

FAST AND FAIR TRIALS – HOW DO WE GET THERE?

Sir Dennis Byron

INTRODUCTION

On September 18 2000, in my address to mark the Opening of the Law Year 2000/2001 in the Eastern Caribbean, I stated that *"the public has expressed concerns about delay, the excessive costs of litigation and the quality of service they have been receiving. They have expressed concern about access to justice – they are concerned that they are unable to get legal representation ... The Court is not and should not be unaffected by such complaints."*

There is no need to reiterate the steps necessary to bring a matter to trial. The issues are what exactly do we mean by "fast and fair" trials? Is the current system reliable in achieving that goal? If not, what are the possible changes that can be made to achieve that goal?

FAST AND FAIR TRIALS – WHAT DOES THAT MEAN?

The old adage "justice delayed is justice denied" is a fair platform to launch my presentation to you today. Simply put, the cumbersome nature of bureaucracy and/or procedure slows down the effectiveness of the delivery of justice to the litigant, so much so that by the time justice is delivered to the recipient, the effect is whether irrelevant or meaningless.

It is in this context that "fast and fair" trials have become the buzz words for exponents of what is the fundamental duty which the modern justice system, both civil and criminal owe to its citizens and other persons using the system.

I shall confine my presentation to the civil justice system, since this is the area most in need of our concentration at this time.

Let me hasten to point out that it is NOT advocated that the speediness should take precedence over the quality of justice to be delivered. In fact, it is envisaged that by proper use of the management tools which I shall make mention of later in this paper, will ensure and enhance the quality of the trial system and ultimately the delivery of justice to the citizenry. What the concept of "fast and fair" means therefore is that litigants can understand the judicial process, expect timeliness in the resolution of their disputes that must go to trial, which are handled by competent attorneys using best practices, regulated by a Court office that is efficiently and effectively managed and before a Judge who is temperate, impartial and not overburdened by tasks that do not meaningfully enhance the trial process.

IS THE CURRENT SYSTEM RELIABLE IN ACHIEVING THAT GOAL?

The current system is largely Attorney and Client driven. I need not spend too much time letting you know what obtains in practice, from the moment that instructions are taken from the Client to sue until final disposition. In most cases, especially for those matters begun by Writ of Summons, the process is at best painful, both for the Client and I daresay you as Counsel. Important and relevant instructions which should have been available to you as the Legal representative, at the first meeting come to you after a Defence has been filed or worse still after the deemed date for close of pleadings. In some other cases, pressure of work alone forces some matters to be placed on the back burner, not to surface until they appear at an application stage or call over day. The court's calendar is clogged with applications for particulars, discovery and disclosure orders, addition and substitution of parties, and the list goes on.

As far as the client is concerned, his matter in the court is shrouded in mystery. Clients have complained to me about the inability to get information that is comprehensible to them, or in some cases to meet with their legal representative at all. In fact, I have received numerous complaints about client disillusionment in the ability of the present civil justice system to serve them, especially with respect to the time it takes for the matter to get to trial. Research has shown that throughout the region, it is in rare cases that a matter filed in one calendar year would have been disposed of in twelve to fifteen months. The average time from filing to disposition is four years.

Another area for us to examine, is the increase in litigation over the last decade. In St. Lucia, the number of cases filed in 1990 was 425 and in 1999, the figure stood at 984. This is directly attributable to a better educated public as far as their rights to approach the courts is concerned, the increase in foreign investment in the region resulting in the persons having more disposable income and the enhancements in technology making communication links less complicated and more easily accessible, which exudes positive and negative influences at the same time on the nature, pace and ability of both the Client and the legal practitioner to manage litigation.

From the perspective of the Bench, our research in the Eastern Caribbean reveals that approximately about 25% of judicial time was not spent on final disposition of matters but on applications of the type referred to above, which are essentially management issues. We shall refer to these as "traditional " Chamber applications.

When all of these perspectives are placed side by side, I come away with the conclusion that the present system **is not** as reliable as it once may have been in providing the litigant with a "fair and fast" trial.

