

Civil Procedure Workshop for Judges

Case Management Strategies

The start of a discussion – one position

The task we have been given is to consider case management strategies of commercial cases in the context of the *Civil Procedure Act 2010* (Vic). The Act may not add much to the armoury of case management that was not already available and in active use in the Commercial Court but it may be worth saying something about a couple of aspects of the legislation and about some aspects of case management as it has been developed in the Commercial Court over the last two years.

The Act is couched in language emphasising active judicial management of cases. For present purposes it may be assumed that active management of cases by judges is desirable at least some of the time. In saying that it is important to bear in mind three things. First, that in some cases judicial management may not be desirable. Secondly, that judicial management of cases carries both a risk and a cost to the community. Thirdly, any judicial involvement in the management of a case is in the context of the adversarial system of justice, which is a sometimes forgotten, but overarching principle. Thus, we cannot and should not assume that all cases are best managed by judges. It is the parties who have an interest in the outcome of their dispute and who have a real and legitimate stake in how their dispute is managed.

The ability of the parties to control the management of their own dispute is an important feature of dispute resolution in the Supreme Court. Disputants are more likely to have confidence in an outcome in which they have control over how their dispute is managed and ultimately resolved. The parties are usually much better

placed to know how best to manage their dispute than will the judge. Even in cases in which judicial management is more desirable than management by the parties, it must be remembered that the parties will have a better appreciation of the dispute and how it should be managed than the judge. It is the parties who know what evidence they have: the judge generally will not. It is the parties who know what resources they have to allocate to the management and resolution of their dispute. The judge has very limited resources to allocate to the resolution of a dispute. Judges do not have infinite time nor a budget for appropriate management of disputes. In complex cases involving, for example, technical or expert evidence, judges will usually be poorly placed to identify an appropriate expert and will not be able to retain the expert without co-operation from the parties.

Active judicial management must be undertaken bearing in mind that inappropriate intervention will undermine the confidence which the parties may have in the outcome of a dispute should the judge inadvertently become a participant in the dispute.

Active judicial management comes with real costs and risks. The costs are in part the public resources of judge time and court facilities. There is, however, also the risk that resources are misplaced when management is undertaken without fully appreciating all of the facts, issues and consequences.

All of these considerations should cause a managing judge to consider the one question common to every case: what, if any, judicial management is necessary or desirable in this case. In some cases the answer may be that there should be no

judicial management at all: whether active or not. Some cases are best resolved by leaving the dispute to be managed by the parties. The single largest number of commercial disputes in this Court need, and receive, no judicial management of any kind. The Court has an institutional interest in getting the right balance between cases which need management by judges and those where the management can, in effect, be “sub-contracted” (that is be left) to the lawyers. The Court’s resources are limited and they need to be allocated effectively.

The identification of cases for judicial management in the Commercial Court is, at present, largely left to the parties. The Commercial Court was the successor to the Commercial List. A fundamental pillar upon which the Commercial Court, and the Commercial List before it, was erected was the idea that the parties determine whether they wished their dispute to be managed by a judge. Judicial management could always be imposed by the Court, determining that cases should receive judicial attention, but in the first instance it is left to the parties to determine whether they wish to have judicial management by entering the Commercial Court, or would prefer to have their case self managed through the operation of the rules, establishing steps and processes to be followed. An incident of the adversarial process in the Commercial Court is a party’s freedom to choose to enter the Court or not. The preservation of the freedom also ensures the appropriate use of public resources. The system developed in this Court enables the allocation of resources to cases where a party or a judge decides that it requires management and so does not use judicial resources indiscriminately in all cases. Enabling the parties to manage cases themselves frees up judicial resources and permits their allocation to cases where management is best provided.

