THE FIRST ELECTRONIC TRIAL
SOUTH AUSTRALIAN SUPREME COURT
JUSTICE BLEBY – OCTOBER 2002

Southern Equities Corporation Ltd v Arthur Andersen

November 2001 – May 2002

BACKGROUND

Southern Equities Corporation Ltd v Arthur Andersen (Action No. 1474 of 1994) was the first fully electronic or "paperless" trial to be conducted in the Supreme Court of South Australia. This note has been prepared at the request of the Historical Collections Librarian of the Supreme Court library for the purpose of recording some of my reactions as trial Judge to the electronic aspects of the Trial.

NATURE OF THE CASE

The action was brought in the name of Southern Equities Ltd (formerly Bond Corporation Holdings Ltd), the ultimate holding company of some 300 companies in the Bond Group of Companies, then in liquidation. The action was for damages and other relief for negligence and breach of fiduciary duty against Arthur Andersen, a worldwide firm of chartered accountants and auditors of the Bond Group of Companies at the relevant time.

The claim involved the audit of some 19 transactions or situations included in the audit of the accounts of the Bond Group for the year ended 30 June 1988. The claim, including interest, was said to exceed $1 billion. The trial was expected to last for two years or more.

The case was some six or seven years in the preparation, and the evidence involved many thousands of documents relating to the original transactions, to the audit of those transactions, to the overall approach to and execution of the audit and to the quantum of the plaintiff's claim.

The trial began on 21 November 2001. Apart from a break in January 2002 and for two weeks in March 2002, the trial continued until the parties reached a settlement in May 2002. Most of that time, until the end of February 2002, was taken up by the plaintiff's opening and the tendering of documents and the defendant's short opening to identify some of the real issues. There was some relatively short evidence from some "lay" witnesses, and settlement occurred during the course of what would have been a very long cross-examination of the first expert witness called by the plaintiff.

PREPARATION FOR THE CASE

I first became involved in the management of the case early in 2001 after Debelle J, who had been managing litigation to that time, felt constrained to disqualify himself from sitting on the trial. I therefore took over the management of the case at a very late stage in the process, but at a time when issues concerning the use of technology and payment for it had to be resolved.

I became responsible for giving directions concerning a timetable for the electronic scanning of all documents to be tendered in the case and for ensuring that timely contractual and other arrangements were entered into between the parties to the litigation, the Courts Administration Authority and the provider of the technology, Systematics Pty Ltd.

I was fortunate in that, to coincide with the commencement of the trial, there was undertaken the complete redesign and refurbishment of Supreme Court No. 11. That involved the redesign and layout of that court room afresh, with new bench, court staff station, witness station bar tables and public gallery. The court was designed particularly to accommodate electronic trials and trials for multiple parties, with flexibility in the layout of bar tables and concealed underfloor wiring to all stations in the court room and beyond.

One of the first issues that had to be resolved was the nature and size of monitor screens to be used by those participating in the trial. In order to produce a satisfactory image of many of the documents, the screens had to be reasonably large. I was urged by Systematics to use CRT screens for clearer resolution and lack of deterioration over time in favour of the more modern flat TFT screens. The disadvantage of CRT screens was their bulk. Their advantage was their comparative cost.

It was intended that I have two screens on the bench – one to replicate the view on the screen in the witness box and one to control myself. My associate was to sit on the bench also with a screen. There was to be one in the witness box, one for the court reporters and two for counsel for each party, together with the operator's screen and one for the small public gallery at the eastern end of the court room.

I was concerned that the processes of the court should not be or appear to be dominated by the technology, but the technology should at all times remain and be seen to remain the court's servant. I considered that the number and location of CRT screens of the necessary size would have a dominating and even oppressive effect.

The commercial arrangements concluded between the parties and the Courts Administration Authority required that the parties pay for the hardware that they were to use and that the Court provide the hardware for the judge, court staff and witnesses to use. I was uncomfortable dictating what the parties should use because of the cost, but I insisted that court staff and witnesses should have flat screens. I do not regret that decision, as they were far less intrusive on and around the bench than would have been the case with CRT screens. At it happens, the parties opted for CRT screens, and their bulk and intrusion was probably more apparent to me and my staff than from those operating or observing from behind the bar table. As it happened, the TFT screens performed well, and those who used them had no complaints about the quality of the image.

