CASE MANAGEMENT AND THE MANAGERIAL JUDGE

BY

JUSTICE R.I.B. ADEBIYI

"*…the traditional adversarial methods of work, both on the Bench and at the Bar, leave a great gaping hole in the efficiency and effectiveness of our litigation performance.* ***Efficiency and expedition in disposing of litigation requires a stout case-management style at the Bench****; and, at the Bar, a flexible approach to the prosecution of cases.* ***Instead, the tendency with the adversarial mode of dispute resolution is: (a) for the Bench to recline into a laissez faire stance, in which the Judge does not descend into the arena of the case;*** *and (b) for the Advocates to mount the attack and, like latter-day gladiators, hurl heavy duty adversarial weaponry at each other, in the venerable game of a battery of preliminary legal objections, incessant adjournments (on the flimsiest of reasons), and technical knockouts on any and all grounds available in the omniscient book of Legal Procedure. All the above, and more, are the underlying causes from which arise the numerous instances of delayed justice; and which give litigation a bad name." (emphasis mine)*

- ***Justice James Ogoola, Principal Judge, High Court of Uganda.***

Introduction

The above statement aptly captures the issues for discussion in this paper, appropriately tagged, "*Case Management and the Managerial Judge*". Not only does the Learned Judge mention the deplorable delay he observed in the dispensation of justice and the detached, *laissez faire* stance of judges, he also avowed the need for stout case management by the Bench as a vital ingredient in the speedy and efficient disposal of cases. Consequently, this throws the spotlight on the role of the judiciary in securing an effective justice system.

It is important to understand that an efficient judicial system is an essential component of socio-economic progress, stability, rule of law and development. Backlogs, overstretched case dockets, delay and other problems currently assailing our judiciary, create pressure to evade the judicial

system or even to seek special privileges from its officers. A judicial system characterized by these unsavory elements will ultimately lose the confidence of the people. In the light of the foregoing the topic of this paper assumes great significance.

Accordingly, I will describe the concepts of "case management" and "the managerial judge", before discussing the perceived need(s) which necessitated its conception and adoption. Furthermore, I will also outline the benefits derivable from case management, before proceeding to outline case management methods. The concept of the managerial judge and a brief examination of the arguments of its opponents and proponents will also be discussed.. I will conclude this paper by advocating Alternative Dispute Resolution (ADR) as an integral part of case management, and the Lagos Multi-Door Courthouse (LMDC) as a safe route for furthering the cause of case management, without radically compromising the traditional perception of the role of the judge.

WHAT IS CASE MANAGEMENT?

In simple terms, case management means the control of case movements through a court or techniques of managing cases within the litigation system The concept was designed to identify and define issues in dispute, reduce costs, delays and unnecessary pre-trial activities. It is not usually regarded an ADR process, however, ADR techniques are often designed to be integrated with case management systems.

This foregoing finds support in Justice James Ogoola's definition as contained in his paper, "The Growth, Future and Promise of ADR in Africa: The Ugandan Experience", delivered at the 1st NCMG African ADR Summit, where he said:

> *"…the supervision or management of the time and events involved in the movement of a case through the Court system namely, from the time of filing the case, to the point when the case is disposed of with finality. In other words, from the time a case is filed in the Court's Registry, the Court takes charge of the case; and shepherds it through all the scheduled stages and events. For this reason, the effectiveness of Case Management depends on the existence of stipulated time frames (which should be strictly complied with*

by all concerned); as well as the existence of appropriate penalties and sanctions, to ensure observance of the stipulated time frames."

From the above definitions, it is clear that it entails actions taken by the court aimed at monitoring and controlling the progress of cases from commencement through trial in order to ensure that justice is done expeditiously. It assumes a closer administrative control over the litigation process by the judge or a tribunal than what obtained traditionally. Some aspects of it include precluding the parties from engaging in procedural manouevres by empowering the judge to set firm deadlines and otherwise managing the litigation. This inevitably led into the development of the concept of the "managerial judge", which is the next term that falls for consideration.

Intertwined with the concept of case management, is the concept of the managerial judge. Naturally, when case management is said to be done by the court, it presupposes that this management is done by its chief functionary – the judge. He is the manager of the process and the person primarily charged with the responsibility of implementing the case management. Hence, the appellation, "managerial judge".

WHY CASE MANAGEMENT?

