the purpose of the letter. Is it to advise, complain or set up an application? Whatever the purpose, if you do not have it clearly in mind, you will not achieve it.

The middle

12. The 'middle' and usually longest part of the letter is where the argument is set out in clear, concise, logical narrative. It is here that references are made to relevant fact and law. Conclusions based upon the facts and law are also set out in this section.

The end

13. The 'end' section of the letter may have a convenient sub-heading like *"Conclusion"*. In this section the author can briefly summarise the lengthy middle section. Thereafter the point, or 'punchline' of the letter is made. For example, *"It is for these reasons that our client requires the following undertaking to be provided on or before…"*

OTHER TIPS

Headings

14. In a letter of more than, say one page or which deals with more than one topic, it is very useful to include sub-headings. They identify what the text is dealing with, and ensure that the writer focuses on the issue described in the heading.

Paragraph numbers

15. In a letter of substantial length it is also quite helpful to include numbered paragraphs. This makes for ease of reference (for example when directing the judge's attention to a

particular part) and when responding to the letter (*"We respond to paragraphs 41-45 as follows…"*).

Definitions

16. It is efficient and convenient to use defined terms in a letter. Rather than refer to the *"Second Further Amended Defence and Counterclaim"*, you may define it as *"SFADC"*. This makes the letter shorter and easier to read.

Capitalisation

17. It is very common to use capitals, particularly in headings where they are not required. Of course names, titles and places (*C.S.I.R.O, Mr Smith* and *Canberra*) require the use of capitals. However, other words rarely require capitalisation. Nonetheless it is common to observe headings like *"The Defendant's Affidavit of Documents"*. For some reason which always escapes me, the word *"of"* is usually not capitalised. Insofar as I have been able to identify the source of this practice, it seems to have some antiquity. The *Cambridge Encyclopaedia of the English Language*[5] attributes the origin of the process to John Hart, a grammarian who died in 1574. It is said that he recommended his readers to use a capital letter at the beginning of every sentence, proper name, and important common noun. By the 17th century, the practice had extended to titles (Sir, Lady), forms of address (Father, Mistris), and personified nouns (Nature). Emphasized words and phrases would attract a capital. By the beginning of the 18th century, the influence of Continental books had caused this practice to be extended still further (e.g. to the names of the branches of knowledge), and it was not long before some writers began using a capital for any noun that they felt to be important. Books appeared in which all or most nouns were given an initial capital (as is done systematically in modern German) – perhaps for aesthetic reasons, or perhaps because printers were uncertain about which nouns to capitalise and so capitalised them all.

18. Apparently the fashion was at its height in the later 17th century, and continued into the 18th. The manuscripts of Butler, Traherne, Swift, and Pope are full of initial capitals. However, the later 18th-century grammarians were not amused by this apparent lack of discipline in the written language. However, by this time, the proliferation of capitals was considered unnecessary, and causing the loss of a useful potential distinction.

[5] At 67.

Thereafter rules of grammar brought a dramatic reduction in the types of noun permitted to take a capital letter.

19. So, as near as I can tell, it was a practice which originated in the 17th century and then fell out of favour. The efforts of our profession to re-establish it should be avoided.

Sub-paragraphs and sub-sub paragraphs

20. It is often necessary to break up a long topic with a series of sub-paragraphs. This obviates the need for an extremely long sentence and gives some clarity, especially when making a series of related points. The issue is how to identify the sub-paragraphs. It is increasingly common to see *'bullet'* points or *'diamonds'* or other creatures of the word processing programs. I have not seen *'smiley faces'* or other pictorial devices but I am sure they are waiting for an opportunity to be used. Do not give them one.

21. It is useful to have a system which identifies each sub-paragraph in the same way as each paragraph is identified, namely ease of reference. In my view, the best way is that used by Parliamentary draftsmen. In legislation, the section is identified by a number (e.g. *s. 101*), the first sub-section by a letter (e.g. *s. 101(a)*), the next sub-section by a small Roman numeral (e.g. *s. 101(a)(i)*) and the next sub-section by a capital letter (e.g. *s. 101(a)(i)(A)*). You are in serious trouble if you need to go further than that.

Sentences

22. Sentences in legal letters can be very long. The longer the sentence, the more likely the point will be confused. It usually requires only simple punctuation to cure one very long sentence. This will result in say, two or three shorter sentences. There are many examples to be found, however this is an extract of a solicitor's letter:

> *"In light of the necessity to establish the principle that shop 19 is able to compete fairly and equally with Duffy Bros, we request that the second component of our compromise offer be reconsidered to allow for a new lease to be drawn which embraces items (i) to (vi) inclusive as well as an abatement of 1/3 rent agreed upon for the period referred to in the opening paragraph of this communication.*
>
> *Since we believe that considerable progress has been made to effect settlement by way of negotiation, an incomplete reference is now made to a single ground under active consideration in respect to one point raised in your memorandum dated 21st April 1992 which concerns the defence of the landlord to an action*

> *by the tenant for damages for diminished loss of the value of the assets and profits of the business styled Southpoint Fruit Market."*[6]

It can be seen that the last two sentences run for two paragraphs. Further, the second sentence is almost unintelligible.

