



Introduction

- In large complex proceedings, such as class actions, there are many hidden reefs, there are cross winds and there are side winds. There is rarely plain sailing. Everyone, except the judge, is usually part of a well resourced team. The pot of gold can be large and the benefits for plaintiffs chasing that pot are significant. The pirates, though, are well armed, astute and motivated. I assume class actions are profitable for all the lawyers because they do not appear to be going away.
- Let me move from my pirates of the Caribbean analogy and begin with a genuine compliment. The general view amongst the Common Law Division judges is that the lawyers involved in the class actions before our court are for the most part highly competent, experienced practitioners who provide very substantial assistance to the court. That said, the judges do face challenges.
- I've grouped the Challenges loosely into two categories: first, in terms of resources and second, in terms of litigation management. I am proposing to say a little of each and of the Court's response to the latter through the Practice Note. The third challenge, writing a judgment, is ours alone. Although it is the last task in a class action, you ought not forget it in case management. I can assure you we don't. We hope that good management of the issues I will now address will assist in the task of judgment.

The Challenge on Resources

- Class actions were not a feature of court lists when our current premises were designed. The level of political commitment over a long period to providing litigants with modern resources has created a resources challenge.
- Class actions bring with them not only the need for courtrooms, but large ones which can accommodate many lawyers, parties and members of the public in comfortable and suitably equipped premises. Appropriate technology for 21st century trials is usually necessary.
- The Supreme Court's courtrooms generally are already being used to capacity. We've managed to ease the pressure on courtrooms as best we can. In the bushfire cases, by allowing the matters to be heard at a forum closest to the relevant fire, holding the trials out of Melbourne has eased the immediate resources burden. The last case management conference in the *Brookland Greens* case was held in the new Cartel courtroom at the Federal Court and that was a circumstance where the facilities may well have contributed in achieving a partial resolution of a very large and complex class action.

- Another issue that arises is allocation of judge time to closely manage such cases. Class actions tend to be matters which require close and careful management and multiple interlocutory steps. This requires a substantial investment of time from the judiciary and judicial staff. This is another precious resource. In the Common Law Division new listings of class actions are promptly allocated a managing judge from the start.
- The court is actively seeking to meet its resources challenges seamlessly for litigants and their lawyers. In return we hope that court's efforts are respected and that this allocation of court resources is not under utilised or wasted.

The Challenge in Litigation Management

There are a number of particular pressure points in class actions from the perspective of judicial case management.

- Class Issues
- Pleadings and issues for determination, both common and individual
- Other Interlocutory Issues - particulars and discovery
- Expert evidence
- Trial management
- Settlement approval

Class Issues

- There are various issues which can erupt into interlocutory dispute between litigants arising out of controlling the class, opting in/out, communications with potential class members.
 - For example, whether the claims of the plaintiffs were in respect of or arose out of the same or related circumstances as in the *Timbercorp* proceeding before Justice Judd [2010] VSC 68.
 - Another topic, by way of example, is the relationship between the primary parties legal representatives and the group members. Closely related to that topic is the relationship between the primary parties legal representatives and the source of funding for the plaintiffs side of the fight. There are substantial lines of authority in the Federal Court on these topics, which seem to fascinate defendants and their advisers.
 - Yet another area productive of a need for judicial management is interlocutory activity by group members, such as making discovery or providing particulars A recent example is *Thomas v Powercor* [2010] VSC 489, one of the bushfire class actions when Justice Jack Forrest was asked to consider circumstances in which it was appropriate to order discovery by group members, not named as plaintiffs. His Honour noted that it would be an 'extraordinary step' for a court to compel all the known members of the group to provide discovery whilst others could sit back and await the adjudication of the liability issues. On the other hand, he acknowledged that early discussion

Pleadings

- The focus of the court will be on the identification, and preparation for trial, of the common issues. Generally a greater level of particularity is required as the proceeding progresses.
- To do so, the court may need to grapple with the extent to which a defendant ought to be informed of the claims by group members in the plaintiff's pleadings, versus, the difficulty in pleading the group members' claims with a great degree of specificity. We are mindful of the need for the parties to be armed with appropriate information to consider resolution of the dispute as soon as practicable. We are mindful that the lawyers don't like to go out chasing down all interested parties and witnesses too early in the proceeding, despite what we think.
- The issue of proportionate liability can also lead to many complexities, extending well beyond the consequences which can flow from its provisions. There are questions of joinder of parties and rather complex pleading issues. The impact of Part IVAA in large complex multiple party litigation where there are partial settlements can re-open management issues and add to distinctly counter intuitive consequences. In this court, the *Brookland Greens* matter will, it is hoped, soon move its focus from the claims of the plaintiffs to those of the defendants and third parties.
- There is a view, not necessarily of this court, that there is, or was, a trend of extensive interlocutory applications followed by appeals, generally initiated by the defendant and you will all be familiar with the observations made in 2002 by Justice Finkelstein in *Bright v Femcare Ltd* (2002) 195 ALR 574 at [160].

