Legalwise Seminars - Advanced Litigation Conference

Commercial Court Reforms

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Introduction

Thank you to Legalwise for the invitation to present at today's very comprehensive conference.

By way of introduction, I was appointed to the role of Judicial Registrar in the Commercial Court Division of the Supreme Court of Victoria in late October 2014. Prior to commencing at the Supreme Court, I spent seven and a half years as a Registrar at the Federal Court where I performed mediations and exercised judge-delegated functions.

Today I am going to speak about some important reforms in the Commercial Court. They are exciting, innovative and ongoing. I would also like to briefly set out how the approach of the Supreme Court to commercial disputes has developed over the years.

History of the Supreme Court's approach to commercial disputes

In the High Court case of *AON Risk Services v Australian National University*[1], Heydon J made the following observations about the critical and symbiotic relationship between the Courts and commerce:

> *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*[2]*.*

The Supreme Court of Victoria has an extensive history of accommodating the particular needs of the business community in the management and

[1] (2009) 239 CLR 175.
[2] Ibid 223-224.

hearing of commercial cases. This is because the Court has long recognised that certainty, predictability and timeliness are the lifeblood of commerce.

And so, since the mid 1980s, the Supreme Court has marshalled dedicated judicial and administrative resources to achieve the quick and efficient resolution of commercial disputes. Initially, there were two Commercial Lists managed by Judges from the Commercial and Equity Division who were rotated through these lists at regular intervals**.**

In February 2009, the Commercial Court was established as a section within the Commercial and Equity Division. The number of managed lists expanded to accommodate the growing demand for specialist Judges to hear an ever increasing volume of cases. However, the Commercial Court arguably became a victim of its own success and experienced a surge of cases, particularly corporations matters. At the same time, following the elimination of the 10 day trial rule, the average length of trials conducted in the Commercial Court doubled. The Court also began attracting mega litigation, such as class actions, which presented a challenge for both the parties and the Court itself. It therefore became necessary to look for new ways to reduce delays and manage the impact of longer cases.

Other jurisdictions

Other jurisdictions around the world have been confronted with similar problems concerning the length and complexity of commercial cases. They recognised a need for the establishment of dedicated commercial courts

comprised of Judges and other judicial officers with specialist commercial expertise.

As a consequence, there are now a number of commercial courts in other jurisdictions. For example:

- the recently established Singapore International Commercial Court is a purpose-developed Court which hears cases that are both international and commercial in nature[3];
- the proliferation in the United States of business courts and specialised commercial dockets in various cities and regions, including in New York, West Virginia, Delaware and, more recently, in Michigan and New Jersey[4]; and
- the Admiralty and Commercial Courts in the Queens Bench Division of the High Court of Justice in the United Kingdom, which deal with complex cases arising out of business disputes, both national and international, and with a particular focus on international trade, banking, commodity and arbitration disputes[5].

[3] See generally Ian Roberts and Nicholas Sykes, 'The International Commercial Court: now open for business' Lexology (online), 8 January 2015, <http://www.lexology.com/library/detail.aspx?g=f12cfa85-6ddd-49a0-af2b-f173d5a161e5>.
[4] See generally Richard Renck and Carmen Thomas, *'Recent Developments in Business Commercial Courts in the United States and Abroad*', Business Law Today (online), May 2014 http://www.americanbar.org/publications/blt/2014/05/01_renck.html.
[5] Courts and Tribunal Judiciary, High Court < http://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/high-court/>.

Divisional Restructure

In light of all of these pressures and trends, the Supreme Court recognised it must continue to adapt to the changing nature and complexity of commercial litigation to meet international standards of best practice in the management of such cases.

On 1 September 2014, the Commercial Court became a Division of the Supreme Court in its own right[6]. However, this should not be seen as a mere "re-badging" exercise. The ideas and processes which underpin this restructure are substantive in nature.

