The Litigation Contract: The Future Roles of Judges, Counsel and Lawyers in Litigation

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Thank you Chairman, Chief Justice Allsop, your Honours, Chairman of the Victorian Bar, President of the Law Institute of Victoria, ladies and gentlemen.

It is quite an extraordinary event, as I look around this room after nearly forty years in the legal profession, to see this collaboration occur. Collaboration will be a theme which will resonate throughout my remarks this morning and one which I hope will resonate with you.

If you reflect upon it, Chief Justice Allsop and I represent the vast bulk of civil litigation in this country. The Supreme Court of Victoria is the second largest and busiest civil superior court in the country and the Federal Court covers the federal jurisdictions. Together it is quite an amalgamation here this morning.

The purpose of this morning is to give you a snapshot of what is about to happen and how this will affect you in your work as litigators. In the Supreme Court of Victoria we now have a mega-trial courtroom and also other electronic court facilities in the main building.

This has proved to be very important and will become more clear this afternoon when Justice J Forrest addresses you on his experiences in the Kilmore East bushfire trial. It was a case where leading edge technology was utilised. We in the Court made sure that the judge was not left alone,

as an isolated individual, to be the subject of a tsunami of counsel and solicitors and then have to walk away and write a judgment. This is in the modern world an impossible challenge. What we did in the Supreme Court was to provide additional support and research staff to support the judge.

If you look at the Supreme Court website you will see the lone judge, Justice J Forrest, and those of you who know him would appreciate that he is not a man of huge stature, and there he is as a small isolated individual on the bench. However in front of him was a wide row of individuals there to provide support to his Honour. Then on the other side of the bench there was a phalanx of counsel and lawyers ready to head into battle.

An interesting aspect of the Kilmore East bushfire trial was that his Honour very courageously issued an edict banning trolleys. He also banned folders. I have seen photos where one or two senior counsel had managed to sneak in a folder but on the whole it was a paper free trial that ran for almost a year. This was an extraordinary achievement.

One of the other lessons that came out of the trial was the way in which technology improves the efficiency of trials. We have had measurements taken, so far as we can in a scientific manner, of both the Great Southern trial which was before Justice Croft and then of the Kilmore East trial. Our research found that about a third of court time was saved due to the effective use of technology in the courtroom. That leads me to indicate to you that technology and its application is the way of the future. We will see more and more of it. In the Supreme Court we have set ourselves a goal of becoming a completely paper-free court by 1 January 2016. The clock is ticking but we certainly hope to reach that goal.

Building on the Kilmore East experience we have other class actions coming into the Court. The Murrundindi trial is set to run next year and at this stage will take up the bulk of the year. We have

had Great Southern and there are both common law and commercial class actions coming in constantly. It is a challenging time, but an exciting time.

Another reform which will happen on 10 November this year is the Court of Appeal will introduce the new civil appeal reforms. This will streamline the civil appeal processes in the Supreme Court and we believe the reforms will dramatically reduce wait times for appeals to come on. Effectively, in most cases, there will be no automatic right of appeal; appeals will require leave and in many cases leave will be decided on the papers. There will be an opportunity for an election if a party wishes to be heard. Essentially it will be a way to speed up the whole process. Coincidentally, with the Court of Appeal, we are aiming in most instances to set specialist appeal benches so that cases coming out of the Commercial Court which have been on a fast track will go into the Court of Appeal. Let me give you an example of an insolvency case. That would have seated on the Bench insolvency expert judges such as Justices Whelan, Santamaria and Ferguson to give you an indication. If there is a planning or environmental appeal there will be judges of similar expertise on the Bench. This is all done with the aim of expediting and smoothing out the path to the resolution of litigation.

Mediation, particularly court annexed mediation, has become a significant phenomenon in the Supreme Court. The other day I was speaking to Associate Justice Wood and he told me he had just finished his 100th court annexed mediation for the year. The availability of court annexed mediation through associate judges such as Associate Justices Efthim, Wood, Gardiner and others is not available universally but is used carefully and selectively. Many of you would have been in cases in the Commercial Court where the plaintiff's case has been opened, the defendant has provided its response and at that point the judge has referred the matter off to court annexed mediation. This has proved very effective and beneficial to the parties.