23. Short, simple sentences are best. Use simple, plain English words. Each sentence should be no more than 8-10 words long. Each sentence should only make one point. Consider Winston Churchill's *"Blood, sweat and tears"* speech given on 4 June 1940:

> *"We shall go on to the end.*
> *We shall fight in France.*
> *We shall fight on the seas and oceans.*
> *We shall fight with growing confidence and growing strength in the air.*
> *We shall defend our Island, whatever the cost may be.*
> *We shall fight on the beaches.*
> *We shall fight on the landing grounds.*
> *We shall fight in the fields and in the streets.*
> *We shall fight in the hills.*
> *We shall never surrender."*

24. Each line is short. Plain, simple words are used. The meaning is clear.

LANGUAGE

25. I did not learn Latin at school but I did learn a large number of Latin phrases, so-called maxims when at university. They seemed to be popular with examiners, if not lecturers. I can still rehearse a great number of these today. However, I think that the time of Latin in legal writing is over, just as the language itself is over.

26. In an interesting article, Michael Kirby explains how other languages, including Latin, came into our English language:

> *"I am here to urge fellow lawyers to ditch their Latinisms and to embrace their inner Germanic being, with the essential simplicities of pre Norman English. Everything went wrong, you see, in 1066. That was when the usurper, William Duke of Normandy, defeated good King Harold at the Battle of Hastings. As if it was not enough for William to bring over with him all those garlic eating Frenchman, he imposed on his royal court the French language of the time. It became the language of the clerks in the bureaucracy (a nice French word if ever there was one).It it also became the language of his judges. Under his*

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6 *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723 at 728 – an extract of a solicitor's letter.

> *successor Henry II, they fanned out over all of England, bringing with them the common law and legal language. ...*
>
> *Naturally, the English parliaments, made up of the Commons of the kingdom, repeatedly protested against the use of this foreign language in the courts and in legal documents. They objected to the use of Norman French, which was a kind of doggerel language, neither wholly English nor French. But above all they objected to the intrusions of Latin, the language of their earlier and unlamented conquerors, the Romans. However, the universal Church used Latin for its services and dealings. So in the proceedings over which church officials presided, Latin was literally the lingua franca. This state of affairs continued, to a greater and lesser degree, until 1731 when An Act of Parliament banned the use of French and Latin and insisted on the use of English in courts of law and legal documents. The problem was, by then, that so many of the foreign words had grafted themselves onto the English tongue, that it was impossible to eradicate the foreign imports."*

27. The point is this, Latin is a language no longer spoken, it has no relevance to you or your client. It should not be used unless absolutely necessary and even then with an English translation as the main proposition. Even worse, most people who use Latin words or phrases do not learn the true meaning, if at all.

The word "AND"

28. Think before using *"and"* in a sentence. It generally means that you are adding another point rather than commencing a new sentence. Any time you use *"and"* in a sentence twice will usually be fatal. **[Example …]**

Economy of language

29. Do not use words that do not add anything to the letter. *"We advise that"* or *"We note that"* are acceptable but only in moderation. Often the phrases are used when the author does not know how to start the sentence and fears that without an introduction it will be too abrupt. Sometimes that is correct but legal letters are allowed to be abrupt. If you try hard then you may be able to avoid them altogether.

Courteous and polite

30. The language of the letter should be both courteous and polite. It should not be abusive, colloquial or flamboyant. There are a number of reasons for this.

31. First, it is a professional letter written on behalf of a client. It derogates from the force of the letter if intemperate language is used. Secondly, the letter may well be referred to and relied upon in Court. Thirdly, it is a professional requirement. Rule 4.1 of the *Legal Profession Uniform Law Australian Solicitors Conduct Rules* 2015 imposes a fundamental ethical duty to *"...be honest and courteous in all dealings in the course of legal practice."*[7]

Wooliness

32. An inability to come to the point quickly is sometimes referred to as 'woolliness'. The Oxford English Dictionary describes *"Woolly"* as:

> *"Woolly: Lacking in definiteness or incisiveness' 'muzzy'; (of mind [style]), etc.) confused and hazy."*

33. Legal letters which use language which is *"confused or lazy"* are something to be avoided. Woolliness is that fault of style which consists in writing around a subject instead of on it; of making approximations serve as exactitudes; of resting content with intention as opposed to performance; of forgetting that whereas a haziness may mean something to the perpetrator, it usually means nothing (or an ambiguity) to the reader or listener. The ideal at which a writer should aim – admittedly it is impossible of attainment – is that he write so clearly, so precisely, so unambiguously, that his words can bear only one meaning to all averagely intelligent readers that possess an average knowledge of the language used.[8]

Archaisms

34. Archaisms are words which are old and should not be used in modern parlance. The Oxford English Dictionary defines 'archaism' as:

> *"1. The retention or imitation of what is old or obsolete; the employment in language, art, etc., of the characteristics of an earlier period; archaic style. 2. An archaic word or expression. Also, an archaic feature in script."*

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[7] See also Rule 5.1.2.
[8] *Usage and Abusage,* E. Partridge (1994).

35. Partridge[9] refers to *"hereof"*, *"heretofore"*, *"hereunto"*, *"thereafter"*, *"thereof"*, *"therefore"*, *"whereas"*, *"wherefore"* and *"whereof"* as examples of archaism. We all use them but they are actually very outdated words and should be avoided. The meaning can usually be achieved using much more simple language. Consider – *"of this"* (*cf* hereof) and *"but"* (*cf* whereas).

Alternate and alternative

36. Many words are used incorrectly. A good example is the prevalent use of *"alternate"* when *"alternative"* is actually the word (and meaning) which is intended. Each of the words *"alternate"* and *"alternative"* have different meanings. The first means *"every other"*. For example, alternate days are Monday, Wednesday and Friday. However, alternative means *"available instead of another"*. For example, *"We took an alternative route"*. The words are not interchangeable.