The underlying objectives of the new and invigorated Commercial Court are to enhance flexibility in the allocation of judicial resources and to meet the expectation of the legal profession for active case management and fixed trials. To achieve these overarching objectives the Court has introduced:

a) eight judge managed lists;
b) a dedicated Commercial Court Registry and the appointment of a Judicial Registrar;
c) RedCrest - the Supreme Court's electronic filing and case management system; and
d) Enhanced case management and alternative dispute resolution procedures through, amongst other things, judicial mediations conducted by Associate Judges and Judicial Registrars.

[6] See Supreme Court of Victoria, *Practice Note 4 of 2014 - New Structure of Trial Division*, 29 August 2014.

General and Specialist Lists

A cornerstone of the new Commercial Court is the further expansion of its general and specialist lists. There are now:

- *General Commercial Lists A–E*

  These lists deal with disputes arising out of ordinary commercial transactions, including any proceeding relating to:

  - the construction of commercial, shipping or transport documents;

  - the export or import of merchandise;

  - the carriage of goods for the purpose of trade or commerce;

  - insurance;

  - banking;

  - finance;

  - commercial agency; and

  - commercial usage transactions.

- *two Corporations Lists;*
- *the Arbitration List;*
- *the Taxation List;*
- *the Admiralty List;*
- *the Technology, Engineering and Construction List (**TEC List**); and*
- *the Intellectual Property List.*

The introduction of these specialist and general lists enables targeted allocation of proceedings to lists managed by Judges who have extensive specialist and commercial law experience. The Commercial Court holds weekly meetings of Judges and staff at which new matters are considered and triaged. Judges are then allocated cases to manage and hear from the first return date, to each subsequent directions date and interlocutory hearing, all the way through to trial. The trial dates are also fixed well in advance. This approach promotes efficiency, consistency and certainty, for not only the parties but the Court itself. In addition, litigants will benefit from the specialist skills and knowledge of a wider group of Judges within the new Commercial Court.

There are potential advantages to specialised Judge management. Having dealt with many similar cases, the Judge is well across the legal and commercial issues involved. As a consequence, the Judge's approach to case management is focused on those critical issues, whilst at the same time being sufficiently flexible to accommodate the unique circumstances of each individual case. Not only may this potentially reduce the amount of pre-trial work and the cost involved for the parties, it may also potentially result in shortened timeframes to finalisation. In addition, specialist lists allow greater flexibility to reallocate a matter before another Judge in the event that the original Judge is unable to hear the case. In this respect, specialised Judge management is arguably more flexible than a strict docket system which can sometimes, depending on the workload of an individual docket Judge, produce bottlenecks.

Commercial Court Registry

The dedicated Commercial Court Registry was set up in late 2013 as a precursor to the September 2014 divisional restructure of the Commercial Court. Further recruitment for the Commercial Court Registry was required to ensure that the Registry played a key role in supporting the Commercial Court Judges in achieving the timely resolution of matters through active case management and fixed trial dates.

The Commercial Court Registry team was recently augmented to include a Deputy Registrar and two Assistant Registrars, each of whom are legally qualified and who have complementary yet distinct skill sets.

Each member of the Commercial Court Registry is well equipped to provide specialist knowledge to practitioners and court users in respect of Commercial Court processes and procedures.

Commercial Court Judicial Registrar role

My appointment to the role of Judicial Registrar was the first such appointment within the Commercial Court (and the Trial Division of the Court more broadly) and is a key component of the recent reforms. The underlying functions of my role are as follows:

1. responsibility and oversight for the efficient management and operation of the Commercial Court Registry;
2. the provision of operational, listings and judicial support to the Principal and Deputy Principal Judges of the Commercial Court; and

3. exercising leadership in driving the implementation and management of various existing and future reform projects.

In addition, I am also responsible for conducting judicial mediations, extensive case management conferences and exercising judicial powers, including conducting public examinations.

RedCrest

One significant reform project currently being implemented in the Commercial Court is RedCrest. RedCrest was developed pursuant to the Commercial Court's ethos of striving for outstanding service, innovation in case management and the just and efficient determination of commercial disputes.

