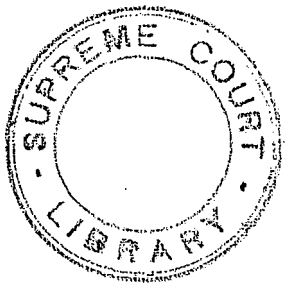
THE HON JUSTICE ROGERS

ON HIS FAREWELL

AS CHIEF JUDGE



COMMERCIAL DIVISION

SUPREME COURT OF NEW SOUTH WALES

ON

3 MAY 1993

Thank you for all you have said. It is customary to respond to speeches at farewell ceremonies by saying that all that has been said has been far too kind. I will not do so for two reasons. First, no lawyer truly believes it. In our heart of hearts we know that all that has been said is true. On one occasion, when I was junior to our departed friend, then Glass QC, I told him that I thought his cross-examination that day was particularly outstanding. Silence fell between us for about thirty seconds and Harold then said, "Don't stop, go on". The other and more important reason is because modestly to disclaim would be to do less than justice to all those whose work brought the Commercial Division of the Court to where it is. Thanks go to those who immediately preceded me, Mr Justice Meares and Mr Justice Shepherd. I am delighted that they are both able to be present today. Over the years I have had the support and help of many judges. Mr Justice Yeldham also is able to be present, Mr Justice Hunt, Justices Wood and Carruthers all contributed greatly in the time they were able to allow for commercial work. Later in time a number of judges spent most of their time on the bench of this court in commercial work, Justices Clarke, Foster, Brownie and more recently Cole, Giles and Rolfe. Nothing should be read into the fact that a number of those I have named were glad to escape variously to the Court of Appeal, the Federal Court and the Equity Division. Because the Commercial Division is small in number, because of the fact that the others have all been good

natured people, we have been able to work as a close-knit cohesive unit. This led not only to efficiency but also to camaraderie.

For much of my time as a judge I had the support of the former Chief Justice Sir Laurence Street, without whose help we would have found it difficult to achieve what we have done. The present Chief Justice continued the benevolent attitude towards the work of the Commercial Division. I thank all my judicial colleagues, librarians, registry staff, court officers, and the personal staff whose help I enjoyed. I particularly wish to thank members of the legal profession. Although at times they appeared to labour under the wholly erroneous belief that appearing before me was a trying experience, and no doubt charged accordingly, I for my part remain in debt to all those whose efforts have allowed the work to be done efficiently and speedily. I particularly wish to draw attention and to thank the solicitors who constituted the Users Committee on whose advice we drew. When I was appointed I had hoped that we would have members of the commercial community on the Committee. I have not been able to achieve that goal. That is a matter for regret because an understanding of the process and the opportunity to make an input would have been of mutual benefit.

I should emphasise that all that was said and done was driven by nothing else except an anxiety that

the litigants whose cases were before the court were put in the position of best advantage that could be achieved. I will remember with gratitude the assistance and guidance I was given. It is fair to say that of course members of the profession were frequently unable to stop me from falling into error. One of the last things that Mr Justice Young must have done before his appointment to the Bench was to settle a notice of appeal, the first ground of which suggested that the judgment was in error by being infected with my "idiosyncratic notions of commercial morality". On my retirement, I intend to engage in a number of activities, one of which may permit me, in the relatively near future, say a day or two, to return the compliment.

So much for the self congratulatory part of the proceedings. Anyone with a social conscience and a concern for the public good is deeply troubled by what has happened to the litigious process. It is only thirteen years ago that I came to the Bench of this Court, and at that time the average case took one or two days. Any case scheduled to last for a week was regarded as being long, and anything longer was a rarity. Concurrently with the increase in the length of cases came the explosion in legal costs. The courts fulfil a distinct social purpose. To put them out of reach by reason of the cost involved, is unacceptable. There are many reasons why cases are taking longer. Some of them were referred to by Mr Justice McLelland the other day.

