

NATIONAL JUDICIAL ORIENTATION PROGRAM

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BROADBEACH, QUEENSLAND

CASE MANAGEMENT

Justice P A Bergin¹

- 1 The modern judge is actively involved in the pre-trial management of cases as well as performing the intrinsic duties of judicial office - hearing and deciding cases without fear or favour. Judges must be sensitive to the need to ensure that in the process of case management judicial impartiality and the perception of it are not compromised.

- 2 Chief Justice Gleeson is reported to have said recently:

There are certain types of cases that will settle if they are just left alone. There are other cases where the parties require some encouragement - often very vigorous encouragement - to settle. A good judge is one who can tell the difference between those two kinds of case, and, in relation to cases best left alone, leave them alone.²

- 3 Case management is aimed at ensuring that disputes that are amenable to settlement, settle as soon as practicable and those that are not, proceed to trial efficiently on the real issues between the parties. It is an essential skill for the modern judge to hone. For the purposes of this discussion, "case management" should be understood as the process in which cases are

subject to the supervision by a judge from the time of commencement of the proceedings to the time they are allocated for trial.

4 Courts have adopted a variety of systems within which case management occurs. They include the docket system, either 'rocket' or otherwise, in the Federal jurisdiction, the general system of pre-trial management of individual cases and the specialist List system of management of all cases in the particular List in State jurisdictions. The docket system is one in which the case is allocated to the "docket" of the judge who manages the case pre-trial and also hears the case. In some State jurisdictions Registrars manage the cases until they are allocated a hearing date after which the matter is listed for pre-trial directions before the trial judge. Those pre-trial directions are for final preparatory steps for the conduct of the trial, with discovery and any interlocutory arguments having been completed prior to the allocation of a hearing date. Cases in the specialist List are case managed by the List Judge from the first directions hearing until the trial. The List Judge also allocates the cases for hearing. Obviously only some of the cases managed by the List Judge will also go to trial before that judge and in this regard the system in respect of those cases is not dissimilar to the docket system. I intend to concentrate on the management of the cases that may be accommodated in each of the systems rather than to embark upon an analysis of comparative advantages/disadvantages of these systems.

5 There is no comparative empirical data in this country on the settlement rate of cases prior to the introduction of case management nor is there any such data from which a conclusion could be drawn that the costs of running a case were higher (or lower) prior to the introduction of case management. Research in the United States, somewhat dated now, suggests that case management increases the costs of litigation.³ The research in England suggests that costs have increased since the

introduction of the Woolf reforms, although it is not clear whether the increases were due more to the introduction of pre-action protocols than increased judicial case management.⁴ In Australia, with the broadening of statutory powers and mechanisms for case management, judges are able to monitor the costs of litigation more closely.⁵ Chief Justice Spigelman recently referred to these statutory powers and mechanisms as follows:

28 The respondent invoked the authority of *Queensland v J L Holdings Pty Ltd* [1997] HCA 1; (1997) 189 CLR 146 in support of its ability to amend, even for the fifth time. Case management practices in all Australian courts have changed significantly in the decade since that judgment. Although it remains binding authority with respect to the applicable common law principles, the circumstances of the case were significantly different from those in the present case and do not dictate its outcome. In any event, such principles can be, and have been, modified by statute both directly and via the statutory authority for Rules of Court.

29 In this State *J L Holdings* must now be understood as operating subject to the statutory duty imposed upon the courts by s 56(2) of the *Civil Procedure Act* 2005, which requires the Court in mandatory terms - "must seek" - to give effect to the overriding purpose - to "facilitate the just, quick and cheap resolution of the real issues in the proceedings" - when exercising any power under the Act or Rules. That duty constitutes a significant qualification of the power to grant leave to amend a pleading under s 64 of the *Civil Procedure Act*.⁶

6 The best method of case management is to have the parties and their lawyers agree on the pre-trial orders and/or directions that should be made that are then proffered to the judge managing the case for approval. If this approach is adopted it will usually be unnecessary to make a great deal of adjustment to the proposed orders. It is, of course, necessary to have experienced practitioners involved for the consensual case management process to operate effectively. It is also necessary to educate the profession as to the court's expectations of practitioners in this process.

This can be done by way of practice notes and also by meetings with members of the profession in groups, which have (unfortunately) become known as “users groups”. There is enormous benefit in meeting with members of the profession to obtain their constructive criticism and input to establish best practice in case management.