By way of background, on 22 September 2011, RedCrest was first tested in the Court's TEC List by Justice Vickery with over 400 users. Following the success of this initial trial and further development of the system, from 1 August 2014, RedCrest began to be used in respect of all new matters commenced in the Commercial, TEC, Intellectual Property and Corporations Lists of the Commercial Court.

It is not an exaggeration to say that RedCrest represents a paradigm shift for the Supreme Court from a hard copy document filing system to an electronic filing and case management system. It is hoped that RedCrest will significantly enhance dealings between the Court and those participating in litigation.

The purpose of RedCrest is to offer a "one-stop-shop" to assist in the management of a case from its commencement to its conclusion. Simplicity is a key feature of the system. It is easy to use, logically set out and users should be comfortable with the platform after reading the user instructions, the RedCrest Rules[7] and the applicable Practice Note[8]. Accessibility is also a key feature. Users can file and access documents 24/7 from anywhere and keep up to date on all matters over which they have conduct. Importantly, there is also a friendly helpdesk to support users which is currently run out of the Commercial Court Registry.

The second release of RedCrest took place on 31 December 2014. The key user features of Release 2 included:

Sealable docs

That is, the ability to file, and where appropriate, pay for any document requiring a Court seal. This would include a Summons, Subpoena, Notice of Appeal etc. A seal is applied by the Court to the document as part of the upload process for the purpose of service.

Pay My Account

That is, the ability to utilise RedCrest to make payments for search fees, hearing fees and the like.

[7] *Supreme Court (General Civil Procedure) Rules 2005* (Vic) O 28A.
[8] See Supreme Court of Victoria, *Practice Note 3 of 2014 - RedCrest Electronic Case Management System (Commercial Court),* 1 August 2014.

Grant/Remove Access feature

This enables RedCrest Case Managers (the practitioners with the day to day conduct of the file) to push access to a case to barristers, junior solicitors and, where required, to remove access in the event of changes within the legal team.

Following these improved features, RedCrest may be further developed and progressively rolled out to other divisions of the Supreme Court throughout the year.

Case Management

I would like to talk a bit more about case management. The Court is committed to flexible and active case management of matters to facilitate their timely resolution. In addition to Judge management within the general and specialist lists (which has already been discussed), two further examples of case management are the Oppression Proceedings Pilot and the increased number of matters being listed for judicial mediation.

Oppression Pilot

The introduction of the Oppression Proceedings Pilot in October 2014[9], is a prime example of innovative case management within the Commercial Court. The objective of the Pilot is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute where an application for

[9] See Supreme Court of Victoria, *Practice Note 5 of 2014 - Applications under s 233 Corporations Act 2001 (Vic) – oppressive conduct of the affairs of a company*, 8 September 2014.

relief is made involving allegations of oppressive conduct. Parties filing an affidavit in support are now restricted to three pages and no exhibits, other than a company search. The page limit not only contains costs but helps the parties and the Court to focus on the key issues in dispute and not become distracted more peripheral matters between the protagonists.

Following the initiation of a proceeding, the case is listed for an initial conference before an Associate Judge who will explore with the parties whether the application can be resolved before any other interlocutory steps take place. Getting parties to attend the initial conference with their lawyers is a real reality check and enables parties to confront the time, cost and stress which would otherwise be involved if the matter proceeds. In this way, the Pilot offers parties a convenient "exit ramp" from further litigation.

The relevant Practice Note is not overly prescriptive about the conduct of the initial conference and promotes a flexible approach. For example, if the valuation of the company shares is the key issue in the case, it may be necessary that an independent valuer be appointed before the matter is mediated or any other steps take place.

Inherent in the Pilot is the notion of proportionality. Often the costs associated with litigating oppression cases are disproportionate to the value of the company the subject of the dispute. The Pilot seeks to mitigate those costs and focus on potential resolution at a very early stage.

The initial results of the Pilot are promising and the Court has also received excellent feedback from practitioners who have written to the Court thanking it for the bespoke management and mediation of their matters.