WHAT ARE THE CHANGES WHICH CAN BE MADE TO ACHIEVE THE GOAL OF FAST AND FAIR TRIALS?

In jurisdictions such as the U.K., Canada, Trinidad and Tobago and Jamaica, the judicial system made accommodation for the appointment of Masters to ease the congestion in the High Courts as far as matters to be heard by the Judge in Chambers is concerned. Order 32 rr16A of the **Orders and Rules of the Supreme Court of Trinidad and Tobago 1975**, provides *inter alia* that “a Master shall have power to transact all such business and exercise all such authority and jurisdiction as may be transacted or exercised by a Judge in Chambers...” save for specified matters. Again, my research guides me to the conclusion that this jurisdictional accommodation was not enough to achieve the goal of a fast and fair trial. I shall use the instance of Trinidad and Tobago again, although the introduction of the Master saw a change in the figures, there is still an appreciable number of cases not receiving fast movement through the system. Consequently, the same concerns of fairness can be raised.

The question therefore that arises is, can the change made by the appointment of an additional tier in the judiciary be enough to create the environment for fair and fast trials? I think that the ready answer to that question is no. It has been recognized by jurisdictions such as the United States, Australia, Canada and lately the United Kingdom, that the answer lies in adopting a systemic approach to trials. These jurisdictions view each matter filed as a project to be approached using management techniques, case management techniques.

These techniques have been reduced to Case Management Rules that have been either incorporated into existing Rules of Court or form a part of new Rules of Court. Where they form part of new Rules of Court, they are part of a

management process to be used by the court that has as its overriding objective to deal with cases justly. Courts must ensure *inter alia* that the parties are on equal footing, that cases must be dealt with expeditiously and that each case must be allotted to it an appropriate share of the court's resources while taking into account the need to allot resources to other cases.

THE CASE FLOW MANAGEMENT AND THE CASE MANAGEMENT SYSTEM

The Courts in these jurisdictions further recognized that a fundamental tool in driving the attainment of fast and fair trials was the realization that time had come for the Court office and the Bench to take responsibility for the progress of litigation through the system, from initiation to final disposition according to time standards fixed and managed by the Court. This wave of reform has given us the methodologies of case flow management, the function of the court office and case management, the function of the Bench. The Court has to ensure that only the most deserving of cases are allowed and allocated more of the court's time and resources which may mean the holding of a formal trial to resolve the matter. Case Management is one of the tools to be employed in achieving the Overriding objective stated in Part 1 of the Civil Procedure Rules, 2000 (hereinafter called "the new Rules"). The twin concepts of elimination of trial by ambush and its replacement, openness and certainty of trial date buttress the new system to be used in the attainment of fast and fair trials.

The passage in each of the jurisdictions has not been without incident, but that will necessarily form the subject of another paper. Within our region, we note the Trinidad and Tobago experience and I mention the efforts being made by both Barbados and Jamaica in carefully setting their stages for the way forward. In my own jurisdiction, I am happy to report that I have

received support from the Executive, my colleagues and members of the various Bar Associations for the introduction of the new Rules of Civil Procedure which incorporates the case flow and case management concepts.

WHAT IS CASE FLOW MANAGEMENT?

At a ceremonial sitting of the High Court at Canberra in 1999, Cox CJ had this to say:

...the Court (has to ensure) that the proceedings commenced ...will be conducted expeditiously, that interlocutory proceedings are initiated in a timely way and orders complied with in similar fashion, that cases capable of settlement facilitated as soon as possible, and that when cases do go to trial, the issues are clear and proof of matters not in dispute dispensed with...

Case Flow management and Case management therefore are the processes by which litigation is supervised and conducted by the Court. There has been over the years a natural development from the prudence of introducing the entire system, to the recognition of a need for it to the processes involved in implementation. I do not think that I need to spend any more time on the first two questions, so I think that I shall go right on to the processes involved in implementation of the case flow management and case management.

