Hong Kong 2018 International Commercial Law Conference

Modern case management in commercial litigation in the Federal Circuit Court of Australia

His Honour Judge Josh Wilson QC

INTRODUCTION

1. Thank you for the invitation to speak at this conference and for the kind words of introduction by Ms Claire Harris QC.

2. May I convey my own gratitude and give thanks on behalf of every other delegate to Mr Paul Hayes QC for his outstanding organisation of this brilliant event.

3. Deputy Chief Justice Alstergren originally intended to speak at this juncture. However, his Honour has been detained in Australia and I have been asked by him to present in his stead.

4. The topic of modern case management in commercial litigation is of critical importance in all courts internationally nowadays. That is particularly the case with the rise in unrepresented litigants, the huge costs associated with litigation, the enormous demands on court's limited resources and the determination exhibited by governments to get the biggest bang for its buck from judges.

5. These seemingly contradictory imperatives have created a need for some very clever thinking by all courts to devise a strategy in the management of huge volumes of litigation.

6. In Australia's federal jurisdiction, the Federal Circuit Court of Australia is something of a beacon in modern case management, the ingenuity of which I will share with you.

7. In the short time available let me explain how 69 judges nationally, operating under an annual budget of about $100 million deal with 110,000 cases annually and achieve a 105% clearance rate, closing off most cases by judgment or resolution through settlement within 12 months of issue.

8. Those are eye watering statistics.

9. The workload of the Federal Circuit Court of Australia is not for the fainthearted. Its output is the envy of the national judiciary and the toast of many state judiciaries.

10. While this seminar is on civil litigation, in the process of my discussions today I will briefly touch upon public law (mainly migration) and on family law.

CIVIL JURISDICTION OF THE FCCA

11. The reach of the Federal Circuit Court of Australia's civil jurisdiction is almost as broad as that of the High Court of Australia.

12. The cases in respect of which it has jurisdiction include admiralty, administrative law, bankruptcy, equal opportunity and discrimination law, family law, industrial, intellectual property, migration, privacy, national security, terrorism and extradition.

13. The court does not deal in crime, taxation or personal injury cases although the Productivity Commission wants the FCCA to deal with those two areas.

14. The FCCA has registries or sits in over 30 locations in Australia. Its work touches the largest number of Australians, more than any other federal court.

15. Most FCCA judges have over 600 cases in their dockets. That is to be contrasted with judges of the Federal Court of Australia or the Family Court of Australia having in the order of 60 cases in their dockets.

16. Some FCCA trials are short, up to 3 days in duration, while other trials involve more complicated trusts, real property issues, personal property issues, company law and equity points, or otherwise involve assets of many millions of dollars with trials lasting up to 10 days in duration.

17. The appeal rate is very low.

18. Most cases are heard and determined within 12 months of their issue.

19. It is a common misconception that with so many cases, the attention to detail exhibited by the FCCA judges is compromised. Far from it. Sheer numbers have demanded the FCCA to devise new ways to keep cases moving, to identify early in the litigation process cases that are

amenable to resolution and to otherwise streamline the real matters in issue in the litigation.

20. I have the great honour to be judge in charge of general federal law in the Federal Circuit Court of Australia.

REORDERING OF THE STRUCTURE OF THE COURT

21. Mirroring the FCA, general federal law in the FCCA is divided into national practice areas ("NPAs") with a principal judge in each NPA.

22. For administrative law, discrimination and human rights, the NPA judge is his Honour Judge Riethmuller.

23. For bankruptcy and personal insolvency, the NPA judge is his Honour Judge AJ Kelly QC

24. For industrial law, the NPA judge is his Honour Judge McNab.

25. For intellectual property law, the NPA judge is her Honour Judge Baird SC.

26. For admiralty, the NPA judge is his Honour Judge Street SC.

27. For national security, the NPA judge is his Honour Judge Vasta.

28. Judges are allocated to one or more of those NPAs based on proven expertise thereby enhancing public confidence in the court, particularly in relation to specialist areas such as intellectual property, admiralty and industrial law.