These are just a few highlights. The President mentioned the Mediation Centre and I would select

that as a highlight. Such a facility has been available in Sydney for many years and Melbourne needed that facility as part of the national grid and the push to attract arbitrations into this country. The next port of call may be in Perth, certainly if Chief Justice Martin has his way, and we will see a national grid developing which will utilise the skills of all of the bars and the profession. Of course, Victoria has a very prominent arbitration bar and profession and we should expect to see many arbitrations here in Melbourne.

There is a snapshot of the sorts of things going on short term and longer term. But I did want to speak to you today and give you some thoughts on the future direction of your role as lawyers and the role of litigation in the future.

If you think about your role it is very much one where you have been educated, developed and practiced in an adversarial setting. It is maybe time to think about a different way. If you think about the role of the lawyer in the courtroom and working for clients and applying the law, if you think about the role of the judge in the administration of justice, we are all in this together. Ultimately, what we want is the resolution of disputes. A client wants speed, efficiency and economy.

Perhaps something you could reflect about is this: the practice of the law is not entirely adversarial. What I would suggest to you is that what we do, what we engage in, ultimately is a contract between the Bench and the profession whereby we work co-operatively for the benefit of clients and in the interests of the administration of justice. It is a collaborative, cooperative exercise. It is a contract.

Of course in any contract the obligations lie with the parties of the contract. So let me start with the Bench. In order to achieve the best resolution of disputes a judge must be prepared, be across the submissions and know the relevant case law. This allows a judge to adequately engage with the matter before, during and after the hearing. A judge should be courteous and civil to counsel and the

profession. It allows for barristers and solicitors to assist the Court as best as they can without undue interference from the Bench. While being courteous and civil, judges must also be firm in not allowing irrelevant points and arguments to be made. This allows the Bench to focus on the key issues and ensures that costs are not incurred on points that should not be taken. In addition to being courteous and civil judges must strive to be good listeners; they should be interactive listeners, not sit silently so that parties cannot analyse or calculate what it is the judge is thinking. The parties need some indication so that they can address the judge's points.

Importantly, and picking up on my earlier remarks, judges need to be across technology and subsequent developments. For all the major law firms and all of those with busy practices at the Bar, we understand that you are particularly technologically savvy. It behoves the judiciary to be able to respond.

Judges must commit to delivering judgments in a timely manner. They must keep in mind that parties are often in a state of limbo while waiting for hand down. From the point of view of your clients time costs money.

Judgments should be written in an accessible form. While arguments are often delivered in a very technical and legal way, the Bench must keep in mind the fact that the ultimate consumer of what is being delivered is the client. It should be possible for the client to be given a judgment, even a technical one, and be able to understand why they won or, importantly, why they lost.

Judges should, as part of the contract, encourage the parties to work collaboratively in their interaction with the Court. This means allowing both parties to have input into timetables and the provision of documents. While judges are specialists in adversarial justice, they should encourage the parties to engage in ADR.

Now, that is the judiciary and those are just some suggestions. Let me now turn to the Bar.

Counsel should be aware of their obligations under the *Civil Procedure Act 2010*. These require counsel to work together with the Court and practitioners to "facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute."

Let me say this loudly and clearly, counsel should not take unnecessary points. If you need a hint from the Bench, it is one of the things that irritate judges the most. In addition to not taking unnecessary points, counsel should be wary to not be verbose; succinct submissions are welcomed by the Bench.

Counsel should also be courteous and civil not only to the Bench but also to their opposing counsel and the other practitioners in the room. This assists all parties in identifying the key issues and seeking to resolve them. Counsel should keep in mind not only their own capacity when making submissions as to timelines but they should also understand the ability of their instructors to comply and make appropriate submissions reflecting that. Counsel, along with their instructors, need to be open with their clients about the process. That will sometimes involve looking directly at the client, explaining to the client that according to the principles in the High Court it is counsel who runs the case not the client. It is challenging and difficult but there are times when a client needs to be told that a point cannot be taken, evidence cannot be led, where the weaknesses in the case are and the course the client should follow.

Importantly, counsel should engage in collaboration with their instructors. Barristers too, as I have adverted to a number of times, should also keep abreast of technological developments. This has another benefit in that it pushes the Bench and it is a very healthy litigation scene if the Bench is

being pushed by counsel out front.

Let me now turn to the lawyers, the practitioners. Similarly they must be aware of their obligations under the *Civil Procedure Act.* They also need to be prepared for hearings; it is imperative for litigation to be collaborative that solicitors are across the matter and ready to proceed.

They need to have a cooperative attitude to their opposing firm. It is so easy to become engaged in combat, even litigation warfare, and lose sight of the fact that ultimately what we are all engaging in is the resolution of a dispute that is timely, cost effective and satisfactory for the client.

