Procedures for complex commercial cases

By Jeremy Stoljar

Large scale commercial cases cause problems of a special kind. Often vast quantities of documents are involved, electronic and otherwise. Discovery becomes voluminous, sometimes almost unmanageable. Witness statements are long and complex. Even the pleadings can be so intricate they are hard to follow.

All this makes large commercial cases highly expensive. This articles looks at two recent attempts by courts to curb these problems – and thereby make commercial litigation cheaper and faster.

Developments in the United Kingdom

In December 2007 the Commercial Court Working Party on Long Trials delivered its report and recommendations (the report).[1]

The report includes various proposals for the efficient and swift conduct of what it described as 'heavy and complex' litigation, including that:

- pleadings be limited to 50 pages;
- no two party trial, however complex, be listed for more than 13 weeks;
- time limits be set for every component of the trial, including cross examination and closing submissions; and
- no opening 'should ever ordinarily be estimated to exceed two days, even in the heaviest case'.

Central to the new procedures contemplated by the report is a judicially settled list of issues. According to the report, the working party became increasingly convinced that a list of issues should be the 'keystone' to the proper management of commercial cases:

> The WP [working party] concluded that the list of issues should be the key working document in all commercial court cases, whether small or large and whether involving few or many issues. The list of issues will be based on the pleadings of the parties, but in future it should become, effectively, a court document. It should, once settled, be the basis on which decisions are made about the breadth and depth of disclosure, provision of witness statements, what experts will be permitted and, ultimately, the shape of any trial.

The report contemplates that once the list of issues is settled pleadings 'will thereafter increasingly only have secondary importance'. Pleading points will be actively discouraged by the court.

The report includes the following:

> The collective view of the [working party] is that frequently almost the only time a [pleading] is examined in detail by the court is when an issue arises on whether a party is entitled to raise or pursue a particular point, either in an expert's report or at trial. Then there is a minute analysis of the contents of [the pleading].

The scope of discovery and the content of witness statements will also be regulated by the list of issues. For example, witness statements will address, by reference to the list, the particular issues on which that witness is giving evidence, arranged by appropriately worded headings.

In respect of expert evidence the recommendations of the report include the following:

- permission for expert evidence should not be given until after the list of issues has been judicially settled;
- the list of issues should identify, in summary form, the issues on which expert evidence is required, and permission for expert evidence should be limited to those issues; and
- the court may give directions limiting the length of expert reports.

The report contemplates that judges will be involved in the case management of complex commercial cases from an early stage. As already noted, a judge will settle the list of issues. A 'two judge team' may be used if the case is 'sufficiently heavy/complex'.

The working party also recommended that judges be encouraged to give provisional views on the merits of particular issues if that seemed appropriate. Judges would also be encouraged to exercise their powers with regard to giving summary judgment, or for strike outs.

In a statement in court[2], Mr Justice Andrew Smith, judge in charge of the Commercial Court, stated that the judges of the Commercial Court will adopt the approach of the report in managing all cases which are issued, or in which a case management conference is held, in that court after 1 February 2008. This trial period will continue until the end of November 2008.

Developments in the Federal Court in Victoria

On and from 1 May 2007 in Victoria the Federal Court of Australia introduced a Fast Track List, on a pilot basis.

In this list matters will not proceed on pleadings. Rather, there will be case summaries: statements of a party's claim or cross claim, points of defence and points in reply.

A 'scheduling conference' will be held not less than 45 days from the commencement of the proceedings. At the scheduling conference the presiding judge will set the matter down for final hearing. The trial

shall be between two and five months from the date of the scheduling conference, sooner in urgent cases.

Discovery will ordinarily, at least as regards to liability, be confined to documents in the following categories:

- documents on which a party intends to rely; and
- documents that have a significant probative value adverse to a party's case.

A pre-trial conference will be held approximately three weeks prior to the trial.

At the pre-trial conference the presiding judge will decide the total time that each party will be allocated to present its case at trial, with due allowance for questions from the judge. As noted in the Fast Track List Directions issued by the court:

> Each party shall receive a fixed block of time for its oral submissions; a fixed block of time to present its case in chief, cross examination, and any re-examination; and a small amount of flexible time to be used as needed. It shall be counsels' responsibility to determine how to allocate and best use each party's available time.

A trial of a case in the Fast Track List will be conducted in what is described as 'chess clock' style, i.e., as also noted in the Fast Track List Directions:

> The judge's associate will be responsible for keeping track of each party's time used and time available. At the conclusion of each day of the hearing, the parties and the judge will confirm how much time each party has used and how much time each party has remaining.

The court will ordinarily deliver judgment within six weeks of the conclusion of the trial, sooner if necessary.

It appears from information published on the Federal Court of Australia website that, at the time of writing, some 28 matters are currently in the Fast Track List. Five of these matters appear to be applications commenced by the ACCC. A number of these matters have proceeded to final judgement.

Endnotes

1. A copy of the report is at http://www.judiciary.gov.uk/docs/rep_comm_wrkg_party_long_trials.pdf
2. A copy of the statement is at www.judiciary.gov.uk/docs/long_trials_statement.pdf