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THE NEW PRACTICE AND PROCEDURE IN THE COMMERCIAL DIVISION OF THE SUPREME COURT OF NEW SOUTH WALES

by

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> "The trouble at the root of our legal system is that we have allowed it to grow up in an atmosphere in which, where justice is concerned, money is hardly an object. But money must always be an object for those who believe in justice for, if the system is too expensive, it will not be used and so injustice will go without redress." (Lord Devlin)

Practice Note 39, designed to provide a code of procedure for the Commercial Division of the Supreme Court, will come into operation when the Supreme Court (Commercial Division) Amendment Act 1985 comes into force on 1 January 1987. The judges who principally have the task of handling the commercial work of the Court have taken the opportunity to restructure procedures for the preparation and hearing of cases and to reinforce the drive for speedy, inexpensive and, hopefully, legally correct resolution of the real dispute between the parties. The Practice Note is designed to aid in the achievement of those objectives and to provide, within its four corners, a basic reference point for the practitioner. The Practice Note will be reviewed regularly. Practitioners are invited to make suggestions for improvements and all proposals will be carefully considered. Nothing elaborate is required, a brief note is all that is necessary in the first instance. We have received a great deal of assistance and comment already but we welcome all thoughtful input.

I should mention that, by coincidence, the Commercial Court in England is also reviewing its procedures. A Report by Practitioner Members of the Commercial Court Committee contained many helpful suggestions of which we have made use. A document called "Guide to Commercial Court Practice" represents an interim implementation in England of some of the recommendations. I must make the same acknowledgement as the United Kingdom Committee made:

> "We are also aware that our recommendations are likely to result in an increase of workload that is done out of Court - either before trial or in the course of trial. This is inevitable if trial times are to be reduced. The savings of time and of the hearing costs that are incurred while both lawyers and clients are confined in Court fully justify devoting time and expense in out of court preparation."

The initial task of a practitioner encountering a dispute with a commercial flavour is to determine the venue to be chosen. It is to be hoped that from next year practitioners will be absolved from confronting one present difficulty. The proposed cross vesting of jurisdiction between the State Courts and the Federal Court in almost the entire range of matters encompassed by the Trade Practices Act should ensure that no jurisdictional difficulties will be encountered in that area (cf Jurisdiction of Courts (Miscellaneous Amendments) Act 1986; Jurisdiction of Courts (Cross-Vesting) Act 1986).

It is important that I reaffirm the need to lay the venue for litigation involving less than $100,000 in the District Court. I recognise that there may be exceptional cases involving less than $100,000 where new problems of law, questions of principle or matters of general commercial importance make it desirable that the venue should be in the Supreme Court. Of course, we shall continue to accept such cases. It is said that resolution of a dispute at the trial level may be achieved more speedily in the Commercial Division than in the District Court. Even if that be correct, with the limited manpower that we have, we cannot take on board work which should rightfully be disposed of in the District Court. Surely the remedy lies in changes in District Court management. It is also important, I think, that practitioners should bear in mind the provisions of s 88F of the Industrial Arbitration Act and not commence proceedings in the Supreme Court and incur costs and expense before realising that more adequate or appropriate relief may be had in the Industrial Commission.

Once a determination is made that the venue should be in the Supreme Court, a decision is required to be made whether the matter should be commenced in the Commercial Division. Experience has shown that insufficient attention has been paid by practitioners to the assignment of business by the Supreme Court Act (s 53) and the Rules (Pt 12). On the one hand, there is still a mistaken belief that if remedy by way of injunctive relief is sought then the venue necessarily lies in the Equity Division. Equally, it is not recognised that if an application is made under the Companies Code, say under s 556, the venue is required to be laid in the Equity Division. Nonetheless, there is wide area in which proceedings may equally well be instituted in the Commercial Division or the Equity Division.

The new Pt 14 r 1 deals with assignment of business to the Commercial Division. The definition is new and should probably be construed as being more extensive than previously. Business assigned to the Division is proceedings in the Court: "(a) arising out of commercial transactions; or (b) in which there is an issue that has importance in trade or commerce". I emphasise that the width of r 1 is to be construed in the light of the preservation of existing assignments of business by any Act or the Rules. Nonetheless, subject to specific assignment to other Divisions, the words "arising out of" are wide and the range of matters characterised as "commercial transactions" may be thought to be wider than under the present rule. There is then the new limb of jurisdiction in matters which may not arise out of commercial transactions but nonetheless expose issues which have importance in trade or commerce. As time goes on, the width of the rule will no doubt fall for consideration. It would be unwise and inappropriate that I should attempt to define its scope in the present forum.