Most importantly, I hear from many judges, particularly in the Commercial Court, that counsel has not been briefed early enough in the case. Secondly, that delays in providing the brief to counsel have led to unnecessary and wasteful preparation. For example, pleadings. Pleading is an art. I do not suggest that practitioners cannot draw pleadings but it needs to be appreciated that there is particular expertise at the Bar and for as long as we have pleadings, which we do in litigation, then they should be prepared by the artists, not by those whose strengths lie elsewhere.

Practitioners also need to be honest and upfront with clients as part of the contract with regards to timing, costs and expectations. This is equally so with counsel.

So they are some of the suggestions as to the obligations of the three main parties to the contract in litigation. You may sit think this is all very well in theory but why cooperate? Well, there are the overarching obligations in the *Civil Procedure Act 2010.* In Victoria, in the State courts, whether parties like it or not, they are subject to the *Civil Procedure Act* and there are similar provisions across the Federal Court, the Supreme Court of New South Wales and the Supreme Court of Queensland.

However, what I would like to urge you to consider is that you do not do these things simply

because you have to, but you do them because it produces a better outcome for your client. Candour, courtesy and cooperation facilitate faster and less costly resolution of disputes.

Let me give you some suggestions to you as to how this cooperative, collaborative approach may look to you. It manifests itself in many ways. Obviously, responding promptly to reasonable requests for information, obtaining joint appraisals from experts, conducting oneself in a reasonable, courteous and professional manner, even in trying times; using constructive problem-solving techniques to settle clients' disputes and to assist the Court; conducting discovery by agreement, and not using the discovery process to harass other lawyers or their clients or to generate unnecessary costs.

These are just a few suggestions. All of you involved in litigation know the sorts of things that can be done to lead to a quicker path to the judge and to the resolution of the dispute.

I would like to give you some very significant examples of how this cooperation has worked. Following the outcome of the decision in the Timbercorp investment scheme class action there are now around 1600 cases which have to be individually determined. They are now before Justice Judd. What his Honour has done is, in a directions hearing and with the cooperation of the parties, prepare a template. With the use of the template his Honour was able to conduct a directions hearing for about 150 separate pieces of litigation in a single morning by 11:30am. Justice Judd was able to achieve this because of the approach he took and the performance of his contractual obligations under the litigation contract, but also, importantly, because of the cooperation of the parties.

Another example is the Kilmore East Black Saturday class action. This was a large, high stakes, hard fought proceeding. The parties were very good at discussing the tendering of documents,

agreeing which documents could and could not be tendered. Experts were able to focus on the issues in the dispute through the use of expert conclaves. There was also substantial cooperation within the Court with the trial judge being able to draw very effectively on the assistance of the associate justices in managing the expert conclaves and the issues arising from it.

So there are a couple of very quick examples of cases which, without the cooperation of all involved, would still be running. Let us take a moment to reflect on what cost this would have meant for the community and on who would have been the ultimate beneficiary if that had been the case. The client, the winner, the loser? These are reflections we need to have.

If we decline to have these reflections then it is my view that we will face very serious challenges. We need to be alert to the fact that if we as parties to the litigation contract do not seize the moment and take the leadership we are at risk that the government will intervene. We have seen this already with the *Civil Procedure Act.* It is a government driven intervention, albeit supported by the courts and largely by the profession, to try and control litigation.

It is an adversarial setting that we live and breathe every day. What we need to do is to find ways to dilute, vary and soften the impact of the adversarial setting. We might learn from the European experience where judges very much control the litigation. Discovery is confined and directed by the judge. The scope of the evidence is directed by the judge. Litigants in person may be actively assisted by the judge and indeed mostly have to be. The imbalances in resources are eliminated. Cross examination is directly controlled. There is no longer a need for lengthy judgments, dealing with every single argument put forward. If we learn from the European experience trials would be shorter and costs may be a fraction what they are now. Litigation may no longer be used as a tactic and class actions would be tightly controlled.

As one of my colleagues suggested to me last night, it is time to say, ‘why don't we talk about Kevin?’ So could I suggest to you, indeed encourage you in every way, to seize the moment of this unique collaborative opportunity where the Bar and the profession meet to ask each other whether we can be doing anything differently.

I congratulate the Victorian Bar and the Law Institute for the initiative today. It is a unique event and one that I hope will become an annual one on our calendars.