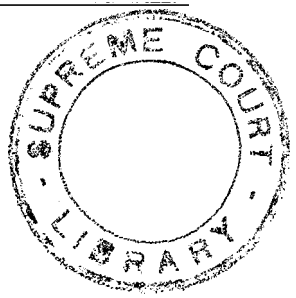
FORUM ON RECENT DECISIONS AFFECTING PRACTICE IN THE COMMERCIAL DIVISION



Guest Speaker: Mr. Justice Rogers

Chairman: Mr. B.S.J. O'Keefe, Q.C.

Commentator: Mr. D.M.J. Bennett, Q.C.

Date: 17th July, 1989

Mr. Justice Rogers

Sam Reuben asked me to speak some time ago and said that it would be to the young barristers, the newly admitted barristers and I have prepared for it on that basis. I now have a cause of action against him under the Trade Practices Act which I intend to avail myself of in due course. However, I shall try and adapt what I was intending to say to the knowledge and depth of experience that the audience obviously possesses and leave some of the more introductory material aside.

I think that what might be a convenient course is just to track a couple of the topics of interest that present themselves at the present time and to deal with any problems that you could be having during question time.

It seems to me that anyone practising in the Division first of all has to spend a bit of time making a difficult decision on forum selection. It used to be that you only had to decide which Division of the Court you were going to pursue your rights in. With the advent of the Federal Court of

course that choice became more difficult and I think that it has become even more difficult now with the cross-vesting legislation. I will deal with the problem in an overall way.

It seems to me that we have not even begun to grapple with the problems of cross-vesting and that the ultimately useful purpose of the cross-vesting legislation will prove to be transfer of matters from one State Court to another. The most obvious situation which arises is where you may be statute barred in one state, but not in another. As you all know, the periods of limitation prescribed, for example, in Queensland and the Northern Territory are much shorter than in New South Wales and in some of the other states. The question that has been cropping up with increasing frequency is what is the situation when an action is commenced in New South Wales which obviously is much better or more appropriately heard say, in the Northern Territory or in one of the other states, with a shorter period of limitation.

It is easy enough to say that you decide upon whatever it is that the interests of justice demand, but the great difficulty is that you are trying to do justice to both the plaintiff and the defendant and that if you are going to give justice to the plaintiff in giving him a forum, you are going to be doing an injustice to the defendant.

We have not had to grapple with that situation until the

advent of the cross-vesting legislation because, in the words of Mr. Justice Samuels, when he was considering the problems of forum non-conveniens,

> "It is not much use saying that there is an alternative forum if the shop being contended for as the alternative forum has the shutters drawn."

Well that simplified solution is not available under the cross-vesting legislation and the question will arise whether we should travel the same route that Lord Goff has charted in the Spiliade Maritime Corp. v. Consulex Ltd. [1987] 1AC 460 in relation to forum non-conveniens where in susbstance he said, if the plaintiff is in anywise blameworthy in letting the limitation period expire, then you should not permit him to pursue his rights in the jurisdiction. On the other hand if the plaintiff did not act unreasonably in failing to commence proceedings in the other jurisdiction within the limitation period applicable then it would not be just to deprive that plaintiff of the benefit of having started proceedings within the limitation period applicable here.

The first problem is that the High Court did not seem to think very much of the Spiliade in Oceanic Line etc. v. Fay (1988) 165 CLR 197. The question arises, was their inclination not to follow Lord Goff in the Spiliade restricted to forum non-conveniens cases, or is it applicable also under the cross-vesting legislation? Second, there is a real practical problem in an application under the cross-

vesting legislation, if you have to engulf yourself in an examination of why it is that the plaintiff has not proceeded in the other jurisdiction and in a sense allocate blameworthiness or otherwise. To what extent, if at all, should there be an issue estoppel, assuming that the plaintiff had already applied for an extension of time in the other jurisdiction and failed?

