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George Johnson Prize Trust Essay Winners: 2011

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GEORGE JOHNSON LAW PRIZE 2011

"In civil trials how should the court balance the need for expedition with the need for justice?"

Introduction

This essay title implies that a tension may exist between expedition and justice. Use of the word "balance" generally predicates a weight and counterweight existing between the items being balanced. In this essay it is intended to analyse this point and, in assessing some legal history behind the balancing exercise, attempt to answer the question in the essay title.

Defining the key terms in this essay title is scarcely necessary save perhaps in respect of the word "*expedition*". The relevant Oxford Dictionary definition of expedition is "*promptness, speed*". Expedition is however the noun from the verb to expedite and that has a slightly wider meaning in the Oxford Dictionary of "*assist progress of, hasten (action, process etc)*". The verb therefore has the extended meaning of assisting the progress of something not simply acting with speed. In this essay I think it is right to treat the meaning of expedition as not only acting with speed but also assisting the progress of, in this case, litigation.

Thus how does the court balance, in civil trials, the need for promptness, speed and assistance with progress with the need for justice. Let us first examine how recent events have influenced the balancing exercise.

Significant historical points

A sea change in Manx civil procedure took place on 1 September 2009. On that day the Rules of the High Court of Justice 2009 ("the 2009 Rules") were introduced, thanks in no small part to the tireless energy and effort of the late His Honour Deemster Kerruish QC. Prior to that, the way parties brought civil cases in the Isle of Man High Court was governed by a procedural code established in 1952 and amended generally in accordance with English procedural updates latterly that of 1999 where the Supreme Court Practice "*White Book*" of England largely married up with much of the Isle of Man High Court Rules of 1952 ("the 1952 Rules").

In the neighbouring jurisdiction of England and Wales, following a review conducted by Lord Woolf, the new Civil Procedure Rules ("CPR") were introduced in 1999 which sought, amongst other things, to cut down on delay and therefore improve expedition in the legal process. For similar reasons and to update the Manx rules generally the 2009 Rules were laid before Tynwald on 16 June 2009 and approved accordingly.

A cursory glance at the 2009 Rules reveals a fundamental shift away from party-led litigation to court managed litigation. Automatic time limits and active case management by the court feature heavily in the 2009 Rules. For instance, according to rule 7.1 of the 2009 Rules the court has a duty to manage cases and "*shall further the overriding objective (rule 1.2) by actively managing cases*[1]". The overriding objective itself[2] specifically states that dealing with a case justly includes, so far as is practical, ensuring that the case is dealt with expeditiously and fairly. It is interesting to note that rule 1.2(2)(d) specifically brings together the two counter-balances set out in this essay title and that they are conjoined by "*and*" rather than "*but*"; evidence that expedition and fairness sit comfortably together in these rules.

Evidence of the need for expedition in the court's duty to manage cases set out in rule 7.1 is easy to find: the court must decide "*promptly*" which issues need full investigation and trial and dispose summarily of others[3]; the court must fix timetables and otherwise control the progress of the case[4];

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[1] Rule 7.1(1)
[2] Rule 1.2
[3] Rule 7.1(1)(c)
[4] Rule 7.1(1)(g)

and the court must give directions to ensure that the trial and case proceeds "*quickly and efficiently*"[5]. There are other examples.

Banished then are the less specific and more malleable timetables of the 1952 Rules whereby cases could drift. Even before the 2009 Rules were introduced the Isle of Man judiciary showed an increasingly disapproving attitude towards dormant or drifting cases, one such illustration being that the hitherto familiar "*adjournment sine die*" became a rarity in the Manx cases from the late 1990's[6]. In all cases, the Manx judiciary preferred to set fixed dates rather than let matters drift.

Part of the problem of the old rules was illustrated when the Manx authorities were on the wrong end of a finding in the European Court of Human Rights in *Bhandari v United Kingdom* [31 March 2008]. This case is noteworthy within the context of this essay because it shows how delay can breach a litigant's human rights. In *Bhandari* a couple brought negligence proceedings against a firm of Manx advocates on 26 March 1996. Those proceedings ended on 25 May 2004 when the Staff of Government Division of the High Court dismissed an appeal. Over two levels of jurisdiction therefore the case had lasted 8 years and 2 months.

In giving judgment, the European Court of Human Rights reiterated the following factors which must be assessed when considering the reasonableness of the length of the proceedings:-

- The circumstances of the case;
- The complexity of the case;
- The conduct of the parties and the relevant authorities;
- What was at stake in the dispute.

In *Bhandari* the court found that these factors did not sufficiently mitigate matters and declared that the proceedings were not pursued with the diligence required by article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Accordingly there was an article 6 violation in that Mr & Mrs Bhandari's civil rights and obligations have not been determined within a reasonable time.