37. Similarly, alternately and alternatively have different meanings but are often misused. Alternatively means *"offering a choice"*, or *"offering the one or other of two things of which either may be taken"*. For example, one could fly or alternatively travel by road. Alternately means *"by turns"* or *"in an alternating manner"* and is not a substitute for alternatively.

Simplification or plain English

38. There is no doubt that lawyers like to use big, important words. Presumably, if one uses such words, it is more likely that one will be seen as big and important. However, there is often a simpler word which is more direct. Consider some examples:

    (a) *'help'* instead of *'assist'*;

    (b) *'try'* instead of *'endeavour'*;

    (c) *'buy'* instead of *'purchase'*;

    (d) *'about'* instead of *'approximate'*;

    (e) *'enough'* instead of *'sufficient'*;

    (f) *'dressed'* instead of *'attired'*;

[9] *Usage and Abusage* at 33.

(g) *'ask'* instead of *'inquire'*;

(h) *'shut'* instead of *'closed'*;

(i) *'if'* not '*in the event of*';

(j) *'allow'* not *'afford an opportunity';*

(k) *'because'* not *'by virtue of the fact that';* and

(l) *'happen'* not *'eventuate'*.

39. It will not always work but consider whether a more direct, simple word is just as good, or better, than a big, important word.

40. Above all, avoid *'hereinafter', 'heretobefore' 'ultimo', 'inst'* and *'aforesaid'*. They have no place in a modern legal letter.

Prolixity

41. Sentences which are too long are often prolix, that is to say they use too many words. In 1935, A.P Herbert gave a good example, in a section of his book about plain English in what he described as *"Commercialese"*:[10]

> *"'Madam,*
> *We are in receipt of your favour of the 9th inst. With regard to the estimate required for the removal of your furniture and effects from the above address to Burbleton, and will arrange for a Representative to call to make an inspection on Tuesday next, the 14th inst., before 12 noon, which we trust will be convenient, after which our quotation will at once issue'."*

42. Sir Alan reduced it by eliminating unnecessary words:

> *"'Madam,*
> *We have your letter of May 9th requesting an estimate for removal of your furniture and effect to Burbleton, and a man will call to see them next Tuesday forenoon if convenient, after which we will send the estimate without delay'."*

43. The revised letter contains 42 words instead of 66:

> *"'Madam,*

[10] A. P. Herbert, *"What a word!"*.

> *Thank you for your letter of May 9th. A man will call next Tuesday forenoon, to see your furniture and effects, after which, without delay, we will send our estimate for their removal to Burbleton'."*

44. The end result is 35 words rather than the original 66; or 157 letters instead of 294 letters.

Final salutation

45. The letter will end with a final salutation. If a formal letter (starting with *"Dear Sir"*), it should end with *"Yours faithfully"*. If a more personal letter (starting with *"Dear William"*), it may conclude with *"Yours sincerely"*. For obvious reasons, legal letters will conclude with *"Yours faithfully"* and not *"Best wishes"* or *"Kind regards"*, which are reserved for personal communications.

Do not be rude

46. One must always be courteous and respectful, regardless of the circumstances or provocation. If for no other reason assume that your letter will become an exhibit in Court for all to see. Lord Denning observed[11]:

> *"It has been held unbefitting conduct for a solicitor to write offensive letters to clients of other solicitors, to government departments and to the public. The use of insulting language and indulging in acrimonious correspondence are neither in the interests of the client nor conducive to the maintenance of the good name of the profession."*

47. Ethical or conduct rules often require lawyers to behave courteously and not to bring the profession into disrepute.

48. The Legal Profession Uniform Law Australian Solicitors Conduct Rules 2015 provide as follows:

> *"4.1 A solicitor must also:*
> *4.1.1 act in the best interests of a client in any matter in which the solicitor represents the client,*
> *4.1.2 be honest and courteous in all dealings in the course of legal practice,*
> *4.1.3 deliver legal services competently, diligently and as promptly as reasonably possible,*
> *4.1.4 avoid any compromise to their integrity and professional*

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[11] *Weston v Central Criminal Courts Administrator* [1977] QB 32 at 43, quoting from *'Guide to Professional Conduct of Solicitors* (1974).

independence, and

4.1.5 comply with these Rules and the law.

5.1 A solicitor must not engage in conduct, in the course of practice or otherwise, which demonstrates that the solicitor is not a fit and proper person to practise law, or which is likely to a material degree to:

5.1.1 be prejudicial to, or diminish the public confidence in, the administration of justice, or

5.1.2 bring the profession into disrepute."

