AN CHÚIRT UACHTARACH
THE SUPREME COURT

O'Donnell J
Dunne J
Charleton J
O'Malley J
Baker J

Supreme Court appeal number: S:AP:IE:2019:000027
[2020] IESC 000
Court of Appeal record number 2019/219
[2019] IECA 53
High Court record number 2019/000
[2019] IEHC 000

BETWEEN

DEFENDER LIMITED

PLAINTIFF/APPELLANT

AND

HSBC FRANCE (FORMERLY HSBC INSTITUTIONAL TRUST SERVICES (IRELAND) LIMITED)

DEFENDANT

AND

RELIANCE MANAGEMENT (BVI) LIMITED, RELIANCE INTERNATIONAL RESEARCH LLC, FINEMAN LIMITED AND DAVID WHITEHEAD

THIRD PARTIES

Judgment of Mr Justice Charleton, delivered on the 3rd of July 2020

1. In concurring with the judgment of O'Donnell J on the outcome of this appeal, since there will now be a full trial, rather than a preliminary issue, some further comment may be appropriate on the management of that trial.

Crime and tort

2. What the trial judge concerned himself with was the issue of whether a settlement of liability with the trustee in bankruptcy of the Bernie Madoff financial entities in New York, consequent upon his gigantic and decades-long fraud, meant that the plaintiff was to be identified with a co-tortfeasor defendant so completely as to relieve all other defendants of all possibility of any finding of liability. In so deciding, the trial judge was attracted to the notion that a crime always trumps a tort: that since Bernie Madoff had erected a voracious but superficially attractive Ponzi scheme, deceiving new investors on the basis of false past returns funded by the continual agglomeration of new money, his liability was to be assumed by the plaintiff and as what he had done was a series of crimes, that those offences outstripped even the grossest negligence, should there be any negligence at all, of any of the defendants. That approach was wrong. Crime does not remove or somehow trump tortious liability. What the Civil Liability Act 1961 is about is sharing and

finding equitable apportionment for fault where more than one person has contributed to the wrong suffered by the plaintiff or where a plaintiff has contributed to the occurrence of that wrong.

3. Assault is a crime and a tort, as is false imprisonment, as are various forms of trespass to property and detinue. Fraud describes various tortious wrongs and also crimes prohibited under the Theft and Fraud Offences Act 2001. If a relative is killed, where the intention of the killer was to cause death or serious injury that is murder but even a conviction does not preclude recovery of compensation for grief and for the loss of the financial support of that person which is recoverable under Part IV of the 1961 Act. Moreover, even in homicide there may be contributors to the ultimate tortious wrong, that a dependant of the victim is deprived of support and is bereaved. A person supplying a knife to an assailant may be reckless that death or serious injury results, but the killer may intend that. Hence, there are two wrongdoers, one guilty of manslaughter and one of homicide. What about gross negligence manslaughter? This is a crime and it is also a particularly clear form of the tort of negligence. If a car is badly repaired and crashes, the contribution of the garage to the wrong may be so serious that if someone is killed that liability for manslaughter is involved but so too there may be fault in the driver that can be part of the overall wrong or be, in terms of driving, so overwhelmingly bad as to displace that liability in crime. Or it can be in tort that both driver and garage share liability. Crime has nothing to do with one form of wrong being more important than another from the point of view of civil liability and degrees of fault. The 1961 Act, as the separate judgment of O'Donnell J demonstrates, is concerned with contribution to an overall wrong to a plaintiff, should any such wrong be proven, and not in classifying wrongs in a cascade from murder to manslaughter to gross negligence to negligence to breach of statutory duty to breach of contract.

4. What is involved here is neither obscure nor unusual. A person receives another's money. That person is to care for it and foster growth through investment, possibly to enable the investor to one day retire. Another person, because of the temptations associated with money, and the flaws in human nature, is appointed to watch how that person deals with the money. If the money disappears, the argument for Defender is that if the keeper of the funds dissipated or stole the money, then if the watcher did not detect it by doing the job assigned, the watcher as well as the fraudster may both be liable. O'Donnell J's judgment recites the settlement with the trustee in bankruptcy of the Madoff entities, the keeper, to the tune of 75% of what was lost and that it is possible to recover up to 25% of the total should negligence be found against the watcher of the investor of the money. Where the share of contribution to any wrong is larger, because of existing compensation nothing more than 25% may be recovered, but if the contribution to the wrong by the watcher is less than that, say 5% for example, then there may be an issue of constitutional construction or unconstitutionality in relation to the legislation.