It is of extreme importance that the venue be correctly laid at the outset. An application for transfer from one Division to another needs to be made to the Division in which the proceedings are then located (Supreme Court Act s 54). I should draw attention to the judgment of McLelland J in Giorgi v European Asian Bank (unreported, 3 March 1986). The defendant made loans to the plaintiffs secured by a mortgage. A dispute arose concerning the circumstances in which the right to discharge the indebtedness might be said to have arisen. There was a cross claim for repayment of the moneys lent. On the basis that redemption of a mortgage was concerned, His Honour held that the proceedings were correctly commenced in the Equity Division. An application was made by the defendant to have it transferred to the Commercial List. His Honour said that the orderly conduct of the business of the Court requires that proceedings properly commenced in one Division remain in that Division unless a sufficient case for transfer has been made out. He was of the view that no such case had been made out and dismissed the application. Needless to say, the entirety of His Honour's judgment needs to be read. It is sufficient for present purposes to say that it clearly makes the point that, provided that a matter may be said to be properly located in another Division of the Court, an order for transfer will not readily be made. It is interesting to refer to the judgment of Donaldson J in Midland Bank v Stamps 1978 3 AER 1 where His Lordship declined to transfer a matter from the Commercial Court to the Chancery Division. It was almost exactly a mirror image of the facts in Giorgi.

The Practice Note (para 4) requires that an application to transfer a matter from the Common Law Division be by notice of motion setting out the same information as required in the summons as to the nature of the dispute, likely issues and also the reasons why an order should be made as well as explanation for any delay in siting the proceedings in the Commercial Division. It is anticipated that any such applications will be heard on Fridays in a Common Law Division list by the judge who deals with directions in the Commercial Division on that day. The Rule Committee declined to call for the same information to be set out in any notice of motion which may be filed in any other Division of the Court seeking a transfer to the Commercial Division. Pt 14 r 2 requires that, where an order is made transferring a matter to the Commercial Division, a plaintiff take out a motion for directions within seven days. That will not be necessary where the order is made by one of the judges of the Division sitting as a judge of the Common Law Division, who may be expected to give all appropriate directions at the time of making of the order.

It has been suggested that another question which may require resolution some time in the future is whether, having regard to the assignment of business, the judges in the Commercial Division may, in the exercise of their discretion, properly transfer matters within the category of assigned business out of the Division for whatever reason. Once again, it would be premature to anticipate the outcome of what may become a contested issue.

Diverging slightly, I need to draw attention to another important change in the Rules in the assignment of business. Pt 72A r 1A assigns to the Commercial Division applications or appeals relating to arbitrations, except those involving building disputes. This should ensure that a coherent body of principles grows up in this area, particularly in determining the circumstances in which leave to appeal from an award will be granted.

Having decided to commence proceedings in the Commercial Division the legal adviser is next required to give careful consideration to the anticipated issues. Unlike other Divisions of the Court, proceedings will not be commenced by a statement of claim or even by a summons simply in the ordinary form. The form of summons set out in Annexure 1 to the Practice Note requires the plaintiff to specify the nature of the dispute, the issues likely to arise and a summary of the plaintiff's contentions. What is expected of the legal representatives is short, succinct, pungent statements. Let me illustrate:

> "Nature of Dispute:
>
> 1 The plaintiff obtained a fire policy from the defendant.
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> 2 The insured property was destroyed by fire on 5 June 1986.
>
> 3 The plaintiff claims the cost of reinstatement.

Issues Likely to Arise:

1 The defendant alleges non-disclosure of a material fact, a previous fire at 5 Smith Street City on 7 October 1981.

2 The defendant claims that in breach of conditions of the policy the plaintiff failed to assist in the determination of its claim by withholding books and invoices.

3 In reply the plaintiff will claim that:
(i) the previous fire was not material - the plaintiff had no connection with the premises or the fire;
(ii) the defendant waived the requirement for disclosure by advertising that it will insure everyone;
(iii) rely on ss 18 and 18A of the Insurance Act (NSW).