Before doing so, I must stress that there needs to be co-operation at the functional and philosophical levels between the Bench and the Bar. The Bar must be prepared to undergo far reaching and sometimes daunting changes in its attitude to practice, office management and financial responsibility both to

the Client and to themselves in a real and meaningful sense and the Judiciary must do likewise. Litigation must be approached as a “joint venture in which all are under a duty to co-operate in resolving disputes sensibly, speedily and economically”¹. If the way forward is fully supported at these levels, the Executive and the Litigants will respond positively.

AIMS OF THE CASE FLOW MANAGEMENT SYSTEM

I shall adopt the aims of the Case Flow Management System stated by Cox CJ and reproduced in document titled SUPREME COURT RULES 2000 – PRE-TRIAL CASE MANAGEMENT, to wit:

- (i) proceedings are conducted expeditiously;
- (ii) interlocutory proceedings are initiated in a timely way;
- (iii) orders are complied with;
- (iv) cases capable of settlement are identified and the prospects of settlement facilitated as soon as possible;
- (v) when cases go to trial, the issues are clear and information and evidence presented efficiently.

CASE FLOW MANAGEMENT

As stated above, this is a Registry driven process. The features are the Backlog Reduction Programme, Generation of Notices of Events by the Court Office and dissemination of Information to Attorneys and pro se litigants.

¹ Report by Practitioner members of the Commercial Court Committee in England referred to in Justice Rogers’ “Business Disputes Made Easier”, 1986 Supreme Court of New South Wales Library, Judges’ Papers collection.

1. BACKLOG REDUCTION PROGRAMME

It is important that the system is fashioned to suit the environment in which it is expected to operate in. With that in mind most jurisdictions embarked upon a Backlog Reduction Programme, so as to deal with cases already in the system. My jurisdiction is no different. We devised a Backlog Reduction Programme in which the first step was to take an Inventory of the Status of existing cases over a ten year period.

In one of the territories forming part of the Court's jurisdiction, St. Vincent and the Grenadines, that yielded the result that the number of cases in the system over the ten year period stood at 832. The next step taken by the Registry was to classify those cases according to the documents appearing on the Court file, that is, whether the records revealed that only originating process had been filed, if defences were on file, summonses for directions had been filed, if requests for setting down and /or hearing had been filed, or if the matter was ripe for hearing. Lists were then compiled and sent to Attorneys who indicated whether the matters were of interest to them in any way. The Registry then set about listing those matters before the Resident Judge who applied the existing Rules of Court to officially declare matters live or no longer live. Those matters that were live, (which numbered 125) were then put on a list for Status Hearings conducted by the Master. These status hearings provided a further opportunity for cleaning up the system. Those matters that were to be tried were identified as eligible for the further step of case management by the Court.

After these hearings are conducted and there is a good feel for what the exact number of cases awaiting trials is, it then becomes a management issue whether to appoint additional Judges specifically to deal with those matters.

2. GENERATION OF NOTICES BY THE COURT OFFICE

The new system entrusts the Court Office with the responsibility to keep the process moving. It is sometimes said that the process is court event driven, so that once dates are given for events to occur, they must, on pain of sanctions. The trigger in the system is the filing of the Defence. In the Draft Rules, once the time has passed for the filing of a defence, the Claimant is expected to take certain action, and should there be a failure to do so, the action is struck out. The time limits given in the new Rules are relatively short in this instance, evidencing the modern approach to attaining fast and fair trials, that only deserving cases move through the system and the necessary change in culture of using court action as a negotiating tool, rather as a means of dispute settlement in itself. In the Toronto, Ottawa and Windsor in Canada, the three cities in which I, and members of the Eastern Caribbean Supreme Court had the opportunity to visit, this system was adequately managed by software devised for this purpose. I shall deal in more detail with the automation aspect of the system later in this presentation.

Once a defence has been filed, the case is set on course for trial. I must mention that at every stage of the process, the parties are encouraged to pursue other means of dispute settlement, which I shall develop later on.

3. THE ROLE OF THE COURT OFFICE

As stated before, case flow management is an integral part of the case management system and is the responsibility of the court. Basically, this connotes the supervision or management of the time and events involved in the movement of a case through the court system, from the time of initiation to final disposition, whether by settlement by the parties or by trial.