Managing the case

5. In the neighbouring kingdom, case management came in consequence of the reforms introduced by Lord Woolf and have been the subject of continual refinement since then.

These developments are set out in the judgment of Denham CJ in *Talbot v Hermitage Golf Club* [2014] IESC 57. Emphasised in that judgment, concurring in the remarks also made by Charleton J, is that the courts have limited resources and that such internationally declared obligations as the entitlement of litigants to have a trial heard within a reasonable timeframe mean that no litigant is entitled to demand any undue portion of a public court system. That system exists for the benefit of all litigants. Simply because a great deal of money may be involved, or the issues are complex or are presented as complicated, does not automatically mean that the parties are entitled to: multiple pre-hearing motions; or can place an undue burden of discovery one on the other; or have a right to call multiple contending experts on the same issue; or to open a case over days; or be granted days or weeks to cross-examine witnesses, traversing in the process linked chains of acres of emails or documents; or, in short, to have as much time as they feel they want that can become an indulgence of obsession blurred by poor focus.

6. Over centuries, the need to sort out facts was refined by the duty of the parties to, in the earliest days of litigation, make an opening statement and this became the pleading of the party seeking relief to be answered in a defence. In the 19th century, to fail to mention a fact in opening a criminal case to a jury resulted in that evidence not being receivable by the court. Pleadings used to be simple and understandable, and it has to be noted are still a great help if read before a case by a judge, but these have also become so complex and so infused by every possible approach that the basic facts and the reason why a plaintiff may be liable or a defendant has an answer has become obscured. Since liability may be apparently found for mistakes in pleading, *Saif Ali v Sydney Mitchell & Co* [1978] 3 All ER 1033, the tendency since that case has been to plead every possible wrong of a defendant in the alternative. Whether the removal of immunity from counsel in pre-trial preparation markedly contributed or not, what was designed to simplify cases now leaves those reading pleadings wondering exactly what the issues might be. Defences are now documents that deny everything but do not state what a defendant says happened or why a defendant is not liable. Rules of court now control that and the task of the court is to fine focus out of this diffusion. That is where the trial judge comes in and that is where case management comes into its own.

7. Case management is a process that begins when the parties have pleaded their case. Not every case needs case management. There is no need to manage vendor and purchaser summonses or simple contract debt cases or the kind of tort claims that the courts dispose of dozens of on a weekly basis. Case management is for cases that should be required to be notified in advance of seeking a trial date as being unusually difficult or as demanding significant court resources. Where discovery or interrogatories or other pre-trial relief is sought in such a case, the scope of what a case is about and the answer to the claim of wrong should be capable of being explained clearly and concisely to the court. This case is an example of how that process might refine itself, but other cases are capable of yielding the same results though perhaps in different ways. Here, a prominent and highly-regarded financier ran an investment brokerage in New York and it so happens that it attracted some €500 million worth of investment through the Financial Services Centre in Dublin. Central to the trial of this case is what obligations were on the parties

under the relevant legislation. But, since the case is pleaded as failure to do what an ordinary custodian or a prudent manager of those funds would do, liability is to be found in apparent departures from those standards. Hence, the case is about: firstly, the nature of the legal obligation of each defendant, in terms of responsibility defined by legislation or by contract or in tort; secondly, the standard to which that obligation would ordinarily and reasonable be discharged; and, thirdly, the signs or lack of signs whereby the Bernie Madoff operations were to be regarded as highly trustworthy or might give cause for either concern or further appropriate investigation. That latter factor can be called a contest as between white flags, were there any, and red flags, should any be proven. If that is what the case is about, and it seems to be, and after all that can easily be clarified to the trial judge, then why not get on with that case?

8. Agreeing, or at least writing down, possible red and white flags at the behest of the trial judge makes engaging in sorting out the facts easier. Going back to the prior factor of reasonable discharge of duty or of contractual obligation, evidence as to how custodians or managers ordinarily and reasonably discharge such duties or obligations, and the reason for any measures of prudence or checking, if any, might be given by an expert. But, as will shortly be turned to, the rules of court do not allow six of each for each party but only one, subject to exceptional and compellingly valid reason. Further back, at the point of legislation, the parties should agree what the governing legislation is, the relevant sections, and where there is a contract, that text can be provided with the key conditions highlighted. It might also be said that tort liability can arise concurrently with contract, but why that might be so and whether the contract, if any, excludes that might usefully be asked.