Part 4.2 of the Act specifically acknowledges the Court's ability to manage civil proceedings "actively". A number of examples are found in s 47(3) of what the legislator had in mind by actively managing a case. The list is unsurprising and contains virtually every aspect of case management known to all of us who have conducted litigation over the years. The legislative expression of the examples may provide comfort for those judges who may have felt timid in adopting robust case management measures but the comfort may be less than it might seem at first. Let me give you an example. Section 47(3)(f)(i) permits a judge to manage a civil proceeding actively by, amongst other things, limiting the time for the hearing by limiting the number of witnesses, or the time for examination or cross examination or the issues or the matters that make the subject of examination or cross examination. The power now expressly found in s 47(3) may be no more than previously existed and which, from time to time, has been exercised by some of our colleagues. A judge wishing to take the "active" management of a case by limiting the time for examination or cross examination of a witness may now confidently do so knowing that there is a provision in an Act of Parliament authorising that course. The problem, however, is to ensure that the decision to limit, for example, the time for the examination or cross examination of a witness is appropriate in a given case. One of the big differences between the judge and the litigants is that the judge will not know all of the facts which may or may not bear upon the ultimate disposition of a case. The confidence which a judge may obtain by knowing that he or she may limit the time for examination or cross examination may evaporate by doubts and uncertainty about whether they are doing the right thing in any particular case. Indeed, the overarching purpose of the Act found in s 7 "to facilitate the just, efficient, timely and

cost effective resolution of the real issues in dispute” is effectively undermined whenever a judge makes an active case management decision which on appeal is found to have been wrongly made. In that respect there is a risk that it will be wrongly made whenever the decision produces the wrong legal answer on the facts of any particular set of circumstances. Depending on the approach taken by the Court of Appeal to the management decisions of trial judges under the Act, new and lucrative areas of dispute may emerge. Unsuccessful litigants will have an interest and incentive to challenge active management practices which can arguably explain the litigant’s loss. It will ultimately be the views taken by the appellate courts in those complaints about management that will determine whether the Act has changed much.

These concerns have in part been dealt with in the Commercial Court by the use of case management conferences. A fundamental aspect of the case management conference is that a case management conference is convened at an early stage in a proceeding, attended by those who will have the carriage of the case at trial. Case management presupposes action at the beginning of a case, not at the end. By the end there is often no opportunity to manage effectively. However, for management at the beginning to be effective, the judge needs to be meaningfully informed about the case. For the judge to be meaningfully informed about the case it is essential for those who have the carriage of the case at a trial to be on top of their case at the beginning so that its management from the beginning may be appropriate to its needs. The obligation on counsel to be sufficiently informed about the case and take authoritative positions on case management is found in other jurisdictions. The Chief Administrative Judge of the New York State Trials Court amended one of its rules in July 2010 to require:

Rule 1. Appearance by Counsel with Knowledge and Authority

- (a) Counsel who appear in the Commercial Division must be fully familiar with the case in regard to which they appear and fully authorized to enter into agreements, both substantive and procedural, on behalf of their clients. Counsel should also be prepared to discuss any motions that have been submitted and are outstanding. Failure to comply with this rule may be regarded as a default and dealt with appropriately. See Rule 12.
- (b) Consistent with the requirements of Rule 8(b), counsel for all parties who appear at the preliminary conference shall be sufficiently versed in matters relating to their clients' technological systems to discuss competently all issues relating to electronic discovery. Counsel may bring a client representative or outside expert to assist in such discussions.
- (c) It is important that counsel be on time for all scheduled appearances.

All that brings forward some costs, although it does so in the expectation that other costs (such as unnecessary discovery) may be avoided. It also imposes burdens upon judges that they did not previously have. They are expected to read, understand and analyse the materials found in case management bundles so that case management conferences can proceed efficiently and effectively.

A case management conference can provide a real and effective context for alternative dispute resolution. That occurs whenever a judge requires a careful focusing by the parties on their case, upon what is precisely in dispute between them, and upon the evidence needed to maintain their respective positions. A case management

conference immediately after the close of pleadings, attended by counsel who will have the carriage of the case at trial, provides a meaningful opportunity for the parties to be fully briefed about their respective strengths and weaknesses and therefore: (a) evaluate their position; and (b), make informed decisions about how their interests are best served. Such an expectation ensures that the practitioners who attend are fully on top of the issues at an early stage of the proceeding, before substantial costs are incurred, and have a realistic and meaningful opportunity to reach an agreed compromise.

