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COMMERCIAL CAUSES JURISDICTION ADDRESS GIVEN TO MINTER ELLISON STAFF 10 JUNE 2004

The Commercial List

The three largest Supreme Courts among the Australian states and territories all have a commercial division or commercial list. They are, of course, New South Wales, Victoria and Queensland. The existence of the specialist list is an indication of the importance of the commercial community in those states. The purpose of the commercial list in each case is the same:

> To provide a court the judges of which have a greater familiarity with the subject matter of commercial and mercantile disputes and to provide procedures which will enable those disputes to be determined justly, expeditiously and efficiently, without unnecessary formality.

The corollary to these features of judicial specialist knowledge, efficiency and speed, is a saving in cost.

The relative economy of proceedings in the commercial list is important. 'Time is money' may be trite but it is also true. Those who transact business do not want to be distracted by disputes or litigation. If a dispute does arise business people want to have it determined promptly so that they can return to making money.

There is a second aspect to the emphasis on economy. Chief Justice Spiegelman in a recent address pointed out that in the last 20 years the cost structures of most Australian businesses has been transformed. Enterprises have become more profitable by reducing their costs, but one

of the few areas of business expenditure that has not diminished is the cost of dispute resolution. The Chief Justice suggests that the reason personal injury litigation has been largely lost to the profession is that those involved in it did not deliver a cost effective service. I suspect the reasons are more complicated, but the excessive costs of that type of litigation must have been a factor in its loss to the profession. He suggests that unless the profession involved in commercial disputes does deliver a cost effective service the business community will find other alternatives.

So, two factors underpin the need for, and the success of, the commercial jurisdiction. They are the familiarity of the judges with the subject matter which arises for dispute so that disputes can be resolved competently and quickly, and the cost savings involved in expedited hearings.

The Australian commercial jurisdictions all derive from the commercial court established in the High Court of England in 1895. The particular circumstances which led to the formation of English commercial court are worth recalling because they highlight the first of the two rationales I have mentioned. Before 1895 commercial disputes were heard by the Queen’s Bench Division, the judges of which had varying backgrounds and no uniform understanding of mercantile law. One of the judges was Mr Justice Lawrance who had been appointed as a reward for services to the Conservative Party. He had very poor legal ability. Lord Justice MacKinnon once said of him:

> '(He was) a stupid man, a very ill equipped lawyer, and a bad judge. He was not the worst judge I have ever appeared before: that distinction I would assign to Mr Justice Ridley; Ridley had much better brains than Lawrance, but he had a perverse instinct for unfairness that Lawrance could never approach.'

Lawrance J was appointed to hear a case involving a claim for salvage of a ship and her cargo of wool bound for London from Sydney. The ship had foundered off the French coast. The dispute concerned the apportionment of the salvage expenditure among the various owners of the cargo. Counsel for the parties were all very able and experienced. They included the future Lord Justice Scrutton who had written a leading text book on shipping law. Lawrance J reserved his judgment for six months. He apparently forgot about it but when reminded he returned to court and commenced to deliver an ex temporare judgment during which he frequently stopped to ask counsel what the issues were and then described them in terms that showed that he did not understand them. In the end he had failed to deal with the more important issues in the case altogether.

The outcry from the commercial community which had long been critical of the delays, technicalities and excessive costs of commercial litigation in the Queen's bench division were such that the commercial court was established.

Queensland followed suit not long after. In 1910 the *Commercial Causes Act* was passed which established a commercial causes list to be kept by the Supreme Court Registry and provided for the expeditious preparation

and trial of cases on the list. The court had a busy commercial list not long after I commenced practice. The jurisdiction flourished in the 1980's but fell into disuse at about the time the court was reorganised in 1991. The commercial jurisdiction involving judges specifically allocated to try commercial cases was re-established by Practice Direction No. 3 of 2002 which came into effect on 1 May 2002.

Common to all the commercial lists is the philosophy that disputes which qualify for entry on the list should be resolved quickly. To achieve that purpose the statutes and practice directions establishing and regulating commercial courts have stressed that the court, and the parties should identify the real issues in dispute at a very early stage and deal with them as soon as possible. This ordinarily means dispensing with the normal rules of practice and procedure, and of evidence. The principal provisions of the *Commercial Causes Act* 1910 are now found in sections 279 – 285 of the *Supreme Court Act* 1995. Those provisions are not likely to have much practical effect now because the terms of the practice direction and the *Uniform Civil Procedure Rules* together give the court wide scope to manage a dispute and bring it on quickly. Nevertheless section 283, reproduced from the 1910 Act, gives a good indication of how the jurisdiction is meant to operate. The section provides:

> '(1) (The commercial) judge … shall … give such directions as in the judge's opinion are expedient for the speedy and inexpensive determination of the question in the action really at issue between the parties.
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> (2) To effect this purpose the judge may … do any or all of the following things –

(a) Dispense with pleadings
(b) Dispense with the rules of evidence for (proving) any matter where it is just to do so.
(e) Require either party to make admissions with respect to any question of fact involved in the action.
(f) Settle the issues for trial …'

If you are going to litigate in the commercial list then the approach you must adopt is that which is implicit in the section: the early identification of the real issue or issues, the prompt preparation for trial of those issues, and the resolute abandonment of anything that will get in the way of that process. This is very important and I will come back to this topic in a moment.