The most important elements are time management and proper scheduling. It is said that,

...By managing the time between events so that the occurrence of the scheduled activity becomes predictable and certain, a court encourages timely preparation by attorneys, increasing the probability of an early and fair disposition of the case.

The purpose of this type of management is to facilitate early disposition of those cases, which do not require trial and early intensive judicial focus.

WHAT THE COURT OFFICE MUST DO

Here I shall outline the some practical points that the Court office must consider so as to achieve our stated purpose.

- Within eight to twelve weeks of the filing of the defence, the Court office sends a notice to the parties to attend a case management conference. The Court Office must have a dedicated case management schedule. The sending of the first notice must be prompt, as it is of paramount importance for the proper flow of the case. Thereafter, parties **MUST** keep their own scheduling arrangements.

In my jurisdiction it is intended that the newly appointed Masters will preside over these conferences in addition to functions traditionally performed by masters as outlined above. This is the actual start of the case management process.

- Ensure the availability of a Judicial officer, whether Judge or Master on the date set for the Conference. The importance of this is readily evident.
- List a reasonable number of cases for conference with the Judge or Master so as to make best and wise use of judicial time and court resources.
- Inform the Master if there are or there are likely to be any applications for adjournments, so that other matters may be listed.
- Maintain communication with the Judge and the Case Management Master especially for the purpose of scheduling trial dates.

CASE MANAGEMENT

1. FEATURES OF THE TYPICAL CASE MANAGEMENT CONFERENCE UNDER THE NEW RULES

All civil matters will be case managed by either a Judge or a Master. Case management by the Master will occur whenever a matter is commenced by Claim Form. If a matter is commenced by a Fixed Date Claim Form, the Judge who is hearing the matter will perform the case management function. Perhaps I should mention briefly that the Rules provide that matters hitherto commenced by using the Originating Summons and Petition process will now be commenced by a Fixed Date Claim Form as opposed to a Claim Form that is used to initiate matters previously commenced by way of a Writ of Summons.

Case Management is to be performed by the Court and is triggered only after the Defence has been filed in the court office. The time limits set in the Rules cannot be extended by Consent of the Parties. Application has to be made to a Master or to a Judge. In a complex matter, or in an urgent matter, the parties can elect to have a Judge perform the role of Case Manager instead of a Master. This is an important consideration in our jurisdiction, especially if the matter is urgent and cannot await the Master's scheduled visit. In a rare case, the Court may dispense with a formal case management hearing. As stated above, upon the filing of the Defence the preparation for case management must begin.

2. EXPECTED OUTCOMES OF CASE MANAGEMENT

The expected outcomes of case management are, and I borrow the following categorization:

- (i) to ensure that issues are clearly defined at an early stage;
- (ii) to tailor the timing and nature of the pre-trial steps to suit the requirements of the case;
- (iii) to facilitate the early investigation, and possible reduction , of issues, once resolved, enhance the prospects of successful settlement negotiations;
- (iv) to assist the parties in having the action progress to a stage where a trial can occur at the earliest possible time;
- (v) when cases are ready for trial, to ensure that proper steps are taken to facilitate efficiency at the trial, including dealing with matters such as admissions of fact, proof of documents, mode of evidence such as affidavits, expert reports;

- (vi) generally to reduce the time and cost involved in litigation without jeopardizing the fair and just determination of issues in dispute.²

3. THE ROLE OF THE JUDGE OR MASTER IN CASE MANAGEMENT.

I have dealt with the necessity for the appointment of this additional judicial tier already. Under our new Rules, the Master are empowered to do the following:

- Conduct Case management Conferences
- Conduct Pre-Trial Reviews
- Hear applications for Summary Judgment
- Perform any pre-Case management functions as may be designated by the new Rules, such as Service of Process out of the Jurisdiction or determine whether proper service has been effected on an application to set aside a default judgment.

To achieve these aims, it is my opinion that there is the need for proper and thorough preparation for the case management conference. The judicial officer should read all files beforehand to facilitate a functional understanding of facts and issues raised on pleadings. All applications and law relating to applications made and the dominant relief requested should be studied and reviewed.