The phenomenon of case management is sweeping the globe, as several countries grapple with increasing case dockets, backlog of cases, and ultimately delay. Consequently, the need for case management i.e. the involvement of the court in the control of cases in their courts has come to the fore and received recognition in many jurisdictions.

Commenting on the foregoing, the United States Ambassador to Botswana, in his remarks at the opening of the Case Management Workshop conducted by U.S Specialist Judge David Campbell, which held on July 23, 2007 in Lobatse, Botswana stated:

*"It is no secret that **Botswana's judicial system is operating on overload; that case management requires improvement if justice is not to be deferred**. You are much more familiar with the difficulties and the obstacles within the system. I do not want to imply that such obstacles are unique to Botswana: all judicial systems grapple with case load*

management, and in the United States, our federal, state, and local courts struggle constantly to cope with the ever increasing workload, and not always successfully. One key to solving some of these problems is to exchange experiences; to compare best practices and to learn from each other. ***Among the implements to be found in the judicial toolkit are Alternative Dispute Resolution mechanisms – ADR for short—as well as judicial case management****. I understand that your workshop today will focus on case management, with a view to enabling judges to control and speed up the litigation process."* (Emphasis mine)

An extensive research across jurisdictions, all over the world will reveal overloaded and increasing case dockets, delay, congestion and inefficiency in the court system as the primary factors that gave rise to the evolution and development of the concept of case management and the managerial judge. It is believed that through the adoption of appropriate case management techniques by the judge, the problems will be effectively combated.

Evolution and Development of the Concept of Case Management and the Managerial Judge

The development of these twin inter-related concepts can be traced to the American legal system. Although, they gained momentum in the 1970's, the circumstances that actually gave rise to them can be traced as far back as the 1900s.

The administration of justice in American courts was perceived as being too slow and expensive. In a 1906 speech to the American Bar Association, Dean Roscoe Pound, distressed by court delay, technical and antiquated procedural rules, inadequate substantive law, urged the Bench and Bar to take responsibility for weakness in the administration of justice. These criticisms galvanized the legal community into the establishment of a society completely devoted to the study of court administration, and ultimately the enactment of Uniform Procedure Rules for the Federal Courts in 1938.

The new legislation confirmed the power of district courts to make "local" rules and the in addition, empowered parties to make discoveries, and established the just, speedy and inexpensive determination of all action as the goal of all judicial rule-making. Case law also confirmed the power

of the trial judge over the pre-trial phase. However, due to a variety of reasons such as population increase and attendant upsurge in litigants; articulation of new rights and wrongs, increase in lawyers, etc., the workload of the federal courts increased..

The situation was worsened by the discovery rules which, by the 1960's became a source of worry for commentators who decried its uncertain scope and reported abuse. Some parties argued about their obligations under the rules. Such generated the need for someone to decide pre-trial conflicts. Trial judges accepted the assignment and thus became mediator, negotiators, planners as well as negotiators. This supervision of discoveries became a conduit for judicial control over all phases of litigation. Thus, the concept of a managerial judge began to take shape.

The upsurge in the caseloads caused reformers in the 1960's and the 1970's to shift their focus from procedural problems to the administrative. Consequently, social scientists, investigating trial courts for the first time depicted increasing backlogs of pending cases and "indolent" judges, devoting little time to their work. . Appalled by the delays and lack of judicial accountability, commentators declared a crisis in the courts.

Subsequently, a lot of measures were advocated and devised to combat the crisis. Examples of such measures are design of procedures for case allocation, analysis of methods for expediting case disposal, training of newly appointed trial judges in docket management techniques, hiring of circuit executives, individual calendar systems, introduction of computerized record keeping systems, conforming to judicial timetables for preparation of trial, and pre-trial conference. This developments in the 1970's, signaled the formal emergence of case management and the managerial judge.

OBJECTIONS TO CASE MANAGEMENT AND THE MANAGERIAL JUDGE

The objections raised against these two concepts have centred on the perception of role of the judge. In this respect, there are two polar views – the traditional view and permit me to use the term, the contemporary or modern view.

Proponents of the traditional position view the judge as primarily aloof finders of fact, impartial, detached, and devoid of intimate contact with the litigants and their circumstances. He is not

expected to "intervene" or "descend into the arena of conflict". On the other hand we have the modern view, which describes the interventionist, pro-active and managerial judge, who rather than being paralysed into inaction, takes charge of the litigation progress in order to ensure its speedy disposal. This is the global trend now in view of the dire need to minimize or eliminate delay and decongest the case dockets. Many judges have dropped their relatively disinterested pose to adopt a more proactive managerial stance.

