DELAY AND COST OF JUSTICE

by

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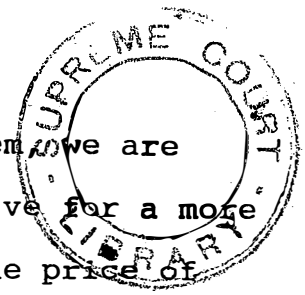

At the outset of the examination of this problem, we are confronted by a paradox. In our continuing drive for a more just result in court decisions, we have made the price of justice prohibitive. In other words, the result of a court case today compared with say 30 years ago, arguably, may be a more thoroughly considered one, in which all the relevant circumstances are taken into account, provided that the litigant can last the course. Because it takes time to examine all the additional material the next case down the line (No 2) gets delayed and then the delay is not just passed on to the case after that (No 3) but there is also the additional delay occasioned by case No 2 itself taking longer. Why is this so, and what should done about it?

The lengthening hearings may be illustrated with a relatively simple example. A and B enter into a contract and A claims that B has broken the contract, and claims damages. Thirty years ago there would have been a relatively crisp court case, in which the questions would have been, what did the contract call for, was there a breach of its requirements, and what are the damages.

Today, thanks to well intentioned and benevolent Parliaments and an equally well intentioned and benevolent High Court, the questions have become encrusted with ancillary problems and points of debate which lengthen and increase the cost case in a geometrical progression. First, no breach of contract case worth its salt would be submitted to the scrutiny of a court

without including a claim under s52 of the Trade Practices Act that there was false and misleading conduct by either, or both, parties in bringing the contract into existence. The provision initially was intended by the Parliament to be a consumer protection device. As the High Court has interpreted it, the provision is now available in business competition cases , take-over battles, purchase of businesses, and almost anything other than day to day consumer protection.

The Parliament thought it appropriate, as no doubt fairness demanded, that the poor and the weak should be protected by the provisions of the Contract Review Act. It is now sought to be invoked by Alan Bond. From the days when a court was simply required to decide what a contract meant, it has now been put in a position where it has to consider whether the contract is fair, and to examine in minute detail the conduct of parties to it. I am not for a second arguing that the provision was not necessary, or that it is not appropriate. To the contrary, it undoubtedly works to do justice in many cases. However, it necessarily requires an examination of the individual circumstances of each of the contracting parties in order to determine whether relief should be granted, and then, the extent, and form, of the relief to be afforded. Going back to the provisions of the Trade Practices Act, the provisions of s52A, dealing with unconscionability, drive to the same end and involve the same material for examination.

There has been a "legislation explosion" which in turn has fuelled a "litigation explosion". Some may think it a matter for regret that no thought is given to this consequence of legislation when Parliament is considering a Bill. Even when the legislation does not, at first blush, appear to cater for particular circumstances the imagination of lawyers has been such as to make it into a fertile field of litigation.

Again, particularly in Australia, there has been the ever increasing tendency of the courts to import into the field of legal relationships the concept of unconscionability. The law now expects, in a wide variety of circumstances, that citizens and indeed the State, will behave towards one and another in a way which a court regards as proper and acceptable conduct. A striking illustration is the landmark decision of the High Court in Commercial Bank v Amadio, where it was held that the bank owed a duty to the guarantors, the parents of the principal debtor, who were inveigled by their offspring into providing a guarantee. Undoubtedly the decision represented an extension of the concern that equity has always shown for the poor, the ill-educated, the uninformed, and the exploited,to name but a few. The court sought consciously to create a more level playing ground for contracting parties. Other illustrations abound. The same intention to be fair, informed the developing doctrines of promissory estoppel, conventional estoppel, not to mention the newly arrived law of restitution. The point about all these principles is that they involve a minute examination of the conduct of the parties, in some case,

both before, and after, the making of the contract. So, from a point where evidence of negotiations prior to the contract, and of acts of the parties after the contract, were inadmissible in disputes concerning alleged breaches of contract, we have arrived at a position where all that material is now to be laid bare for reasons ancillary to the alleged breach of contract.