Accepting as we must that we cannot turn the clock back and that the Parliament and the High Court with a proper concern for individuals will direct more and more detailed personal examination of factual circumstances, witness the requirements of the Contracts Review Act, is there anything that can be done to the litigation process in order to reduce expense? Contrary to popular thought this is not solely, or perhaps even primarily, a question for lawyers, but for the community at large. It is for the community to decide whether we wish to, or can afford to, adhere to what has been described by others as a Rolls Royce method of dispute resolution or whether our conveyance should be more modestly priced.

There is an inherent contradiction in the litigation process. Ultimately, in most cases, everything will turn on the findings of fact which are made. These findings will of necessity be infected by structural defects. Not only are witnesses' perceptions at the time to a large extent unreliable, but with the progress of time, self interest and pride will work wonders in adjusting the recollection of even the most honest of witnesses to conform to a desired purpose. All of us must remember instances where we had as clients the most honest of men, or women, who were disbelieved. Judicial fallibility in witness evaluation is a fact of life. Notwithstanding these inherent vices, lawyers labour unceasingly to produce more and more facts and documents calling for evaluation. For the sake of achieving a better result,

more and more discovery of documents is had, more and more witnesses interviewed, greater and greater detail gone into. In the same way that photocopies and computers have worked to make hearings longer and more costly the trolleys that trundle into Court each day reproduce the function of tumbrels that carried passengers to the guillotine.

Risks of fallibility are inherent in the trial process and the risk drives many to insist upon even more meticulous processes to guard against an unfair outcome. We ought to evaluate each step in the dispute resolution process to determine their real worth, their real contribution to a fair result. A good example is discovery. Is it necessary for a fair result that every document which <u>may</u> lead to a line of inquiry which <u>may</u> lead to a relevant matter ought to be discovered? Should we instead look more appropriately to some test of fairness. Are our rules for summary judgment appropriate to the conditions of today? There is no more high-minded statement than the proposition that every citizen should be permitted to have his or her day in court. Does that necessarily mean that some other citizen should be exposed needlessly and unfairly to the costs which attend legal proceedings today.

Instead of discussion about whether barristers ought to wear wigs and gowns, whether there should be a fusion of the profession, all conducted with the high minded

purpose of reducing costs should not questions be the more fundamental. The much more difficult questions are what is the dictate of fairness in the litigious process, in the particular matter, and how do we implement it.

I have tried to raise an awareness of these issues and to contribute my thoughts to the discussion. Once the guidelines are in place it is for lawyers, no doubt, to assess whether a particular procedure will or will not conduce to the desired purpose.

Judge Newman, of the Second Circuit Court of Appeals in the United States put what I have been endeavouring to say in a more elegant way which might appeal:-

> "We must think hard about ways to save time and money in the litigation system so that the system can function properly and thereby provide justice for all who wish to use it or are affected by it. We need to rethink our conception of fairness not simply to save time and money but to distribute fairness more evenly."

The Judge suggested that we must gather the empirical data necessary for sound evaluation of the real worth of each component of our litigation system and for hard calculations of the burdens upon the entire system. Today we operate primarily by intuition reinforced by the comfort of tradition. The courts and lawyers should be allowed to experiment with changes. It has been pointed

out that whilst the medical profession has made enormous progress by experimenting with matters of life and death, the law shuns experimental ways of deciding matters of probity.

We have had Law Reform Commission Inquiries, Parliamentary Inquiries, Trade Practices Inquiries. What the citizens of this State are entitled to have is an inquiry that looks at the process itself which will allow economically ascertained fairness in place of economically unattainable approximation to perfection.

Maybe that is not what the community in which we live wishes to have, but at the least, the community deserves an opportunity to have it discussed.

It is perhaps not inappropriate to conclude with the words of Lord Denning in Rahimtoola v Nizam of Hydrabad 1958 AC 379:-

> "I have stirred these points, which wiser heads in time may settle."

****