Considerations like these, may well not have been vividly to the forefront of the minds of those who drafted the cross-vesting legislation and it will be a very difficult task, I think, to work out all the difficulties that are presented by the cross-vesting legislation.

Whilst I am speaking of that, let me alert you to another argument that is floating around at the moment. As you all know, we redrafted the rules relating to service outside the jurisdiction included in Part 10 of the Rules, insofar as service within Australia is concerned. It used to be the case that you could serve within Australia, but outside New South Wales if you could bring yourself within one of the enumerated kinds of matter prescribed by Part 10, Rule 1. The amendment restricts the operation of Part 10, Rule 1 to service outside Australia and the theme of the provision now is that you can serve anywhere within Australia subject to getting leave, possibly in the face of opposition from the defendant.

The underlying rationale for that amendment to the Rule, was twofold. First of all, there was for consideration the Report of the Australian Law Reform Commission on the Service and Execution of Process Act. The Commission carried out a very careful evaluation of the question whether or not there should be a requirement for a specified nexus to be established between the State and the cause of action in the legislation or in the Rule which confers the power to effect service out of the jurisdiction. The conclusion in the Report was that it was inappropriate and unnecessary that one should have to necessarily come within the enumerated classes of nexus and it was far better that it should be left to the Court, on the return of the summons, to determine whether or not the plaintiff should be permitted to proceed within the jurisdiction.

Well it was not all that long before somebody came along and submitted that the Rule was invalid because it was outside the Constitutional power to legislate for the peace, order and good government of New South Wales, because the nexus between the cause of action and the State did not apppear on the face of the Rule. (1)

The reason why I mention this in the context of the cross-

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(1) Since this address was delivered judgment has been given finding the Rule to be valid -Seymour-Smith v. Electricity Trust of S.A. (unreported 14.8.89).

vesting legislation is this: the whole game has now changed in a sense, where every Supreme Court in Australia has the jurisdiction of every other Supreme Court. In that context, is it still necessary, or appropriate, that there should be a requirement in the rules of each individual Court specifying the nexus that should exist between the Court, the cause of action and the service?

In referring to the problem I am alerting you to the fact that the cross-vesting legislation may operate in a sense in quite unforseen settings, unforseen at least so far as the judges and the profession are concerned. It may have been something present to the minds of the draftsmen. You may get the situation where it may be quite unnecessary to implement the Report of the Australian Law Reform Commission for a new Service and Execution of Process Act. Commonwealth legislation will be unnecessary. All that you will need will be for each of the State Supreme Courts to amend their rules to conform to the New South Wales pattern. Alternatively, if that argument is wrong and the New South Wales rule is invalid we will have to go back to the former format and go forward by way of Commonwealth legislation.

These matters have all been argued in recent times and no doubt they will slowly travel on their way to the Court of Appeal or perhaps the High Court. My purpose at the moment is simply to alert you to the fact that there are these problems bubbling beneath the surface.

Once I am talking about cross-vesting legislation, let me also refer you to one discordant note that presently exists and which will have to be explored further, not in New South Wales, but in some other Court. In Bankinvest A.G. v. Seabrook (1988) 14 NSWLR 711, you remember, in the decision of the Court of Appeal dealing with the cross-vesting legislation, the view was expressed that there was no onus carried by either side either in retaining the matter in New South Wales or transferring it out, but the task was to determine what the interests of justice dictate and then to determine in the light of that, what was the appropriate Court. Mr. Justice Wilcox in Bourke v. State Bank 85 ALR 61 took a different view. He takes the view that prima facie, the person laying the venue is entitled, all other things being equal, to lay the venue in whatever Court and whatever place he, she or it has chosen, and that there is then an onus lying on the party wishing for a transfer to show that there are circumstances which justify that. That is a question which could have quite substantial consequences, because it is not difficult to imagine a situation in which the interests and contentions are fairly evenly balanced and if there is an applicable onus, then it may tip the scale one way or the other.

