"Well they started it!"

Fear not, the court will finish it

"The courtesy of your hall is somewhat lessened of late, Théoden son of Thengel."
-Gandalf the White, *The Two Towers, J R R Tolkien*

Gandalf's wise words notwithstanding, courtesy is not the exclusive province of kings, and is regarded by most practitioners as an essential element in the competent practice of law. It is also a fundamental duty[1] and closely allied with the duty to refrain from behaving in ways which bring the profession into disrepute.[2]

Nevertheless, there are times when these stern duties can be forgotten, or at least their boundaries pushed-and when the court becomes aware of poor behaviour, its condemnation will almost surely follow. It probably goes without saying, but there will likely be little profit, when called to account for such transgressions, in claiming that the other side started it-which is not to say that people won't give it a try.

In the case of *Wilden Pty Ltd -v- Green [No 5]*,[3] a torturous piece of litigation which began in 1990 and continues at the time of writing, the Supreme Court of Western Australia was asked to rule on a number of curious matters. These included consideration of the proposition that submissions containing scandalous material should not have been rejected by the registrar, on the basis that the submissions of the other party also contained scandalous material.

Not surprisingly, the 'they started it' line of reasoning did not impress the court, which noted (at 34):

"It is not an answer for a party seeking to file a document containing scandalous material to say that a document filed by the other side also contains scandalous material. The fact, if it be the fact, that there is scandalous material in the respondents' submissions is not a licence for the fourth appellant to include scandalous material in his. There is not some rule of 'tit-for-tat' that applies in such cases. The appropriate course is to bring an application to have the scandalous material in the other side's document or the whole document (as the case may require) struck out."

The underlying point is, of course, that the behaviour of another party does not alleviate a practitioner from his or her duties to be courteous and to refrain from acting in a way which brings the profession into disrepute. It is uncontroversial to note that the inclusion of scandalous material in court submissions is inconsistent with those duties, and unsurprising that the submission suggesting otherwise should find no favour with the court.

It is also difficult to see how the inclusion of scandalous material in submissions assists in the administration of justice, or for that matter, is in the best interests of the client. Interestingly, the court also dealt with the 'startling proposition'[4] that the court as constituted by two judges had no jurisdiction to hear one of the applications, as the legislation involved specified that the application be determined by a single judge of the court. The proposition was put forward that

---

[1] *Australian Solicitors Conduct Rules 2012*, r 4.1.2.
[2] Ibid r 5.1.2.
[3] [2016] WASCA 195.
[4] Ibid 13.

the effect of the court being constituted by two or more judges would be to deprive the appellants of the right of review of the decision of a single judge.

The court understandably rejected this submission, and found that it did indeed have the powers of a single judge. The fact that the submission was advanced at all, however, tends to suggest that the litigants may well have lost sight of the big picture, and might also go some way to explaining how the litigation has lasted 16 years.

Practitioners would be well-advised to avoid attempting to justify poor behaviour on the basis that the other side did it first, and it is also wise to avoid propositions likely to startle the court. Maintaining expected levels of courtesy and keeping fundamental duties at front of mind will likely keep litigants focussed on the big picture, and away from detours into points that may impress lecturers but rarely find favour with judges.

Shane Budden
Ethics Solicitor
1 December 2016