THE ROLE OF THE MODERN COMMERCIAL COURT
Supreme Court Commercial Law Conference
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The last twelve months have seen a comprehensive and thorough review of how commercial disputes are managed in the Supreme Court of Victoria. The impetus for this has come from different sources but all largely prompted by the same objectives of achieving prompt, efficient and affordable resolution of commercial disputes in a modern environment.[1] These objectives are not new although the environment in which they need to be met has evolved over time with changing technology and changes in practices. In particular, the rapid growth in technology over recent years has posed challenges, and imposed greater costs, for commercial litigation, particularly, but not only, in the need to provide discovery of a greater volume of material found in a greater number of places in electronic form. The burden of providing discovery in modern litigation has alone imposed heavy time and costs burdens that has made it unattractive for some commercial disputes to be resolved by judicial determination.

Calls for review and change have been made by litigants asking that disputes be dealt with quickly, efficiently and affordably to meet business needs and expectations. The legal profession, for its part, sought active judicial management of

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1 See: "McClelland Urges Professional Reform," *Australian Financial Review*, 18 September 2009, 44; "Takeovers Panel Saves us 'millions'," *The Australian,* 14 September 2009, 23; "The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction," *National Alternative Dispute Resolution Advisory Council*, Report to the Attorney-General, September 2009, Launched 4 November 2009.

disputes, speed in setting cases down for trial, and certainty of trial dates. The judges, as decision makers, sought improvements in the conduct of litigation to focus on that part of a dispute that required decision making and discarding the dead weight of unnecessary issues, unnecessary testimony, unnecessary disputes about evidence, unnecessary documents, and unnecessary submissions that, however interesting, distracted and delayed decision making, consumed costly Court time and did not assist the judge in deciding what was still in dispute.[2] Many of these concerns are not restricted to commercial disputes. As recently as 3 November 2009, the Lord Chief Justice of England and Wales complained about excessive citation of cases in a homicide appeal, saying that the "essential starting point, relevant to any appeal against conviction or sentence, is that if it is not *necessary* to refer to a previous decision of the Court, it is *necessary* not to refer to it. Similarly, if it is not *necessary* to include a previous decision in the bundle of authorities, it is *necessary* to exclude it"[3] (emphasis in original). The need for case management is well established and in "the public interest in the proper and efficient use of public resources."[4]

The need for special procedures dedicated to the resolution of commercial disputes is not justified by commercial law or commercial disputes having a privileged position in the legal system. We need only think of the primary importance of the liberty of the subject to realise that there are many claims upon a Court's time which may be

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2 See, for example, Victorian Law Reform Commission, *Civil Justice Review*, Report 14, (2008); Justice D Byrne, "Building Cases – some thoughts on innovation", Supreme Court of Victoria Practice Note 1 of 2008; Justice D Byrne, "The building contractor and Practice Direction 1 of 2008" (Paper presented to the Master Builders Association, Melbourne, 16 April 2008); Paula Gerber and Bevan Mailman "Construction Litigation: Can we do it better?"(2005) 31 *Monash University Law Review* 237-257; Justice T Pagone, 'Lost in Translation: The Judge from Provider to Consumer of Legal Services' (2008) 12 *Southern Cross University Law Review* 157.

3 *R v Erskine; R v Williams* [2009] 2 Cr App R 29, [75]. My thanks to Gray J of the Supreme Court of South Australia for drawing my attention to this passage.

4 *AON Risk Services Aust Ltd v ANU* (2009) 83 ALJR 951, 960 [23].

more important than civil disputes about money, convertible notes, detachable coupons, stapled securities or even false and misleading conduct in trade or commerce. There is, however, a fundamental aspect of commercial disputes which requires an institutional, systematic and structured response by courts of law. In *AON Risk Services v ANU*[5] Heydon J said:

> Commercial life depends on the timely and just payment of money. Prosperity depends on the velocity of its circulation. Those who claim to be entitled to money should know, as soon as possible, whether they will be paid. Those against whom the entitlement is asserted should know, as soon as possible, whether they will have to pay. In each case that is because it is important that both the claimants and those resisting claims are able to order their affairs. How they order their affairs affects how their creditors, their debtors, their suppliers, their customers, their employees, and, in the case of companies, their actual and potential shareholders, order their affairs. The courts are thus an important aspect of the institutional framework of commerce. The efficiency or inefficiency of the courts has a bearing on the health or sickness of commerce.[6]

It is ultimately the courts which facilitate ordered commercial activities by enforcing bargains and resolving disputes which arise in ongoing commercial activity. Business dealings need certainty, predictability and enforcement of deals. Commercial activity therefore needs the courts, and looks to the courts, to create an ordered environment within which to operate.