I remain unrepentant in thinking that there should not be an onus, that the question is one which should be dealt with on a purely practical plane of determining which is the most

appropriate court and that the wishes of the parties should be subsumed in what the legislation refers to as 'the interests of justice'. It may be that it will be left to other State Supreme Courts to express their own views and to see on what side the general consensus of opinion comes down.

It is worthwhile to bear in mind that there is no appeal against an order that the matter be transferred from one Court to another and, accordingly, it is unlikely that any difference in viewpoint between the judges will be resolved in any decisive fashion and yet as you can readily understand, it would be a rather unfortunate situation if different practices were adopted by different Courts.

Let me spend a minute or two, in talking about a transfer of a matter not just from one State Court to another, but also as between different Courts. I shall put aside, all sense of modesty in so doing, because really you can only discuss this problem in a way which might be thought by some to be beating your own drum. In Bourke v. State Bank (supra) Mr. Justice Wilcox had to consider whether or not it was appropriate to transfer a matter from the Federal Court to a State Court and he was invited to transfer it, not just to the Supreme Court of New South Wales, but to the Commercial Division, which as he rightly pointed out, he could not do. He was content to proceed in the discussion of the problem on the basis that that in truth what he was considering was simply a transfer to the New South Wales Supreme Court. Therefore, he drew a

comparison between what would have been the situation if the action were left in the Federal Court and what the situation would have been on a transfer to the Commercial Division. He referred to the fact that there are certain procedures adopted in the Commercial Division, but he said those procedures are also habitually adopted in the Federal Court. There was no suggestion that evidence would be available in one Court that would not be available in the other and he said the hearing time would be much the same in both Courts. In many ways, your experience would be better than mine in gauging whether or not the procedures that are followed in the Federal Court and in the Commercial Division are much the same and whether in truth there is any advantage to be had in transferring matters from one Court to another, or from one Division of the Supreme Court to another.

That brings me to ask you and myself this question. Is there still the appropriate division to be drawn between sections of the Supreme Court or between State Courts and the Federal Court? You might remember, because I am sure that you spend your nights reading all the reports, that when the Commercial List was first established in England, the rationale for it was that you would have a specialist judge who, by reason of his expertise in commercial matters, would be able to more rapidly and perhaps, sensitively, to despatch commercial matters this way or that way. That subsumes an underlying notion that the other judges who were sitting in the English Courts at that time lacked that commercial experience.

It would be difficult to say, bearing in mind the way judges are appointed in New South Wales, for example, that other judges do not possess the same degree of commercial experience as the judges who habitually sit in the Commercial Division. Perhaps we get more of a steady dose of it than they do, because they have got to consider all sorts of other matters.

In this difficult area of transfer from one division to another, one ought to bear in mind what Lord Justice Lindley said and, if you will forgive my just reading two short quotes, he said,

> "First of all, something which is completely unexceptionable and must have been true then and is true now. So in the first place I hope that nothing I may say will be supposed to be based upon the superiority of one judge to another. It is not a question between judges."

The only question to consider is how an action can be tried in the cheapest and best way for both parties. That seems to me to be the ultimate test in determining whether you transfer from one Division to another or from one Court to another. Then he went on, referring to commercial lists to say this,

> "In this particular case, it is exactly one of those which ought to go to a Commercial Court for this reason -that whether this will be a long case, involving a very

exhaustive investigation of accounts or not, depends in my mind upon what you have done in the summons for directions. If that summons comes before a judge who is not by training and practice, specially able to deal with commercial correspondence and commercial views of business, this case may be a very long one. But on the other hand, if it comes before a judge who is thoroughly versed in that particular department of business and of law, it may be a comparatively short one."