49. Rude letters can get one into trouble. Allow me to share some examples with you.

50. In *Council of the Law Society of NSW v Griffin*[12], a solicitor wrote to the judge hearing a case complaining about a decision in the following terms:

> *"I put you on notice that I am a junior solicitor who was subject to supervision at the People's Solicitors.*
>
> *Mr Kingsley Liu, principle at the People's Solicitors, was aware of my junior status as I sent him a text mag in late 2013 seeking work he may have available. I have not deceived or mislead Kingsley Liu about my status. I consider that the law society is discriminating against me because I am not a full member of that organisation and because it is seeking a vulnerable scape goat and test case for a hitherto unheard of complaint of 'gross discourtesy'. Attached hereto and marked* ***'Exhibit MG 1'*** *is a copy of the text message I sent to Kingsley Liu of the People's Solicitors in December in 2013.*
>
> *Further, I do not believe that I have been provided with adequate particulars in this complaint. I have not been able to locate any law relating to a complaint of 'gross discourtesy' and I do not believe that any such ground of complaint exists. I do not consider that the Law Society has power to invent grounds of complaint as it suits them. On that basis, I deny that the correspondence and its contents are 'grossly discourteous' to anyone and I submit that the failure to provide me with proper particulars, for instance, in relation the party to whom the alleged discourtesy has been expressed, is a denial of the procedural fairness I am entitled to in this process.*
>
> *Further again, I put the complainant on notice that I my employment with the People's Solicitors has been terminated due to this complaint and I am now without resources to obtain assistance in address this complaint.*
>
> *Notwithstanding that I am unsure of the substance of the complaint and that I consider the particulars given to be*

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12 [2016] NSWCATOD 40.

vague making me unsure of what principle or provision I am alleged to have breached, I make the following response to the complaint.

I also need to inform you that an appeal has been brought before the Federal Court from the decision of Foster J which is the subject of my communication. A ground of that appeal is the apprehended and actual bias of his Honour Foster J in hearing the matter. The matter before his Honour which provided the context of the statements complained of was an administrative law judicial review matter in which the decisions of a Commonwealth Officer - the Deputy Commissioner of Taxation - were being judicially reviewed. The ground of bias arises from comments made by his Honour Foster J at a directions hearing and which are evident on the transcript of those proceedings the relevant page for which I attach to these submissions and mark ***'Exhibit MG 2'*** *and which is now before the appellant court.*

I also put you on notice that I intend to lodge my own complaint about Foster J's treatment of me in this directions hearing in the appropriate forums. I consider Foster J's treatment of me was bullying in the workplace, which is systemic in Australian courts in relation to junior lawyers in particular and lawyers more generally, and the statements made by him in his Reasons For Judgement support my claim that his intentions were to humiliate and denigrate me at my place of work which I consider to be unacceptable of any person even a judge. I found Foster J's statements, gestures and tone at that directions hearing intimidating and abusive and I will be lodging this complaint with the Chief Justice of the Federal Court, as I believe that is the avenue of complaint against judicial offices in the Federal Court, with the Bar Association NSW, with Fair Work Australia and with the Human Rights Commission. If my complaints are not dealt with properly and fairly I intend to agitate my complaint in international forums.

On the basis of the above, I consider that it may be inappropriate to deal with this complaint at this stage given that an appeal raising issues dealt with in my correspondence is currently on foot and before the Federal Court. I leave this to you but will raise it if necessary in future. It is for this reason that I have also delayed making a complaint to the CJ of the Federal Court at this stage - that is, in order not to influence the decision of the Appellant court.

The Complaint

First, I admit that I sent the correspondence the subject of this complaint to his Honour Foster J's Associate. I did not

sent it to his Honour but it was provided to his Honour by his Associate

Second, I submit that the transcript exhibited as 'Exhibit MG 2' above evinces the reasonableness of my statement regarding the bias of his Honour Foster J. On that basis, a reasonably held belief that has a grounding in objective fact and truth can only be discourteous to someone who seeks to cacoon themselves from the truth or to a person who has an unusually fragile constitution or to one who seeks to protect their own prestige, person and reputation. I refer to the passages of his Honour Cummins J in Anissa Pty Ltd v Parsons (on application of the Prothonotary of the Supreme Court of Victoria) [1999] VSC 430 (8 November 1999) at para 18 & 19 when, in dismissing a contempt charge brought against a solicitor for calling a Judge a 'wanker', his Honour Cummins J quoted Rich J in R v Dunbabin & anor; ex parte Williams [1935] HCA 34; (1935)53 CLR434where his Honour Rich J at 442 stated:

The jurisdiction is not given for the purpose of protecting the Judges personally from imputations to which they may be exposed as individuals.

His Honour Cummins J in that case went on to state at par 19 that:

From the authorities three basal principles emerge. First, proceeding for contempt of court is not and must not be in diminution of free speech. Second, proceeding for contempt of court is to preserve the administration of justice. Third, proceeding for contempt of court is not to protect the individual person of the judge.

Hence, I deny the claims of bias and the other statements particularised by you are 'grossly discourteous' or even discourteous to His Honour Foster J as they have an obvious founding in fact to support them. I contend that this complaint arises from Foster J's concern for his own person rather than from concern for the solemn office which he holds. In essence, the person Lionel (sic) Foster who is a judge in the Federal Court may find it personally offensive, but the Judicial Officer has no basis for doing so because the statements arise from a concern for the administration of justice as dispensed in this instance by the individual holding the office and are not offensive to the office or court itself but relate to what I consider were inappropriate applications of principles of justice and the role of the Court. In this respect, my communication was made in discharge of my paramount duty as a lawyer - that is, to the administration of justice - and with the objective of rectifying that problem in a manner that was convenient, inexpensive and sensitive to all parties involved. The statements particularised and communication itselfare

rooted in a deep concern for the administration of justice and respect for the Federal Court and disappointment with the administration of justice by a particular individual on this occasion.

As stated in John Holland Rail Pty Ltdv Comcare [2011] FCAFC 34 at par 22, the rule is that a judge should not receive any communication from anyone concerning a case that the judge is to decide, made with a view to influencing the conduct or outcome of the case: Re JRL; Ex parte CJL [1986] HCA 39; (1986) 161 CLR 342 ("ReJRL") at 346 (Gibbs CJ) and 350 (Mason J), both citing Kanda v Government of Malaya [1962] UKPC 2; [1962] AC 322 at 337 and Reg. v Magistrates' Court at Lilydale; Ex parte Ciccone [1973] VR 122 at 127.