Interlocutory Issues

- Similar to the contests on pleadings, there can be many interlocutory contests involved in class actions. It is to be expected that interlocutory applications can be as much about jostling for position in negotiations as preparation for the trial. It is an envelope which is often pushed. I mean no criticism by that. It is fundamental to the psychology of dispute resolution and essential to litigation as a commercial enterprise for its participants. Some discernment on the part of the judiciary is required to distinguish what are potentially meritorious interlocutory applications that could and should be made in the applicants' legitimate interests, whether in settlement or at trial, and those applications made solely for tactical advantage. The courts are not a circus.
- Plainly, we do not want representative proceeding to get bogged down with expensive and time consuming procedural fights. There are multiple reasons: Costs to the parties, delays, the drain on court resources. The court will be allocating resources throughout the proposed timetabled life of the proceeding which will always be needed elsewhere, so the parties will find the court intent

- Consistent with the objectives of the *Civil Procedure Act* encouraging settlement processes is an important objective for the court. *Thomas* shows practitioners that while it is recognised that a settlement point in a complex dispute cannot always be mutually identified until discovery has been undertaken, there can be clear benefits in a good faith approach to limiting the burden and expense of discovery to what is needed. Easily stated, but difficult in implementation. However, the court will be actively seeking to identify that path.

Expert witnesses

- The procedure now in favour is Court controlled expert evidence. You will be familiar with this. It was the subject of a recent Commercial Court seminar like this one. The experience of the courts is overwhelmingly favourable. I don't know of a judge who doesn't prefer it to the traditional method. It is here to stay.
- In summary, the parties instruct their own experts. The instructions to experts, the questions to be asked, issues as to expert qualifications are examples of matters which, in appropriate cases, may be dealt with by case conference in advance of reports being prepared. Experts are expected to meet and produce a document setting out their points of agreement and disagreement. Again, in appropriate cases depending on the issues arising, that process is likely be the subject of case conference. There may be a need for a facilitator or issues as to who attends or how experts are grouped. Expertise challenges might be sorted out before reports are prepared. Early identification of the common ground for the experts, whether in assumptions, instructions or opinions will always be desirable. What the court seeks is the tendering of joint expert reports to confine the issues and provide a platform for the court to take the evidence of the experts concurrently.
- It is intended at trial to avoid many of the old problems arising – cross-examination in turn of each expert about contested assumptions, confusion of expert, cross-examiner and court in a maze of disorganised detail and, not insignificantly for the decision maker, the expert as partisan warrior for the instructing party. Experts can expect to give evidence in the presence of other experts and that those other experts, rather than a barrister, will be first to respond to what they say. It is a refreshing process.
- The myriad of procedural issues which can arise through this process can be managed at the interlocutory stages by case conferences. The benefits are expected to be significant in class actions.

Evidence and Trial Process

- In large complex disputes a real difficulty can arise in finding a consensus on the factual narrative because of the number of parties and the complexity of the facts, often involving a long history. In the *Brookland Greens* class action, Justice Osborn has asked the parties to provide an agreed narrative outline of the facts of the case, identifying the areas in dispute, thereby allowing the judge to grasp complex histories. Such narratives may later form the basis of the judgment, once those parts in dispute are resolved. How this approach plays out is yet to be tested. The benefits in this process may be comparable with the current approach to expert evidence. Preparatory interlocutory work is directed at what will assist the parties to understand the parameters of their differences on the non-expert issues, to aid negotiations, the decision making task of the court, and to speed up the delivery of the decision.
- Many Supreme Court judges now eschew the use of witness statements. Evidence is increasingly ordered to be given *viva voce*, its anticipated content may be notified by detailed, exchanged outlines.
- In the Common Law Division, the Court is encouraging electronic discovery intending to run the trial with electronic exhibits. Court Books are increasingly being regarded as a failed initiative, usually appearing to be no more than a catalogue of the discovered documents put together by the articulated clerks and later wheeled into court by them to fill the empty spaces at the back. Where they continue to be employed, revised procedures, on a case by case basis, to engender greater refinement in documentary presentation to the court should be expected.
- An issue that may arise in one of the bushfire class actions is whether the matter can be heard before a civil jury. It's not a question that has been considered in Australia before to my knowledge.
- The emphasis of the court at trial is on the common issues which will take precedence. We are mindful of the strong desire of almost all litigants to settle disputes and in class actions we will be maintaining a strong focus on facilitating that objective throughout. May I remind you that judges, too, love settlements.
- The legal and other costs of running a class action can be very substantial. This is in itself an issue. The court is mindful of the role played by litigation funders and by no win no fee funding. The traditional checks and balances, what might be called the motivating matrix of reward vs. risk, which usually feed the desire for settlement on both sides are altered. There are many influences at play and the judges vision of them from the bench is usually obscured. Litigation legal services are a business like any other. Incentives for plaintiff solicitors to accept a settlement agreement instead of funding additional costs to persuade the defendant to offer more, or to agree to settlements compensating unidentified class members or in continuing with the litigation in the absence of such an offer can arise. The motives for defendants to financially crush lenders as a tactic towards resolution is not unknown. The discharge of the practitioners duty to assist the court is subject to new and different influences. We are mindful of these factors.