Well the question first is, if that assumed expertise is present in the Commercial Division, (and I do not want to enter into a debate about that) and, second, is it present only in the Commercial Division. Whether a barrister can comfortably argue these matters before a judge who is sitting in some other Court or some other Division, I will leave to you because it is your task to do it. Ultimately, that really is a question to be determined. Take this, for example - we have as the evidence in chief of witnesses the witness statement. That it shortens the case, must be unarguable. Other Divisions and other Courts do not have them, some of them have affidavits. Is that a good thing or a bad thing? Is that a commercial method for the resolution of disputes? Is it justifiable to transfer to a Commercial Division a matter from another Court for that reason? With the greatest of respect, I would take issue with Mr. Justice Wilcox on the question of whether our procedures are exactly the same because I do not think that the Federal Court does

have provision or procedures for allowing the witness statements to serve as the evidence in chief. On the other hand, I could be wrong.

The other thing that we do have is S.76A of the Supreme Court Act which, as you know, only applies to the Commercial Division and, that, if I may remind you, provides,

> "The Court may from time to time give such directions as the Court thinks fit (whether or not inconsistent with the rules) for the speedy determination of the real questions between the parties to proceedings in the Commercial Division."

I have always thought that that was a very useful provision and I can tell you, I think without any breach of confidence, that the judges are going to ask the Attorney to extend that provision to all Divisions of the Court. Whilesoever it is restricted to the Commercial Division, it does seem to me that it serves to distinguish the procedures and practices of that Division of the Court from other Divisions and other Courts.

This sort of consideration and other features of the Practice Note do seem to me to serve to draw something of a distinction between the practices of the Commercial Division and others. For that reason, I think it is necessary to resolve in some fairly clear-cut way, what may be asserted on applications for transfer to be the advantages or otherwise

of the Commercial Division.

That having been said, let me if I may, remind you of the decisions which were given in Barclays Bank v. Wade and Advance Bank v. A.P.A. Holdings (16.12.88) neither of which are reported and which concern applications to transfer to and from the Equity Division of the Court. Barclays, in particular, was a situation in which proceedings were commenced for a negative declaration in the Equity Division of the Court and subsequently proceedings commenced in the Commercial Division to get substantive relief. I had no hesitation in transferring the Commercial Division proceedings to the Equity Division, because I thought it was quite inappropriate that advantage should be sought to be taken of the existence of a particular Division of the Court when there were already pending proceedings concerning that dispute in another Division of the Court which it was not sought to remove. (See also 81 Stephen Road Pty. Ltd. & Anor. v. Macquarie Bank Limited ED 1212/89 31.1.89.)

Nothing that I have said is intended to foster in anybody's mind the idea that the Commercial Division is there waiting to have matters transferred to it or to seize cases that have found a happy home somewhere else.

There is another feature of the Commercial Division that I think I need to emphasise to members of the Bar who have been newly admitted. The District Court is there to deal

with matters within its jurisdiction and that we take very unkindly to people commencing District Court type actions in the Commercial Division and they are very quickly remitted to the District Court.

I should mention to you that I have decided in the matter of Challenge Bank v. Raine & Horne (Rogers, C.J. Comm.D. 9.3.89) that the former discretion to transfer matters from the Commercial Division for failure to adhere to timetables or for other discretionary reasons, is still alive and well and the Court of Appeal refused leave to appeal from that decision. It should not be thought that merely by having the new assignment of business to the Commercial Division, anybody has acquired some sort of vested right to stay in that Division.

May I, with that background, now leave the present situation and just cover with you a couple of the problems that we see at the present time and contemplate with you what might be thought to be matters to attend to in the future.

The first problem is that of late settlements. Time and time again we get told the night before or on the day of the hearing that a matter has been settled. Quite apart from the difficulty that occasions in the running of the list, it just costs people too much money altogether. The profession has to come to grips with the problem of giving better service to the community. It cannot be in the interests of litigants

that they should have to face up to the complete cost of preparation of a Brief on Hearing before a matter is settled. We all know why this happens and the rules have been amended to try and preclude that happening. The amendment to which I refer are the newly introduced rules in Part 22 relating to offers of settlement. If all goes well it should make the greatest change in the conduct of litigation for quite some considerable time, because the punishment against inappropriate refusal to consider an offer of settlement is very substantial indeed.