Summary of the plaintiff's contentions:

1 The defendant was not entitled to avoid the policy.

2 The plaintiff was not in breach of the conditions of the policy.

3 The New South Wales Insurance Act is still operative notwithstanding enactment of the Commonwealth legislation."

We are attempting to reduce costs of proceedings in a number of ways. Thus, for example, it can happen quite frequently that solicitor or counsel for the plaintiff appears on the first return of the summons which either has not been served or has been served too late to allow the defendant's representative to get any instructions. In order to avoid this, the Practice Note makes provision for amending the return date of the summons in the Registry and thereby avoid an unnecessary and inappropriate attendance at court.

At this point I should mention that some practitioners do not seem to be aware of the fact that applications for leave to serve outside the jurisdiction can and should be made to a registrar. Furthermore, the application needs to be supported by an affidavit from a person who knows the facts and who can depose to primary facts which show that the plaintiff has a cause of action in respect of which the court has jurisdiction. Frequently, affidavits are filed which are largely or purely hearsay and should be rejected. The affidavit should identify the subrules in Pt 10 r 1 relied on as giving the Court jurisdiction to order service outside the jurisdiction. I should mention that the question of service outside the jurisdiction is under review both by the Australian Law Reform Commission and by the Rule Committee.

With this exception, all interlocutory work, including Directions Hearings, in the Commercial Division is dealt with by a judge. This is of great value. It ensures that continuous control and monitoring of proceeedings is maintained. The grasp which the judge obtains of the proceedings and his ability to ensure that all steps, but only the steps which will assist the Court, are taken expeditiously is of extreme value.

I cannot emphasise too strongly the need for the defendant's representative to be sufficiently briefed at the first Directions Hearing to inform the Court of what the defendant's defences will be and what will be the issues which can be anticipated will arise. It may help if I explain why the judges insist on this information. Driven by the desire to avoid the parties incurring unnecessary costs, we can see no good purpose being served in defences, replies and other pleadings being filed where the issues are quite simple. We hark back to the days when the Commercial Court in England had the solicitors for the parties exchange letters in which they agreed on the issues. We recognise that in some cases this, or something similar, cannot be done. However, it can be done, should be done and will be done far more frequently than is the case at present. It should be self evident that proceeding in this way will both save costs and ensure an early hearing. For example, the plaintiff may allege that the defendant repudiated a distribution agreement and that repudiation had been accepted and damages are sought. The defendant alleges that the repudiation was the plaintiff's, the defaults in performance of the plaintiff's obligations had been such as to constitute repudiation and the defendant merely accepted it. Now, what is the point in going into great detail about this? True, the defendant will have to provide particulars of the alleged breaches by the plaintiff but the issues are simplicity itself. In many cases, the issues can be distilled into a dispute as to whether certain conversations took place. The Court will order affidavits to be filed and the dispute will be readily and speedily determined. We cannot do this if the parties merely inform the Court that, "amongst other issues", the following will be contested.

The Court is entitled and will require the parties to state with specificity what the issues are. The defendant will be aided by the definition of issues in the summons. I anticipate that the Court may well require the defendant to hand up a similar document if the defendant is in disagreement with the plaintiff's statement of issues. Very many of the proceedings in the Division involve actions on guarantees. Equally numerous are the instances where what is relied on by way of defence is the Contracts Review Act. The defendant's case can be put on affidavit with no great difficulty and the defendant can be cross examined. There is an interesting review of the methods which have been adopted in England for definition of issues in "The Practice and Procedure of the Commercial Court" by Colman (1st Ed, p 40).

Even where some more formal statements of contention are required, only points of claim and points of defence will be ordered. Appendix B to the first edition of Matthew's "Practice of the Commercial Court" provides excellent examples of statements of earlier times stripped of excessive verbiage and technicality. The 1962 Report of the Commercial Court Users' Conference lamented the departure from them:

> "We express our dissatisfaction with both the prolixity of modern pleadings in the Commercial Court and the time which is consumed in their delivery.
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> The original conception in the Commercial Court of short 'Points of Claim' and 'Points of Defence' seems now to have been forgotten and pleadings in

> the Commercial Court have become as lengthy as the more formal pleadings current in the Common Law Courts. Further, it has become the exception rather than the rule for either of the parties to deliver their pleadings within the times specified in the Order for Directions, and extensions of time are freely and frequently agreed. We find that much of the delay in bringing commercial cases to trial is due to the preparation and delivery of pleadings.
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> We appreciate that pleadings can perform a useful function in preventing either party being taken by surprise at the trial. We agree that in the comparatively rare commercial cases in which fraud or misrepresentation is alleged pleadings are essential. But we recommend that, subject to these safeguards, pleadings should be avoided in the Commercial Court wherever possible and that far more use should be made than at present of trial on agreed statements of fact."