9. Where huge funds are at stake and reputational damage may result, the expressed mystification of the trial judge might dissolve by considering that we live in a free society. Commercial entities are entitled to feel that since an issue to be litigated is vitally important to them that they should overturn every stone and search in every crack while engaging however many lawyers they feel will add value to their quest for self-vindication. That is all very well, but courts are not supposed to be tribunals of inquiry looking into a general situation or finding reasons for a disaster or why an apparent national scandal came about. Instead courts are engaged in a judicial exercise in deciding, based on reason and having heard whatever evidence is appropriate, where legal liability lies. It is not for a court to pursue issues obsessively; but it is the job of a court to ensure that obsessive scrutiny of the same email chains and continual mention of all of the same documents does not overwhelm the purpose of focus on the central issues.

10. For many years courts in both the neighbouring kingdom and in the United States have read case files and pleadings, together with witness statements, and have made a reasoned estimate that because of the importance of the case and the complexity of the issues that only a certain amount of time may be granted to hear the case. Each side might be given, for instance, 40 hours each. That can be spent in an over-long and diffuse opening speech so that little time remains thereafter for examining witnesses in

chief or cutting into the time for cross-examining essential witnesses. No court system should be inflexible and all human approaches to such important matters as litigation must recognise that parties may stray, may err, may underestimate or may need to be given some more time than was at first recognised to an issue or to a witness. Such indulgence must be part of judicial discretion and rigidity might result in parties feeling that they have not had a decent hearing. That can be avoided but only with the cooperation of all those representing litigants. It should also be recognised that without case management, that parties feel the increasing burden of days and weeks of litigation, of cross-examination, of unfocused submissions as turning the court process into an unbearable burden.

11. While the trial judge's fear in entering a case that might have lasted six months, had the parties not been appropriately managed, might be understandable, consideration of the Rules of the Superior Courts could have enabled him to shorten the toil, ease the burden of the huge resources of memory that a long case requires and bring the case into better focus.

12. With the setting up of the commercial list in January 2004, essential to the management of really difficult cases has been the need for appropriate rules. The model rules for the commercial court have now been extended and adapted and strengthened for all non-jury and chancery cases. These rules, by requiring the exchange of witness statements, allowing those to be read before the case by the trial judge, cutting down on repetitive expert testimony and placing the responsibility of the management of the trial not in the hands of the parties but of the judge, means that focus will replace diffusion. The trial judge had those rules available to him but may have felt overwhelmed by the task in hand. That responsibility not only needs to be taken up and exercised by the trial judge but needs to be applied to ensure that throughout the trial the parties focus, identify issues and concentrate on what is central to deciding the case. If necessary, the trial judge can give a list of issues he or she feels are central. Asking for that from the parties invites diffusion. The reason for the various iterations of the rules has always been that without firm direction cases are in danger of taking on a life of their own. The trial judge, here, may well have appropriately directed the parties, may well have asked who was being called and for how long, may well have required a bundle of what the key documents were, may well have directed that every witness need not be cross-examined on the same documents but that selected points might be extracted, may well have required a time estimate, may well have imposed limits and once a week, once the trial properly started, could have held an end-of-week conference in court over ten or so minutes as to scheduling and keeping up with the throughput of work. Further, in no way is any trial judge bound by the estimates of the parties but could impose his or her own, subject to being flexible. If, as this trial judge in the particular circumstances of this case might, he had asked for a list of red or white flags, that was his entitlement. If, as was within his power, he limited the number of experts to one on each side and if the examination of witnesses was gently kept moving, cases can be done effectively. A trial judge can set hours of sitting longer to get through cases, and when holidays are taken, or are not taken at all, is a matter for him or her. That gets people moving.

13. The trial judge had all such necessary powers. It may be that he tried to exercise them in managing this case in advance. But, such management has to be made to work. The exercise of those powers might usefully have been substituted for generalised complaining. Order 63A of the Rules of the Superior Courts in itself, at rule 5, provides ample and sufficient power whereby the court may order its own procedures and whereby a trial judge may quietly direct considerably more concision from parties than they may seem at first willing to give:

> A Judge may, at any time and from time to time, of his own motion and having heard the parties, give such directions and make such orders, including the fixing of time limits, for the conduct of proceedings entered in the Commercial List, as appears convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings.