Our commercial community has come to expect, and is entitled to expect, that commercial disputes be resolved by judges who are familiar with commerce and who appreciate the commercial realities of their decisions. It also expects, and needs, commercial disputes to be resolved quickly, predictably, consistently and economically. Business needs quick, efficient, affordable and predictable outcomes for business and the economy to run smoothly. Our legal system cannot afford to fail

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5 (2009) 83 ALJR 951.

6 *Ibid*, 981.

its business community and must provide a system of dispute resolution that takes account of the context in which disputes arise and the need to resolve them as business continues to be carried on.[7] The legal system, to that extent, is a necessary adjunct and facilitator of efficient business activities. Our system of dispute resolution must, to that extent, be moulded to business needs and exigencies.

These are the pillars that this Court has sought to build upon in reviewing how commercial disputes are to be managed and resolved in this Court: namely, expertise of decision makers; expedition in decision making; predictability in process, management and outcome; and sufficient flexibility to ensure that the processes can be moulded to the needs of each individual case.

Increased judicial resources

The first step in the changes was the announcement by the Chief Justice of the creation of the Commercial Court in place of the then Commercial Lists.[8] A dedicated forum for the resolution of commercial disputes is neither novel nor unique to Victoria. The English Commercial Court was said to have begun by a resolution of the Council of Judges on 17 June 1892.[9] The New York State Supreme Court, on which Judge Benjamin Cardozzo sat with great distinction, launched its Commercial Division in 1993. I recently visited a dedicated Commercial Court in Casablanca which was inaugurated in 2006.

The particular significance of the announcement by the Chief Justice was the

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7 See *AON Risk Services Aust Ltd v ANU* (2009) 83 ALJR 951, 960 [23], 975 [97], 981 [137].

8 Supreme Court of Victoria, Notice to Practitioners Commercial Court, 12 December 2008.

9 V.V. Veeder 'Mr Justice Lawrence: The "True Begetter: of the English Commercial Court' (1994) 110 *Law Quarterly Review* 292.

increased allocation of judicial resources to commercial disputes and the broadening of the kinds of cases which could be brought within the Commercial Court in Victoria. There are now five judges and four associate judges in the Commercial Court. The cases which may be brought within the Commercial Court for management by judges are no longer limited to those which would take no more than 10 days of trial time. Commercial disputes are more widely defined and no longer exclude class actions which, in my experience as counsel, are particularly well suited to judicial management. The category of cases amenable for judge management within the Commercial Court has recently been increased further by the inclusion of tax disputes in recognition of the fact that there are many commercial disputes arising from or involving tax considerations.[10] Some such disputes arise from claims in contract and tort against tax advisors, some from GST disputes between supplier and acquirer of goods and services, but many apparently non tax disputes arise in transactions which owe much in their structure, form or economic viability to taxation considerations which need to be understood to deal properly with the competing interests of the parties in their commercial dispute (for example the structures adopted in various investment products which at times collapse, encounter difficulties or give rise to other commercial disagreements).

The increased allocation of judicial resources to the Commercial Court by the Chief Justice, and the inclusion of associate judges in that allocation, should not be underestimated both as an efficiency measure, as well as a burden upon scarce public resources. An immediate effect was to make available more judges to manage commercial disputes as well as to decide them. That allocation brings with

[10] Supreme Court of Victoria, "Notice to Profession 11/2009: Commercial Court List F", 16 September 2009.

it significant costs to the court as a whole and to the judge to whom the task is given. Dedicating some judges to manage commercial disputes reduces the number of judges available to hear and determine the much greater number of other cases which remain in the system to be heard and determined by others. The management of cases also imposes burdens and demands on the managing judges that may not fully be appreciated by the legal profession or by the public. Effective management requires preparation, and proper preparation requires finding time to read and analyse the material which has been filed by the parties. The parties to commercial disputes, and their advisers, expect that a judge will be familiar with the case before entering court. This requires the judge to find time and to juggle competing demands on limited resources to ensure that cases get the particular management that they need.

The judicial management of commercial disputes also requires the judge to strike the right balance between managing a case for adversarial decision making and for other dispute resolution. The traditional model of judicial dispute resolution is for the judge to decide between competing cases tested by adversaries with real interests in competing outcomes. The role of judicial management for a contested dispute focuses upon ensuring that the adversaries are adequately prepared to present their cases, to test the cases of their adversaries, and to ensure that the case as a whole is appropriately presented for the judge to identify what needs to be decided. However, not all commercial disputes brought to the Commercial Court will go to a contested hearing or will require judicial decision. The judge managing a commercial dispute needs to manage a commercial dispute with a view to facilitating a resolution that best fits the needs of the particular dispute. Some disputes will only be resolved after a full hearing and by an arbitral decision by a judge. Those cases

