Ethical implications of alleging fraud, dishonesty, malice and other serious misconduct

1. Legal practitioners are subject to ethical obligations that prevent them from alleging fraud and other serious misconduct unless they have clear instructions and a proper basis to do so. If fraud is alleged in a pleading, there are also obligations that it be specifically particularised.

The professional conduct rules

2. The *Legal Profession Uniform Conduct (Barristers) Rules 2015* provide as follows:

> ***Rule 64***
>
> *A barrister must not allege any matter of fact in:*
>
> *(a) any court document settled by the barrister,*
>
> *(b) any submission during any hearing,*
>
> *(c) the course of an opening address, or*
>
> *(d) the course of a closing address or submission on the evidence,*
>
> *unless the barrister believes on reasonable grounds that the factual material already available provides a proper basis to do so.*
>
> ***Rule 65***
>
> *A barrister must not allege any matter of fact amounting to criminality, fraud or other serious misconduct against any person unless the barrister believes on reasonable grounds that:*
>
> *(a) available material by which the allegation could be supported provides a proper basis for it, and*
>
> *(b) the client wishes the allegation to be made, after having been advised of the seriousness of the allegation and of the possible consequences for the client and the case if it is not made out.*

3. Rules 21.3 and 21.4 of *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* are in identical terms to rules 64 and 65 of the Barristers' Rules.

The common law – *Clyne v The NSW Bar Association*

4. While the ethical obligation is now stated in the conduct rules, its genesis is long established in the common law.

5. One of the leading Australian cases on the ethical obligation, and the serious disciplinary consequences that may follow if it is breached, is *Clyne v The NSW Bar Association* (1960) 104 CLR 186. In that case a barrister made in court what the High Court described as a "savage public attack on the professional character" of the solicitor for the opposing party.

6. The allegations made by the barrister included that:

   (a) the solicitor prepared an affidavit and arranged for his client to swear it knowing the affidavit to be false;

   (b) the solicitor was deliberately protracting the litigation for the purpose of making costs for himself;

   (c) the solicitor was acting in proceedings which he knew to be hopeless;

   (d) the solicitor was "using his client as an instrument of blackmail against a wealthy man in the hope of extracting money".

7. By the time the matter reached the High Court there was no doubt that all of the allegations were baseless.

8. The Full Court of the Supreme Court of NSW ordered that the barrister's name be removed from the roll on the ground that the professional misconduct was so grave as to demonstrate that the barrister was not a fit and proper person to practise as a barrister. The High Court dismissed the barrister's appeal.

9. The High Court said at 200-201 [with emphasis added]:

> *The last thing we would wish to do would be to say anything which might be thought to curtail this freedom of speech, which public policy demands. Cases will constantly arise in which it is not merely the right but the duty of counsel to speak out fearlessly, to denounce some person or the conduct of some person, and to use such strong terms as seem to him in his discretion to be appropriate to the occasion. From the point of view of the common law, it is right that the person attacked should have no remedy in the courts. But,* ***from the point of view of a profession which seeks to maintain standards of decency and fairness, it is essential that the privilege, and the power of doing harm which it confers, should not be abused****. Otherwise grave and irreparable damage might be unjustly occasioned. The privilege may be abused if damaging irrelevant matter is introduced into a proceeding. It is grossly abused if counsel, in opening a case, makes statements which may have ruinous consequences to the person attacked, and which he cannot substantiate or justify by evidence.* ***It is obviously unfair and improper in the highest degree for counsel, hoping that, where proof is impossible, prejudice may suffice, to make such statements unless he definitely knows that he has, and definitely intends to adduce, evidence to support them****. It*

> *cannot, of course, be enough that he thinks that he may be able to establish his statements out of the mouth of a witness for the other side.*

Pleading requirements for allegations of fraud and other serious misconduct

10. Allied to the ethical rule is the pleading requirement that if fraud is pleaded, it is to be pleaded specifically and with particularity. It cannot be pleaded in vague or general terms.

10.1 In *Shergold v Tanner* (2000) 102 FCR 215 at [53], Burchett J stated that the requirement for specificity in pleading allegations of fraud or bad faith is "of great antiquity, and has never been doubted". His Honour referred to *Daniell's Practice of the High Court of Chancery*, 5th ed, 1871, vol 1, pp 276–7 where it is stated:

> *Where it is necessary to allege fraud … a general allegation of it in the bill will not be sufficient to shut out a demurrer; but the facts upon which such allegation is founded must be stated.*

11. In *Minister Administering the Crown Lands (Consolidation) Act and Western Lands Act v Tweed Byron Aboriginal Land Council* (1990) 71 LGRA 201, the NSW Court of Appeal (Kirby P, Meagher and Handley JJA) ordered that points of claim be struck out which alleged that a decision by a Minister was "tainted by fraud". The points of claim did not specify what the fraud was, who was responsible for it and how the Minister's decision to grant the lease was tainted by that fraud.