It is interesting to note that *Bhandari* echoes a similar ruling in *Mitchell and Holloway v United Kingdom* [European Court of Human Rights; 17 December 2002] whereby the lapse of time between proceedings commencing and the end of enforcement proceedings amounted to 10 years, 4 months and 17 days. Assessing the similar points set out above, the European Court of Human Rights acknowledged that the parties had some responsibility for contributing to the delay but overall found that "*the delay derives, first and foremost, from the failure by the State to organise its system in such a way as to meet its Convention obligations*"[7].

It is easy to see therefore why modern courts were keen to embrace new rules that were designed to expedite proceedings. When making these new rules it will not have escaped the draftsmen that they had to balance the need for expedition with the need for justice. It is perhaps for this reason that a small but significant survivor from the old fashioned way of litigating still features in the 2009 Rules. The backdrop is that where a rule, practice direction or court order requires a party to do something within a specified time and specifies the consequence of failing to comply then "*the time for doing the act in question may not be extended by agreement between the parties*"[8]. The chink in the armour, the saving grace - depending on your views - however is rule 2.14. Tallying with rule 2.58(2), this states that unless the rules or a court order provide otherwise then the time specified by a rule or by a court for a person to do any act may be varied by the written agreement of the parties.

In an advocate's daily busy practice, rule 2.14 is of considerable assistance in ensuring those who litigate in the Manx High Court have a degree of flexibility without the cost of making a court application.

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[5] Rule 7.1(1)(l)

[6] Deemsters here perhaps already having one eye on the Woolf Reforms in England and Wales at that time

[7] Page 11 of the judgment

[8] Rule 2.58(2)

Why does a system of justice need expedition?

Expedition is one part of the balance, justice is the other. There is no need to ask why justice is required as that is axiomatic. It is perhaps worth briefly enquiring as to why expedition is required. Litigation invariably involves judicial determination of a dispute where one party claims it has been wronged. It is clear that a wronged party should not be kept out of its remedy for more than a reasonable time. Balance that, however, against the fact that the alleged wrongdoer must not be unduly railroaded into a defence of the claim without being given proper and reasonable opportunity to mount its defence.

What delay and lack of expedition can cause was astutely observed in the context of employment disputes by the Employment Appeal Tribunal in *Yorkshire Housing Ltd v Swanson* (EAT 12 June 2008). In the context of workplace disciplinary procedures being delayed Mr Justice Cox commented as follows:

> *"We would also add, by way of general observation, that delay is always the enemy of fair dispute resolution in the workplace, leading as it does to fading memories, prolonged anxiety, the entrenchment of parties' positions, prejudice to a fair hearing of the issues, and thereby to injustice. The over-arching general requirement... to avoid unreasonable delay at all stages of the [statutory disciplinary] procedures no doubt seeks to achieve this; and employers will be well advised to comply with it at every step."*

The employment law example is an interesting parallel to general civil litigation conducted by the Isle of Man High Court. In Employment Tribunal cases, speed of process necessarily has a greater emphasis because of the very short standard time limit for submitting a claim, namely that in most cases a complainant must file his complaint within three months of dismissal or similar intervening event. Contrast that with the six years generally allowed for High Court negligence or breach of contract disputes and it is clear that statutory employment disputes proceed at pace.

Notwithstanding this distinction, however, the words of Mr Justice Cox will resonate with the Manx judiciary and every one of the features in the above quotation will likely rear its head in civil court cases that become bogged down. In a case decided on 17 March 2009 in accordance with the 1952 Rules His Honour Deemster Doyle, in declining to strike out a clinical negligence case that had experienced delay, stated:

> *"My failure to dismiss the action in the circumstances of this case should not be treated by the Plaintiff or his advisors or by plaintiffs and their advisors in other cases as a licence to drag their heels or as a licence to fail to comply with the rules and orders of this court on a timely basis. The Defendant and its employees should not have these proceedings and the serious allegation of negligence contained in the summons hanging over their heads for any longer than is necessary. It is important that time periods are duly observed. It is also important that justice is done."*[9]

It is noteworthy also that rule 62 of the 2009 Rules was introduced such that dormant claims could be struck out if, amongst other things, one year elapsed without a document being filed[10].

The Isle of Man High Court sees all types of civil disputes. There are cases that are complex and very closely argued and there are cases where the parties involved for whatever reason may have other agendas. As appeal Deemsters Tattersall and Sullivan stated in *Kennedy and the Australian Securities Investments Commission*[11]:-

> "*We add that in compact jurisdictions, such as this, it will be important for the courts to be ready to expedite hearings so that those seeking delay will not be able thereby to frustrate the interests of justice*".

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[9] *Sims v Department of Health and Social Security* CLA 2004/39 paragraph 42 of the judgment of 17 March 2009

[10] Similarly rule 15.16 of the 2009 Rules provides for an automatic stay if existing proceedings had not come before the judge after one year from 1 September 2009.