As luck would have it, these developments coincided with the information explosion brought about by the photocopier and the computer. Even if many of the doctrines of today had been in place prior to the 1960's, they would not have had the same effect. However, today, any well run company will have detailed records of what transpired prior to the making of the contract, the details of the negotiations which led to the contract, and the events which occurred thereafter. The ubiquitous "note for file" when added to correspondence, internal memoranda, draft contracts, correspondence with all other parties and government records have unleashed a torrent of information which is available to be sifted, considered, given in evidence and used in cross examination. Because the decision may turn on concepts of fairness many barristers consider it necessary to turn over every stone and explore every act or document. They cannot be blamed. One never knows what will tip the scales in the eyes of the judge.

Little wonder then that both the preparation and conduct of the case have been immeasurably lengthened. In a recent speech, Lord Justice Bingham pointed out that, a dispute involving an insurance claim for loss of a ship, which was allegedly

scuttled, occupied four days of court time back in the early part of the century. Four substantially similar cases, heard in the last ten years, required no less than 40 days in court, and in some cases considerably more.

In 1980, when I started looking after the Commercial List, the average length of cases was perhaps two days. These days, the average is getting to a week. There are a great number of two week cases, and we are now no longer in the situation where only occasionally do we get a case that might take three, four, five, six weeks. They are becoming a regular feature of life. The Spedley cases will take between them one year of judge working time. That has a necessary impact on other cases in the list. Admittedly the agreements from which commercial disputes usually spring are often more complex, the available arguable points of law are more numerous, with the photocopier and the computer there is more information available for scrutiny. Nonetheless is the result today any more fair or just? It is certainly much more expensive.

The Rules of Court and the practices of the court have not really met the problems which I am addressing in any satisfactory way. Take the question of discovery and inspection of documents. We continue to adhere to the old rule for the purposes of discovery that, not only is any document which is directly relevant to the issues discoverable, but as well, any document which may lead to a train of inquiry which will assist in the resolution dispute, and may go to a matter

in issue. Discovery is no longer counted in tens of documents, hundreds of documents, but in some major disputes there have been millions of documents discovered. A whole new industry of para legals involved in discovery has sprung up. Once again, modern technology has to take some of the blame. It is now possible to record in computers, to index with computers, the mass of documentary material so discovered, and made available, to the lawyers for the purposes of further information gathering, cross examination, and tender. Lap top computers are now brought to court so that the cross examiner may have instant access to the wealth of material accumulated. These shortly are the reasons why cases take longer, and therefore are more expensive.

The difficult question is, how we can intercept the avalanche of information, and try to produce a just result without making it cost prohibitive. Here again, another paradox intrudes. Ultimately, there are very few cases which turn purely on documentation. The recollection of individuals, more often than not, will be the ultimate determinant. As we all know, memory is for a variety of reasons, fallible, even in the hands of an honest witness. True it is that the documentary information may, at times, prevent a witness from falling into error due to faulty recollection. However, the fact is that, the result of a case often times, will only be as good as the fruits of a witness's recollection. Thus, it is of necessity, fallible. One may ask what is the advantage of this torrent of information, when the result has this underlying capacity for fault?

It is necessary for the community as a whole to confront the really difficult questions to which this present state of affairs give rise. The correct questions have not been posed, much less answered. Furthermore, it would be unwarranted arrogance for the answers to be sought only from lawyers, much less given only by lawyers. It is for the community as a whole to decide what it wants. The choices are stark. By no means are the choices simple. Does the community wish to persevere with a system which, with all its attendant disadvantages and difficulties, the major ones of which are delay and cost, does seek to obtain as near to perfect justice as is possible? Alternatively, perfect justice being, in any event, an impossible ideal, is the community prepared to accept, for the purpose of arriving at as fair a result as possible, but, consistently with eliminating a great deal of the evidentiary material, which does not go to the heart of the dispute, that procedures be formulated which will reduce cost and delay? Does the community desire two parallel systems to be available, the long and expensive, with the result of a more complete exploration of the facts, together with a shorter, more truncated effort at fact finding? Would the community tolerate one system for the rich and powerful, and another for the average members of the community? What is to be done where one of the contestants desires to take the high road and the other the low road? Should it be made compulsory that, before the curial process is embarked on, there should be good faith attempt at resolution of the dispute outside the curial system?