OTHER FACILITIES

Planning included the provision of electronic links to rooms occupied by counsel and solicitors adjacent to the court room and, via the internet, to the solicitors' offices in Adelaide, Sydney and London. There was a link to my Chambers and to my associate's desk. I declined the offer of a link to my home, that being one location where I decided that a case of that magnitude should not intrude.

FEATURES OF THE TECHNOLOGY

The principal benefit of the system was its ability to handle the large volume of exhibits, some exhibits being extremely voluminous in themselves. I was presented with an electronic court book, at the centre of which was a website home page. From there, by a few clicks of a mouse, I and any other user could gain instant access to any document stored on the system, together with a panel containing a description of that document, its discovery number, its tender number, the parties to the document, its date, its status (whether tendered, marked for identification, and any qualifications on its tender), and reference to the page of transcript where it was tendered. Search facilities were available based on any of those criteria. For each exhibit there was a facility to make one's own secure annotations. For a non-keyboard operator, that was still extremely useful in conjunction with my associate, with whom I had common but secure access to such annotations.

With a further click of the mouse I could gain instant access to any page or passage of transcript, with associated comprehensive word search facilities, enabling almost instant finding of any passage. With a paper transcript such search would have taken many minutes or even hours. Furthermore, the transcript was equipped with hypertext links to every exhibit mentioned, enabling immediate access to that exhibit. Any page of transcript could be securely annotated in similar manner to the exhibits.

Instant access was also provided to a full set of pleadings (occupying six full lever arch folders in the paper version), to the Supreme Court Rules, to internet case and legislation data bases, to chronologies and other facilities.

We did not have real time transcript, but a full day's transcript was provided at the end of that day.

We had instant email communication through the system between any party, including the operator. The use of that, between my associate and the operator particularly, was invaluable to the smooth running of the trial.

All of the above could be accessed at any time in court, in Chambers, and at any time of the day.

During court sessions the process was aided by an operator providing everyone's screen with the document called for, with the ability of each participant to scroll through that document or to open another window to gain access to some other document or transcript at the same time. A quick return to the document or page of transcript left to view another could be secured merely by opening another or series of windows for different purposes.

A DISEMPOWERING (BUT BENEFICIAL) EXPERIENCE

My background was that of technological ineptitude. I had no useful keyboard skills, and very basic computer search skills. I had always relied on paper documents and paper transcripts. In this case I had to rely completely on others to advise and make decisions on the technology supplied, except for more obvious matters such as the size and type of screen.

For one who was used to having control over almost every aspect of a trial, it was a disempowering experience to have to rely on others to provide a system, the actual operation and scope of which was then a largely unknown quantity. In that regard, it was also a salutatory experience to have to trust others to make a trial run smoothly. As it happens, that trust was not misplaced. Apart from one or two very minor teething incidents, the technology ran extremely smoothly and efficiently without interruption. It was upgraded to provide additional minor features and improvements as the trial proceeded and as these were discussed with the operators as providing greater efficiency.

So one beneficial learning experience on my part was the necessary involvement of a wide range of skills in others to ensure that the trial ran smoothly and efficiently. That is one disempowering factor with which Judges must come to terms in the electronic age.

The other disempowering feature was the total lack of control over exhibit designation. All that had been necessarily organised beforehand. When a document was tendered which was not on the system, I had to ask counsel to allocate it an exhibit number. This was not a matter of concern. It illustrates, however, the devolution of authority that is necessary in the running of an electronic trial.

MY APPROACH TO THE SYSTEM

I came to the system with some in trepidation in my technologically impaired state. There were two particular matters of concern. In the first place, I thought I would have to rely almost entirely on either the operator or my associate to find things for me and to present them on my screen. I did not see how I could concentrate on operating a computer and at the same time give adequate attention to the trial. Secondly, I had to decide whether to require a paper transcript as well. With great hesitation I decided to use only the electronic version and not to require paper.

My apprehension on both counts was misplaced.

