Failure to Comply with the Construction List Practice Note

Advance Bank Australia v Tyndall Life Insurance Australia Ltd
Coram: Rogers CJ Comm D
21 September 1992

His Honour: By summons, filed on 10 December 1991, the plaintiff sought a declaration as to the proper construction of policies of insurance issued by the defendant as well as an order for the payment of some $480,000. The return date for the summons was 7 February 1992. It came before Mr Justice Cole on that date. Relevantly for present purposes, I should mention that counsel for the plaintiff then told his Honour that the dispute was "a short construction point". It is also relevant to note that, on that occasion, his Honour mentioned that he was concerned that the purported beneficiaries of the policies were not parties to the action and he wanted to have some assurance as to their position when the matter next came before the court on 21 February.

Various orders were then made for the future progress of the matter. A defence and a cross claim were filed on 19 February. A reply and defence to cross claim were filed on 14 March. The matter was again before the court for directions on 27 March. On that occasion his Honour directed that the matter should be in the call-over list on 15 April for the allocation of a date for hearing and directed that, on that occasion, the parties hand to the court an agreed statement of issues. When the matter came into the call-over list on 15 April his Honour allocated four days for the hearing of the action commencing on 28 September 1992. He made the Usual Order for Hearing in accordance with the Construction List Practice Note. That, amongst other requirements, contains a provision that statements of the evidence proposed to be relied upon be exchanged one month prior to the date fixed for hearing.

His Honour was told that the agreed statement of issues was not available, there was a draft in circulation and a further two weeks was required. That statement was made by both counsel. Thereupon his Honour extended the time for the filing of an agreed statement of the issues to 1 May. So far as the court file is concerned, even today it appears barren of any statement of issues, agreed, or otherwise. Whether that be the true position or not the fact indubitably is that there has been a complete failure to comply with the requirements of the Construction List Practice Note in so far as exchange of statements is concerned. The plaintiff says that it had difficulties in getting instructions; that a great deal of work had been done, but nonetheless there was an inability to comply with the provisions of the Practice Note. I would have thought myself that it would have been appropriate for the solicitors to draw the attention of the Court to their inability to comply when that became manifest. That was not done.

The defendant equally appears to have no explanation, satisfactory, or otherwise, for the failure to comply with the provisions of the Practice Note. The legal representatives and their clients should realise that there is a real purpose in the provisions of the Practice Note. They are not promulgated merely to make the judges feel better. The whole point of exchange of statements is in order to expose the strength and weaknesses of each party's case to the other, to allow the parties to focus on what the genuine issues are and to allow counsel to prepare his, or her, cross-examination so as to reduce the time required to be taken in court.

It is the experience of the Judges that a timely exchange of statements often times leads to a settlement of a dispute or, at least, to the exchange of realistic offers of settlement, which may later lead to more appropriate orders for costs being made than would otherwise be the case.

For the parties to fail to comply with the court's directions defeats each and every one of those purposes and accordingly works to deflect the proper and purposeful administration of justice. The courts are not here to accommodate the idiosyncrasies of clients or legal advisers in the preparation of the case. They are here to administer justice in accordance with the directions and requirements of the Court.

The proceedings came into the list last Friday on an application to amend the reply and defence to cross claim. At one stage, at any rate, that application was opposed by the defendant on the basis that, some at least, of the proposed material was futile and accordingly would not further the proper resolution of the dispute. The application was stood over until this morning when there was a more substantial examination of the position.

It was then that the details of the neglect of the parties emerged in full flower. I was told that, as a result of the receipt of some statements from the defendant the plaintiff would be unable to proceed on the date fixed some five months ago, whether or not, the late amendment sought was granted. The plaintiff is still, at the present time, looking for an expert to meet the evidence recently produced by the defendant.

The defendant, for its part, is unable to meet the case which is the substance of the amended reply and amended defence to cross claim sought to be propounded by the plaintiff. In the result, not only have the parties failed to comply with the directions of the Court, but they are now unable to proceed on the date fixed for hearing. The consequences of that are not only the ones I have already mentioned. It means that the Court will be unable to usefully occupy the time of a judge which would have been devoted to the hearing of this case. Further, if the matter were to remain in the Commercial Division, it would be

necessary to allocate a new date and thereby deprive some other and likely more deserving party from the opportunity of getting that date for the hearing of its case. I trust I do not have to explain to two commercial organisations how that would impact on the efficiency of the Court. There is repeated and steadfast complaint from the community as to the cost and expense of litigation and of delay in hearings. The Commercial Division attempts to give parties an early date for hearing. That attempt is defeated by events such as these which I am presently addressing. If the commercial community wishes to have an efficient and working Commercial Division it is incumbent that it and its legal advisers co-operate with the Court.

The usual consequence of a failure to adhere to the Court's orders and, more particularly, the failure to utilise the date for hearing allocated, is to remove the matter from the Commercial Division and allow the matter to take its place in the general list where the delay is somewhere in excess of eighteen months.

I have been asked not to make an order removing the matter from the Commercial Division because the parties are presently giving consideration to having the dispute between them mediated by Sir Laurence Street or some other appropriate person. Alternatively, it is said, the parties may wish to utilise the provisions of Part 72 of the Rules and have the dispute referred for enquiry and report by some appropriate person. Even that would only solve part of the difficulty because when that report came in it would then be necessary to devote Court time to a consideration of the referee's report. Nonetheless, I think it is appropriate that I should try and maintain such momentum as there may be in the disposition of the case by not removing it from the Commercial Division at the present time, whilstever the parties consider how they should best try and bring about a resolution of the dispute.

There is one other matter to which I should refer. The discussion with counsel has led to an exploration of the question whether the undertaking which had been offered to Cole J, pursuant to the remark he made, concerning the position of beneficiaries of insurance policies, adequately takes care of the difficulties which might conceivably arise. Now is not the time to take up that question but I trust that the parties will, if this matter is not otherwise disposed of, give proper consideration to the undoubted difficulties which exist.

The orders I make are:-

By consent I give leave to the plaintiff to file and serve amended reply and an amended defence to the cross claim in the form of documents filed in Court.

I vacate the date fixed for hearing.

I will stand the matter over for directions to 9.30 am 6 October.

I direct the parties to forward a copy of what I have said to the Chief Executive of their respective clients.

I will reserve the costs of the motion to amend, of Friday and of today. ❑