[11] Staff of Government Division 19 July 2010.

It is not just the size of the jurisdiction that may sometimes be relevant to expedition of hearings. Another factor is the nature of the remedy sought. This point was noted in the well known House of Lords constitutional law case of *Lloyd v McMahon* [1987] AC 625[12]. In this case, concerned with whether an oral hearing was necessary in the context of a local council decision, the appellant submitted that:

> *"As to expedition, principles of fairness are not inflexible in their application, especially where discretionary remedies are being sought. If this were a case of judicial review, and not the exercise of a statutory right of appeal, practical considerations might influence the court in the exercise of the jurisdiction not to enforce the principle of fairness to the full extent. One such instance is that of urgency, where the public interest demands swift action [further authority quoted]. The principle of urgency may negative the presumption of fairness, but only where the statutory scheme clearly so indicates and the particular circumstances require the appellate body to assume primary discretionary power rather than causing the whole issue to be dealt with by the tribunal a quo. In public law, the urgency principle is parasitic on clear statutory words and demonstrable need."*

As the court of competent jurisdiction for a thriving offshore finance centre, the Isle of Man High Court regularly deals with urgent applications sometimes *ex parte* where, although justice remains uppermost, expedition and urgency dictate temporary suspension of certain fundamental principles such as *audi alteram partem*. Of course, both sides of the argument are heard at a later stage after an *ex parte* hearing therefore expedition only temporarily takes priority and, in any event, cross-undertakings given by the applicant should always ensure an absent party is never out of pocket if justice ultimately finds the urgent *ex parte* action to be unjustified.

Finally, in analysing expedition, a practical point as to effluxion of time in cases should not be ignored. There are those who may argue that time is a great healer. Thus litigants who issue proceedings on the back of a raw dispute might in due course moderate and find a middle way. It was presumably for this reason that CPR in England and Wales introduced certain mandatory pre-action protocols that had to be carried out before a party launched into court proceedings. The 2009 Rules, wisely in the author's view, do not incorporate such mandatory protocol but they contain sufficient teeth in the costs rules to the effect that pre-action conduct is material to costs[13].

The various routes to trial set out in the 2009 Rules could hardly be accused of being so expeditious that the parties would not have sufficient time to reflect and perhaps moderate their views. Those who argue therefore that there should be no rush to justice can rest assured. Moreover, the clear encouragement of mediation set out in the 2009 Rules[14] indicates that the court is very much alive to parties whom have issued proceedings subsequently moderating their views and seeking other ways of resolving their dispute. Rising legal costs often also help shape such moderation.

How then should the court conduct the balancing exercise?

We get to the knub of this essay here. All sorts of generalised and learned statements could be made as to the balancing exercise. This writer prefers to attempt to be more specific and practical in answering the question of how to conduct the balancing exercise, while accepting that an essay of this nature will always tend toward generality and not the specifics of a particular case.

It is thought the following points are the key features to the proper conduct of the balancing exercise in civil process.

Latitude

- Have some latitude. Expedition by a court or a party should not be unreasonable to the point of denying a party a proper chance to make its case. In all but the clearest of cases, by the time

[12] Often quoted because of Lord Bridge's seminal statement that "*The rules of natural justice are not engraved on tablets of stone*".

[13] Rule 11.1(6) makes it clear that the conduct of the parties includes conduct before the proceedings as well as during the proceedings and in particular the time and extent to which each party has disclosed its case.

[14] Rule 7.1(1)(e) and Chapter 9 of Part 7.

the parties have reached court and exchanged pleadings it will be clear that whereas there may be some black and white areas, the key issues are shades of grey. In critical interlocutory phases of civil litigation, particularly of a commercial nature, the parties must be given ample opportunity to flush out those shades of grey whether it be by way of seeking further information, asking questions of experts or undergoing proper and proportional disclosure. Weaknesses exposed in this process can often lead to early resolution of the dispute or reconsideration of an earlier decision not to engage in mediation.

Wisdom and vision

- When setting directions and actively managing cases, the court and parties by using wisdom and vision should be alive to the fact that on occasion hidden agendas may exist. In the writer's experience however allegations of conspiratorial delay made by an opposing party are generally ill-founded and a request for more time is more often down to genuine and reasonable factors. In any event, those parties who do seek to play the system and delay to their advantage face costs consequences. Moreover, interest accrues during legal proceedings and a claimant with a solid case can rest assured that the missing funds will likely attract more statutory interest than they would lodged in a deposit account, assuming of course that the defendant has the wherewithal to pay at the end of the case.