may need full discovery, extensive evidence and costly hearings. Other cases may require early mediation before time and money is spent on preparation directed to judicial decision rather than to negotiated resolution or settlement. A difficult task for the judge managing a commercial dispute is to manage a case in such a way as to create an environment to allow resolution whilst at the same time ensuring that it be made ready for contest and hearing if that becomes necessary. Furthermore, and paradoxically, some of the processes designed to facilitate an early resolution of a dispute may be counter productive causing delays and adding to the costs and burdens of litigation. Sometimes compelling unwilling parties to mediate a case, or to take some step which others may think likely to encourage an early resolution, only adds cost and delay which, in turn, may make subsequent resolution more difficult. On the other hand some of the processes directed to adversarial contest and judicial decision impede or render impossible negotiated settlement or resolution. These are important considerations for a judge who is managing a commercial dispute which do not arise for judicial consideration in cases which come to be heard when set down for trial without case management. It is the management of a case that creates the additional work and complexity for the court to manage as it balances the needs of cases that would benefit or require labour intensive management by a judicial officer and the remaining work of the court which is left for the profession to manage by general operation of the rules of court. It is an important and difficult issue of appropriate resource allocation for the community and the court as a whole as well as for the individual judges tasked to manage cases.

The allocation of associate judges to the Commercial Court introduced an important functional flexibility in the management of commercial cases. A concern about judicial management of cases has sometimes been that the judge as ultimate

decision maker may be inappropriately influenced by matters raised in earlier interlocutory disputes concerning disputed facts, the credibility of witnesses or the credit worthiness of the litigants. The ability for many hard contested interlocutory disputes to be heard and determined by associate judges,[11] removes those concerns and bolsters the confidence which the parties can have in the ultimate decision of the judge at trial by ensuring that the interlocutory decisions are made (and potentially prejudicial evidence can be heard, evaluated and adjudicated) by a person other than the judge ultimately deciding the case.

The dedication of associate judges to the work of the lists in the Commercial Court also enables interlocutory disputes to be determined sooner than they might be decided if the time needed for judicial decision could not be accommodated during the regular days allocated for directions and the list judge was unable to find time during the running of a lengthy trial. The division of interlocutory disputes between judge and associate judge is in part a matter of the particular practices of individual list judge and list associate judge but, for example, in my case, it enables me to decide procedural issues which bear directly upon the conduct of the trial and leave to the associate judge in my list those interlocutory disputes which cannot be accommodated in directions days, which do not impact directly upon the trial (for example, applications for security of costs and most discovery disputes), or which perceptions of fairness or pre-judgment make desirable to be heard by a judicial officer other than the trial judge.

An effect of this division is to enable more interlocutory disputes in the Commercial

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[11] See Supreme Court of Victoria, "Notice to the Profession 2/2009: Matters to be Determined by Associate Judges," 2 March 2009, for a non-exhaustive list of matters that Associate Judges can determine.

Court to be heard promptly and, therefore, to reduce delays in the management of a case for its resolution or disposition by trial. A list judges' working week is thus available to hear trials, and to conduct regular directions on Fridays without the difficulty of having to find time for interlocutory disputes which would otherwise languish until time could be found. The practice of ensuring that appeals from decisions of a list associate judge are generally heard by the particular list judge to whose list the case was allocated provides a continuity that, over time, should ensure that decisions of associate judges reflect the management decisions which the list judge would have made if the matter had been brought directly to the list judge.

Judicial case management

It may be useful to emphasise the fact and significance of judicial management for commercial cases. The first thing to say about judicial management is that case management by judges of commercial disputes is primarily a choice made by the parties. Commercial disputes can be instituted in the traditional way and be managed by operation of the ordinary rules of Court without a judge. Not all disputes need individual judicial management and, indeed, the Court is not able to provide judges to manage all disputes: judicial management is labour intensive, occupies scarce public resources, and is not an efficient way of dealing with all disputes. The ordinary rules of Court provide a convenient structure and process for case management by operation of the rules (rather than by a judge) through the diligence of the legal profession complying with the rules and ensuring their enforcement. The management of such cases are left, in effect, with the legal representatives in the context of standard but flexible rules, and an ability for the parties to apply to the court for orders where necessary. Case management by the profession through

operation of rules of Court can be efficient and economical: compliance with the rules do not depend upon finding judicial time for directions and do not require costly Court attendances. The parties may, however, elect to have a commercial dispute managed by a judge by having the matter come into the Commercial Court. In such instances the proceeding is allocated to a list with the usual expectation that the judge managing the case will also be the judge who will hear the case at trial and who will decide the dispute.