MY REACTION

The efficiencies of the system have been written about by others. I endorse those estimates of others that the actual trial time saved by not moving, retrieving and returning paper is at least 25%. That efficiency speaks for itself. So whatever the limitations, that was an enormous bonus.

As to my areas of concern, rather than rely on my associate, I soon found that the system had been developed to such a high standard of user-friendliness that its use did not detract from my concentration on the trial. It was a pleasure to use, and I found that I was doing my own searches and retrieving information without delay, difficulty or interruption to the conduct of the trial. On some occasions I even began to feel frustrated when counsel, relying on hard copy documents, were causing minor delays. The only limitations on the use of the system were self-imposed by my lack of keyboard skills. For those equipped with such skills, or even for those without, the system provides new horizons, not only of efficiency, but of availability and quality of information.

As for considering the use of hard copy transcript, I cannot think why I even considered using it. The speed of access to obscure passages by simple and efficient search processes saved enormous time in retrieval. The text was presented in a form that was easy to read, as indeed were the documents and the panels relating to them.

I have since returned to the comparative frustration of conventional techniques of using hard copy documents and transcript. My enthusiasm for the use of electronic systems in ordinary trials is reflected in part in the *attached memorandum to the Chief Justice concerning the provision that should now been made for the use and integration of technology in other trials in conjunction with developments in the electronic filing and like matters.

THE DISADVANTAGES

The disadvantages were few, and were far outweighed by the advantages. Such is the ease with which and the speed at which one can be taken to the relevant part of a particular document relating to a particular transaction that one does not initially see the whole document in the context in which the particular passage appears. Without making the effort outside court times to read and get the "feel" of the whole document, part of its true significance may be lost by viewing only that part of the document which counsel asks one to read. It was only after some time that I realised I had been taken to the same document for different purposes, and that the document had a significance and integrity of its own, over and above the passages being referred to. This is easy to appreciate in a hard copy where one must necessarily have some understanding of the whole document before one can find the particular passage being referred to.

The only other disadvantage was that in preparing notes for a judgment where it was necessary to quote from a document in evidence which had been scanned, it was not possible, save at great expense, to copy and paste relevant parts of the document into the draft. No doubt at some stage in the future the technology will improve to a point where that can be done economically.

A MATTER OF BALANCE

It is easy to become seduced by the technology and to forget the primary purpose of the exercise in question – the proper administration of justice according to law, and the conduct of a trial in an open and transparent manner. This was brought home to me on the opening day of the trial. It was a matter which had generated some public and media interest. Counsel and I knew all the detail. We could all see it on the screen. The technology resulted in the presentation by counsel in a way which would not be done if one were relying solely on paper. Members of the public did not have access to a screen. To them, parts of the opening were meaningless. The statutory right of access to documentary exhibits conferred by s 131 of the Supreme Court Act 1935 was being denied. That was something which I had not anticipated, and which required speedy rectification, so that what counsel and the judge could see was accessible to the public, and so that copies of significant documents were available to be downloaded by the media. As Kirby J has observed [1] in speaking of the fundamental human rights mentioned in the International Covenant on Civil and Political Rights, namely that all persons "shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law"[2], publicity "is an inherent and essential feature of a court system conforming to such fundamental rights and freedoms. The principle has obvious implications for the right to confront not only the judicial decision-maker but also witnesses and opponents".

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[1] " The future of courts – do they have one?" (1999) 8JJA 185 at 188.

2 Article 14.1

This is but one example of the constant need to remind oneself that the use of technology must always be dictated by and be subservient to the proper administration of justice. Efficient and time saving as it is, it must never be allowed to subvert or prejudice in any way the litigant who does not have the skill or resources to use it. Its use and application must always be sensitive to the primary needs of litigants and their entitlement to a fair trial in every respect. Thus, while the use of technology by well-resourced commercial litigants does not present a significant problem, courts must always be alive to the needs of those litigants who do not have ready access to those resources and whose conduct of a trial may be prejudiced by the unsympathetic use of what are undoubted by great technological advances.

For all that, this has been an important step in raising the awareness of and the need to embrace the best of information technology in the presentation of cases before courts. It has been a major step in overcoming the natural cultural resistance to change embedded in the practice of the law.

The Honourable Justice Bleby

October 2002