Kluwer Patent Blog

Fordham Conference 2015 – Views From The Judiciary

Daniel Byrne (Bristows) · Thursday, April 9th, 2015

A panel of international judges gave their interesting perspectives on the tribunals on which they serve and the cases which they hear.

Annabelle Bennett (Federal Court of Australia) discussing case management in Australia introducing reforms to streamline procedure and how this has been successful (in taking some power away from the lawyers). In particular, she mentioned with favour the concept of expert 'hot-tubbing' where experts give concurrent expert evidence in court. She also mentioned that it is possible to encourage the parties to restrict the issues during a case management conference.

Hon. Mr Justice Birss was asked about being a chairman of the competition tribunal and noted that this was part of his job as a Chancery Division of the High Court in England and Wales. Originally a trained computer programmer he thought law sounded more interesting!

He is credited with turning the Patents County Court (now the Intellectual Property Enterprise Court) into a very effective court for lower value IP disputes. He said that streamlining case management had a large part to play in this and that the docketing system (one judge for deciding interim as well as final issues) was important. The 'fat' in IP cases is caused by the problem that, by the time lawyers have to make a decision about how to manage a case, there is a tendency to increase the issues with the aim of increasing the chances of winning a case. This is where active case management plays a part in controlling the issues and curtailing this natural tendency for lawyers and their clients.

Robin Jacob's view is that a party's own view of its case can be identified by the number of points it is running. He thinks the more points which are in issue the more likelihood that party will be the loser. Something for litigants to bear in mind perhaps.

Hon. Roger T Hughes (Federal Court of Canada) referred to the 'prairie chicken dance' done by the parties the closer they get to trial. The letters proliferate and the parties get more hysterical. He says he knows his own view of the case by this point. **Annabelle Bennett** frankly admitted that judges never read the inter-solicitor correspondence which parties bring to court, preferring the 'we are where we are' approach.

Hon. Mr Justice Charleton of the Supreme Court of Ireland noted how often written submissions diverge from the oral submissions ultimately given in the Supreme Court (and expressed the view that there is too much in the way of oral submissions in that tribunal). As a recent ad hoc judge in the European Court of Human Rights the conversation turned to that tribunal. **Robin Jacob**

expressed that he was a fan of the ECHR (although not all of its decisions) and was confident that the system would have prevented World War 2 had it been in place at the time. **Mr Justice Charleton** mentioned that the ECHR has something to say about intellectual property where the balance of benefit for society is at issue because IP is a property right.

Robin Jacob continued that, as regards the 'nitty gritty' of IP law, the CJEU is now getting into this, but 'doesn't understand a word of it'. When IP rights go too far (for example copyright being used to suppress free speech) human rights should trump that.

Folllowing a discussion about generalists sitting in IP courts, the **Hon. Roger T Hughes** said that there was an 'unseen force' of law clerks in the system. Where a judge doesn't know something about the subject there is a tendency to turn to a law clerk (who might be recent graduate) and there is therefore a danger in such reliance.

Hugh Hansen expressed the view that US Supreme Court decisions are frequently not 'vetted' and frequently not followed and said that he doubted their worth.

The Hon. Ryuichi Shitara (Chief Judge, IP High Court, Tokyo, Japan) has faith in the Japanese Supreme Court. He also pointed to the increased efficiency in th Japanese system where his court can reach a decision between 8 months and 1 year.

In response to a question on how to achieve harmonisation, the **Hon. Mr Justice Birss** indicated that conferences like this give judges the chance to meet each other and judges are more likely to take each others opinions (recorded in judgments) into account and this results in a degree of increased harmonisation.

This entry was posted on Thursday, April 9th, 2015 at 7:52 am and is filed under Australia
You can follow any responses to this entry through the Comments (RSS) feed. Both comments and pings are currently closed.