7 A most important step in ensuring cost efficient and effective case management is the early identification of the real issues between the parties. That means putting in place a regime that will ensure pleadings are closed as promptly as possible. We have all had cases in which new issues arise after discovery or after evidence has been served which may or may not require further interlocutory steps before the matter is ready for hearing. I suggest that the fact that this may happen should not deter you from pinning the parties down to agreed issues at the earliest stage practicable. What is practicable will of course differ from case to case. In a case that is going to be long and complex with multi-parties and with the prospect of numerous cross-claims, the earliest practicable time will take a little longer to reach.⁷ The process by which the agreed issues are identified will once again depend on the nature of the case.

8 Once the real issues are identified, the ambit of discovery can be assessed with more precision. Discovery, or its more modern presentation “disclosure”, has been a controversial topic because of the costs involved, particularly in large commercial matters.⁸ Methods need to be utilised to contain the costs of discovery so that they are proportionate to the importance and complexity of the subject-matter in dispute.⁹ In this regard I advocate flexibility in the way in which discovery is provided because every case has its own needs. There are many cases in which special management of discovery will not be necessary, however may I endorse paragraphs 27 to 32 inclusive of the Practice Note that governs the Commercial List and Technology & Construction List in the Supreme

Court of New South Wales (the Practice Note) as a regime that may assist in the management of discovery.¹⁰

- 9 The success of the discovery process in line with that Practice Note depends very much on the support of the profession. The Joint Memorandum regime requires the parties and their lawyers to actually focus on the issues that need to be addressed in the discovery process and to make a “best estimate” of the costs of the discovery. This process also brings the parties together at an interlocutory stage at which time there must be discourse about the real issues between them to identify the nature and the ambit of discovery. It is important for the judge managing the case to make enquiries of the parties as to the stage they have reached in the discovery process, if it is not otherwise clear from the parties’ suggested regime in their proposed consent orders.
- 10 There are differing views as to how discovery/disclosure should be made,¹¹ however if the flexible approach is adopted, the parties may choose from those methods and create the most effective and cost efficient process for their particular case. The judge managing the case(s) should be aware of all of these methods to be in a position to assess the parties’ proposals and if necessary, to suggest to the parties the best ‘recipe’ for their discovery/disclosure.
- 11 It is very important to create the appropriate mix of mechanisms to assist the parties to reach a resolution of their dispute as soon as possible, whether that be by way of mediation, facilitation, reference to a referee, expert determination, final hearing, or final hearing combined with the use of a reference. It is important to try to assess the “ripe” time to refer a matter to mediation. In this regard the judge will depend very heavily on the profession and candid discourse about the utility of referring the matter to mediation at a particular time should occur.¹²

- 12 I see from the programme that there is a session on expert evidence to follow this session, however from a case management point of view, it is imperative that you identify with the parties as early as possible whether expert evidence will be necessary. The discourse during directions hearings should identify the issue(s) or question(s) upon which it is suggested the trial judge will need assistance from an expert. The identification of these matters early in the process will prevent any wastage of costs in obtaining expert opinion on false issues or on matters that are really unnecessary for expert opinion. It is also important to identify ways in which the parties can combine to obtain an expert opinion, rather than each of the parties expending costs on separate opinions. The profession needs to be reminded that the expert is there to assist the judge. There will obviously be cases in which it will be necessary for the parties to obtain expert opinions from different and/or a variety of experts, but in the main, once the issues/questions calling for expert opinion are identified the number of experts in a particular field can be contained.
- 13 The discussion in the following session today will include reference to experts giving their evidence concurrently. This method is not new, but it has been lifted into modernity with a new name and endorsement by the courts.¹³ I have found that the flexible approach to case management as endorsed in the Practice Note has been extremely successful in relation to the preparation of expert evidence and the manner in which experts give their evidence. More often than not, the experts will agree on the majority of issues/questions, once they meet in conclave and produce a joint report. I have also found that the parties/practitioners are very amenable to finding ways to reduce the costs of the experts. The key to this is the early identification of the necessity for such evidence and requiring the parties to agree upon the most cost efficient way for the expert evidence to be available to assist the trial judge.