14. These rules were promulgated for the commercial court but have been extended because of the success that this division of the High Court has demonstrated in getting through work. The full extent of what initial directions can be given are set out under rule 6 and these are entirely without prejudice to the all-embracing power that rule 5 represents:

> (1) Without prejudice to the generality of rule 5 of this Order, a Judge may, at the initial directions hearing:
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> (a) of his own motion and after hearing the parties, or
> (b) on the application of a party by motion on notice to the other party or parties returnable to the initial directions hearing, give any of the following directions to facilitate the determination of the proceedings in the manner mentioned in that rule:
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> (i) as to whether the proceedings shall continue:
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> (I) with pleadings and hearing on oral evidence,
> (II) without formal pleadings and by means of a statement of issues of law or fact, or of both law and fact,
> (III) without formal pleadings and to be heard on affidavit with oral evidence, or
> (IV) without formal pleadings and to be heard on affidavit without oral evidence;
>
> (ii) fixing any issues of fact or law to be determined in the proceedings;
> (iii) for the consolidation of the proceedings with another cause or matter pending in the High Court;
> (iv) for the defining of issues by the parties, or any of them, including the exchange between the parties of memoranda for the purpose of clarifying issues;
> (v) allowing any party to alter or amend his indorsement or pleadings, or allowing amendment of a statement of issues;

(vi) requiring delivery of interrogatories, or discovery or inspection of documents;

(vii) requiring the making of inquiries or taking of accounts;

(viii) requiring the filing of lists of documents, either generally or with respect to specific matters;

(ix) directing any expert witnesses to consult with each other for the purposes of:

(a) identifying the issues in respect of which they intend to give evidence,

(b) where possible, reaching agreement on the evidence that they intend to give in respect of those issues, and

(c) considering any matter which the Judge may direct them to consider,

and requiring that such witnesses record in a memorandum to be jointly submitted by them to the Registrar and delivered by them to the parties, particulars of the outcome of their consultations:

provided that any such outcome shall not be in any way binding on the parties;

(x) providing for the exchange of documents or information between the parties, or for the transmission by the parties to the Registrar of documents or information electronically on such terms and subject to such conditions and exceptions as a Judge may direct;

(xi) for the examination upon oath before a Judge, Registrar or other officer of the Court, or any other person, and at any place, of any witness, in accordance with Part II of Order 39;

(xii) as to whether or not the proceedings should, by virtue of their complexity, the number of issues or parties, the volume of evidence, or for other special reason, be subject to case management in accordance with Rules 14 and 15 of this Order;

(xiii) on the application of any of the parties or of his own motion, that the proceedings or any issue therein be adjourned for such time, not exceeding twenty-eight days, as he considers appropriate to allow the parties time to consider whether such proceedings or issue ought to be referred to a process of mediation, conciliation or arbitration, and where the parties decide so to refer the proceedings or issue, to extend the time for compliance by any party with any provision of these Rules or any order of the Court.

(2) Without prejudice to any enactment of rule of law by virtue of which documents or evidence are privileged from disclosure, to assist him in deciding whether or not to make any order or give any direction in accordance with sub rule 1 of this rule, a Judge may direct the parties, or any of them, to provide information in respect of the proceedings, including:

(a) a list of the persons expected to give evidence;
(b) particulars of any matter of a technical or scientific nature which may be at issue or may be the subject of evidence;
(c) a reasoned estimate of the time likely to be spent in:

(i) preparation of the proceedings for trial, and
(ii) the trial of the proceedings;

(d) particulars of any mediation, conciliation or arbitration arrangements which may be available to the parties.

(3) A Judge may, where he deems fit, at the initial directions hearing, hear any application for relief of an interlocutory nature, whether in the nature of an injunction or otherwise.

15. Furthermore, rule 15 states that at "the case management conference the Judge chairing the case management conference" may:

(a) fix a timetable for the completion of preparation of the case for trial, and may for that purpose adopt any proposed timetable agreed by the parties if satisfied that it is reasonable;
(b) make any orders or give any directions which he may make or direct under rule 6(1) or (2) of this Order;

16. Rule 42, which is not confined to cases admitted to the commercial court, is to similar effect and makes it plain that, on request, parties must provide time estimates and confirms that the trial judge has the authority to manage a case so as to ensure the most effective use of court time, cutting out repetition and encouraging or requiring focus on the issues:

(1) The Court or an officer of the Court may require any party to proceedings to provide a reasoned estimate of the time likely to be spent in the trial of the proceedings, including a list of the witnesses intended to be called by that party and an estimated time for the examination or cross-examination (as the case may be) of each witness intended to be called by that party or by any other party.