At the Conference itself, practical time lines should be set for parties to take necessary preparatory action for trial. It is said that this will assure attorney preparation by creating realistic time frames in the case flow process. The judicial officer must be prepared to do a Risk/Cost/Benefit analysis for each matter and be prepared to make judgment calls on matters. Both of the Masters in my jurisdiction reported to me that when they spoke to Attorneys in Ottawa

² Supreme Court Rules 2000 – PRE-TRIAL CASE MANAGEMENT

and Windsor, this was to them one of the most valuable aspects to the case management system.

4. THE ROLE OF THE ATTORNEY / LEGAL PRACTITIONER/ PRO SE LITIGANT

Perhaps I can list what I consider to be what the Bar's approach should be to further the ends of this regime:

- Receive full and proper instructions from the client with respect to all matters raised on the pleadings.
- Amend pleadings before the date of the Case Conference. Under our Rules, this can be done by consent between the parties.
- At the first Case Management Conference:
 - Prepare applications if necessary. Part 25 of our New Rules outline the matters which may be dealt with at case management and these include:
 - Amendments of pleadings
 - Extension of time
 - Consolidation of matters
 - Further and Better Particulars of Pleadings
 - Discovery and Disclosure Orders
 - Interrogatories
 - File and serve intended applications in accordance with the provisions of the new Rules.
 - Explore settlement with your client and with the Attorney for the other litigant
 - Narrow facts and issues and come prepared to discuss them.
 - Prepare Statement of facts and issues.

- Know the amount and type of discovery and disclosure required.
- Experts, if needed, should be identified and perhaps agreed with the other side.
- Have a fair idea of the length of trial. At this time, Counsel should have an idea of the estimated length of trial.
- Inform the client of the date of the case management conference, as his presence will be required at this conference.
- Ensure that the client is present at the time and place notified.
- Do a proper Risk/Cost/Benefit analysis of the matter with your client.
- If the time and date is inconvenient to both Counsel and client, notify the court office in sufficient time.
- Disclose to the conference if other methods of dispute settlement are to be attempted by the parties and give a time frame for reporting to the court.
- If an application is to be made at the case management conference, the papers should be served on the opposing party and filed with the court office in accordance with the times set in the new Rules.
- If submissions are to be in writing, they must reach the court at least 48 hours before the date and time set for hearing.
- If the application is to be argued viva voce, the fixture must be confirmed in writing or by fax by the moving party by at least 3 p.m. the day before.

It is suggested that leading members of the Bar should organize study groups and seminars. New topics and approaches to practice go hand in hand with the new Rules. I can think of 2 important areas that must be addressed, style of pleadings, (which must be fact based for the process to work efficiently and effectively) and the use of the discovery process.

Enhanced Role of the Discovery Process:

In keeping with the new approach to litigation, that is, the moving away from trial by ambush, this procedural step will take on greater significance. The general rule is that all documents which are relevant to the matter, and which are in the possession or control of a party, must be disclosed to the other party. Failure to do this in a timely matter can result in the other side's taking objection to production at the trial. The offending party's case may be seriously hampered by non-disclosure.

If all the matters are not dealt with by final order at the case management conference, then another may be scheduled for the parties to report to the court or make further applications if necessary. Should all the matters be finalized, then the parties may be given a fixed date for trial or a trial window is set. Note well that once the court sets the trial date, it cannot be changed unless application is made to the Judge.

5. THE ROLE OF THE CLIENT

Although the management of cases is court driven, the client plays an enhanced role in the litigation and trial process. The Rules provide that the Master may require the attendance of the client at the Case Management Conference. I shall refer to Ottawa, Toronto and Windsor again as the Masters reported to me that clients were present at about

75% of conferences that they observed. In fact in Toronto, one of the Case Management Masters had to call a witness to participate at the conference since neither the litigants nor their Counsel understood the essential nature of the matter.