There are several consequences of cases being managed by a judge. One advantageous consequence, from the point of view of the parties, is that they have immediate access to a judge able to deal with all issues which may arise in a dispute before its ultimate trial and determination. This can be of enormous importance in commerce, where business needs to continue until the trial and decision of the dispute. Interim orders may need to be made to ensure that business continues and that an enterprise may be kept running with minimal interruption. Interim orders may need to be made and can be made by the one judge who is aware of the facts and is able to control the whole of the proceedings and the relations between the parties until ultimate trial and decision. The allocation of a proceeding to a judge thus creates an efficiency through continuity of a judicial officer managing the case and by that judicial officer's familiarity with the facts and issues in the proceeding.

Another consequence from the point of view of the parties is that the preparation of a case for trial can be made by the practitioners knowing the practices and preferences of the judge expected to conduct the trial. The significance of this should not be underestimated for reducing costs and reducing delays. Many trials are delayed or lengthened by disputes about admissibility of evidence and the like

which may, in part, arise from the practitioner's inability to predict how the ultimate decision maker may approach matters of practice or procedure where individual preference may play a great part. Many costs are incurred by standard orders for the filing of witness statements or the creation of court books. The preparation of cases in the past have frequently had to be made without being able to predict how the judge who would ultimately hear the trial was likely to rule on such procedural matters as reliance upon witness statements or the use of court books. Knowing from the start of preparation who is likely to be the trial judge, enables the parties to prepare the case to fit the practices and preferences of the judge. That will in part occur through discussion and debate in directions hearings and case management conferences, but also by practitioners being able to predict from experience, for example, what the judge at trial is likely to do with inadmissible passages in witness statements that another judge might regard as harmlessly unimportant. If the parties know that the trial judge is unlikely to place weight on witness statements, it enables them to avoid the cost of producing them. If the parties know that the particular judge finds court books unhelpful, it will enable them to avoid the cost of producing them. If the parties know that the particular judge requires the tendering of each document relied upon, the preparation for the case can be done accordingly. Interlocutory disputes that bear upon the conduct of a trial are otherwise likely to be decided cautiously where the judge deciding the interlocutory dispute may not the trial judge. That is because the judge deciding the interlocutory dispute may be reluctant to decide issues that might bind the trial judge. There will be a tendency for a judge hearing interlocutory disputes bearing upon the conduct of a trial to leave as much as possible open for decision at trial with the consequence, in many cases, in over preparation by the parties (to allow for the greatest number of options) with increased costs to the parties. Having the managing judge as the trial judge will

minimise if not remove that tendency with the benefit (at least in theory) of reducing costs, time and delays.

The overriding objective of case management, and of the changes introduced with the Commercial Court, is that each case requires individual treatment taking into account the parties, the nature of the dispute, the resources available and the need for disputes to come to trial promptly but sufficiently prepared. Effective case management therefore requires all involved in the process of management to turn their respective minds to the individual needs of each case to assist the judge in deciding how it should be managed. Many of the changes which have been made to the practices and procedures for commercial disputes in this Court have been designed to ensure effective management and the reduction of time consuming and costly habits.

The tiger's tail: managing cases

One challenge for a Commercial Court managing cases is that of balancing competing, and at times irreconcilable, demands which arise in each case. It is important to appreciate that the demands which arise in managing a dispute are frequently irreconcilable and push or pull in different directions. The interests of one or more of the parties will not always be to have a dispute resolved quickly, or at times at all. Sometimes the desire of one party for a quick trial is only to secure an advantage that is expected to translate into some economic or other gain. What may seem fair or proper preparation in the abstract may also interfere with sound commercial outcomes that ideally should be secured through case management. Discovery of documents, evidence by witness statements, the creation of court books are all defensible as sound practice founded upon fairness and efficiency, yet

each may paradoxically also produce unfair outcomes, inefficiency and at times may make an agreed resolution of the dispute impossible. It is all too frequently the case that the cost of case preparation may have been so great that it is the very costs incurred in the hope of resolving a dispute which sustain the continuation of the dispute and make it commercially impossible for the dispute to be resolved other than by trial.

In an ideal world the cost of litigation should, perhaps, be a relatively neutral element in the dynamics of dispute resolution except, perhaps, as a minimum bar deterring some disputes ever reaching the courts. By "cost" of litigation I include not only the money spent on lawyers in conducting a dispute but all those economic costs and detriments including the time spent and the economic opportunities lost which comes with litigation. A modern Commercial Court, and those who practise in one, needs to minimise the negative impact on dispute resolution which can arise through the costs and processes of litigation. That task is by no means easy for a Court and its judges, especially when remembering that a Court cannot know until trial, and can never be able to know until trial, enough of the facts to ensure that case management in each case is what the particular dispute actually needed.

The legal practitioners for their part might usefully focus upon their part in case management as the vehicle for dispute resolution. In each case the legal practitioners have a key role in assisting their client to achieve a favourable outcome. The role of the lawyer is not to use litigation to increase their profits but, rather, to focus on how the client's interests may be served efficiently, expeditiously and economically. That objective, in part, requires that costs be incurred which are calculated to assist in resolving the dispute. Practitioners need to turn their

professional judgment to how a dispute is best managed to lead to its resolution. The legal practitioners should, in short, always keep firmly in mind the client's need for an appropriate outcome to a dispute.