In reliance upon the ratio in John Holland above, Foster J was obligated to refuse to accept the communication from his Associate if he thought it was inappropriate. This he did not do. I contend that this complaint arises now because Foster J is attempting to shift responsibility for his own failure to undertake his obligations onto a junior lawyer, myself, in an effort to evade responsibility for his conduct particularly that which occurred at the directions hearing.

Third, it is regrettable that this complaint has been made and I have apologised to his Honour Foster's Associate Ms Hannah Clue Saunders for involving her in this matter. In respect to involving the Associate I concede that the correspondence was potentially discourteous to her as it may have put her in a compromising position but in this regard I again rely on John Holland Rail Pty Ltd v Comcare [2011] FCAFC 34in which the court held that it is the function of chambers staff and Judges Associates to screen communications to judges. If Ms Saunders found the correspondence offensive it was her obligation to refuse to provide it to his Honour Foster J in accordance with her duties. In John Holland, the Full Federal Court stated that:

22 As already stated, the authorities do not support the proposition that there is any necessary impropriety if a party or practitioner communicates unilaterally with a judge's chambers. Whether or not such a communication is improper depends on all the circumstances, including, principally, its nature, subject matter, and perhaps, its sequence and extent. There is no impropriety in a party's unilateral communication with chambers in relation to procedural, administrative or practical matters, although a sustained sequence of communications not circulated to the other parties, even in relation to matters of this kind, could, at a certain point, become unprofessional or improper in the absence of some good reason: see, for example, Carbotech-Australia Pty Ltdv Yates [2008] NSWSC 540.

23. On the other hand, save in the unusual circumstances warranting an exparte application, it is clearly improper for parties or their practitioners to attempt to communicate unilaterally with a judge's chambers in relation to the substantive issues in the litigation. Every communication of this kind must be circulated to, or made in the presence of, the other parties (unless the other parties have previously consented to its unilateral communication to the judge: see Fisher at 352). Breach of that principle is not only an impropriety on the part of the party making the communication but may, in certain circumstances, found, or be a factor contributing to, a reasonable apprehension of bias, alternatively, lack of procedural fairness, on the part of the judge. It does not follow from this, however, that the mere making of a unilateral communication raises a presumption of impropriety (as John Holland's argument assumed), thereby casting on the parties involved (including the practitioner, chambers staff who received or engaged in the communication and, in some cases, the judge) an onus to prove the contrary by means of affidavit or a similar level of proof. In the present case, moreover, the mere fact that Comcare's solicitor declined to make an affidavit setting out his conversation with the judge's associate could not make out a case for apprehended bias that did not otherwise arise.

……..

26. Under the docket system prevailing in the Federal Court, effective communication between the parties, their legal representatives and the court is fundamental for efficient case management by the docket judge. ***Chambers staff are, in the ordinary course, well aware of the need to assess communications forwarded to chambers and to manage the transmission or, where necessary, interception of, material and information directed to the judge, to avoid the actual or apprehended compromising of the judge's impartiality.***

27. In this context, the receipt of an improper unilateral communication by an associate or other member of chambers staff is, from time to time, unavoidable; and does not, in itself, involve any impropriety or breach of duty on the part of chambers staff, ***although their continued engagement or participation in, or transmission to the judge of, such communications may, of course, involve impropriety or misjudgement.*** *[Emphasis added].*

Given the above, I consider that the Law Society should bring a complaint against Ms Saunders for transmitting the communication to the judge as it is an instance of bad judgement and impropriety. Failing to do so will render the complaint against me discriminatory on gender grounds and offensive to a fundamental principle of law that parties

be treated equally before the law and will substantiate my claim above that the objective of this complaint is to target a vulnerable junior lawyer in order to establish a precedent regarding a ground of complaint that has no objective basis in law, i.e. 'gross discourtesy'.

In John Holland at [22] the Full Court of the Federal Court held that there was nothing per se improper about unilateral communications with the court by a practitioner but also spoke approvingly of the reasoning of Brereton J in Carbotech-Australia Pty Ltd v Yates [2008] NSWSC 540 and considered that "a sustained sequence of communications not circulated to the other parties, even in relation to matters of this kind, could, at a certain point, become unprofessional or improper in the absence of some good reason".

The Respondent submits that there was not a 'sustained sequence of communications' in this instance that could become unprofessional or that could properly influence the considerations of a judicial officer in a matter that had not yet been heard or that was in process of being heard. In fact, the matter had already been heard and determined and the communication was merely an effort to ascertain the judicial officer's readiness to hear an application to vary non- substantial aspects in his judgement without resort to an inconvenient and costly formal application. In that way, the communication related to a procedural matter. Should his Honour have expressed a willingness to do this, the Respondent, as a matter of course, and as he, in any event, was, would have given notice to the Defendant of his Honours willingness to undertake such a hearing. Given that the communication is in regard to a procedural matter relating to his Honour's willingness to hear an application to vary non-substantive parts of his judgement in chambers, no impropriety can arise as no effort v/as made to influence the determination of the substantive issues.