Much of the objections that have been raised against case management and the managerial judge boils down to the traditional perception of the role of the judge. There are doubts about impartiality and fairness where a judge who previously manages a case or attempts a settlement conference, acts an arbiter in the litigation. This can be avoided where different persons handle both processes.

Some contend that little empirical evidence support the claim that judicial management works. Uganda, Tanzania, Germany, United States, Singapore, United Kingdom and several other countries are good examples of places where the system has been utilized to good effect. Others assert that case management is a new form of judicial activism. Judicial docility or passivity is unacceptable in the face of global trends and current problems assailing justice systems globally. What is important is the type of case management adopted and the degree of the judge's intervention. Opponents also cite a tendency to value statistics more than the quality of dispositions. This is not a sufficient reason to "throw away the baby with the bathwater". While others maintain that it gives the trial judge more authority, without providing litigants with fewer procedural safeguards. This is also a matter which most countries adopting a good case management system have addressed, quite apart form the particular method being criticized. As you will see shortly, there are many case management techniques adopted in different jurisdictions.

SOME CASE MANAGEMENT TECHNIQUES

These are some of the case management the techniques, adopted globally in a bid to expedite the administration of justice. The list is not exhaustive, there are many more techniques utilized in different jurisdictions.

- Total case management
- Pre-trial hearings or conferences
- Time limits for events
- Individual Calendars
- Settlement conferences
- Information technology
- Frontloading system
- Adoption of an automatic procedure which ensures that in every civil case, pleadings are strictly monitored, discovery begins quickly and is completed within a reasonable time and a prompt trial follows if needed
- Good working relationship between the judiciary and the Bar
- Firm trial dates and limited continuance policies
- Emphasis on old cases
- Assignment to management tracks(e.g. expedited, normal and long)
- Alternative Dispute Resolution
- Introduction of various tracking systems

I will shortly discuss ADR as an element of a good case management system and the role which the Lagos Multi-Door Courthouse can play in improving the case management system of our judiciary. However, before that I will talk about the benefits of case management.

BENEFITS OF CASE MANAGEMENT

Justice Ogoola, in the paper I earlier referred to, while stating the objectives of case flow management, incidentally included its benefits. He stated:

"*The overarching objective of Case Flow Management is to promote more* ***efficient use of the Court's time, space, personnel and like resources****. If this primary objective is pursued diligently, then other desirable fruits of the Court's efforts will be realized including, among others:* ***Reduction in delays in the Court's system; Promotion and facilitation of early settlement of many case, Provision of a better service at minimum cost; and Reduction of the overall cost of litigation.*****"** (emphasis mine)

I have underlined the benefits derivable from a good case management as contained in the Learned Judge's paper. Other benefits, depending on the case management method adopted are:

- Empowers all stakeholders to contribute to speedy resolution of disputes
- Promotes substantive justice vis-à-vis technical or procedural justice
- Enhances opportunities for amicable settlement
- Promotes conciliatory litigation over adversarial litigation
- Enhances judge's ability to manage the litigation process

ADR AS AN ELEMENT OF CASE MANAGEMENT

ADR is indeed is indeed a useful tool in meeting the challenges experienced in the judicial system, moreso when it is used as an element of case management. The First Report of the Civil Justice Review of March 1995, published by the Ministry of the Attorney General, Ontario, Canada, canvassed an integration of ADR into the case management model. The report recommended that "early screening and evaluation mechanisms be built into the caseflow management structure to be implemented in the province". Referral to ADR was cited as one such mechanism.

It stated further:

"After further consideration, we are of the view that there should be mandatory referral of all general civil cases to a three hour mediation session, to be held following the

delivery of the first statement of defence, with a provision for "opting out" only with leave of a Case Management Master or a Judge. While this endorsement of mandatory referral may appear at odds with our earlier recommendation with regard to screening through a Judicial Support Officer (now Case Management Master), we have been persuaded that mandatory referral is the most appropriate option for a number of reason. **The evaluation of the ADR Pilot Project found that 40% of the cases referred to mediation resulted in settlement in the very early stages of the case, thereby reducing court caseloads and the costs of litigation.** Lawyers reported that legal costs were reduced even for cases that did not settle. In our First report, we estimated the cost of a typical civil case to a litigant to be in excess of $ 38,000.00. These costs are substantial and ell beyond what the ordinary citizen of this province can afford to pay. Even where there is no settlement as a result of the referral, the parties are forced at an early stage to evaluate the merits of their case"