12. The Court set out the reasons of legal policy which Courts have long had regard to in emphasising the requirement for specific pleading of allegations of fraud. These include the need to safeguard against abuse of process, the need to afford procedural fairness to the opposing party and the rules of ethical conduct in alleging fraud. In a joint judgment the Court said at 203-204 [with emphasis added]:

> *In the pleading of fraud, some requirements of the law are clear beyond argument. These requirements are not only rules of pleading and practice established by decisions of the courts**. They are rules of ethical conduct binding on members of the legal profession**. It is a serious matter to allege fraud against a party in pleadings to which attach the privileges incidental to court proceedings. Reports of such allegations may be recounted in the community and through the public media. They may do great harm to a party before a word of evidence has been offered and submitted to the searching scrutiny of cross-examination or to rebuttal. It is for this reason, amongst others, that **legal practitioners must take care to have specific instructions and an appropriate evidentiary foundation, direct or inferred, for alleging and pleading fraud**.*
>
> ***Professional discipline may follow if allegations of fraud are made where the foregoing conditions are not satisfied**. By such means, courts protect their process from the abuse which would follow from the too ready*

> *assertion of fraud against a party, in circumstances where it could not be proved to the high standard required of such allegations. Cf Briginshaw v Briginshaw and Another (1938) 60 CLR 336, 362...*

13. In *Banque Commerciale SA (En Liq) v Akhil Holdings* Ltd (1990) 169 CLR 279 at 285-6, Mason CJ and Gaudron J also emphasised the requirement to plead fraud with specificity and clarity so as to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her.

14. The requirement for strict pleading of allegations of serious misconduct is not confined to allegations of dishonesty and fraud. It applies to all allegations which amount to an attack on the character or integrity of the defendant. In relation to malice, Kenneth Martin J said in *Calabro v The State of Western [No 3]* [2014] WASC 84 at [39]:

> *Any plea of malice put against the defendant is a very serious matter. Malice in a defendant is not a condition to be casually tossed around. It is a grave allegation requiring a supporting basis in underlying facts which are identified. Because of this, the rules of court enact specific provisions requiring the supply of proper particulars of any underlying facts put forward to establish malice. As to that see RSC O 20 r 13(1)(b). Of course, malice in an alleged tortfeasor is capable of being inferred from objective facts. However, the facts need to be stated and seen in order for the grave inference to be arguably drawn.*

15. It can be seen from the above observations that the ethical rule and the pleading requirement in relation to allegations of fraud and other serious misconduct are related. If an allegation of fraud is to be pleaded, the requirement for a clear identification of the material facts underlying the allegation will expose whether or not there is a proper basis for the allegation. As Sackar J said in *Lawcover Insurance Pty Ltd v Leonardo Carlo Muriniti & Robert Duane Newell* [2017] NSWSC 1557 at [195]:

> *The requirement to plead precisely is a safeguard against humbug. Indeed, the virtue of such a process is that the pleader has to articulate, in accordance with the rules of the Court and the authorities, the material facts that go to the cause of action. This will almost always expose the humbug.*

16. The pleading requirements for allegations of fraud are now reflected in court rules. UCPR 15.3 provides that a pleading must give particulars of any fraud.

Reconciling the ethical rule with the rule in *Browne v Dunn*

17. The ethical rule identified in *Clyne v The NSW Bar Association* also needs to be reconciled with the rule in *Browne v Dunn*. If a witness' credibility is to be challenged on the basis that their evidence is dishonest, as a matter of fairness this needs to be put to the witness. In *Boston Clothing Co Pty Ltd v Margaronis* (1992) 27 NSWLR 580 at 590, Kirby P said:

> *… the practical rule of fairness enshrined in the Browne v Dunn principle required that the suggested contradictions in the worker's history should have been put to the worker before they were used as a basis not of challenging the opinions resting on them but of challenging the truth of the worker's evidence. No such challenge was put to the worker by counsel for the employer in his economical cross-examination. If the commissioner himself intended to rely upon the evidence in the way he did, procedural fairness required that he should have drawn the suggested inconsistencies which were troubling him to the notice of the worker or of counsel. Then the worker would have the opportunity of explaining the suggested inconsistencies.*

18. This calls for judgment by the cross-examiner during cross-examination. If the witness' evidence is to be challenged on the basis that their evidence is dishonest, this needs to be put to the witness. But there needs to be a proper basis for this, eg, where the witness' answers to questions are inherently implausible, contain inconsistencies or are contradicted by prior statements or contemporaneous documents.

D A Moujalli
Ground Floor Wentworth Chambers

2 March 2022