Published on e-First 24 August 2020

JUSTICE AND EFFICIENCY IN MEGA-LITIGATION[1]

By Anna Olijnyk

CHOO Han Teck
LLB (Hons) (National University of Singapore), LLM (Cambridge); Judge, Supreme Court of Singapore.

> [T]he process by which a judge arrives at a procedural decision resembles that by which the fire-fighter reaches a decision to move from a dangerous part of a fire. When judges make a decision based on expert intuition, they are not simply doing what they feel like; they are bringing to bear a lifetime of experience and education in legal practice. Such a decision is not uninformed or arbitrary.[2]

1 Justice begins with the assumption that every litigant will have his day in court. This assumption is tested by the question: How many days should he be entitled to? That is a difficult question because the longer one litigant holds the attention of the court, the longer another litigant has to wait his turn, for access to justice is access for all, and the limited resources of the court cannot be hogged by a litigant as he pleases. *Justice and Efficiency in Mega-Litigation* inquires into the ways in which judges ensure justice between the parties and still achieve a measure of efficiency, especially in the ever-increasing cases of mega-litigation.

2 The question itself suggests that something may have to give, just as the call for freedom finds its echo in the refrain that freedom for the pike is death to the minnows. The concern in this book is the time and resources that are consumed by mega-litigation, which, the author ("AO") defines by adopting the description given by Sackville J, the trial judge in *Seven Network Ltd v News Ltd*,[3] (better known as "*C7*"). The learned judge held as follows:[4]

> The case is an example of what is best described as 'mega-litigation'. By that expression, I mean civil litigation, usually involving multiple and separately represented parties, that consumes many months of court time and generates vast quantities of documentation in paper or electronic form. An invariable

1 Hart Publishing, 2019.
2 Anna Olijnyk, *Justice and Efficiency in Mega-Litigation* (Hart Publishing, 2019) at p 184.
3 [2007] FCA 1062.
4 *Seven Network Ltd v News Ltd* [2007] FCA 1062 at [1].

> characteristic of mega-litigation is that it imposes a very large burden, not only on the parties, but on the court system and, through that system, the community.

3 *C7* had two applicants and 20 respondents and was heard in 120 days. Through electronic discovery, 85,653 documents, comprising 589,392 pages, were discovered, and 12,849 documents, comprising 115,586 pages, were admitted into evidence. Sackville J's judgment was 1,173 pages long. But this was by no means the longest or biggest trial. *Duke Group Ltd v Pilmer*[5] took 471 hearing days. AO noted, however, that trials lasting more than 100 days are more common in Australia than in the UK. She interviewed many judges in both countries, and wrote that some English judges attributed their relatively short trial times to the efficiency of their procedures, particularly in the Commercial Court.[6]

4 The exchange between counsel and the judge in *C7* exemplifies how good humour survives in mega-litigation:

> Counsel: The worst thing that can happen in this case is that the timetable breaks down.
>
> Judge: The worst thing that can happen is that the judge breaks down.

This exchange was reported in *The Sydney Morning Herald* on the 104th day of the trial.

5 The concerns regarding mega-litigation are: (a) the cost to efficiency, with public funds going into one single case, and other cases thus being put on the backburner, queuing for their day in court; and (b) that expenses may be prohibitive especially for the poorer parties dragged into a fight between the deep-pocketed.

6 In Chapter 3, AO examines the causes of mega-litigation. First, the bigger the stakes, the bigger the trial. Parties are more willing to spend more time and money when they have much more to gain. Litigants worry about spending $500,000 in legal costs when the claim is for $1m, but are more inclined to spend that amount if they are claiming $1bn. The second factor is the number of parties. With 20 respondents divided into ten separately represented groups, *C7* had to ensure each party's issues were addressed. The third is the number of days that a court might allow the case to drift. The fourth concerns the staggering number

5 (1998) 144 FLR 1.