29. The creation of NPAs has several beneficial effects including the harmonisation of the systems and procedures in the FCCA with those of the FCA. It enhances symmetries and leads to greater uniformity of practices thereby reducing public confusion in the workings of the two national courts. Hopefully, it will go some way to reducing appeals and enhancing interaction between the FCA and FCCA, especially in respect of education.

30. This regime is the product of careful discussions between Chief Justice Allsop, Deputy Chief Justice Alstergren, principal registrars and others.

31. The regime is yet to reach full implementation. However, when it is fully functional each case will be issued electronically. Registrars will then examine the case for the main issues raised in the litigation. In the normal course of events the case will be brought on for first directions

within seven days of issue. The emphasis on the first return will be an exploration of resolution before the case becomes entrenched in the litigation vortex, mediation being an obvious first port of call. If the case does not settle, on the next return before the registrar hopefully the issues have been narrowed and all parties have a better understanding of the remaining issues and their complexity. It is envisaged that the registrar will give directions for the filing of affidavits relating to substantive issues, or pleadings or even a concise statement of issues. The matter is then allocated to the docket of a particular judge.

32. Allocation to a particular judge is to be done in consultation with the principal judge of the relevant NPA.

33. The allocation of cases depends on an array of different factors including the urgency of the case, the capacity of judges within the existing NPA and the availability of interstate judges who may be able to deal with the case, for example by video link. A case might, for example, be eminently suitable for allocation to a particular judge but that judge may be burdened with an existing long-running case, or that judge may be on leave or the urgency of the case commands its allocation to a different judge. Those sensitivities are dealt with on a case by case basis. Careful triaging will be key.

34. When the case first goes before the allocated docket judge, that judge will have a searching discussion about such things as the need for pleadings, if at all. The judge will explore whether disclosure of limited documents is warranted in the circumstances or whether more general discovery should be ordered. The judge will discuss the best ways to handle expert evidence. The judge will canvass, where relevant, whether a preliminary point may be involved and if so, whether the determination of it might resolve the entire litigation. The judge will undoubtedly canvass the best way to deal with documents, especially agreed documents.

35. When it comes to the duration of trial, it is anticipated that the judge will explore the duration of the trial. My own practice is to obtain details with real precision. Frequently, I ask counsel who is retained for the trial to tell me the number and identity of each witness and to identify precisely what each will say of relevance in the case. I ask for details of areas disputed in each witness's evidence and why such a challenge is necessary. With the benefit of obtaining the total length of all *viva voce* evidence, I then fix the trial date, not as an estimate but as a statement that the case will not go beyond that duration. I tell

parties that if the case goes beyond the duration it will be marked part heard, into the future with all the attendant downsides of that. Parties are locked into their commitment about how the duration will unfold and I require that to be recorded on transcript. Of course, issues crop up in the running of any trial which may call for recalibration of that approach.

36. At trial, I do not entertain line objections nor wordy and indulgent openings. I require the parties to agree on a list of issues and to identify those that are agreed and those that are the subject of dispute which will call for my determination. Evidence in chief is usually limited to the adoption of a party's affidavit and only in rare cases is a deponent permitted to expand by way of evidence in chief on an area not already covered in an affidavit. Most trial time is consumed with cross examination and I do not tolerate ill directed, poorly prepared and indulgent cross examination. Time management demands an interventionist approach.

37. While that may sound reminiscent of the days of the Supreme Court's commercial list in the 1980s during which Beach J and Marks J ruled with an iron fist, the success of that approach is beyond doubt and its implementation is warranted in high volume litigation as is the norm in the FCCA.

38. Cooperation is generally unreservedly given from quarters such as the IP Bar, the IR Bar, the Migration and Public Law Bar and the Insolvency Bar.

39. Speedy turnover is also achieved by rigorous although not inflexible adherence to the three month rule for the production of judgments. Under that regime, consonant with international best practices in judicial administration, parties are entitled to expect that judgment will be handed down within three months of the date on which the case is reserved for judgment.