If an offer of settlement is made by a plaintiff, and not accepted by a defendant and the plaintiff does recover more than the offer of settlement, he will get costs on an indemnity scale from the date of offer onwards. You could be letting your client in for a very very substantial cost burden. If we could induce people to make these offers sufficiently early, it would pay counsel to look at the matter thoroughly at a much earlier point in time in order to ensure that the client does not become involved in this cost burden. The inducement, of course, is to the client to avoid the cost burden. The difficulty is that the client may not know about it. There will be an obligation on the solicitor certainly, and I would suggest to you that there will be a very real obligation on Counsel to give informed advice to somebody on whether or not an offer of settlement should be accepted. Let me say this to you in all seriousness, that I think it is only a question of time before some litigant is

going to come along and bring an action for negligence against a Counsel and say "Look, he or she should have advised me to take that offer of settlement at that point of time. It was not much good telling me the day before the hearing or on the day of the hearing. It has cost me $x and I should not be liable for that."

As a profession, I do not think that we can really cling to the notion that we will continue to be protected against actions for negligence in those circumstances, because, the circumstances do not involve Court proceedings per se, you are not in Court, you do not have to make instantaneous decisions and if the client can say the only reason why he or she did not give me that advice was because he or she was busy attending to the next day's case and did not look at the brief thoroughly, I think you will be in real trouble. I am just anxious that the Bar should appreciate to the full that this concept of offers of settlement, attractive as it may be, carries with it seeds of real danger to individual barristers. Whilst the problem of late settlements is something that barristers as a body can live with, shrug off and give a fresh look about, I do not think that the concept of insufficient consideration to offers of settlement is going to work.

Let me put to you another face of this problem. What about the barrister who does not tell his or her client to make an offer of settlement at a sufficiently early point of time?

I am going to leave you with all these happy thoughts. Not that I have got any sort of answer to them, but what I do know is that unless we start thinking about these things and working out what the answer is to them, one or other of us is going to get very badly caught.

This question of late settlements brings me to another question that I would really appreciate the Bar's views on at some stage and that is the vexed problem of sanctions. As new barristers may not know, as the rest of you do, one of the ways that we try to keep matters moving in the Commercial Division is by prescribing at the first directions hearing and subsequent directions hearing a timetable calculated to bring matters to hearing at what is hoped is a fairly early date. The ultimate sanction, I suppose, is that if people do not adhere to a timetable the matter is removed from the Commercial Division, but that is easier said than putting it into practice. If the defendant has not abided by the timetable, it is quite unfair to remove the matter so far as the plaintiff is concerned. Even if the plaintiff is the one that has not abided by the timetable, it may be unfair to the defendant to remove the matter. Although the sanction as such is available, its implementation is by no means easy. If both sides fall into arrears then removal presents as a possible sanction.

Even then let me ask you to face up to this difficulty. More often than not the fault, if fault it be, is in no way due to

a client, sometimes it is. Try to put yourself in my position for a moment. What do you do in a situation where some barrister turns up and gives you his or her most charming smile and says "well, I am sorry, I have just been too busy". Well, the timetable is in arrears whether he or she gives their charming smile. They might as well be scowling for all the difference it makes. If we do not require adherence to timetable, the way that the Division has been working will fall apart.

I will just leave this problem with you because there is one member of our Division who, I have to tell you, is getting very hot under the collar about this and sooner or later something will have to be done about it. It is something that the Bar could avoid, it seems to me, by a better methodology. There are some circumstances where you cannot help falling into arrears, we all recognise that, but by some uncanny coincidence it seems to be quite often the same people who are in this predicament.