In John Holland, the court largely adopted the position \nR v Fisher (2009) 22 VR 343. In Fisher the court held that the docket system allows unilateral communication with the associate to the docket judge.In Fisher their Honours Redlich and Dodd Streeton JJA in the Victorian Court of Appeal said at [20], in reference to communications with judges in chambers, that:

It is an undoubted principle that a judge's decision should be made on the basis of the evidence and arguments in the case, and not on the basis of information or knowledge which is acquired out of court. In Re Media, Entertainment and Arts Alliance; Ex parte Hoyts Corporation Pty Ltd, Mason CJ and Brennan, Deane, Dawson and Gaudron JJ described it as an aspect of "the rule against bias". Their

Honours said that this aspect of the rule is similar to the rule of procedural fairness, but not identical because the question is whether in the circumstances, the parties or the public "might entertain a reasonable apprehension that information or knowledge which has been independently acquired will influence the decision.

At [38 & [30] their Honours further stated that:

The circumstances in which direct communications may be made to the judge's associate are subject to important qualifications. Written communications between a party to litigation and the judge's associate should normally be confined to matters concerning practice or procedure. Communications including emails containing allegations, matters of substance or requests for substantive advice should not be forwarded to a judicial officer without the party's express agreement (save in an exceptional case warranted for example by an ex parte application).

Unless the subject of express prior consent of the other parties, written communications should not include information or allegations which are material to the substantive issues in the litigation. In all circumstances, the other parties to the litigation should be copied in on any such correspondence. If a communication which apparently fails to comply with those requirements is received in chambers, it would be for judicial staff promptly to inquire whether the other party has been notified before engaging in any further exchanges with the sender.

Attention is drawn to the seminar paper of the Hon Justice John Griffith entitled Ethics Forum LS NSW 13 August 2012 in which his Honour considers unilateral communication with chambers in the Federal Court under the docket system and reiterates the position in John Holland that only if communications with judge's chambers deal with substantive issues that are ***TO BE DECIDED*** *or that are as yet undecided are those communications improper. Clearly, in this instance the decision had already been made in this matter so the communication came after that decision so there was no way it could impact on the decision to be made by his Honour as that decision had already been made. As his Honour's response at the final paragraph of his communication indicates, 'the proceeding has been finalised'.*

Attention is also drawn to the Federal Court website at this link:

http://www.federalcircuitcourt.gov.au/practice/html/chambers.html

Here the court relates that it is not improper to communicate with Judges Chambers on procedural and non-substantive issues. It is to this website that I referred when drafting the communication. As I did not consider the communication sought to influence a determination that was to be made or a substantive issue that had been or was to be determined, I considered at the material time of drafting and sending the emailed communication that the communication was not improper. The communication did not seek to adduce further evidence against the other party.

Hence, in sum this communication was made to ascertain his Honours preparedness to hear an application for variation of non-substantive issues and obiter dicta in chambers in order to save costs and inconvenience to both the court and the parties that a formal application to vary or an appeal would necessitate. This is the purposes of the docket system adopted in the Federal Court. As also indicated by my communication it was also done for the purpose of saving any embarrassment to his Honour. The points made and particularised in the communication are also reiterated to provide the judge with some information as to why he should consider agreeing to hearing the application to vary in chambers and the likely grounds that could be used to justify doing so. These statements were not intended as a discourtesy to a Judge of the Court or to the court itself but to provide reasons that could be relied upon to justify why an informal application to vary should be allowed.

The communication did not seek to influence the decisions on the substantive issues but only to ascertain whether the judge would consider varying the judgement in chambers rather than by formal application and only in relation to matters that were not substantive issues such as in relation to the language used in the judgement and the cost orders. Cost orders are not substantive issues as they follow the event or the determination of the substantive issues and can only be made after the substantive issues are decided.

Fourth, given that the communication was intended to ascertain his Honours preparedness to hear an application in chambers pursuant to s 17 Federal Court Act 1976 rather than by costly formal application, I submit that the communication, and my intention at the time of making it, was to give effect to the paramount and overarching duty at ss 37M & 37N Federal Court Act 1976. That is to the cheap efficient resolution of disputes. The communication was in furtherance and discharge of this obligation in accordance with s 37N not to gain some advantage or pervert the course of justice.

Fifth, with respect to any discourtesy to the opposing party - referred to as the 'Defendant' in the complainant's

correspondence although that party was the respondent in the material proceedings. The Defendant was put on notice of my client's concerns with the judgement and of his interest in appealing it or in having it varied by way of letter to them on 14 August 2014. The Defendant did not respond to this correspondence until some weeks later necessitating the formal appeal. Notwithstanding that the Defendant's attention had not been brought to the communication with Chambers during that correspondence to them the Defendant nevertheless was given notice of the issues raised in the impugned communication shortly after the communication was made and are now very much more aware of those issues as they are raised in the appeal documents with which they have been served and to which they have submitted responses: the Defendant has not been subjected to any unfairness or disadvantage and no bias against him has resulted.

Sixth, all of the statements particularised in your response to my request for further particulars relate to a political opinion by me that, in this instance, his Honour had breached the separation of powers doctrine as it operates within the Constitution (Cth). It was this concern that motivated the whole communication. On that basis, the implied guaranteed freedom of political communication in the Constitution(Cth) as determined by the High Court in Lange v Australian Broadcasting Corporation [1997] HCA 25; (1997) 189 CLR 520 applies and the Solicitor's Rules have no operation except to the extent that they are consistent with that principle and with valid common law on the subject matter. Put concisely, the Rules are invalid to the extent of their inconsistency with the constitutional principle. On that basis, the Respondent submits that the scope of the applicable Solicitor's Rules is confined to that of the common law as recited above and the operation of the Rules is restricted to the scope of common law principles so far as that common law is consistent with the constitutional principle: in this instance, the Rule relied upon by the complainant is inconsistent with the constitutional principle in its practical effect and is invalid.