(2) The trial of proceedings shall, as regards the time available for any step or element, be under the control and management of the trial Judge, and the trial Judge may, from time to time, make such orders and give such directions as are expedient for the efficient conduct of the trial consistently with the interests of justice.

(3) The trial Judge may:

(a) having regard to the period of time fixed for the trial, and
(b) having considered any materials (including any reports and summaries or statements of the evidence of any witnesses) delivered to him or her in advance of the trial in accordance with any provision of these Rules or any order or direction of the Court, and

(c) having heard the parties,

make such orders and give such directions as are expedient for the efficient conduct of the trial consistently with the requirements of justice which may, without limitation, include:

(I) orders fixing or limiting the amount of time allowed to each party for opening and closing the case (including, subject to paragraph (II)(d), the making of oral submissions on points or issues of law) and for examining and cross-examining each witness, which may include an order allowing each party an amount of time (out of the total time set aside for the trial of the proceedings) for its presentation of its case, which may be used in opening the case, in closing the case, in examining in chief or in re-examining any witness called by that party, and in cross-examining any witnesses called by any other party, and

(II) directions:

(a) as to the issues on which the Court requires evidence;

(b) as to the nature of the evidence required to enable such issues to be determined;

(c) as to the manner in which such evidence is to be put before the Court;

(d) where written submissions on points or issues of law have been lodged in advance of the trial, as to whether the Judge shall require any oral submissions on points or issues of law in addition to those written submissions, or

(e) requiring the parties or any party at any stage of the trial to identify the issues which arise or remain for determination by the Court and the questions which the Court is required to decide in order to determine each such issue.

(4) For the purposes of considering the making of an order under sub-rule (3) or otherwise, the trial Judge may require counsel for each party (or a party, if appearing in person) to indicate how much time is required by that party to be taken in the examination or cross-examination of each witness, or in any other step in the trial.

(5) The trial Judge may, having regard to any order or direction given in accordance with sub-rule (3), allow the time proposed by any party, or may allow such other period of time as the Court considers is consistent with the efficient conduct of the trial and with the requirements of justice.

(6) The re-examination of witnesses shall be limited to new matters that were raised for the first time on cross-examination and shall be concise.

(7) A party shall avoid duplicating the same evidence by different witnesses, save where such duplication is necessary for the just determination of the proceedings.

(8) Without prejudice to any other powers conferred on the Court by Order 99, in any case in which the Court is satisfied that the evidence of a witness called by a party was (in whole or in part):

(a) unnecessary for the determination of any question or issue arising in the proceedings, or

(b) merely duplicative of the evidence given by another witness called by that party,

the Court may:

(i) make an order disallowing (in whole or in part) recovery by a party of the expenses of the witness concerned or the costs occasioned by calling the evidence of the witness concerned, or

(ii) order the payment by that party (in whole or in part) of the costs occasioned to any other party by the calling of the witness concerned,

provided that no such order shall be made where the Court is satisfied that any duplication of evidence was necessary for the just determination of the proceedings.

17. Order 63C rules 4 and 5 were specifically promulgated to provide equal powers to judges hearing chancery and non-jury cases to those exercised by judges in the commercial list. Larger cases, under rule 6, are to be brought under case management and the purpose of this is not to increase time in court or to encourage pre-trial applications but to hear what the case is about in dialogue with the parties and for the trial judge then to exercise his or her powers to set limits on the issues, ensure these are defined, and circumscribe the time to be spent. This power is not to be foregone to the parties by them producing a suggested list of orders, though sensible cooperation directed at focus will be of great help.

18. Part XI of Order 39, which is again a general rule applicable to all cases, gives judges considerable power over one of the most repetitive parts of more complex trials, that of the examination and calling of expert witnesses. Rule 58 makes it clear that practices such as calling six experts on each side to testify as to chemical compounds or building practices, or whatever, is no longer possible. Where it is possible, experts should meet and try to agree fundamentals. As the parties cannot agree a joint expert, the complexity of expert evidence must be lessened but no more than one in any particular zone of expertise is possible on each side. Rule 58 provides:

(1) Expert evidence shall be restricted to that which is reasonably required to enable the Court to determine the proceedings.