Counsel must prepare their Clients for these attendances at these conferences. Once the litigants are at the Conference, they must be prepared to answer any questions asked by the Judge or Master. They must have a clear understanding and idea of what is to be achieved. All parties must be open to exploring settlement of matters without a trial and to attempt other methods of dispute settlement. Above all, Counsel must guide Clients so that they will be reasonable with their demands.

6. PRE-TRIAL CONFERENCES

Another step along the management line is the holding of Pre-Trial Conferences, which will resemble what we now refer to as Call Over Hearings. It is anticipated that these conferences will be more meaningful if a proper case management conference is held and the parties comply fully with the Orders made by the Master or Judge. By this time, all procedural matters should have been dealt with, but the parties may regard this hearing as a further opportunity to make any further and necessary applications so that the matter can be made trial ready. Counsel should be able to present an Agreed Statement of Facts, Issues and Law to the Court. They should be able to identify the issues to be tried, the evidence to be led to support the contentious issues, the witnesses to lead the evidence. Counsel should be prepared to inform the court and their clients of the costs to be incurred for trial. Practitioners should bear in mind that settlement is not precluded at any stage of the

matter. A good estimate of length of trial should be produced at this stage.

Parties should endeavour not to vary the date for a pre-trial conference. This should be used as a dress rehearsal for the trial.

Practitioners should note that litigants are not required to be present at the pre-trial review. If a trial window had been previously set, this hearing will fix the trial date certain.

ALTERNATIVE DISPUTE RESOLUTION

There have been serious arguments raised for and against the recognition and inclusion of the ideas of alternative dispute resolution into the court system. I will state that I am a supporter of any system that will lend itself to the delivery of fast, inexpensive and meaningful justice to litigants. Even though the Rules make specific provision for mediation, it is not a mandatory for the parties to use the process.

There is no precise way to define mediation. It is recognized as an informal process at which a person facilitates discussion between opposing parties with a view to arriving at a settlement. In the litigation process, litigation serves another primary function, which is to allow the parties to define their zones of agreement and consequently the zones of disagreement. This is a valuable aid in refining the trial process, as in most cases, only those issues of serious contention will move forward to trial. Mediation also gives a valuable psychological boost to the process, as the litigant feels that he is involved in the settlement of his matter and there is some independent and objective person who is willing and able to listen to him in an informal and fairly open setting.

In Ottawa, mediation as a litigation step is mandatory, but the process is voluntary in the sense that the pace and the conduct are largely dependent on the willingness and co-operation of litigants. Experience has shown that certain types of matters lend readily to mediation, such as banking, human resource problems, accounting, medical and engineering and construction claims. Complicated claims especially those involving public law and liberty of the subject may not lend itself to the process, and a court trial is the appropriate method of dispute resolution. Statistics have shown that the success rate for mediation is 40% of the cases referred to the process.

Our rules provide that parties may engage in mediation at any time during the litigation process.

AUTOMATION

The court and by extension the trial process cannot remain untouched by advances in technology, if efficiency and effectiveness are to be achieved. I said at another forum that once the new systems have been established, they require efficient administrative support, not only in terms of human resources, but also in the area of technology. Technology extends to enhanced forms of telephonic communication such as facilities for conference calling and messaging systems and computerization, both hardware and software.

In the past, software had to be customized to suit the needs for case flow management alluded to above. The field has developed so rapidly, so that there is available off the shelf software packages that can be customized to suit each Registry's needs. In my jurisdiction, we are in the process of making

arrangements with a provider from South Carolina U. S. A. to customize software to suit the needs of each Registry.

I have been privileged to see the operation of the software packages, and assure you that they are user friendly, and from all reports have increased the efficiency and information gathering aspects of litigation and trial management in particular.

CONCLUSION

I have given my share of speeches on the new environment in which it is hoped that Civil Litigation will be conducted in this new century. I never tire of saying that it is my hope that every effort will be made by all concerned to act in such a way as to fulfill the primary function of the legal system, which is, to ensure that litigants are treated fairly and justly in the most expeditious and effective manner in keeping with the available resources. What I have tried to do in this presentation is to provide a holistic and practical approach to litigation and litigation management which will at the end make much of the maxim "justice must not only be done but must seem to be done".

I thank you.