6 Anna Olijnyk, *Justice and Efficiency in Mega-Litigation* (Hart Publishing, 2019) at p 21.

of documents that might be involved. And fifth, a mega-litigation usually has complex questions of fact or law, or both, but AO observes that usually, it is the complexity of factual issues rather than legal issues that mark out a case as a mega-litigation.

7 Under the common law adversarial system, the courts periodically review practice and procedure to weed out wasteful procedural posturing, and AO finds that sanctions against such conduct need to be addressed at source, namely that the legal culture of paying a lawyer by the hour often proves a great incentive for cases to drag, giving rise to the observation of Charles Dickens that "The one great principle of English law is to make business for itself".[7]

8 Money is not the only reason for the reluctance of counsel to abandon any arguable point – the fear of being sued sometimes drives lawyers into the wasteland, and the judges, to despair. AO warns that although adversarial zeal might be a cause of mega-litigation, cases in which litigants appear in person may be even more inefficient.[8]

9 In the entire book, AO has only two brief paragraphs touching on the benefits of mega-litigation. In her view, there is only one benefit – to London – namely, that she "can continue to attract large commercial disputes in the face of competition from other litigation centres such as New York and Singapore".[9] The reason for that, she says, is based on the public efficiency of mega-litigation in London, and not the drain on public funds. And even so, she reminds us that "public efficiency benefit flows from procedures that promote both justice and efficiency *for the parties*" [emphasis in original].[10]

10 The author was quick to point out that she was not suggesting that the courts pursue efficiency to the exclusion of justice. The aim of her book is to reconcile the two; perfect (or Rolls Royce) justice is never attainable. So fair justice is not perfect justice. The management of a mega-litigation is highly dependent on the trial judge and the application of the due process of procedure.

11 In Chapter 5, AO compares the leading theories on the relationship between justice and efficiency, beginning with Adrian

---

7 Charles Dickens, *Bleak House* (Penguin, 1996) at p 621.

8 Anna Olijnyk, *Justice and Efficiency in Mega-Litigation* (Hart Publishing, 2019) at p 32.

9 Anna Olijnyk, *Justice and Efficiency in Mega-Litigation* (Hart Publishing, 2019) at p 43.

10 Anna Olijnyk, *Justice and Efficiency in Mega-Litigation* (Hart Publishing, 2019) at p 43.

Zuckerman's three dimensions of justice as he discussed in *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure*.[11] Zuckerman's perspective envisages a balance between time, accuracy and cost. He sees that the objective of procedure is to bring about a correct decision, while recognising that delay may undermine the rectitude of a decision in several ways. They include the deterioration of evidence and the erosion of the utility of the court's decision when too much time has lapsed.[12] So far as costs are concerned, apart from that borne by the parties, public funds are invariably expended too, and "governments cannot be expected to provide the justice system with unlimited resources".[13]

12 Zuckerman's approach will require judges to decide how much accuracy is to be sacrificed to save time. His is a practical approach that, according to AO's interviews, has found favour with English judges. A perennial concern about procedure is that substantive justice must be taken into account. In this regard, judges may remind themselves that the Rules of Court and established practices must be complied with strictly or anarchy might ensue. But in a mega-litigation, the docketed judge may direct parties from the outset how the standard rules and procedure will be modified for the case at hand. Once the parties know in advance, the rules become the norm for that case, and justice will be served, without fear that procedure will not be followed. It only remains for the judge to crack the whip of discipline on the parties.[14]

13 The second theory is the economic analysis theory favoured by judges such as Richard Posner. The two types of costs that this theory contemplates are "error costs", which flow from a failure to reach a correct decision, such as a failure to give effect to substantive law. The second is "direct costs" which are the costs incurred by the parties as well as the state. Posner enumerates various accounts of how the sum total of these costs may be added so as to arrive at an assessment of how much a procedure is worth. Critics, AO says, point out problems associated with this theory – both in theory and in practice. How, for example, might injustice be added to the cost side of a ledger in such a theory? Furthermore, some processes may be less expensive than others but may be distinctly unfair.[15]