Let me try to insert a bit of good news into all this melancholy litany. There have been some difficulties experienced in obtaining photocopies of exhibits. Apparently the photocopying facilities in the exhibits office are insufficient. You can now get an order from Steve Jupp, the Commercial Division Deputy Registrar, for the release of those exhibits and, provided you are willing to sign some document which undertakes that in the event that the

documents are lost, your children are forfeited, you can have the documents.

I should alert you to the fact that we have got a settled policy in relation to early hearings or even earlier hearings of two types of matters. If there is an application for leave to appeal from the Award of an arbitrator returnable on a Friday, you should come along prepared for the fact that it will be dealt with on that Friday. We think that in order to make the system of arbitration work, it is absolutely necessary to despatch any application for leave to appeal or indeed appeals as expeditiously as possible and therefore people should not assume that the Friday is merely a notional return date. The same applies in relation to applications to vary or otherwise deal with reports from referees. The whole purpose of sending something out to a referee to report on is that once the report is made, it should be adopted or if it is necessary to vary it, such an application should be dealt with as quickly as possible.

Another matter on which we would appreciate the input of the Bar is this question, on which I have to tell you judges themselves have varying views; whether there should be some compulsion in exchange of offers of settlement. For all the reasons that I have given to you earlier, it seems to me that it would ensure that parties and their legal advisers are brought to the point where they have to consider the strengths and weaknesses of their cases at a much earlier

point in time. Perhaps two weeks before the date fixed for a call-over or x weeks before the date fixed for hearing, there should compulsorily be an exchange of offers of settlement. There are arguments both ways. I would think, myself, that there is a great deal to be said for making it compulsory, but it is something in relation to which I would appreciate an input and perhaps some of it might come in the discussion that we are going to have.

The same applies to the question of whether or not there should ever be compulsory mediation. Now you can have a whole range of options there. You could have a rule under which no action could be instituted until parties have exhausted other alternative means of disposing of the dispute. That is really the concept that underlay the Family Law Act and it did not seem to work all that well there as I understand it. Solicitors just sign the certificate saying that they have exhausted all possibilities of settlement and here is the petition or whatever it is called these days. We certainly do not want the situation in which we have a paper certificate, but that having been said, bearing in mind the cost and expense of litigation, the resources of the Court and so on, should it be a requirement that there be some attempt made at settlement before you institute proceedings? As another alternative, should a judge have power to send the matter for mediation or settlement discussions before a third party. Should that third party be another judge, or should it be somebody who is skilled in mediation techniques?

When Sam Reuben asked me to speak about current developments, I wanted to seize the opportunity of putting before you not only what is presently happening in the Division, but also questions on which I would suggest would benefit from a discussion between the judges and the Bar.

Another question is what steps should we be taking in order to utilise more adequately the advantages of modern technology. O'Keefe had some case involving the proposition that the A.M.P. was leaking. There were all sorts of scientific experiments carried out, but even so, when the time came for the matter to be heard, he spent a bit of time in trying to paste up huge plans on the walls and it did not really work too well. I would have thought that it should not be beyond our combined ingenuity and there was certainly enough money involved which would have allowed some sort of screen and some sort of machine which would have thrown the appropriate plan on the wall so that we could all see it at the same time and perhaps even give the witness half a chance of seeing what he was talking about.

That is merely a very elementary example of what it is that we should be doing. Take a long case, a large documentary case. Should not the parties establish a joint computer based data bank into which they would feed all the material which is common to them and have then separate access to the material which they would like to keep apart from each other

in the Court? When the occasion arises in the Court for calling on it, it is available to Counsel and if it is appropriate to actually to show it to a judge, it can be called up on the judge's screen as well. With the sort of money that we are now arguing about, going into millions, if it was used wisely, it seems to me that it could represent a convenient way into the future.

Because I want to give some time for discussion, I am ready to yield the floor although there are a couple of other matters that I can usefully discuss. There are just two quick matters that I want to alert you to.