We have succeeded in curing the habit of automatically seeking particulars. Discovery can provide the information if it really is necessary. Orders for discovery and interrogatories will only be made where it is clear that they are necessary. In most cases, an order will only be made once issues are defined. We do appreciate that in most cases some discovery is necessary. However, it is inappropriate to invest discovery with the significance it does not possess. It should be possible to restrict discovery to areas in the dispute where it really matters. Furthermore, there is absolutely no point in discovering seven copies of the same document except in cases where one or more of the copies may bear some endorsement relevant to an issue. I am quite horrified at the cost of discovery and cannot understand why it should be the function of the Court to try and restrict its scope in order to save expense to the litigants. In this regard, the vigilance should be the task of the solicitors and it is only because of failure by the parties' legal advisers that the judges feel the need to intrude into this area. We believe that the parties should be imaginative in devising ways of reducing the burden of an order for discovery. However, we have experienced problems at the other end of the scale as well. From time to time, where it has been thought appropriate to order discovery, we have found that discovery has been insufficient. It cannot be too strongly emphasised what a heavy burden rests on the solicitor for a party to ensure that proper discovery is given in the cases or in relation to the issues where it is ordered. It must be appreciated that it is meaningless to tell a layman that all documents should be produced. It is necessary for a solicitor to be astute in describing to the client the purpose of an order for discovery and in exploring with the client the kinds of documents likely to be available and required to be produced. It requires a much more detailed exposition of the parties' obligations than appears to be presently provided.

Commentators from a large Sydney firm (cf "Dispute Resolution in Commercial Matters" p 102 et seq) have pointed out, in a joint paper, that the discovery process is significantly dependant upon trust and that, if there is concealment of a document of which the other party could not be expected to be aware, its existence is not likely ever to come to light. It has been suggested that the chief executive or some other very senior officer of a company be required to swear the discovery affidavit and that substantial personal penalties should be imposed in the case of an incorrect affidavit. In fact, at present no steps are taken where the Court is informed that one party or the other concedes that insufficient discovery had been given notwithstanding that an officer of the company concerned had sworn that the list of documents was complete. Consideration may have to be given to a requirement that, where it is conceded that discovery had not been complete, an explanation be given not only by the party concerned as to the reason for the failure but an exploration be made of the steps taken by the solicitor for the party to explain to the client the obligations cast by an order for discovery.

Again, photocopy machines make it much easier to produce everything with the remotest relationship to the dispute. Real issues and essential evidence are not identified. This mass of irrelevant documentary material is often placed before the Court - it is quicker to copy than to select.

We believe that administration of interrogatories needs to be restricted. As a matter of interest, they are seldom allowed in England in the Commercial Court. They occasion untold delay and expense. The problem is not new. In a letter to "The Times" of 9 August 1892, an eminent judge wrote (Matthew "The Practice of the Commercial Court" 1st Ed, p 7):

> "In perfecting for the uses of common law the nicely-adjusted machinery of interrogatories and of discovery, the Judicature Acts placed within the reach of every litigant and his advisers weapons of admirable precision, but too expensive and dilatory for daily and hourly employment at common law. The result was to add a large percentage of cost to the expenses of an ordinary action. Interrogatories began to be administered in every case, the answers to which were generally useless. Piles of documents were sorted, classified, inspected, and copied, without any real advantage or necessity."