A major defect in the present system appears to be insufficient preparation and thought prior to the hearing. How else can one explain the number of settlements at the door of the court. The greatest indictment of the system and of lawyers is the recurring cry in courtrooms across the country, after a matter has been called on. "Your Honour, may we have a few minutes?" Why was it not possible to settle the action prior to that point? Every time this happens the legal system and lawyers have let the community down. The waste in money is equalled only by the frustration and annoyance of the participants other than the lawyers immediately involved. In its submission to the Senate Cost of Justice Inquiry the New South Wales Bar Association said that it is seldom practicable to carefully consider the evidence and applicable legal principles "other than shortly before the commencement of the matter when all of the available material has been assembled....More often than not, at this stage, negotiations in earnest between the parties begins." Surely we can do something to improve on this.

It is a universally accepted fact that some 90-95% of proceedings, will be disposed of without a final contested hearing. Nobody has yet been able to work out how to identify the 5-10% of cases that require court intervention for their ultimate disposition. The further difficulty is that the more steps are taken by means of Direction Hearings and other interlocutory processes, in applying case management to disputes, the more money will be expended without necessarily

either expediting the point of time at which the dispute would in any event have settled or increasing the number of settlements. Let me give an illustration. The bulk of the work in the Common Law Division of the Supreme Court is in claims for damages for personal injuries. In motor vehicle litigation resources are devoted on both sides, to obtain the same information relating to damages thereby incurring two sets of expenditures. A lot of that could be avoided if the plaintiff were required to annex to the initiating process, or file at that time, an affidavit, annexing Doctors' reports, group certificates and all the necessary material to enable damages to be calculated. However this would all cost additional money at that point of time. What is a justifiable requirement for expenditure of money and energy at that early stage of litigation which would achieve an earlier settlement and not be disproportionate to the amounts saved in court costs and such like? Nobody really has worked out an answer to that question based on a cost benefit study.

Take a more drastic proposition. Require every plaintiff to submit to a medical examination by a court appointed expert instead of the plethora of Doctors' reports on each side. I would have thought that the saving in costs, not to mention the saving on the emotional energy expended by the plaintiffs on visits to Doctors, would be quite striking. I will not pause to set out the arguments for and against such a proposal. Nonetheless it is worthy of thought.

Take another example from a different field. In actions against auditors for alleged negligence, which are almost as of course today, the plaintiff, usually the liquidator, engages a well known firm of accountants who expend hundreds, perhaps thousands, of hours on reworking the impeached audit. The solicitors for the underwriter instruct a different firm of accountants to do the same work. I would have thought that any self respecting management consultant would advise the court to engage, at the expense of the parties, an independent firm of accounts who would produce the one report instead of the two sets of reports from the contending parties. What do you then when the dissatisfied party wants to challenge the report? Should that be permitted?

Another field in which the courts are showing the first stirrings of imposing controls is on the length of cases. Complaints in the past have been frequent. Action has been scant. Recently, in La Banque Financiere de la Cite v. Westgate Insurance Co Ltd 1990 2 AER 947, Lord Templeman gave some statistics. The hearing before the primary judge "endured" for 38 days. 23 days were spent in the Court of Appeal. The House of Lords was occupied for six and a half days. The primary judge's judgment was 36 pages in Lloyds Law Reports, Lord Justice Slade in the Court of Appeal delivered a 58 page judgment. Lord Templeman says, (ib. p.388) this cannot go on, he refers to earlier cases where judges had complained of lengths of cases and the number of judgments cited and

mentions, as is the case, that proceedings in which litigants indulge in over-elaboration give difficulties to judges at all levels of the judicial hierarchy. He makes the point (p 959):-

> "A litigant faced with expense and delay on the part of his opponent which threaten to rival the excesses of Jarndyce v. Jarndyce must perforce compromise or withdraw with a real grievance. In the present case, the burdens placed on Mr. Justice Steyn and the Court of Appeal were very great. The problems were complex but the resolution of these problems was not assisted by the lengths of the hearings or the complexity of the oral evidence and oral argument. The costs must be formidable. I have no doubt that every effort was made in the Courts below to alleviate the ordeal, but the history is disquieting. The present practice is to allow every litigant unlimited time and unlimited scope so that the litigant and his advisors are able to conduct their case in all respects in the way which seems best to them. The results, not infrequently, are torrents of words, written and oral, which are oppressive and which the Judge must examine in an attempt to eliminate everything which is not relevant, helpful and persuasive. The remedy lies in the Judge taking time to read in advance pleadings, documents certified by Counsel to be necessary, proofs of witnesses certified by Counsel to be necessary, and short skeleton arguments of Counsel, and for the judge then, after a short discussion, in open Court, to limit the time and scope of oral evidence, and the time and scope of oral argument. The appellate Courts should be unwilling to entertain complaints concerning the results of this practice."