Some practitioners have expressed criticism of the process, but such criticisms should be taken with caution. The plaintiff must be assumed to have at least enough information about their case to have made allegations to commence the proceeding. An opposing party, and the Court, is entitled to assume that a pleading has not been drawn without adequate instructions to justify its content. Every practitioner pleading a case is expected to have satisfied themselves on instructions that the pleading is not a fiction and that if the evidence is as found in their respective instructions, that the pleading will be made good. Attendance at the case management conference does not require lead counsel to have satisfied himself or herself that all of the evidence exists and that it is robust enough to succeed, but it is expected that counsel have turned his or her mind to the issues and to the instructions said to enliven the issues sufficient to justify another party being put to the expense of litigation and for the Court to allocate time and other resources.

Criticism of case management conferences may be made by a party who has no interest in the early or efficient resolution of the dispute. Under the Act, that is no

longer a legitimate interest. The case management conference provides an excellent opportunity for strengths and weaknesses to be exposed at an early stage. While it will not be in everyone's interest for this to occur, it is a necessary incident of modern litigation and limited public resources. Those who see, and take advantage of, the opportunity to confront early what is at stake will applaud the process, whilst those who would prefer, or need, to delay and keep options open will continue to complain.

An area in which the Act may go beyond the powers previously enjoyed and exercised by judges may be in the extension of judicial conduct in connection with appropriate dispute resolution. Section 66 permits a Court to order that a civil proceeding be referred to appropriate dispute resolution. "Appropriate dispute resolution" is defined to include the process of "judicial resolution conference". A judicial resolution conference in relation to the Supreme Court is defined to include a process presided over by a judge, associate judge, or judicial registrar for the purpose of negotiating a settlement including mediation, early neutral evaluation, settlement conference and conciliation. Section 68 extends the protection and immunity of judges to any judicial officer performing duties in connection with any judicial resolution conference.

The extent and limits of this activity are yet to be explored and, in any event, may be a more appropriate subject for another day. The power does, nonetheless, provide a potential strategy for case management which may in some cases be appropriate. In saying that, however, judges would do well not to lose sight of the ability they have to have the practitioners test and explore possibilities of settlement more effectively than the judge may do. The proper administration of justice will confront real risks if

a judge comes into possession of information (whether evidence, attitude, legal argument or inclination) about one side of a dispute which is not fully, openly and transparently communicated to the other side of the case. We doubtlessly all recall the rules of natural justice applied, not to judicial officers, but to administrative and other persons discharging a function, which typically require the interests of a party not to be compromised by private dealings with one party or the imperfect communication of information to persons affected by the communication. Thus, a judge conducting a mediation may perhaps not lawfully be able to withhold information from one side once obtained from another. That may be so, not as a matter of judicial ethics, but because there is a legal obligation not to allow a party to compromise a dispute while withholding information.

In an age requiring more and more transparency in official conduct there may be no room for a judge to conceal from a party information obtained from another party. That may suggest that a judge conducting a mediation may best do so through the lawyers each of whom is likely to know much more about the strengths and weaknesses of the client's case than the mediating judge ever will. Perhaps the best form of mediation occurs, as it frequently has in the past, when the parties confront the reality of a risk of trial and adversarial decision making. At that point the work of mediation is frequently done most effectively by the lawyers explaining to their clients what the strengths and weaknesses of their case happen to be and persuading them to adopt a course to resolve the dispute before an outcome is imposed upon them. That consideration suggests another strategy which is also in part actively pursued in the Commercial Court. That strategy is to minimise the costs incurred up to the moment before trial. We have all seen litigation which could not be stopped

because the legal costs “invested” in the litigation had become so great that the parties’ costs had so dwarfed the initial dispute that the parties could not economically let go of the “investment”. In part this means that care needs to be taken when Courts are ordering costly discovery, witness statements and court books. Keeping costs low provides another effective strategy to permit the parties to negotiate a resolution before the costs make resolution economically unattractive.

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