Judicial Mediations

As recently stated by the Chief Justice, "court annexed mediation has become a significant phenomenon in the Supreme Court"[10]. Whilst judicial led mediations have featured at the Supreme Court for some time, the increased number of cases now being mediated by Associate Judges and Judicial Registrars is a direct result of a targeted and proactive approach to mediation referrals and the ongoing commitment of the Court to active case management. In part, this entails the managing Judge selecting a matter for mediation at the appropriate juncture in the proceeding.

The Supreme Court has made clear that judicial mediation is not intended to replace or compete with mediation services offered by the private sector[11]. However, judicial mediation is a dispute resolution and case management tool that may be deployed in appropriate circumstances. Generally speaking, judicial mediation may be utilised in a matter with one or more of the following features:

- *an earlier unsuccessful private mediation;*
- *one or more parties with limited resources;*

[10] The Hon. Marilyn Warren AC, 'The Litigation Contract: The Future Role of Judges, Counsel and Lawyers in Litigation' (Speech delivered at the Victorian Bar & Law Institute of Victoria Joint Conference High Stakes Law in Practice and the Courts, Melbourne Convention and Exhibition Centre, 17 October 2014) p 3.
[11] Supreme Court of Victoria, *Practice Note 2 of 2012 - Judicial Mediation Guidelines*, 30 March 2012.

- *a substantial risk that the costs and time of a trial would be disproportionately high compared to the amount in dispute or the subject matter of the dispute;*
- *an estimated trial length that would occupy substantial judicial and other court resources; or*
- *aspects that otherwise make it in the interests of justice that the matter be referred to judicial mediation*[12].

The judicial officers who conduct the mediations have specialist knowledge, a comprehensive understanding of the litigation process and its associated cost and are comfortable engaging in genuine reality testing, even in the face of entrenched positions.

The overall settlement rates of judicial led mediations are impressive – approaching 70%. In addition, the trial time saved by successful mediations is staggering. In the last financial year, the 219 judicial mediations conducted across all Divisions of the Supreme Court resulted in a saving of approximately 615 hearing days and at least an equivalent amount of judgment writing time.

The Importance of the *Civil Procedure Act 2010* (Vic)

As the Chief Justice recently noted, all of the Commercial Court's endeavours are strongly reinforced by the *Civil Procedure Act 2010* (Vic)[13]. Litigation must be conducted in accordance with an overarching purpose to facilitate the just,

[12] Ibid 7.
[13] The Hon. Marilyn Warren AC, 'Australia – A Vital Commercial Hub in the Asia Pacific Region' (Speech delivered at a joint Federal Court and Supreme Court Commercial Law Seminar, Monash Law Chambers, 25 February 2015).

efficient, timely and cost-effective resolution of the real issues in dispute[14]. And Judges now have clear and far-reaching legislative powers to actively case-manage matters to achieve this purpose.

A good example of this in practice occurred recently when a Commercial Court Judge ordered parties to attend a case management conference before me to discuss and exchange respective costs budgets. Not only do costs budgets provide parties with greater certainty as to their own costs, they also enable parties to more accurately calculate their potential exposure to an adverse costs order. This information may facilitate productive negotiations. Critically, it may also assist the managing Judge to consider the estimated costs of proposed steps with a view to ensuring that they are proportionate to the value of the matter itself[15].

Future Reforms

Part of the Commercial Court's mandate is to embrace innovative ideas in the management of commercial disputes. In other words, the Commercial Court will not rest on its laurels in seeking to develop new ways of achieving the just, efficient, timely and cost-effective resolution of matters.

At the same time, the Commercial Court extends an open invitation to practitioners to provide their views on potential improvements to it's practices and procedures. We look forward to hearing from you.

[14] *Civil Procedure Act 2010* (Vic) s7(1).
[15] See also s 65C(2)(d) of the *Civil Procedure Act 2010* (Vic)which enables the Court to fix or cap recoverable costs in advance.