The circumstances in which leave should be given for the administration of interrogatories was explored by Clarke J in some detail in an illuminating exposition in The Coal Cliff Collieries Pty Limited v C E Heath Insurance Broking (Aust) Pty Limited (unreported, 31 July 1986). His Honour summarised the position thus (p 7):

> "As a general rule it will be necessary, for instance, for the applicant to show that the provision of the answer will, or may, provide relevant information (such as admissions of facts and other material such would facilitate the just and expeditious disposal of the proceedings) which the interrogating party has been unable to extract from his opponent. Because, however, of the pre-trial procedures in the court and its requirement that the parties make all admissions or concessions necessary to focus attention on the nature of the real dispute, I envisage that an order will be unnecessary in many cases. In particular the court will be unlikely to accede to a submission that 'pretty nearly anything that is material may be asked'." (cf Marriott v Chamberlain 17 QBD 154 at 163)

One of the frustrations encountered in the management of the list lies in the late joinder of parties. One may run the whole gammut of pleadings, discovery and interrogatories and then be faced with a situation in which an additional defendant is sought to be joined or a cross claim issued against a new party and the whole process has to be repeated. This serves to defeat the purpose of a commercial court in affording a speedy determination of commercial disputes. Frequently, a plaintiff's legal advisers decide at the last minute to add an insurance broker as another defendant or the principal debtor as a cross defendant. We can understand and sympathise with situations where it is not and cannot be clear at any earlier stage that the joinder of an additional party is required. However, this should not happen as frequently as it does.

Allied with the foregoing is the problem of amendments. Legal representatives should not get an incorrect appreciation of the new practice whereunder a party will be permitted to amend any document or statement of issues without leave at any time up to six weeks prior to the date fixed for hearing. This does not mean that amendments should be lightly undertaken and, more importantly, the cost burden will not only remain but will be reinforced. In the absence of any other order, a party making the first amendment will pay the costs of all other parties occasioned by reason of the amendment. Furthermore, the costs consequent and arising from the amendment, if ascertainable, can be taxed forthwith and there will be no need to wait for completion of the proceedings before recovery of costs thrown away. It has been suggested in the joint paper, that I have earlier referred to, that judges actually quantify the costs payable. I can see the good sense of this suggestion but judges, particularly a number of years after their appointment, lose all knowledge of current costs and fees on which such an assessment could be based. Another suggestion may be easier to implement. The point is well made that taxed costs never compensate in full the party in whose favour they are made. Now, why should the innocent party, who suffers the need to confront an amendment and incur costs by reason of that, be exposed to a loss? Perhaps an order for costs thrown away should be on a solicitor and client basis?

It is not frequent that prejudice caused by an amendment cannot appropriately be cured by an order for costs. As Mr Justice Hutley remarked in the Court of Appeal, it used to be thought that an order for costs cures any prejudice. This certainly is not so in days of inflation even where the verdict carries interest at a commercial rate. A party may be able to make better use of money than is obtainable generally by the lending of money. It also appropriate to give consideration to requiring an affidavit or affidavits of facts to be filed before granting leave to amend. This should preclude forlorn attempts at amendment which achieve delay, often the desire of some litigants. Amendments should be shown in documents by a marginal note.

One of the matters that troubles me a great deal is the frequency with which legal representatives are required to come to Court for Directions Hearings. One way, perhaps, of reducing the number of attendances is to institute a system that used to obtain many years ago in the Equity Court. A book was provided which parties could sign if they wished proceedings to be adjourned by consent and taken out of the forthcoming Friday's list. Now, that could not be done without some adaptation in the Commercial Division. However, where the parties are agreed on further interlocutory orders they may perhaps hand that document to the associate together with an up to date statement of the progress of the matter by noon on Wednesday and then, in the absence of an intimation from the associate that they are required to come to Court, the matter would be taken out of the forthcoming Friday list. It would be an important condition precedent that the Court have an up to date statement of the progress of the matter so that the parties do not avail themselves of an opportunity to rest oars by consent. Eventually, with improvements in technology, it will be possible to handle much of the applications list by a tripartite telephone hook up. I am advised that at the moment there is no instrument on the market which would enable all parties to hear everything that is said by all other parties.

In the Practice Note, we have indicated our intention to discourage applications to strike out pleadings where such exist and applications for summary judgment. In the seven years that I have now had on the Bench, I have not known one case of an application for summary judgment to succeed. It is far better in cliff hanger cases to make provision for an early final hearing. Quite apart from anything else, it is much easier for a successful plaintiff to retain the fruits of victory on a final hearing than on an application for summary judgment.