He said this in mid-1990.

Just about the same time, the Full Court of the Family Court gave judgment in the Marriage of Collins (1990) 14 Fam.LR 162. At first instance, Mr. Justice Nygh, with a real purpose in ensuring fairness in litigation, felt that he had to limit the time that would be taken by the case, and he did what Lord Templeman suggested should be done, although he could not possibly have read the judgment which came out only at the same

time as the subsequent Full Court decision. Nygh J limited the time for cross-examination and for the totality of the hearing. The Full Court stated (ib.p.174) that the "imposition of an arbitrary time limit on one or both of the parties is however quite a different matter .... The question of a time limit in Court proceedings has, naturally enough, rarely if ever arisen as it would normally be out of contemplation." (my emphasis). Their Honours continued (p.175): "On ordinary circumstances the imposition of an arbitrary limit upon the presentation of a party's case would amount to such a fundamental denial of natural justice as to lead inevitably to an order for a retrial." It is instructive to see the difference in approach between the Templeman view of how one might proceed, and the view that was taken in the Full Court of the Family Court. Nygh, J. was upheld only because, in the view of the Full Court, the Counsel who was appearing before him, did not object sufficiently strenuously. There was an application for leave to appeal to the High Court. In the course of argument, Mr. Justice Deane said "Well perhaps the Full Court of the Family Court needs to take a new look at limiting the length of these types of proceedings", which may have been very polite way, of telling the Full Court of the Family Court that the course taken by Nygh, J. was the appropriate course. The proceedings throw up quite vividly the collision that exists between the traditional concept, that it is part of the demands, or requirements, of natural justice that a judge must allow a party to present its case in full, though the skies should fall, and the demands of ordinary

justice that a litigant should not be allowed to be bled white, or to be oppressed by a wealthy party, taking as long as it likes in the conduct of the litigious process.

It imposes a super human burden on a trial judge to decide where the line should be drawn. It also, imposes a very real burden on the profession. We all know that lawyers have an obligation, within ethical limits, to take every point and to conduct a case in the best interests of the client. The profession needs to consider whether it owes a duty, not just to the client, not just to the court, but to the whole concept of administration of justice. It is no part of the concept of administration of justice that a lawyer conduct a case as long as the money lasts, or conduct the case in order to wear out the opponent financially. Particularly in commercial situations - say in guarantee cases - where one gets a judicial overview of encounters between parties who stand in an unequal financial position, the court, I think, does have an obligation to ensure that in the conduct of the case, it is not made an instrument of oppression. Equally the guarantor should not use the court process simply to postpone the evil hour. We should consider whether the duties of lawyers need new definition.

It is easy enough to understand the dismay, disappointment, and annoyance, with which the community views the delay and cost which seem to be the inevitable accompaniment of litigation. The panacea which is preached today is alternative dispute

resolution. Simply, that embraces a range of methods designed to achieve a consensual resolution of the dispute by the parties, instead of resorting to a decision making process by an outsider. Any of these processes has two outstanding advantages. By definition, the parties know the essential facts, and it is unnecessary to go through the torrent of information gathering and information transmission which now accompanies the curial process. Second, the parties can drive the best bargain that they can both live with.

The community expects a better system for exploring the chances of, and arriving at, settlements. The courts need to play a more immediate role in the mediation. Lawyers are fond of claiming that if a settlement is possible they will achieve it. Without entering into controversy it must be true that an experienced third party, with no interest in the outcome, should be able to assist the process.

With all respect to those who, with perfect sincerity, see the problems as the alleged restrictive practices in the legal profession, as the fees payable to barrister, or lawyers generally, as too little control by judge of the length of hearing, these all seem to me to be at the outer periphery of the deep, underlying problems which confront us. The questions I have attempted to raise, although complex, because they reach to where each of us lives, to our individual concept of justice, are in terms understandable to every member of the community. Each member of the community is entitled, indeed required, to make his or her assessment of what is considered

to be appropriate. It seems to me, that out of the myriad of inquiries which proceed, not just in Australia, but in other countries as well, there has been a failure to identify the questions which need to be answered, for fear that the answer may be too divisive for comfort, and for general acceptance. The community cannot have both, the luxury of avoiding the questions, and persisting with the complaints.

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