It is evident from my correspondence at the bottom paragraph on the second last page that the correspondence arises from a concern that a fundamental democratic principle relating to the independent functioning of courts in democracies and under the Constitution (Cth), that is, the separation of powers doctrine and principle as embodied in the Constitution (Cth), had been breached in this instance. In that respect I consider this complaint is an attempt to suppress my freedom of speech and enjoyment of a right conferred by the Constitution (Cth) and I rely upon the implied guaranteed freedom of political communication under the Constitution (Cth) in regard to

those statements. I submit that, in reliance upon s 109 the Constitution (Cth), the operation of the Solicitors' Rules relied upon in the complaintare invalid to the extent of the inconsistency with that implied guaranteed freedom of political communication and with the common law as explicated above as my statements are all expressions of political opinion and the letter itself a communication within the meaning of that term in Lange.

The Federal Court is a judicial arm of government in the arrangements set up by the Constitution (Cth). As stated by Kirby J in APLA Ltd v Legal Services Commission (NSW) [2005] HCA 44; 224 CLR 322 at 347:

Communication about access to courts is communication about government and political matters. The courts are part of government. They resolve issues that are, in the broad sense, political, as this case clearly demonstrates.

In Cunliffe v The Commonwealth [l994] HCA 44; (1994) 182 CLR 272 Mason CJ referred to the role of freedom of communication in relation to the Judicature in sustaining the representative democracy and government envisaged in the Constitution:

That freedom necessarily extends to the workings of the courts and tribunals which administer and enforce the laws of this country. The provision of advice and information, particularly by lawyers, to, and the receipt of that advice and information by, aliens in relation to matters and issues arising under the [Migration] Act falls clearly within the potential scope of the freedom.

Hence, it cannot be doubted that the implied guaranteed freedom of political communication applies to communications regarding the functions of the judicial arm of government and the provisions relied upon in the complaint restrict the application of that right in this instance. It would be only necessary for the rule and provisions relied upon to have the same ambit as the common law principles referred to above and not go beyond the operation of the common law provided that common law is also valid.

I also rely upon the statement of his Honour Cummins J above in that the jurisdiction should not be used as a means of supressing freedom of speech and I submit that, in this instance, this complaint is being used in this way.

Conclusion

I submit that this complaint is misconceived, otiose and has no basis in law. It is relevant to this submission that his Honour Foster J has blocked any possibility of an apology

> *from either myself or from the People's Solicitors by way of his direction at the end of his letter in response in which his associate states that: His Honour has also instructed me to inform you that you should not communicate further with his Honour's chambers concerning this matter'. Hence, any opportunity for an apology has been denied myself and the People's Solicitors. That, I submit, supports my submission that this complaint is designed to attack a vulnerable junior lawyer in order to seek a test case for a ground of complaint that has no objective basis in law. On that basis the complaint should be withdrawn. That notwithstanding, I am open to a mediated settlement of this matter.*

51. The Civil and Administration Tribunal required the solicitor to undertake a course in Legal Ethics and achieve a pass mark of not less than 50%. In default of which his practising certificate was to be suspended until he achieved such a mark.

52. In *Lander v Council of the Law Society of the Australian Capital Territory*[13] a solicitor wrote to a government department on behalf of a client. The letter included the following:

> *"XXX*

53. The solicitor was found guilty of unprofessional conduct with a third party. On appeal the Court of Appeal upheld the decision and stated "*the use of insulting language or behaving offensively towards members of the public is not conducive of the profession"*.

54. In *Legal Services Commissioner v Wong*[14]

> *"XXX*

Why write clear, simple letters?

55. There are other reasons to write clearly and simply. Lawyers use words as tools of trade. They should be respected and used correctly. Overuse, or poor use of words is what we should not be doing.

56. Apart from anything else, it brings the law and those who practice it into disrepute. Charles Dickens had no affection for lawyers, indeed many of his legal characters are most unsympathetically described. Of the many examples, here are a few:

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13 [2009] ACTSC 117 per Higgins CJ, Grey and Reshauge JJ.

14 VCAT???

(a) Mr Vholes, a lawyer in *"Bleak House" – "...a sallow man with pinched lips that looked as if they were cold…", "...dressed in black, black gloved and buttoned to the chin…", "...so eager, so bloodless, and gaunt...", "...always looking at the client as if he were making a lingering meal of him with his eyes."*;

(b) Sampson Brass from the *"Old Curiosity Shop" – "A tall, meagre man, with a nose like a wen, a protruding forehead, retreating eyes and hair of a deep red with a cringing manner and a harsh voice."* His face being *"...one of nature's beacons warning off those who navigated the shoals and breakers of the world, or of that dangerous strait, the law'"*;

(c) Uriah Heep in *"David Copperfield" – "...was a red eyed cadaver"* whose *"lank forefinger"* when he reads makes *"clammy tracks along the page…like a snail"*, also, *"...he had a way of writhing when he wanted to express enthusiasm, which was very ugly"*;

(d) other lawyers infest dimly lighted, mouldy offices *"...like maggots in nuts."*.

