A GUIDE TO THE USE OF THE NEW BVI COMMERCIAL COURT

Tameka Davis – November 2009

You could easily overlook its entrance, as no doubt many do, unaware that here, disputes are likely to be fought over vast sums of money and/or valuable property. In the main court room there is a flat screen television and rows of microphones; it is a sign that this court is equipping itself with state of the art facilities. This is the new Commercial Court and Edward Bannister QC, an English Silk with considerable commercial experience, has been appointed its sole judge.

In his speech to mark the opening of the new 2009/2010 law year the Honourable Chief Justice Hugh Rawlins said this about the Commercial Division:

> "*This Division is intended to specialize in and bring a new and dynamic dimension to cross-border litigation…The aim of this division of the Court is to facilitate the speedy and efficient resolution of commercial cases in our system, in a manner that permits the Court to maintain a competitive international profile.*"

This is a formidable mandate for a single judge and a dozen or so court staff but it can be accomplished or at least they will try. But no court is able to properly function without sensible rules of court. If commercial cases warrant their own court they also warrant their own rules. This is uncontroversial and accepted. However, the rules, practice direction and guides (the latter two of which are currently being promulgated to shore up the Commercial Division) must be readily assimilated and easily reconciled with our current Civil Procedure Rules, not least if this Division is to have not just local but regional relevance. This paper is briefly examines the changes introduced by Part 69A of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 ("the CPR").

Part 69A was added to the CPR by the Eastern Caribbean Supreme Court Civil Procedure Rules (Application to the Virgin Islands) (Amendment) Order, 2009. Aside from a few notable exclusions, Part 69A for the most part mirrors Part 58 of the English Civil Procedure Rules 2009. The definition of a "commercial claim" is all encompassing and means any claim or application arising out of the transaction of trade and commerce and includes claims relating to:

(a) the law of business contracts and companies;
(b) partnerships;
(c) the law of insolvency;
(d) the law of trusts;
(e) the carriage of goods by sea, air or pipeline;
(f) the exploitation of oil and gas reserves;
(g) insurance and re-insurance;
(h) banking and financial services;
(i) collective investment schemes;
(j) the operation of markets and exchanges;
(k) merchantile agency and usages; and
(l) arbitration.

Although not expressed, one would assume that "claim" in this context includes counterclaims. Further, the use of the expression "and includes" necessarily suggests that the foregoing list is not exclusive.

In addition to passing the definitional test in order to qualify as a commercial claim, a claim must also satisfy the monetary value test. The claim or the value of the subject matter to which it relates must be at least $500,000. The commercial judge is in charge of the commercial list. He retains the discretion to include in the list a claim that has not satisfied the monetary value test notwithstanding the definitional and monetary value test, if he considers that the claim is of a “commercial nature and warrants being place on the commercial list”. There is no guidance as to when a claim will “warrant being placed on the commercial list”. No doubt a highly material consideration must be that the substance of the dispute is sufficiently specialized that it justifies being heard by a judge with expertise in the area. There is also a positive obligation on the part of the legal practitioner for the claimant to file a certificate to the effect that the claim is an appropriate one for treatment as a commercial claim. Even with this certificate, the commercial judge may require that a claim be transferred to any other list if he is not satisfied that the claim is commercial.

But whether a claim is commercial is not always clear; it is certainly conceivable and indeed likely that some matters are capable of being listed in both the commercial and civil division of the High Court. In those cases there should be a greater degree of flexibility in the rules permitting a transfer. It does the system no good if matters are loaded onto the commercial list that could sensibly be dealt with also as an ordinary civil matter, especially if there is a judge competent and prepared to deal with it. There is also no reason why there should not be an express stipulation that any judge may hear a matter if it is urgent and the commercial judge is not available. Ultimately, it is a matter for the commercial judge, but Part 69A in its current form does not expressly say how he is to exercise his discretion in cases which may be appropriately decided by either division. The overriding objective to deal with cases justly will no doubt be of immense value here.

Other noteworthy changes introduced by Part 69A are the requirement that parties include a statement of value in the claim form, that a reply be filed 21 after service of the defence and that parties draw up their own orders and where a consent order is sought it must now be applied for in all cases.

The first change in relation to the statement of value is clearly aimed at assisting with the appropriate listing of matters. The value must relate to the claim or the subject matter of the claim. Fixing a value is easy where the claim is for a specified and indeed unspecified sum of money. It is not so easy where what is being sought is a whole gamut of declarations or injunctive relief. These are usually the kinds of relief sought in jurisdictions like ours. Also, the subject matter of a claim does not always readily endear itself to quantification, whether through some – likely indiscernible – mathematical calculation or otherwise. This could lead to spurious values which may have a real impact on a litigant when it comes to the assessment of costs. While special costs rules in the Commercial Court are being contemplated, they are not yet in force. As it stands, it is certainly not clear whether the inclusion of this statement of value would preclude a party from later seeking to fix a separate value for the purpose of prescribed costs. It remains to be seen how this will operate in practice. There is ample room for confusion.

The second change is sensible. The current rule that a reply be filed 14 days before the case management conference (“CMC”) is impractical. The parties are rarely given that much notice by the court office, which has led to applications for an extension of time in which to file a reply being made at the first CMC. These applications were and are invariably granted, resulting in the CMC proper being adjourned to a later date. It is now commonplace for the first CMC to be a pointless experience. By requiring that parties file their reply, if necessary, after service of a defence, this should reduce the need for adjournments and introduce a welcome degree of certainty which was previously lacking.

The first part of the third change – that parties draw up their own consent order – merely encapsulates what pertains in actuality and will require very little, if any, change in practice. The second part has certainly simplified the rules on consent orders which, while not complicated, continue to mystify the unwary. At first blush, it is difficult to justify this difference in approach between commercial cases and other civil cases. Some guidance may be gleaned from the UK Civil Procedure (Amendment No. 5) Rules 2001 (SI 2001/4015), which introduced the wording which we have adopted verbatim. The primary purpose of those rules was to insert into the Civil Procedure Rules 1998 as Parts 58 and 62 new rules about procedures for, inter alia, the Commercial Court in England. Those new rules were created in response to the ever evolving needs of the commercial community. There is tremendous merit in prescribing that in commercial cases all orders, even if by consent, require the final approval of the trial judge. There is usually a lot at stake and having a judge overseeing every step, however trivial, may seem justified. On the other hand, the requirement that litigants apply to court for approval of an agreed direction might seem onerous and costly. It may be for this reason why there is an express stipulation in our rules that the application may be heard on paper.

Part 69A does not pretend to do anything more than create listing rules and to implement predictable deviations from parts of the CPR. Having seen the draft practice direction currently being circulated, it seems that much of the substantive changes to current practice will be made there. Whether this is the appropriate place is quite another issue, suffice to say that the success of the Commercial Court depends greatly on crafting rules of procedure that are not only forward thinking but also cognizant of our unique challenges.

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