We have more and more found it necessary to infringe the imperative dictate in the Supreme Court Act that all facets of the proceedings be tried together by separating the hearing of the principal proceedings and the cross-claim. That is in circumstances where, for whatever reason, the defendant has been slow in getting ready, the plaintiff is ready to prove his case, there does not seem to be a real defence to it, but there seems to be a cross-claim of one description or another. It seems unfair to delay the plaintiff, so you hear the plaintiff's case, find a verdict for the plaintiff and then comes a real problem. Do you or do you not grant a stay of proceedings on the judgment? There are now a couple of decisions, one of which has been taken to the Court of Appeal which let the orders stand. The stay of proceedings or stay of execution has been refused.

The consequence can be quite disastrous. It may mean that the defendant goes bankrupt, whether its trustee or its liquidator is going to continue with the cross-claim is a an open question.

When I said to you earlier that there is a real problem about sanctions that, I suppose, is the ultimate sanction as against the defendant. We have been careful in making such orders but, partly because, in the building and engineering list we do not have the same sort of sanctions against delay, it is mostly in that segment of our work that this situation has arisen more and more. I wanted to alert you to this because it is a situation that no client will thank a Counsel for if it should happen to arise.

The other matter that I want to refer to very briefly, is that more and more we have situations in which there are concurrent and related criminal proceedings and efforts made to delay the hearing of the civil proceedings by reason of that fact. Once again, the difficulty stems from the fact that really we have been able to do our work at a somewhat faster rate than the criminal proceedings have been heard, either at the committal stage and certainly at the trial stage. To what extent should one infringe the right to silence of the accused when by delaying the hearing you are really detrimentally affecting the interests, not just of the plaintiff, but in a number of cases, a multiplicity of plaintiffs. We have got one case in which the plaintiff is a

trustee company for a unit trust with a huge number of shareholders or unitholders - M.L.C. Life Ltd. v. Abberwood Pty. Limited (Rogers, C.J. Comm.D. 5.4.87). You see, the problem is if we take the orthodox approach and defer hearing this claim of negligence or whatever it is, it means that whilesoever that claim is outstanding, the unitholders who need the money are buying and selling units which are being valued on a basis which does not take into account the fact that there is this outstanding claim. There is also this facet - that anybody who buys that unit, assuming the trustee is ultimately successful, will get a great windfall at the expense of somebody who is selling it. It is an illustration of a number of things. One is that the system of justice is creaking at the joints and that we really are not servicing the population in a satisfactory fashion. It also shows that that segment of the judicial system that can give an expeditious hearing will be held back by another segment which cannot. The question which arises is - what are the dictates of justice in those circumstances? It is a bit like all those proceedings involving various well-known people who were trying to stop hearings before a medical disciplinary tribunal and various other bodies whilst other proceedings against them were pending. Edelsten v. Richmond (1987) 11 NSWLR 51. Hamilton v. Oades (1989) 63 ALJR 352.

The point I make, in short, is this. All the efforts of the Commercial Division which have led to relatively early hearings being appointed had managed to bring in their train

all sorts of unforseen and correlative problems which finally lead you to think that perhaps at times it is not a good thing to give an early hearing. Once we get seized with that concept, of course, we are in deep trouble. Suffice it for the day to say that associated with the obligation and ability to give a relatively early hearing is the need to keep in mind all sorts of other considerations which should not, in a properly organised judicial system, have to impact on the decision-making process, but which in fact do.

May I just sit down with this comment - ever since I have been appointed, I have said to whatever meeting of the Bar I was speaking to, that we regard this whole exercise as very much a two way street and that we are always happy to consider any suggestions and input from the Bar and if I may say so with the greatest of respect and goodwill, it is not much use bellyaching, if I may use that expression, to each other about how the system operates. It would be far better if you told us what your grievances are and if we can accommodate them, we really will try.

THANK YOU.