Commercial litigators should not assume that each dispute will end up with a trial and a judicially imposed adjudication: indeed, most do not. It would therefore be inappropriate for every commercial dispute to be managed on the basis that a court trial and judicial adjudication is the desirable or probable outcome. Commercial litigators should turn their minds to other ways of producing acceptable commercial outcomes for their commercial clients of their commercial disputes. The availability of judicial case management provides valuable opportunities for dispute resolution to be explored before excessive costs are incurred, before excessive time is spent or passes, and before adversarial positions harden.

The role of commercial litigators where the case does get to trial and judicial determination must always be to further their client's interest in dispute resolution by assisting the judge in reaching a decision to the dispute. Commercial litigators might usefully see the judge as the consumer of their services in aid of their client's interests. To that end, the litigators should aim to identify and clarify the issues which need to be decided, to sharpen the ambit of dispute by precise identification of what the dispute depends upon and by reducing to a humanly manageable size both the evidence (oral, written and documentary) and the submissions upon which the outcome depends. The commercial litigator's task must always be to focus upon what will make decision more efficient, expeditious and economical. In other words, to ensure that pleadings, evidence and submissions are directed to the task of decision. Thus, for example, evidence should be focussed on what is needed to

resolve a dispute, documents should be tendered only if they bear upon what needs to be decided and if they bear upon the issue probatively and admissibly. Submissions should identify the evidence and its location in transcript, witness statements or tendered documents. Court books should be scrutinized carefully and critically to avoid pointless repetition or unnecessary inclusion. Legal authorities should only be cited if necessary for judicial considerations. There are all matters which will assist decision making in the modern commercial world; they will assist the judge who receives these legal services as their consumer and, in that way, will assist in furthering the client's case.

Case Management Conferences

One solution recently introduced by the Commercial Court to grapple with these problems is the case management conference ("CMC")[12] borrowed from the London Commercial Court.[13] Each list judge may approach a CMC differently, but they are all directed to the early identification of what is in dispute between the parties after the pleadings have closed.[14] Pleadings may sound like technical jargon from a bygone era to the non-lawyer but they are essential in any form of dispute resolution as a means for each party knowing what the other claims or says in the dispute. There may be any number of ways in which people in dispute may communicate what they claim against each other, but any system of efficient dispute resolution must provide some means for those in dispute to assert their case clearly so that

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12 Supreme Court of Victoria, "Notice to Profession 9/2009: Case Management Conference," 4 August 2009.

13 See London Commercial Court, "The Admiralty and Commercial Courts Guide," (8th ed, 2008) Her Majesty's Court Service, http://www.hmcourts-service.gov.uk/publications/guidance/admiralcomm/index.htm, at 9 November 2009.

14 See Supreme Court of Victoria, "Notice to Profession 9/2009: Case Management Conference," 4 August 2009, which requires parties to submit a draft list of issues to be discussed at the CMC.

each party to the dispute understands what is said and is able to provide a meaningful response. At the stage when pleadings have closed it is possible for the parties, their advisors and the Court to identify what remains in dispute. The CMC provides an opportunity to look carefully at what has been engaged as the dispute, to see whether it needs further refinement, and, significantly, to work out how best that dispute can be made ready for testing, resolution or adjudication. The CMC thus provides a unique opportunity before additional costs are incurred on discovery, witness statements, court books and the like, for the legal profession and the managing judge to look at how best a commercial dispute might be resolved. The senior experienced lawyers who have the carriage of the commercial dispute as adversarial litigation are given the opportunity on behalf of their clients to meet with the judge who has the ultimate task of decision of that dispute and in that meeting to consider how that dispute should best be managed. The CMC, therefore, requires the key players in the presentation, management and decision of a dispute to turn their minds to what the dispute needs for its disposition and provides a unique opportunity to explore the extent of the dispute and, therefore, to explore settlement and negotiated outcomes.

An essential aspect for the success of the CMC is that it be attended by the people who are expected to have the actual conduct of the case at trial. A consequence of this requirement is to bring forward the time of critical evaluation of a dispute by the people who are expected to conduct the trial from a point closer to the trial date to an earlier point in the preparation of the case for trial. A consequence of the CMC should be that those who have the carriage of a case at trial will focus upon the case as a whole at an earlier point in its journey to trial than may have been the practice in the past. That, in my experience to date, has had tangible benefits for litigants. In

some cases it has clarified the position of the parties and wholly removed unnecessary disputes which had found expression in increasingly incendiary and obdurate correspondence. In some cases it identified amendments necessary to be made to the pleadings to reflect more clearly the dispute between the parties. In some cases it clarified for lead counsel the instructions which may previously have been given at a point in time when the instructions may not have been as clear or as precise as they subsequently became. In each case the CMC has ensured that the future management of the case occurred with as precise as possible a focus upon what the individual case needed. The process avoids, for example, the over-cautious preparation of witness statements to deal with peripheral matters that need not be pursued. It avoids the need for discovery of issues in a pleading which no longer remain in dispute. Witness statements, where ordered, can focus upon what remains to be proved; general discovery, where ordered, can be focussed upon what is left in contention.

