Issues in Case Management: The Case Management Conference at Monash University

1. I have been invited today to give a brief talk, from a barrister's perspective, on the new Case Management Conference process.

2. In particular, I intend to focus on that aspect of the Case Management Conference involving the preparation of a draft list of issues.

3. As Justice Davies identified, one consequence of the Case Management Conference process is likely to be the earlier engagement of barristers.

4. Previously, in an orthodox commercial dispute, initial involvement of a barrister would be in drafting a Statement of Claim for a plaintiff, or a Defence for a defendant.

5. The drafting of a Statement of Claim requires the pleading of material facts and not, to the contrary, the assertion as to legal conclusions.

6. The critical and different distinction in a Case Management Conference, for barristers, is the need to focus on the identification of issues. This is a new world for all of us.

7. First, in a matter, it is necessary to identify factual issues.

8. As I will seek to illustrate in a moment, this probably requires a comparative process – a comparison between Statement of Claim and Defence, or in some matters, a comparison between Defence and Reply.

9. In contrast, the issues will be not be evidenced by a review of a Statement of Claim in isolation. Such a review would not identify adequately, or often at all, the true controversy between the parties.

10. Let me seek to make that proposition good by a simple example.

11. A bank sues to recover a debt, or perhaps sues on a guarantee. A typical Statement of Claim might be 10 or 12 paragraphs long. There will be allegations of a loan agreement, of the terms of the agreement, of execution, demand, non-payment and the like. In such a proceeding, the real factual issue will almost certainly be identifiable by reference to the Defence.

12. There are lots of possibilities.

13. Sometimes, there may only be one factual issue in truth in dispute – the level of knowledge on the part of officers or employees of the bank.

14. Or maybe there will be two factual issues – knowledge on the part of the plaintiff, and relevant aspects of the relationship between the borrower, or the guarantor, perhaps his or her partner, or parent or child or the like.

15. The short point is that the factual issues are identified by a review of **a combination** of the pleadings.

16. My initial observation is that practitioners acting for plaintiffs review the Statement of Claim substantially or only to identify issues. They probably do this thinking that it is better strategy to look to their own case to identify the issues. Factual issues will not adequately be identified if this is the thinking process adopted.

17. Can I next turn, briefly, to the identification of legal issues.

18. Usually, legal issues are not identifiable – at least in terms - by reference to the pleadings. We are all taught to plead only material facts.

19. In most true commercial controversies, there are probably only a couple of legal issues.

20. In the guarantee dispute set out above, perhaps there is a single legal issue – was the consent of the signatory relevantly vitiated? Even in very substantial commercial cases, the legal issue may reduce to whether or not one, or a couple of, terms in a commercial contract was breached.

21. Can I next observe as follows: for some interlocutory steps, the identification of factual issues is centrally of importance. The obvious example would be discovery. For some interlocutory steps, the identification of legal issues may be important. Perhaps the identification of questions suitable for a jointly engaged expert would fall into this category.

22. My concluding comment is this: practitioners are just learning to draft statements of issues. Issues include factual issues and legal issues. This is a new skill for those who usually plead material facts in a pleading. It is a different way of thinking about a case to that previously undertaken.

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