Settlement approval

- The provisions of the Practice Note largely mirror the procedures established by the cases and legislative provisions. It is an important process and we hope the provisions of clauses 10 and 11 of the Practice Note provide suitable guidance through the convenient collation of the procedures. I think those provisions are self explanatory. I will say no more about that.

The Practice Note – Some General Points

- In response to the perceived issues, some of which I have described, we now have *Practice Note No. 9 of 2010 - Conduct of Group Proceedings*. I assume you are all familiar with it. You can download it from the Court's website.
- The Practice Note is modelled after the Federal Court's Practice Note. When put to the Common Law Division's class action user group it was overwhelmingly endorsed. It does not apply in the Commercial Court as its practice is laid down in the Green Book. It can be adopted if a commercial court judge considers it desirable in a particular case to do so.
- I would like to address, in particular, three useful procedure to be employed under the Practice Note.
 - the Case Management Conference
 - good faith conferencing between lawyers
 - applications procedure
- Case management will start within 6 weeks of the issue of the proceeding. We are informed of all new filings by the Registry and the principal judge of the Common Law Division will allocate a judge to manage the new proceeding.
- You will note the emphasis in clause 2 to compliance with s. 33H and the emphasis on drawing the statement of claim to set up a good vehicle for determining the common issues.
- I have already mentioned that case management conferences can expedite the progress of a proceeding and expose the real issues in dispute. Much can be achieved by judges with experience of large scale litigation and a commitment to issues based management. We expect the parties to be prepared on many issues when they start proceedings, not 12 – 18 months later. May I refer you to clauses 3.4 to 3.6 in particular which identify the broad range of issues to be addressed from the start. We recognise that many issues will be ongoing, hence clause 3.7.
- These conferences will be informal and, so far, informality has been found by all participants to be beneficial in cutting to the chase.
- If used appropriately, with case management conferences parties may be able to bypass the following steps on any issues in dispute - the filing and service

- We all know that approach will not always work. Applications will be made and will need to be resolved. Before referring to clause 5 on this issue, can I state that our approach to the problems for case management identified by Justice Finkelstein in *Bright v Femcare*
- As in the Federal Court, Clause 4 of the Practice Note, '*Before making any application relating to an interlocutory dispute the parties' representatives must confer and attempt in good faith to resolve the dispute*'. I should say that at the Bar, I found that good faith conferencing is not as easy as it might at first seem. We all know old habits die hard; old dogs struggle to learn new tricks. We will be looking beyond the Bar table for the measure of good faith. Sending counsel off to confer with minimal instructions while composing the set up letters, to be sent to the other side but read by the judge, will not wash. At least in the bushfire litigation, Justice Forrest, managing those actions, informs me that that generally the parties have been encouraged to settle any interlocutory disagreements they have outside court and this approach seems to have worked well. The provisions of the *Civil Procedure Act*, which are now operative also strengthen the judicial arm in this respect.
- How interlocutory applications are to be dealt with is specified in clause 5 of the Practice Note. Again you will note that the procedure is set up to provide judicial resources to enable expedition. It is anticipated that with material and outlines of argument filed in advance, in conjunction with an endeavour to deliver a decision within 4 weeks, expedition may be achieved. Lack of commitment to that end by the parties could sabotage the goal. Overall, inevitable interlocutory disputes will, we expect, be less likely to derail the trial timetable for the proceeding. We know nothing makes litigants talkative like the proximate vision of the whites of the judge's eyes.
- Most of you will be familiar with the Federal Court practice. Some notable differences between the Practice Notes in the two jurisdictions are:
 - The Supreme Court does not have a sample opt out notice. We decided (after some consultation with our class action user group) that a sample notice would not suit every case and that it is important to preserve flexibility. There are adequate precedents for practitioners to use. There was concern that the inclusion of a sample notice would produce a notice for all seasons and would risk being too long and user unfriendly. That could inhibit opt ins. Our approach is flexibly case based.

- The Practice Note contains a clause that allows referrals of applications to an Associate Justice. This procedure was used recently in one of the bushfire matters to resolve some discovery disputes.
- The clause on ‘Communications with Group Members’ is different between the two courts. The Federal Court prescribes that the plaintiff’s solicitors should inform the other parties whether group members are its clients. Our Practice Note does not make such a prescription but states that we will make orders to this effect in appropriate cases. The Federal Court states that any communications with unrepresented group members should as far as possible be in writing. It also states that where a party communicates with an unrepresented group member suggesting that the group member do or not do something, the communication should explain the consequences of following the suggestion and encouraging the unrepresented group member to obtain legal advice. Our Practice Note does not make such a prescription but states that the court may make orders concerning communications with unrepresented group members. Our Practice Note is a flexible case based approach and we expect such issues of communications with group members to be raised at the case management conference (Clause 3.5(j)). Again, we consider that is appropriate. It was overwhelmingly endorsed in our user group consultations.

6 April, 2011.