Innovation

- At case management conferences, where a reasonable obstacle exists in progressing one aspect of a case, consider whether anything else can be done to advance other aspects. Parties should be encouraged to think out of the box; Rule 7.1 gives the court wide powers to facilitate this. This is expedition in its wider sense: assisting the progress of the action.

Proportionality in preparation

- Proportionate and responsible time estimates and trial bundles from counsel are paramount. The court has ultimate ability to override the time estimate of a party[15] therefore does not have to accept at face value an applicant's time estimate for trial or interlocutory hearing. Moreover the court has an inherent jurisdiction to comment on disproportionate inundation of paperwork. In this regard it is enlightening to look at the very recent Privy Council judgment in the Manx case *AK Investments CJSC v Kyrgyz Mobil Tel Limited and Others* [2011] UK PC7 where Lord Collins discussed, within the context of a complex multi-party, multi-jurisdictional dispute that Lord Templeman had been over optimistic in *Spiliada* when he felt that in disputes about the appropriate forum the court would not be referred to other decisions on other facts and that submissions would be measured in hours not days. Lord Collins stated:

  "But this case has been excessively complicated by any standards. The hearings before the Deemster and the Staff of Government Division each lasted for 4 days or more. The hearing before the Board lasted 4 days. The written cases of the parties exceeded 200 pages, and more than 30 volumes of documents were placed before the Board, containing almost 14,000 pages, as well as 170 authorities in 12 volumes. The core bundle alone consisted of six volumes. The list of "essential" pre-reading for the Board listed documents totalling some 700 pages. All of this was wholly disproportionate to the issues of law and fact raised by the parties."

  The counterweight to controlling proliferation of paper is the duty to ensure a fair trial. *Bhandari* may have jolted the Isle of Man Court but those days are long gone. The modern Manx judiciary embraces article 6. As Deemster Corlett stated in *B v D* (18 August 2010):

  "Litigants in the Isle of Man Courts should not be expected to endure some form of second class justice and are entitled to the protection afforded by article 6 of the European Convention on Human Rights which, amongst other matters, entitles them to a fair and public

[15] For instance Rule 7.2(2)(n) as a catchall power.

hearing within a reasonable time by an independent and impartial tribunal established by law[16]."

Evolution

- Evolve rules where necessary. The authorities have already shown willingness to update the 2009 Rules there being amendments approved by Tynwald on 27 August 2009 and 1 June 2010. Teething problems as to the 2009 Rules, including time limits and timetables, may yet have to be reviewed if in practice they are honoured in the breach.

Technology

- Deploy technology but maintain a human touch. Emails, internet, Blackberries, iPhones and iPads were meant to make life easier. In fact they have generally accelerated the pressure on both those who seek justice and those who facilitate it such as the advocates for parties and the judiciary. People are now brought up and operate in an internet dominated world where they move quickly from one task to another often placing more value on speed than accuracy[17]. Modern law offices are nothing like they were twenty years ago. A wise Deemster takes account of the increased daily demands of practice on modern Advocates and the necessarily limited resources of a relatively small Bar and jurisdiction. As part of the balancing exercise, the wise Deemster ensures that technology is embraced and deployed but does not muscle out justice.

Conclusions

1. There is no real tension between the need for expedition and the need for justice. The reason why a balancing exercise takes place in civil procedure is that differing parties in civil cases often want differing things at various stages of the process. A court placing too much emphasis on expedition therefore might jeopardise ultimate justice. Thus, an over eager claimant might be desperate to pressurise a defendant into filing its defence whereas the defendant is more interested in a thorough exercise to collate its defence. At that stage both parties want justice but the claimant wants expedition as priority. That is why the court must conduct a balancing exercise. Later in that same case, the claimant might well seek more time, thus reversing the roles.

2. The 2009 Rules endow the modern court with much greater active case management powers but the court recognises the sense in allowing parties to retain some flexibility such as the optional 28 day extension for a defence in rule 6.27(1) and the more general rule 2.14 allowance.

3. The balance of expedition and justice also affords litigants opportunity to resolve disputes through other means as is clearly encouraged by the 2009 Rules.

4. In each case, the balancing exercise is specific to the merits of that case. But the wise Deemster invokes the following features in conducting that exercise: latitude; wisdom and vision; innovation; proportionality; evolution and technology with a human touch.

Advocate John T Aycock

23 March 2011

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[16] Paragraph 39 of the judgment. This was a recusal case and it was interesting to note that Deemster Corlett in the very next paragraph juxtaposed the modern human rights with the traditional Deemster's oath to act "without respect of favour or friendship, love or gain, consanguinity or affinity, envy or malice... as indifferently as the herring backbone doth lie in the midst of the fish". Deemster Corlett was anxious to point out that this "picturesque simile" was undertaken with gravity and solemnity by the judiciary.

[17] See for instance "Gen Up: How the Four Generations Work"; CIPD and Penna Joint Survey, 16 September 2008.