14 Although Chief Justice Gleeson suggested that a "good judge" can identify the difference between the case that should be vigorously encouraged to settle and the one that should be left alone, such identification can only properly occur with the assistance of the profession. It is a matter of making sensible enquiries of the parties, without overstepping the appropriate judicial mark, to assist you in identifying that difference. I should say however that there have been cases that looked and sounded like they should have been left alone, that have been referred compulsorily to mediation and have settled.¹⁴ However that is the exception rather than the rule. Indeed one must tread extremely carefully in making an assessment as to whether you impose a compulsory mediation order on the parties with the prospect of costs being wasted.

15 Much of what is done in case management is based on common sense. However the following practical suggestions are proffered to assist with effective and cost efficient case management:

- Always keep in mind that your role in case management is to assist the parties to resolve their dispute;
- Always remember that at the outset, the practitioners in the particular case know (or should know) so much more about the case than you do, particularly in relation to the pre-action conduct between the parties;
- Engage the profession in discussion about the real issues in the case as early as possible;
- Read the pleadings and assess for yourself what you regard as the real issues presented on the pleadings;

- Educate the profession to propose case management regimes that are cost effective;
- Listen to the profession and encourage constructive criticism and/or suggestions for improving the case management process;
- Find effective ways of dealing with defaulters/serious defaulters that is fair and just - eg requiring the defaulting party (as opposed to their lawyer) to explain the reason(s) for non-compliance with court orders/directions;
- Be flexible about the way in which the case should be prepared for hearing.

16 I am sure none of this is new to you, however I hope that these suggestions assist you in honing the very important skill of case management.

¹ Justice PA Bergin is the List Judge of the Commercial List and the Technology and Construction List of the Supreme Court of New South Wales.

² James Evers, *Australian Financial Review*, 'Chief Justice's brief to meddling judges' 20 June 2008, 1.

³ In the early 1990s the Institute of Civil Justice at the Rand Corporation in California conducted a five year survey of 10,000 cases in 20 Federal Courts in 16 States (the Rand Survey). JS Kakalik et al *Implementation of the Civil Justice reform Act in Pilot and Comparison District* MR-801; *An Evaluation of Judicial Case Management under the Civil Justice Reform Act* MR-802.

⁴ *Further Findings: A continuing evaluation of the Civil Justice Reforms*, Lord Chancellor's Department, August 2002.

⁵ For example ss 56 -61 *Civil Procedure Act* (2005) (NSW) (CPA); *Uniform Civil Procedure Rules* 2005 (NSW).

⁶ *Dennis v Australian Broadcasting Corporation* [2008] NSWCA 37.

⁷ *Report and Recommendations of the Commercial Court Long Trials Working Party*, Judiciary of England and Wales, December 2007; Justice R Sackville, *Mega-Litigation: Towards a new approach*, Supreme Court of New South Wales Annual Conference, 17 - 19 August 2007.

⁸ The Hon Chief Justice JJ Spigelman, *Access to Justice and Access to Lawyers* 35th Australian Legal Convention, Sydney 24 March 2007.

⁹ *Civil Procedure Act* 2005 (NSW), s 61.

¹⁰ Practice Note SC Eq 3 attached.

¹¹ Victorian Law Reform Commission, *Civil Justice Review: Report*, 28 May 2008, Ch 6; David R Cohen & Kari M Horner, 'New US Federal Rules focus more attention on electronic evidence in construction disputes', 2(1) *Construction Law International* 9, 2007; Part 31, *Civil Procedure Rules*, http://www.justice.gov.uk/civil/procrules_fin/index.htm; Michael Davis & Robert Akenhead, *Technology and Construction Court: Practice and Procedure*, 2006, Oxford University Press, 7.104 - 7.142; Judge Peter Coulson, *The Technology and Construction Court*, 2006, Sweet & Maxwell, London, Chapter 11.

¹² Justice P A Bergin, *Methodology of the management of construction disputes in the Supreme Court of New South Wales*, speech delivered at the Construction and Infrastructure Seminar, Law Council of Australia, Law Institute of Victoria, 5 May 2004; Justice PA Bergin, 'Mediation in Hong Kong: the way forward: perspectives from Australia' 82(3) *Australian Law Journal* 196, March 2008.

¹³ Previously referred to as a 'hot tub': now see Practice Note SC Eq 3, 54-55.

¹⁴ Justice PA Bergin, 'Mediation in Hong Kong: the way forward: perspectives from Australia' 82(3) *Australian Law Journal* 196, March 2008.