Dealing with cost and delay

Abridged version of a paper by Justice DJ Hammershlag[1] published in *Resolving Civil Disputes* (Lexis Nexis).

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Introduction

More effective case management is the modern practical, and perhaps only available, judicial response to counter the ever-increasing cost and delay pressures exerted by significant commercial civil litigation.

Active case management is a relatively modern phenomenon. Commercial transactions and the disputes to which they give rise are increasingly complex. One effect is that case management techniques to deal with such disputes are continually evolving. This article, which is an edited version of a paper first published in Michael Legg's comprehensive book *Resolving Civil Disputes*,[2] is concerned with such techniques and identifies examples in the commercial jurisdiction in New South Wales at trial level where case management may directly affect cost and delay.

Resolving Civil Disputes

The following are the general drivers of effective case management:

- a judicial officer skilled in the art who puts in the necessary effort;
- consistency (but with sufficient flexibility) in approach;
- procedural steps tailored to suit the particular case; and
- a culture of compliance, achieved by maintaining a system for monitoring compliance and applying appropriate sanctions for non-compliance.

Management of a trial cause can conveniently be divided into the following stages:

- ascertaining the issues;
- controlling the evidence-gathering process;
- conducting the final hearing;
- marshalling the material to produce a satisfactory judgment; and
- producing the judgment at the earliest reasonable time.

The final two stages are almost exclusively for the judge, although the configuration the evidentiary material takes and the quality of the argument may affect the Court's burden. The benefits of effective case management are lost unless there is speedy judgment and equivalent effective management at intermediate appellate level. Save for complex commercial causes, judgment should be given in weeks. Cases which warrant longer than three months for judgment should be rare.

The Foundations

Active case management and participation by the legal profession in the process has since 2005 been mandated in New South Wales.[3] This is reflected in Part 6 of the *Civil Procedure Act 2005* (NSW), which:

- confers power on the Court to facilitate active and effective case management, including the power to tailor procedural steps to suit the particular case; and
- imposes obligations on parties and their legal representatives to facilitate the just, quick and cheap resolution of the real issues in the proceeding.

The Specialist List System

A significant feature of the case management structure in the Supreme Court of New South Wales is the specialist list system.[4] Cases within the Commercial and Technology and Construction Lists are administered by the list judge in Court each Friday.

Ascertaining the Real Issues

The formal pleading process – which historically was left unsupervised to the parties unless a specific problem arose – can be time-consuming.

Practice Note SC Eq 3 makes provision for entry into the Commercial and Technology and Construction Lists by commencement of a matter by summons accompanied by a List Statement. SC Eq 3 makes corresponding provision for the filing of List Responses and cross-claims, which must include a response to the plaintiff's list statement. The contentions, responses and cross-claims should avoid formality, state, admit or deny the allegations with adequate particulars and identify the legal grounds relied upon.[5]

Practice Note SC Eq 9 provides for an even more truncated procedure for commercial arbitrations.

The directions hearing is the basic case management vehicle. This is an important opportunity for the Court to begin ascertaining the issues. Requiring parties to state their position early is an important time and cost saver. It may also be useful to require parties to provide a statement of the real issues for determination earlier than that provided for in the usual order for hearing.

Pleading arguments may cause delay and expense. SC Eq 3 provides that as a general rule, applications to strike out, or for summary judgment, will not be entertained.[6] Pleading arguments can usually be avoided by discussion with the parties where the adequacy of pleading is an issue. At an early stage of proceedings, leave to amend is usually generously given.

Directions hearings can be expensive. Good case management dictates that they be kept to a minimum, dealt with quickly and heard as close as possible to the time at which they are listed in Court lists. A time- and cost-saving measure is the provision in SC Eq 3 for consent orders to be made by the list judge in chambers before the lists close.[7]

The Court's response to non-compliance with timetables is important. Leaving aside the effects of unsanctioned and unjustified delay, a limp response where a strong one is needed is inimical to a culture of compliance.

A useful tool is the imposition of an immediately payable (say within seven days) lump sum costs order for costs thrown away by serious or serial non-compliance (which may be accompanied by a proviso that the assessment is provisional).[8] In other cases, an order that the costs thrown away are the opponent's costs in the cause may be sufficient.

The goal is to keep interlocutory contests to a minimum and to deal with them decisively including by requiring written argument in advance with limits on the length of submissions.

Evidence Gathering Process

Discovery

Discovery can be the single most costly and time-consuming process in a trial cause.

Traditionally, discovery takes place after close of pleadings, once the issues have supposedly been defined, and before parties serve any evidence.