(2) A Judge may—

(a) of his own motion and after hearing the parties, or

(b) on the application of a party by motion on notice to the other party or parties,

make any of the following orders or give any of the following directions as to expert evidence:

(i) requiring each party intending or proposing to offer expert evidence to identify–

(a) the field in which expert evidence is required; and

(b) where practicable, the name of the proposed expert;

(ii) determining the fields of expertise in which, or the proposed experts by whom, evidence may be given at trial;

(iii) fixing the time or times at which a report setting out the key elements of the of the evidence of each expert intended or proposed to be offered by each party shall be delivered to each other party concerned or exchanged and in default of such order being made, the provisions of sub-rules (1) to (5) inclusive of rule 46 shall apply to every such report;

(iv) where two or more parties (in this rule, the "relevant parties") wish to offer expert evidence on a particular issue, direct that the evidence on that issue is to be given by a single joint expert (in this rule, the "single joint expert");

(v) where the relevant parties cannot agree who should be the single joint expert—

(a) select the expert from a list prepared or identified by the relevant parties; or

(b) direct that the expert be selected in such other manner as the Court directs;

(vi) as to the terms on which and manner in which the single joint expert is to be instructed;

(vii) requiring any party:

(a) to pay to the single joint expert, or

(b) to deposit with the Accountant on account of fees to become payable to the single joint expert,

a specified sum in respect of or on account of a single joint expert's fees and, where the Court so orders, the single joint expert shall not be required to act until the said sum has been paid or, as the case may be, deposited.

(3) Save where the Court for special reason so permits, each party may offer evidence from one expert only in a particular field of expertise on a particular issue. Such permission shall not be granted unless the Court is satisfied that the evidence of an additional expert is unavoidable in order to do justice between the parties.

19. Rule 59 introduces a debate among experts procedures, whereby one can question another, or each can give evidence sequentially out of the normal order, so as a court can appreciate the divergence in views and in a manner which helps focus.

20. Even though cases may generate a vast quantity of documentation, especially if the parties feel that reasons of reputation or finance require extraordinary resources, that does not mean that witnesses should be led through their evidence in a diffuse fashion. Witnesses are there because they have something to say. What is the position of the witness on the key issues of fact? That is what matters and clouds of emails and weighty expositions on documents can often conceal what the witness wants to say or, even worse, so divert the witness that he or she misses or is led away from the proof of relevant facts. In cross-examination, an exactly similar danger arises but one where the trial judge's task is made more difficult by counsel for the opposing party not putting, and putting clearly, exactly what proposition of fact that side contends for. This has always been the rule for trials: lead the witness's factual position and put the opposing case. That process does not have to be lengthy. In *McNamee v Revenue Commissioners* [2016] IESC 33, the judgment of Laffoy J approves the decision of the House of Lords in *Browne v. Dunn* (1893) 6 R 67 which is encapsulated in the following statement of Lord Halsbury at pages 76-77:

> To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity often to defend their own character, and not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.

21. See also *McDonagh v Sunday Newspapers* [2017] IESC 59. Facing a long case may induce trepidation but judges should exercise the skill which decades of practice will have demonstrated enables the drawing out from each side of the precise nature of their case, setting sensible limits, encouraging focus and requiring clarity in what witnesses are trying to say. Spending time beforehand gently teasing out what the issues are, making sensible rulings as to time and as to the focus of proceedings can mean that what seemed unmanageable and likely to master the time of the court or overwhelm the judge can be brought under control.

22. While a case management culture has characterised our nearest neighbour so that the time taken for complex litigation has been cut to a fraction, half or much less, judges need to be aware not just that the same tools exist in this jurisdiction but that they should be deployed. A court system does not serve the community if unnecessary pre-trial motions run up costs or if the failure to focus on what is essential to a court decision means that cases monopolise court time. Part VI of Order 36 of the Rules of the Superior Courts and Order 63A also give a further discretion beyond Order 99 whereby costs rulings can provide the necessary incentive. There comes a time, furthermore, where parties should be seen to be obsessive or ill-focused in pre-trial procedures and where a sensible view is that the case should proceed immediately to hearing.

23. The point of case management is to fairly share resources of court time in a way that is equitable. Cases have core points and hearings have points on which decisions move in

the balance one way or another. Diffusion in pleadings, directionless witness examinations, multiple experts and mountains of documents both obscure and de-emphasise those issues on which cases are decided and hide the key points of testimony. Complex cases, without case management, waste resources both for the system of justice and for those seeking justice.