The success of CMCs, however, depend fundamentally upon the person who is expected to be in charge of the proceeding at the trial for each party genuinely turning his or her mind to the needs of the case sooner, rather than later. Savings to the clients can occur, efficiencies can be achieved, issues can be identified and refined, but this requires bringing an active consideration to what preparation a case needs *before* costs are incurred and *before* time is unnecessarily wasted. From the judge's point of view it requires finding time, often at nights and weekends, to read and analyse the pleadings and the documents required to be provided for a CMC.

Written advocacy

The need for a judge to find private time to work upon cases in their management is not said as a lament. It is, rather, to draw attention to a fundamental change to the judicial resolution of commercial disputes which has been occurring over time and which is both inevitable and potentially concerning. A fundamental feature of our system of justice is that it be conducted in open Court and orally.[15] The increased reliance on written material filed before oral hearing (including witness statements, draft agreed facts, written outlines, chronologies, submissions and so on) puts pressure on judges in the Commercial Court to find time, other than Court time, in which to read and evaluate what is filed. But, more importantly from the public's and a litigant's point of view, is the impact which this private reading and private evaluation may have upon case management and ultimate decision making.

A judge reading privately the written material filed by one party needs to do so with the caution borne from experience that what is being read may be objectionable, contestable or unreliable. The judge needs to be cautious against being influenced inappropriately by what he or she is reading privately, either by too ready an acceptance or by too ready a rejection of what is read. The lawyers, for their part, need to focus more upon the importance of written advocacy to ensure that what appears in writing is likely to have the intended persuasive effect without some significant point being missed when buried amid other but insignificant material distracting attention from the significant point. They need also to take care that material is not put in a way that a judge may consider so clearly objectionable as to discount it.

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[15] See Richard A Posner, *How Judges Think* (Harvard University Press, 2008) where, at 155 the judge argues that the principle of "orality" was a significant external constraint on judges and a means by which the public could effectively monitor their judicial performance.

The fact that a significant amount of judge time in managing and determining commercial disputes occurs in the judge's private reading of material carries with it the consequence that the lawyers' skills need to shift from oral presentation and persuasion in open Court to written effectiveness through presentation of material (pleadings, evidence and submissions) directed to an experienced legal mind with an overriding requirement to be fair to all parties. The lawyer who settles a pleading should bear in mind that in judge managed cases the pleading will be read by the judge without the immediate benefit of oral explanation. The pleading might therefore usefully be prepared as an informative document clearly exposing the issues in contention and how the case is put. The lawyer drafting or settling a witness statement should similarly keep steadfastly in mind the impact of the document in furthering the client's case when the document is read in chambers and the potential negative impact upon an experienced judge of such matters as lengthy irrelevant passages, overstatement, argumentative assertions, inadmissible evidence, hearsay, commentary upon documents, etc. The role of the modern commercial lawyer is similar to the manufacturer of products. The lawyer should avoid providing documents which read like the instructions you sometimes find in self assembly furniture and other kits from certain foreign based companies. Modern commercial lawyers may have something to learn from those engaged in product design and marketing in how to produce work that assists judges in their tasks and not leave the judge with assembly kit instructions that seem mistranslated from a foreign language.

Another issue arising peculiarly in judicial case management is the potential for inappropriate dealings between one party and the Court. The traditional form of public oral hearing and public decision making, usually meant that the only contact

between a litigant and the decision maker was in public and open to be seen by all. Case management by judges inevitably requires that some part of the dealings between the judge and a party will neither be conducted in public nor will immediately seen by all parties. I have already referred to the fact that some contentious material may be read by a judge as part of case management and as part of the judge's private reading of the evidence in preparation for trial. However, judge management of cases has also seen placed upon the judge's staff both additional administrative burdens and new points of contact with parties and practitioners with the potential for the judge's staff becoming inappropriately involved in the disputes. Associates to the judges with cases allocated for management have had added to their tasks administrative and case management burdens they previously did not have. Furthermore, and significantly, each time a party contacts an associate for what may seem a relatively innocuous matter, there is the potential for some inappropriate communication that may have some negative impact in the disposition of the case.[16] It is surprising how frequently I am told of communications between practitioners and my associates of a kind which, had greater thought been given to the matter by the practitioner, might have been avoided. Frequently, and surprisingly, my associates are asked to advise on some process affecting the parties to a dispute. This may sometimes seem harmless enough, except that in most cases which have been reported to me, the communications have carried the possibility that the practitioner might use the response of the associate against the other side as the Court's view of how something should be done. The availability of hearing dates for interlocutory disputes is a matter which, on its face, seems innocuous enough, but has frequently led to surprising disputes between the litigants