A significant departure from this position

was brought about by Practice Note SC Eq 11. It applies to all proceedings in the Equity Division of the NSW Supreme Court, other than those in the Commercial Arbitration List. SC Eq 11 provides that orders for disclosure will not be made until after evidence has been served, unless there are exceptional circumstances.[9] All applications must be supported by an affidavit setting out why disclosure is necessary and the likely costs.[10] The Court may limit the amount of recoverable costs in respect of disclosure.[11]

SC Eq 11 has been the subject of extensive judicial comment, particularly as to whether 'exceptional circumstances' are present. Obviously, each case is to be assessed on its facts.

SC Eq 11 has proved to be effective in reducing cost and delay. In most cases, discovery before evidence is not needed as parties know enough about their position to put on their evidence. It has encouraged parties to examine the real issues early and engendered a more disciplined analysis of the need for disclosure. Few applications for early disclosure are ruled on because parties frequently agree and implement by consent.

A useful technique is to require a party seeking extensive or costly discovery to pay in advance, with the costs incurred by it to become costs in the cause. Imposing such a condition has the effect of encouraging a party to limit disclosure to what it considers necessary.

Appropriate search terms for electronically stored material are a regular source of controversy. This problem is usually solved by appointing an independent expert to report on appropriate search procedures.

Expert Evidence

The cost of garnering expert evidence is a perennial issue. In many cases, the expert evidence may be of little utility or does not meet the criteria for admissibility.

A useful device is to require the parties to engage a single expert before being given leave to adduce further expert evidence.[12] The process of producing an agreed brief focuses attention on the issues to which the proposed evidence is said to go.

There are some cases where it is feasible and appropriate to give rulings as to the admissibility of evidence, including expert evidence, in advance of the hearing.[13]

The trend is to hear expert evidence in concurrent session. This generally works well in encouraging experts to focus on the real issues. Handled correctly, this saves significant time, but does require advance preparation by the Court.

While it is preferable for objections to be dealt with before the evidence is admitted, this is frequently not practical. The only option to save cost and time may be to admit the evidence provisionally under s 57(1) of the *Evidence Act 1995* (NSW) on the condition that, unless before conclusion of the proceedings the Court rules otherwise, the material is admitted unconditionally (or rejected).

The Hearing

Proceedings are diarised for an appropriately early pre-trial directions hearing to monitor readiness.

In most cases, the usual order as to hearing (with or without some modification) is appropriate.[14] Effective trial management requires monitoring of compliance with these requirements and taking appropriate steps in the face of non-compliance.

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SC Eq 3 makes provision for 'stopwatch hearings'. This is rarely used but may be a useful management tool in some cases. There are pitfalls in being overly restrictive including that the hearing becomes too compressed and the task of decompressing the information in a judgment is made more difficult.

The Court may make orders for the decision of any question separately from any other question.[15] The most important practical benefit is that determination of a single issue may dispose of proceedings entirely. But there are potentially significant pitfalls including:

- the separate questions which the parties articulate may lack utility;
- the risk of delay while leave to appeal[16] is sought in relation to a separate question which does not entirely dispose of the proceedings;
- the separate questions are required to be answered on incomplete facts; and
- the ability of the judge who hears a separate question to hear the remainder of the proceedings.

Finally, most commercial causes are appropriate for mediation at some stage. An early referral may cap costs, while a later referral enables the parties to be better informed about the case. However, early mediation is generally preferred, because parties' positions frequently harden after they have incurred significant costs. Ultimately, each case depends on its own circumstances.

ENDNOTES

1 Judge in the Equity Division of the Supreme Court of New South Wales, Head of the Commercial, Technology and Construction and Commercial Arbitration Lists.
2 Sixth Floor Selborne Wentworth.
3 There are equivalent provisions in other states and territories, and the federal jurisdictions.
4 This system is to be contrasted with the 'docket system' used in some Courts.
5 SC Eq 3 at [9] and [11]. The plaintiff's statement and a defendant's response must still each disclose a reasonable cause of action and defence respectively: *Ucak v Avante Developments* [2007] NSWSC 367.
6 SC Eq 3 at [62].
7 At [23]-(24].
8 See *Uniform Civil Procedure Rules 2005* (NSW) r 42.7(2). See also SC Eq 3 at [57] which provides that, unless otherwise ordered, a party in whose favour a costs order is made may proceed to assessment.
9 At [4] and [5].
10 At [6].
11 At [7].
12 See also UCPR r 31.24.
13 Evidence Act s 192A.
14 SC Eq 3 Annexure 3.
15 UCPR r 28.2.
16 *Supreme Court Act 1970* (NSW) s 103.