40. That puts judges under a considerable degree of pressure to produce high-quality judgments in complicated cases that are turned over in high volume numbers. The FCCA's efficiency in that regard is well documented and, as mentioned before, is the envy of most courts in the Commonwealth of Australia.

FAMILY LAW IN THE FCCA

41. Let me now turn to the overlay between family law and case management.

42. The majority of the FCCA's filings relate to family law and the majority of the FCCA's judge time is devoted to family law.

43. No one capable of reading the newspapers over the last few months has been spared the discussion on the proposed merger between the FCCA and the Family Court of Australia. It is not my place to enter into the public fray about the wisdom or otherwise of that legislation as the enactment of all legislation is a matter for government. However, the public cry has been loud about deficiencies in the family law system. With that in mind, let me point up a few things.

44. First, 80% of all family law cases are issued in the FCCA. They are made up of complex property cases, intense alienation cases, sexual, physical or mental assault cases along with the usual array of voluminous slightly less complicated parenting or property cases.

45. Second, despite an explosion in the number of family law cases, the FCCA enjoys a huge clearance rate in family cases – 97% in 2016 and 2017.

46. Third, the median time to trial is 12.3 months.

47. On any view, that is a staggeringly successful array of statistics.

48. How has this been achieved, you might ask? Several strategies have been employed.

49. The first involves callovers of pending cases. Each case was subjected to intense investigation of what was going on, why the case could or should not be resolved and if it was insoluble, the case was fixed for trial. Some cases were sent for mediation while others were listed for trial immediately. Some cases were resolved on the spot without further ado. The callover method was enormously successful and enjoyed popular acclaim almost universally across the country.

50. The take-home point is that all judges should review their files. Dormant cases need clearing.

51. Next, let me tell you about the Brisbane pilot.

52. Three judges are involved. One hears first returns and decides whether the case should be sent to mediation, to a family consultant or how the case can best progress in some other way. The other two judges deal with trials. Some cases start then settle, some cases settle before starting and others go to the wire. That method has enjoyed huge clearances with the cases being resolved or determined in less time than was otherwise allocated.

53. The Brisbane pilot has enjoyed equally considerable successes.

54. The third innovation involves the reduction of interlocutory skirmishes. Since 1 January 2018 a new practice direction has been in operation so that any party bringing on an application is required to file all affidavits 48 hours prior to the return date and no affidavit is permitted to exceed 10 pages in length. This has orchestrated a considerable cultural change. The success is also well documented. It has reduced the number of frivolous interlocutory applications and in the case of more serious interlocutory applications, it has caused the parties to focus much more intensely on the factual and legal issues thereby eliminating, or at least reducing, the amount of judge time that is necessary to determine the relevant application.

55. No doubt you will be at once struck with the overlay between well-credentialed commercial litigation practices and their application to family law cases. There is no coincidence about the success enjoyed in that approach in its application to family law.

56. Personally, and I know other judges do likewise across Australia, in addition to the trials that are listed before me, each day I list up to 10 cases for directions. None take very long and the conduct of the trials are not thereby disadvantaged. However, by listing 10 cases each day for directions I keep all cases moving, unblock logjams, frequently obtain resolutions in the interlocutory phases, reduce interlocutory skirmishes and otherwise keep my docket ticking along. That is just a normal day.

FCCA CLEARANCE RATES

57. In the period October 2017 to September 2018, the FCCA has achieved a 105% clearance rate. That means that the FCCA is clearing the backlog and finally disposing of more cases than it has done in 15 years. Again, that is on any view a commendable statistic.

A PLACE FOR AGGRESSIVE CASE MANAGEMENT

58. From the foregoing it will be readily apparent that aggressive case management has its role in certain cases. That is not to say that every case must be the subject of the aggressive case management outlined above. There is a place for it in a high volume court.

59. Don't let the parties control the traffic - not all the time, anyway.

His Honour Judge Josh Wilson QC, Federal Circuit Court of Australia, September 2018.