---

11 Oxford University Press, 2000.

12 Anna Olijnyk, *Justice and Efficiency in Mega-Litigation* (Hart Publishing, 2019) at p 53.

13 Anna Olijnyk, *Justice and Efficiency in Mega-Litigation* (Hart Publishing, 2019) at p 53.

14 This is the personal view and approach of this reviewer.

15 Anna Olijnyk, *Justice and Efficiency in Mega-Litigation* (Hart Publishing, 2019) at pp 58–59.

14 The third theory is Dworkin's rights-based approach, as he envisaged in *A Matter of Principle*.[16] Dworkin seeks the middle ground between the extreme view that one should seek the highest degree of accuracy (Rolls Royce justice), and the utilitarian and economic analysis views in which procedural laws should depend on a cost-benefit calculation between the interests of society and the interests of the parties. Dworkin's theory, as one seeking the middle ground, carries the sound of reasonableness for its moderate position, but in practice, many argue that Dworkin will end up close to the utilitarian way.[17]

15 The fourth theory is Robert Summers' "process values" in which procedure is evaluated by reference to the values it embodies rather than by the outcomes it produces. By this theory, torture is objectionable even if it produces reliable evidence because torture offends process values.[18] The problem with this theory, of course, is that it runs contrary to the view that procedure is a means to an end, and not an end in itself. Process values, rather than reconciling the competing claims of justice and efficiency, adds another ingredient into the pot.[19]

16 After discussing case management and civil procedure generally, AO then discusses, in Chapter 9, the attributes of a mega-litigation judge, who seems to be a new animal created from the rise of case management. Towards the end of the previous century, judges were more willing to let trials be run by the parties. That caused a rise in time and costs to levels that made access to justice unattractive, if not impossible, for many people. Case management was a judicial movement that began with the objective of clearing the backlog of cases jammed by litigants who not only sought their day in court but also ended taking up the days of other litigants.

17 This book discusses two important features that shape the conduct and course of a mega-litigation: judges and procedure. In respect of the former, AO identifies the characteristics that are consistently displayed by judges in such litigation. She writes:[20]

> The mega-litigation judge is a highly *active* participant in the preparation and presentation of the case; is *creative* in finding new ways of dealing with

16 Ronald Dworkin, *A Matter of Principle* (Clarendon Press, 1986).

17 Anna Olijnyk, *Justice and Efficiency in Mega-Litigation* (Hart Publishing, 2019) at p 63.

18 Robert Summers, "Evaluating and Improving Legal Processes – A Plea for 'Process Values'" (1974) Cornell L Rev 4 at 23.

19 Anna Olijnyk, *Justice and Efficiency in Mega-Litigation* (Hart Publishing, 2019) at p 72.

20 Anna Olijnyk, *Justice and Efficiency in Mega-Litigation* (Hart Publishing, 2019) at p 121.

> mega-litigation; is *flexible* in the approach to procedure; and places a high value on *fairness*. Mega-litigation judges tend to be daring and non-traditional. [emphasis in original]

These characteristics are needed in the efficient case management that every mega-litigation requires. But judges will differ in their management style. AO reports that English judges tend to be less active in defining the issues than their Australian counterparts. Although case management is a heavy burden on the judge, it is considered a necessary price for efficiency.[21]

18 AO's interviews extracted comments and views from judges that reconcile the traditional role of the common law judge with the active role of the mega-litigation judge. From those interviews, AO identifies various other traits – brevity, toughness, confidence and experience. She concludes with this comment:[22]

> The mega-litigation judge is not the old-fashioned cuckoo clock judge. Mega-litigation judges are highly engaged participants in litigation from its earliest stages; they mould procedures to suit the needs of each case, and they make up rules as they go along.

19 Procedure in a mega-litigation is crucial and so are the modifications imposed by the judge during case management and at trial. In Chapter 10, AO discusses the various procedural techniques in mega-litigation. She begins with the emphasis on early and continued case management. Early introduction of the judge to the parties allows the parties to know and understand the judge's approach to procedural issues.