57. It should not be hard to do a bit better than as Dickens would like us portrayed.

One final example

58. An example of legalese – *"The night before Christmas"*. When preparing this paper, I came across a humorous example of a well-known verse converted to 'legalese'.[15] It demonstrates the hard to resist temptation to convert simple English into complex, convoluted narrative whenever the opportunity arises.

> *"Whereas, on or about the night prior to Christmas, there did occur at a certain improved piece of real property (hereinafter "the House") a general lack of stirring by all creatures therein, including, but not limited to, a mouse. A variety of foot apparel, e.g., stockings, socks, etc., had been affixed by and around the chimney in said House in the hope and/or belief that St. Nick, aka St. Nicholas, aka Santa Claus (hereinafter "Claus") would arrive at sometime thereafter.*
>
> *The minor residents, i.e. the children, of the aforementioned House were located in their individual beds and were engaged in nocturnal hallucinations, i.e. dreams, wherein visions of confectionary treats, including, but not limited to, candies, nuts and/or sugar plums, did dance, cavort and otherwise appear in said dreams. Whereupon the party of*

[15] It is attributed to *'Anonymous'* but was almost certainly a lawyer.

the first part (sometimes hereinafter referred to as "I"), being the joint-owner in fee simple of the House with the party of the second part (hereinafter referred to as "Mamma"), and said Mamma had retired for a sustained period of sleep. (At such time, the parties were clad in various forms of headgear, e.g., kerchief and cap).

Suddenly, and without prior notice or warning, there did occur upon the unimproved real property adjacent and appurtenant to said House, i.e., the lawn, a certain disruption of unknown nature, cause and/or circumstance. The party of the first part did immediately rush to the window in the House to investigate the cause of such disturbance. At that time, the party of the first part did observe, with some degree of wonder and/or disbelief, a miniature sleigh (hereinafter "the Vehicle") being pulled and/or drawn very rapidly through the air by approximately eight (8) reindeer.

The driver of the Vehicle appeared to be, and in fact was, the previously referenced Claus. Said Claus was providing specific direction, instruction and guidance to the approximately eight (8) reindeer, and specifically identified the animal co-conspirators by name: Dasher, Dancer, Prancer, Vixen, Comet, Cupid, Donner and Blitzen (hereinafter "the Deer"). (Upon information and belief, it is further asserted that an additional co-conspirator named 'Rudolph' may have been involved). The party of the first part witnessed Claus, the Vehicle and the Deer intentionally and wilfully trespass upon the roofs of several residences located adjacent to and in the vicinity of the House, and noted that the Vehicle was heavily laden with packages, toys, and other items of unknown origin or nature.

Suddenly, without prior invitation or permission, either express or implied, the Vehicle arrived at the House, and Claus entered said House via the chimney. Said Claus was clad in a red fur suit, which was partially covered with residue from the chimney, and he carried a large sack containing a portion of the aforementioned packages, toys, and other unknown items. He was smoking what appeared to be tobacco in a small pipe in blatant violation of local ordinances and health regulations. Claus did not speak, but immediately began to fill the stockings of the minor children, which hung adjacent to the chimney, with toys and other small gifts. (Said items did not, however, constitute "Gifts" to said minors pursuant to the applicable provisions of the U.S. Tax Code).

Upon completion of such task, Claus touched the side of his nose and flew, rose and/or ascended up the chimney of the House to the roof where the Vehicle and Deer waited and/or

served as 'lookouts'. Clause immediately departed for an unknown destination.

However, prior to the departure of the Vehicle, Deer and Claus from said House, the party of the first part did hear Claus state and/or exclaim: 'Merry Christmas to all and to all a good night!', or words to that effect."

59. Allow me to refer you to a summary proposition by Michael Kirby[16]:

1. *Begin complex statements of fact and law with a summary (the issue, crucial facts and answer) to let readers know where they are going;*
2. *Break up long sections and paragraphs. Group related materials together, and order the parts in a sequence that will appear logical to readers;*
3. *Pay careful attention to lay out (type size, typeface, whitespace, indenting, and the like). And use plenty of headings and subheadings to identify the progression of ideas;*
4. *When conveying detailed information, regularly use vertical lists. Where appropriate, number the items as these Commandments are numbered, for later reference;*
5. *Prefer short and medium-length sentences. As a guideline, keep the average sentence length to about 20 words;*
6. *For continuity between sentences, put old information-some word or idea from the previous sentence-at or towards the beginning of the sentence. ('No more legalese. It has been ridiculed long enough.') And end sentences forcefully by putting your strongest point, your most important information, at the end;*
7. *Prefer the active voice to the passive. (You should know the difference.) Use the passive voice selectively, for example, if the agent is unknown or not understood. Or if you want to focus attention on the object of the action instead of the agent-typically, so that old information is upfront;*
8. *Prefer verbs to noun phrases ('consider', not 'give consideration to');*
9. *Prefer the familiar words-usually the shorter ones with Germanic roots-that are simple and direct and human. Avoid old potboilers ('whereas', 'hereinunder', 'cognisant' ,'requisite' ,'pursuant to', and all the rest). In drafting, banish 'shall' wherever possible; and*
10. *Avoid unnecessary detail and words. Take special aim at multiword prepositions ('prior to', 'with regard to',*

[16] Kirby, M. – *How I learned to drop Latin and love plain legal language',* Law Society Journal 2013(2).

'in connection with') and unnecessary prepositional phrases (Delete 'the duty of the landlord' and substitute 'the landlord's duty';' and' order of the court', and replace it by 'a court order').

Remember these ten points, they will serve you well.

P. J. BOOTH

June 2018

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