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[16] *Gas & Fuel Corp Superannuation v Saunders* (1994) 52 FCR 48, 51 (Davies J); *Lynch* v *Trustees of Sisters of Charity of Australia* (1997) 74 IR 232, 233 (Moore, Marshall and North JJ).

with the judge being said by one or other party as the cause for what one or other party either wanted or did not want. In one instance an apparently innocuous request of whether I might be available to hear an interlocutory dispute on a particular date became a dispute between the parties about whether that date should or should not be the one upon which the contest had to be heard. On another occasion, a remark was made to my associate about an application for contempt of Court being made for a purpose collateral to that which the procedure may be used. The important message is not merely that there are dangers in new practices but also to be conscious that the role of the Court in resolving commercial disputes has necessarily brought changes with new and particular challenges.[17]

Objectives, balance and partners

Flexibility to adapt outcomes for individual cases has been at the forefront of the developments in the Commercial Court. Flexibility and change is not a recent invention with courts and judges always having responded to the needs of the community, including those of the commercial community. The changes made this year are unlikely to be the last attempts to secure commercial objectives for commercial disputes and commercial litigants.

Much has been said about alternative dispute resolution and its desirability. The judicial model of dispute resolution has focussed upon the judge as the neutral decision maker deciding between competing positions in adversarial proceedings. It is a model which has perhaps too readily assumed that the parties were not otherwise able to resolve their differences and that what was needed was the

[17] For a guide on communicating appropriately with associates, see Supreme Court of Victoria, "Notice to Profession 6/2009: Communication with Associates," 2009.

authoritative intervention of a neutral judge with power to declare the rights of the parties upon the facts found after contest and testing. The model may be one which owes a great deal to the cultural environment in which it has evolved and over the years has itself developed practices which may have been calculated to make decision making easier but, which paradoxically, may have made settlement, negotiation and non arbitral resolution harder.

Many of the developments introduced in the Commercial Court have been made with a view to maximizing resolution of a dispute by means other than by trial. Thus, for example, the case management conference brings forward the consideration of how to manage a dispute to a point in time before many of the costs are expected to be incurred. The practitioners are required to complete a questionnaire for the CMC in which they are required to have identified such matters as the discovery available and needed, the witnesses to be called and the topics about which they are expected to give evidence.[18] The practitioners are also required to state whether alternative dispute resolution has been discussed with their client and whether the dispute might benefit by, for example, being referred to mediation.[19]

Mediation is ordered[20] in virtually every case in the Commercial Court and is actively considered throughout its management from inception to trial, including during trial. Commercial disputes should, where possible, be resolved by the litigants themselves arriving at commercial outcomes. Resolution of disputes by the parties retains for the parties the control of their own affairs and enables them to take into account, to

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18 See Supreme Court of Victoria, "Notice to Profession 9/2009: Case Management Conference," 4 August 2009, Annexure A.

19 Ibid.

20 For a general form of draft order for mediation, see Supreme Court of Victoria, "Notice to Profession 9/2009: Case Management Conference," 4 August 2009, Annexure A.

act upon, and to give weight to factors which may not arise in a trial for consideration by a judge. In part what the Court has done through some of its recent changes is seek to balance the costly needs of case preparation for adversarial decision making with the creation of active opportunities for earlier resolution of commercial disputes by settlement, negotiation and mediation.

The costs incurred by discovery is one area that needs close and constant attention. Discovery is fundamental to justice being done and to creating confidence that it is being done. On the other hand it can be very costly, very time consuming and continues increasingly to be so. The CMC being held at the close of pleadings before orders for discovery provides an opportunity for a meaningful reduction in the cost and time spent on discovery.

Early Neutral Evaluation

One of the new developments in the Commercial Court has been the adoption of the pilot project of early neutral evaluation ("ENE"),[21] which has been developed and adopted in other jurisdictions with varying degrees of success. The ENE at its simplest, enables litigants to seek a private and non-binding indication of the likely outcome of a dispute or an issue in a dispute from a judge other than the judge who may hear the trial.[22] The ENE has been adopted in part in response to suggestions that some commercial disputes would benefit from an early indication of the likely outcome of an issue in a dispute or of the dispute as a whole by an independent third party with the authority and independence of judicial office.[23] The expression of

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21 See Supreme Court of Victoria, "Notice to Profession 10/2009: Early Neutral Evaluation," 4 August 2009.