We feel that insufficient use is made of notices to admit facts and of the provisions of s 82. It would be most rewarding, I would think, for a body such as the Young Lawyers to set up a research group to explore the ramifications of s 82 which is a relatively unploughed field and on which there is no authority at all. One of the reasons, I think, why insufficient use of these provisions is made is because the practice of getting Advices on Evidence has completely fallen by the wayside. Getting an Advice on Evidence ensures that parties apply their minds to the evidence which will be required at the trial at a relatively early stage. It would also obviate last minute amendments. I readily understand that getting an advice out of popular counsel is not an easy task. However, in commercial matters it does seem to me to be absolutely crucial.

The new Practice Note seeks to achieve expedition in the actual hearing by more elaborate pretrial procedures and measures. We recognise that this will mean heavier costs prior to hearing. On the other hand, it should substantially shorten the hearing and also provide an opportunity and encouragement for the parties to consider settlement at an earlier date. Further than that, it will enable settlement to be considered in a more realistic light with a better appreciation of the case to be mounted by the other side. It is for these reasons that we consider it appropriate to require statements of witnesses to be exchanged prior to the hearing. Even without the Practice Note, in some cases, statements have been tendered as the evidence in chief of the witness in question and the time saving has been quite startling. Not only does it enable the party tendering the statement to avoid oral examination but it also enables the prospective cross examiner to focus more closely on the points that really matter. Having an earlier opportunity of preparing the cross examination should prove of considerable benefit. Beyond that, the exchange of statements serves to clarify what facts are truly in dispute and precludes surprise at the hearing. We recognise that in some exceptional circumstances, it is necessary for one party or the other to conceal some material. The Pratice Note contemplates that an ex parte application may be made to a judge to be relieved in part from compliance with the order. However, we do not see that these instances will be many.

Where statements have been exchanged, it will be expected that opposing counsel will indicate to each other, in good time before the witness is called, which, if any, passages in that witness' evidence are objected to.

I am conscious of the argument that the procedure prescribed by the new Usual Order for Hearing will impose a financial burden on parties that will make litigation impossible for all but wealthy corporations. There are three answers. First, the order will not invariably be made. Second, it is expected that the cost of pre-trial preparation will be more than outweighed by the time and cost saved in court. Third, I just do not have the number of judges to allow the parties the luxury of as much time in court as they ask for. The only way that I can reduce time in court is by increasing the time devoted to preparation out of court.

The practice of asking defendant's counsel to give a short responsive opening after the plaintiff's counsel has opened the case is another useful tool in ensuring that the Court has a full grasp of the matters in issue and that irrelevancies are expunged. In long cases, provision is sometimes made for the two opening statements to be delivered some weeks before the date fixed for hearing so that the judge may give any final directions, the desirability of which may not have been apparent any earlier.

Counsel often feel obliged to put every fact of their case to an opposing witness, notwithstanding that it is obvious what the case is and equally obvious that it cannot be reconciled with the evidence given by that witness. Where there is personal criticism intended to be made of a witness or accusations against him, the details should be expressly put. This apart, the putting of the case for form's sake will be discouraged.

We have not yet had occasion to experiment with the provision which the Practice Note now makes for the hearing of the whole of the lay evidence prior to calling any of the expert evidence. Nonetheless, it stands to reason that the experts will be able to focus more readily on expressing a view which is likely to be of assistance once the conflict of lay evidence has been fully exposed and refined. It will be unnecessary in many instances to explore all the factual hypotheses which might otherwise be available and in relation to which expert evidence may need to be solicited. We also hold high hopes for the proposal that experts for the parties be ordered to confer prior to the hearing and refine the points on which they differ and the reasons for their respective contentions. These conferences of course will be "without prejudice" except to the extent that some agreement may be arrived at.

The operation of Pt 72 may be considered to be a distinct success. No order has been made by any judge in the Commercial List remitting a matter to an arbitrator or referee in the face of opposition from both parties. Indeed, I do not know of any case in this list in which an order has been made otherwise than by the consent of both parties. There has been only one occasion when the decision of a referee was sought to be reviewed. The referee was the Honourable R G Reynolds QC, the application went straight to the Court of Appeal. In the result, we feel that the system has been of benefit. It has freed judges to attend to matters where their expertise can be fully utilised. Cases where the decision required the utilisation of considerable expertise and nothing else as well as the details and minutiae of cases have been left to arbitrators. We propose to continue this practice.