20 One of the differences between the traditional approach and the mega-litigation approach lies in the defining of issues, which, in the traditional way, is left to the parties, through their pleadings. AO found that mega-litigation judges prefer to go directly to the defining of issues. She cites some of the comments that show why mega-litigation judges abhor prolix and technical pleadings (the pleadings in *C7* were more than 1,000 pages long):[23]

> Issues are important and pleadings are not, at this level … Nobody ever looks at pleadings. They're expensive and time consuming.

---

21 Anna Olijnyk, *Justice and Efficiency in Mega-Litigation* (Hart Publishing, 2019) at p 137.

22 Anna Olijnyk, *Justice and Efficiency in Mega-Litigation* (Hart Publishing, 2019) at p 141.

23 Anna Olijnyk, *Justice and Efficiency in Mega-Litigation* (Hart Publishing, 2019) at p 145.

> They can … become a vicious distraction. If people are going to spend hours, days, weeks, arguing about the adequacy of the pleading it's just pointless.
>
> The pleadings [in a mega-litigation matter] were I think, 1,000 pages all up … so yes, the pleadings weren't particularly helpful at all.

21 What is important in mega-litigation is discovery. This may be one of the largest contributing factors that makes litigation expensive. It is also the area in which a party may seek, in the vast expanse of data, a warm refuge for its weak case. The mega-litigation judge must master the principles of discovery, and apply them with a stentorian voice. Otherwise, the discovery process will lapse into an endless train of inquiry. Defining the issues and then controlling discovery are thus the tools he uses to keep the parties on track. One way of doing this may be to conduct a series of discovery conferences early in the case management. That way, based on the defined issues, the judge will have a better understanding of what documents a party may be seeking and why they are relevant, but directions for discovery should retain flexibility, taking into account the nature of the individual case.

22 Discovery is but the root of evidence. Once that process is done, the judge has still to manage the evidence that is uncovered. Directions on the presentation of the evidence have to be firm and clear. The crucial function of the judge is to ensure that relevant evidence – and no more – is admitted. He will then have to direct the most sensible way of presenting the evidence. As AO comments:[24]

> While restricting the scope of documentary evidence may mean that the parties cannot put in every document that they otherwise would have done, it need not diminish the quality of justice between the parties. The key is to let in only documents that are relevant – or, as *The Commercial Court Guide* puts it, 'necessary'.

23 So far as witness statements are concerned, it seems that mega-litigation may see the death of hearsay. Most judges interviewed expressed poor views of "facile objections to evidence". The rules of evidence thus need not be applied in a strict or technical manner. Some judges dismiss objections based on hearsay by declaring: "I know what hearsay is, let's get on with it, let's not argue about it." Objections to expert testimonies sometimes meet with judges who take a pragmatic approach, such as Neville Owen J, who was quoted as having told counsel: "In the end these are questions of weight. That's what I do for a living."[25]

---

24 Anna Olijnyk, *Justice and Efficiency in Mega-Litigation* (Hart Publishing, 2019) at p 160.

25 Anna Olijnyk, *Justice and Efficiency in Mega-Litigation* (Hart Publishing, 2019) at p 162.

24 The final point concerns submissions. One judge sums it up best when he said that the mega-litigation judge may have to read "1,000 pages of written submissions, many of which are not the least bit helpful".[26] Thus, AO reports that judges respond by controlling submissions. One English judge told AO:[27]

> I always used to say 'I will hear submissions from you for two hours. Not a penny more.' […] I strictly limit pleadings, strictly limit witness statements, strictly limit submissions. Because that gets completely out of hand, simply because you get information overload in the judge. You simply cannot absorb it'.

Technology helps, but only to an extent. Ultimately, the information must be processed by the judge – with a very human brain.

---

26 Anna Olijnyk, *Justice and Efficiency in Mega-Litigation* (Hart Publishing, 2019) at p 168.

27 Anna Olijnyk, *Justice and Efficiency in Mega-Litigation* (Hart Publishing, 2019) at p 169.