22 John S. Blackman, "Neutral Evaluation – An Adr Technique Whose Time Has Come" (1999, Farbestein & Blackman), 1.

23 Geoff Wilson, 'Renting Your Judge' (2000) 2 *ADR Bulletin* 71, 72; "Early Neutral Evaluation,"

such a view is similar to an opinion by counsel when asked by a party, or by an instructor, for an opinion on the basis of the limited evidence in a brief. The pilot project of ENE in the Court enables all parties to have input into the material leading to the expression of an opinion not by their individually hired counsel, but by a judge who will not be the judge hearing the dispute, if the dispute does not otherwise resolve. An ENE is only available at the request of the parties and cannot be imposed upon them without the consent of all.

In principle the expression of an opinion by a judge may be the same as that which a judge is frequently called upon to determine on pleading summonses, where the judge does not determine the rights of parties but may need to conclude that a case may be reasonably arguable.[24] The rationales for summary determinations of claims[25] may apply with equal force to ENE procedures. In practice, an ENE may be little different from the frequent expression of judicial observation from the Bench about the strengths and weaknesses of cases, propositions or submissions. The procedure may, however, be of great commercial advantage to litigants where their commercial position may benefit from a non-binding view of a dispute, or an issue in a dispute, without the necessity for a formal and final determination after lengthy preparation and lengthy trial.

The use of the ENE procedure as an element in the armoury of corporate governance should not be lost upon the captains of industry. At times business

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Alternative Dispute Resolution Program, http://www.adr.cand.uscourts.gov/adr/adrdocs.nsf/354c0e78f4dde1a6882564e1000be228/c721a13da682c8c882564e600603882?OpenDocument, at 5 November 2009.

[24] *Silverton Ltd v Harvey* [1975] 1 NSWLR 659, 665; *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62, 91; *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125.

[25] See Williams, *Civil Procedure* Vol 1, I 23.01.20 f (as at Service 231).

decisions makers do not need a final determination of a dispute with its attendant costs, delay and distraction before moving forward. There are many cases where the captains of industry need, as a matter of corporate governance, to make commercial decisions about whether to maintain disputes with the benefit of a neutral's expression of an opinion about the merits of some position. In such cases the ENE procedure may be an important element in the process of decision making in modern commercial life with the additional benefit of a substantial saving in time and money.

The process which has been adopted for ENEs has imbedded in it such flexibility as the parties' needs require and as their creativity permits. The possibility of ENEs becoming a major drain on Court's time or resources is guarded against by the need to obtain the agreement of the Judge-in-Charge of the Commercial Court for an ENE to be conducted. However, the processes for an ENE to be conducted are sufficiently flexible to suit a great variety of situations. Indeed, the flexibility is such that they could rival private commercial arbitrations as a form of determination. There is, in principle, no reason why an ENE could not by agreement of the parties be converted from a "neutral" to a "binding" judicial determination based upon a selection of material without the need for costly discovery, interlocutory procedures and an exhaustive trial. There is also no reason, in principle, why the person making the evaluation not be an expert, a senior lawyer, a non lawyer, or a retired judge, rather than a sitting judge of the court or in addition to a judge.

Impartial, neutral and fair decision making

In each of the endeavours to match outcomes with the needs of the case, the role of the judge needs to be that of the independent neutral facilitator of a just resolution of

a dispute and, if need be, as the ultimate neutral, impartial and fair decision maker.[26] In that context, the role of the profession will be critical in assisting the Court as facilitator of these outcomes. The legal profession has a role in furthering the particular interests of their particular clients and in doing so, will be of great assistance to the Courts in their task of achieving just outcomes efficiently, expeditiously and economically. I have been impressed at how opposing counsel have worked together with me in each of the CMCs I have conducted. They have met with me in a co-operative basis which has enabled meaningful discussions directed to facilitating the processes for case management and dispute resolution. The CMCs I have conducted have been with lead counsel who have not adopted antagonistic positions on case management or engaged in posturing for the benefit of their client. Rather, they have all been conducted on the basis that it is in their client's interests for the case to be managed well, for the issues to be identified clearly and early, and for the preparation of the case to be conducted in a way that best suits its resolution and ultimate decision.

May I say finally in that regard how well the legal profession in this State has responded to the Court's initiatives and assisted both in the formulation of the changes and in their implementation. Commercial disputes in this State are well served by an diligent and specialist legal profession who have embraced the Court's attempts to improve the resolution of Commercial disputes. Senior practitioners have responded to the Court's requests to serve on the Commercial Court's Users Group and have helpfully engaged in debate about the changes suggested. Where the Court has adopted procedures which some practitioners have resisted, it has been done on the basis of meaningful debate, which has more fully informed the

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[26] *AON Services Aust Ltd v ANU* (2009) 83 ALJR 951, 960 [23], 975 [98], 981 [137].

Court about the consequence of the changes.

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