The occasion has not arisen for the actual appointment of a judge to sit as an arbitrator. There is a matter in the list which is of some interest in this regard. An insurer has sued five or six reinsurers who, although they happen to be Australian companies, accepted reinsurance in Singapore. The reinsurers had acting for them a Singapore company as an agent. A dispute has sprung up between the reinsurers and their Singapore agent as well as between reinsurers and reinsured. Aspects of the former dispute are probably within the scope of the arbitration clause in the agency agreement. In order to accommodate the legitimate wish of the reinsurers and their agents, the defendants and cross defendants, to have their dispute arbitrated but at the same time allow the proceedings involving the same issues between the plaintiff and the defendants to go ahead, I have suggested that the trial judge be appointed as the umpire in the proposed arbitration and to conduct it and the trial involving many of the same issues simultaneously. The proposal has not been disposed of but it serves as an illustration of a situation in which having the judge as the arbitrator would be in my view a distinct advantage.

With the consent of the parties, I have fixed a matter for hearing with an assessor. The matter involves the installation of highly sophisticated computer equipment at a governmental statutory agency. The assessor is an expert in computers. I have taken considerable care to ensure that the parties are kept abreast of any discussions which I may have with the assessor and with any views or opinions that he may tender. The only exception to a full disclosure to the parties will be straight out technical tuition which the assessor may give me in the intricacies of computer software and which will be of a purely non-partisan, technical nature. I am hoping that this experiment will satisfy the Bar and solicitors that the use of assessors will be useful and may safely be accepted as part of the regular Court process.

A solicitor who frequently appears in commercial matters has made a valuable suggestion as to the use of assessors derived from his experience in England. Apparently, there, in Town and Country Planning Appeals, the Minister appoints an inspector. Often an assessor is appointed to sit with the inspector and the assessor is permitted to ask questions of expert witnesses and required to prepare a report for the guidance of the inspector. The assessor's reports are published along with the inspector's report and are, like the inspector's report and the minister's decision itself, susceptible to being the subject of an appeal. The suggestion is that any assessor sitting with the judge should publish a report to the judge which would be as capable of attack on appeal as any finding of the judge. The judge would be obliged to consider the report and explain in his judgment what his reasons were for not adopting it.

Certainly, as we experiment with the use of assessors, experience will guide us in improving the methodology but that there can be no doubt of the value of the underlying notion as to the use of assessors. As was said by Bingham J in England ("Current Legal Problems" 1985, p 25):

> "It could not plausibly be argued that the elucidation of complex technical issues could not be more quickly and economically achieved between judge and assessor out of court than by the laborious processes of question and answer in court. The assessor will not decide the case. The responsiblity of arriving at a judicial conclusion remains that of the judge alone."

In a long case, after an opening statement by the defendant, as a matter of course the judge will consider whether to order that evidence on one or more particular topics be heard and otherwise adduced from all parties prior to consideration of other topics. Under current procedure vital witnesses on basic issues (such as, for example, the existence of a representation or of a term in the contract) need not be called by a defendant or third party until near the end of a case. Meanwhile much time and expense may have been wasted by a plaintiff in trying to adduce evidence on subsidiary issues so as to deal with any contingency that might arise out of the evidence which has yet to be adduced. At the end of the day, the defendant's evidence may never be tendered or it may be such as to make irrelevant most of the evidence which has previously been adduced by the plaintiff.

Again in long cases, written submissions may be called for at the conclusion of the evidence. The Court will need to be astute to ensure that there is no undue delay in the preparation and delivery of these.

In conclusion, I should mention one other matter. Commentators have suggested that there is still too long a delay in the final disposition of longer cases. I am afraid the blame for this lies entirely in the court of the legal profession. Time after time we are prepared to allocate earlier dates for hearing but cannot do so due to the unavailability of counsel. The profession and clients will really have to make up their minds which they want. From time to time I have ordered letters to be written to clients informing them that the matter could be heard earlier but for the unavailability of their preferred counsel. I am never quite sure to what extent clients truly appreciate what the position is.

We appreciate, rely upon and need the co-operation of the profession. I am sure that we are all driven by the same objective of serving the interests of litigants. Sometimes these interests conflict. Often one side wants expedition, the other strives for delay. Nonetheless, so long as we maintain the same objective, we should achieve the ultimate aim outlined at the beginning of this paper.

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