The approach is the same in Australia, as ADR is an integral part of its case management, as gleaned from Justice L.T. Olsson's article, "Civil Caseflow Management in the Supreme Court of South Australia: Some Winds of Change", published in 1993, in the Journal of Judicial Administration. There he began his article with a statement of two fundamentally important principles of litigation, that the court has a duty to all litigants to provide efficient, economical and timely disposal of their cases, and a duty as well to ensure that public time and money are not wasted or ill-spent. He further remarked that the goal of all effective systems of case management is to generate real benefits for litigants and the practicing profession, and that the promotion of settlement through the use of ADR is regarded as achieving this goals by reducing costs in 90% of cases.

Ghana seems to be toeing the same line. Justice Margaret. Insaidoo, in her paper, "***Emerging Trends In Justice Delivery –The Case for ADR***", presented at the ***Seminar on the New Court-Connected Alternative Dispute Resolution Practice Manual for Selected Magistrates***, concluded as follows:

"There is absolutely no doubt in my mind that ADR is the answer to effective case management and speedy resolution of disputes. It therefore behoves us as Magistrates and Judges to be conversant with the ADR principles and proceedings, and to encourage

parties to attempt a resolution of their dispute by applying ADR principles. ADR is the latest trend in justice delivery. Embrace it!"

India, in Asia, is not left out in turning to ADR as a means of case management. The Government of India deemed it fit to amend their Civil Procedure Code to incorporate ADR. S.89 of the amended code gave mandatory powers to judges to refer matters to ADR if they thought there was possibility of settlement.

All over the world, more and more people are realizing the great potential of ADR in case management, and ultimately, reduction of case dockets and improvement of efficient dispensation of justice. Through this means, a significant portion of cases are streamed out of the court system. This brings to fore the issue of where it can be streamed to? Where else, but our own court-connected ADR centre – The Lagos Multi-Door Courthouse.

THE LAGOS-MULTI-DOOR COURTHOUSE – A VERITABLE TOOL IN EFFECTIVE CASE MANAGEMENT

Earlier on I spoke on the two positions on the role of the judge, and how proponents of the traditional view advocate that the judge strictly adhere to his adjudicatory role. Traditionalists frowned at practices where judges engaged in settlement conferences and acted as mediators, or negotiators in matters which came before them. This is fast gathering pace all over the world as many judges explore ADR in the resolution of some cases. In fact, they are empowered under statute to so do.

However, I find the Lagos Multi-Door Courthouse (LMDC) as a leeway of avoiding criticisms of modern roles of judges, while at the same time acting as a panacea to some of Lagos Judiciary's teething problems of congestion and delay. Through the LMDC, we can afford to be managerial and proactive without necessarily departing from our adjudicatory role. Our Case dockets are filled to overflowing. It is common knowledge. Thankfully, just like the Indian example earlier referred to, we have an enabling law which clothes us with the authority to refer matters to the LMDC – the Lagos Multi-Door Courthouse Law 2007. Let us take advantage of it.

CONCLUSION

The Judiciary of Lagos State has led the line well in the quest for reforms. We were the first to introduce New High Court Civil Procedure Rules in 2004, first to create divisions in the High Court, first to have fast-track courts in Nigeria and first to have a Multi-Door Courthouse, the first court-connected ADR centre in Africa. All the foregoing innovations have been targeted at decongesting the courts, expediting resolution of disputes, and improving the justice system.

Essential to attaining these goals is an effective case management system of which ADR is an integral part, and by virtue of which the LMDC assumes great significance. Permit me to end this paper with a statement from my Learned Brother/Sister, Justice Opeyemi Oke, extracted from her paper, "Decongesting the Courts the Place of the LMDC", published in the Negotiation and Conflict Management Group (NCMG) Working Paper Series, where she stated:

> *"With the acceptance of ADR by litigants, the court will be able to operate a good and excellent case management system since congestion will be a thing of the past. Cases that now go to trial can be managed properly without delay in justice"*

For this to be achieved, it requires our support, understanding and prayers. It will not happen by being passive, aloof, and disinterested. Rather, it will require us to be proactive and managerial. This the Way Forward. This is the noble path we have to tread.

Thank you listening.