In the meantime I should say something about the subject of commercial disputes. The practice direction defines such a dispute in these terms:

> A commercial list matter is one which involves issues which are of a general commercial character or arise out of trade and commerce in general and which will take no more than five days to try.

The direction then gives a number of examples which is not meant to be exhaustive. The examples include:

- The construction of business contracts
- Insurance
- The provision of banking and financial services
- The provision and enforcement of securities of any kind
- Business and commercial agents
- The exploitation of or rights to technology
- Entitlement to intellectual property
- Takeovers

- Exporting and importing of goods
- Carriage of goods
- Arbitration
- Exploitation of natural resources
- Conduct or operation of markets exchanges

The 1910 Act defined a commercial cause to be one which arose out of the ordinary transactions of merchants and traders and went on to identify some such transactions, which to a large extent coincides with the examples given in the practice direction. There is one notable exception. The 1910 definition included disputes arising out of building or engineering contracts. They are excluded in the more recent definition no doubt because of the time constraint. Building disputes normally last more than five days. Another noteable exception is the absence of claims against professional people for negligence or breach of retainer.

From these considerations you should understand that a commercial cause will be an action which, in addition to its subject matter, has the following features:

The pleadings will be concise
Disclosure of documents will be limited in class and/or number
Interlocutory applications of any kind will be rare
There will be no insistence upon strict proof of matters not genuinely in dispute

To prepare and conduct a trial according to these criteria is very different to the way in which litigation is now normally conducted. To do it successfully requires the cooperation of both parties and their lawyers. It requires common sense and adherence to the common purpose of getting the action ready and heard in a compressed time frame. This, as I say, is

a cultural change from the way in which litigation is normally conducted. If you remember anything from this session remember this: that a wholly different approach is required to litigating in the commercial list. Typically in modern litigation the pleadings will go through a number of versions before they will be regarded as complete. It is common for there to be applications to strike out the statement of claim or for particulars of it before a defence is delivered so that months go by before a defendant reveals its hand. Disputes over the adequacy of disclosure are normal. It is customary for the litigants not to adhere to time limits imposed by the court or the rules.

Pleadings themselves have become very complex. Ordinarily a statement of claim will run to dozens of pages and contain multiple causes of action. No claim seems complete unless in addition to contractual claims there are allegations of breach of the Trade Practices Act and the Fair Trading Act, and recourse is always had to equity with some basis being alleged to found a complaint that the defendant has acted unconscionably or in breach of some fiduciary duty. Much time is spent in the examination of witnesses trying to elicit evidence of misrepresentations or inequitable conduct. This is not the time to examine the pressures which have led to this form of procedure but it is inimical to the early identification of the real dispute between the party and the efficient resolution of that dispute.

A wholly different attitude to commercial litigation is required. That requires concentration on the essential dispute and the abandonment of all supplementary causes of action. It requires the collection of documents

and oral evidence necessary only for the point really in dispute. There is no scope for point taking on pleadings or contesting, or requiring an opponent to prove, facts which are not truly in contention.

Likewise there is no point in seeking to have an action made a commercial cause if the parties are not content with this approach and if the lawyers are not committed to providing it.

Getting on the List

The Chief Justice has allocated two judges to conduct the commercial list. At present the judges are Muir J and me. An application to have a matter put on the commercial list is made to one of the commercial list judges. At a basic level an application to put a matter on the commercial list is initiated by a telephone call to the Associate to advise of the application and obtain a date for its hearing. Sometimes where the matter is clearly a commercial dispute and the parties agree, orders are made on the papers without the need for a hearing. These orders usually include a timetable for interlocutory steps. In addition to hearing applications to have matters put on the list the commercial judges will hear all applications for directions and management of commercial causes and will try the actions. Normally the same judge will hear ………. any interlocutory applications and the trial of a particular case, but that is not always possible.

At the moment the listings arrangements are such that eight weeks each half year, that is a court term, are dedicated to commercial cases so that it is possible for trial dates to be allocated very promptly. In fact the

present position is that the court can make trial dates available sooner than parties can get ready. That may change. There are signs that the list is growing in number and I expect there will soon be more competition for available trial dates.

The practice direction provides that an application to make a matter a commercial cause should be made after delivery of the claim and after the attitude of the defendant to the listing has been sought by the applicant. This is important for the reason I mentioned: the co-operation of both parties is necessary if a commercial cause is to run smoothly. Both parties must be committed to the philosophy of the commercial list. The application must be brought on notice and must be supported by a statement which sets out:

- A succinct statement of the nature of the dispute
- Brief particulars of the issues which will arise from the claim and why their nature is such that they should go on the commercial list
- A brief statement of the contentions of facts and law which will arise in the case
- Whether there is any urgency about the matter
- The proposed timetable for the progress of the action and an estimate of the likely length of the trial

There is no appeal from the decision to put a matter on the commercial list. There is no similar prohibition on appeal from a refusal to put a matter on the list, but good luck if you try.

It would be contrary to the philosophy of the commercial list and inimical to its operation if the first interlocutory application were a protracted

dispute as to whether or not the matter should be on the list at all. You will have noticed that the definition of commercial cause is in general terms which involves some flexibility in the approach the court will take to listing matters. There will inevitably be a degree of impressionism in the approach judges take to applications for listing. The fact that there are only two judges who make these orders gives rise to a consistency in approach. Some matters are intrinsically commercial in character and will be listed while others are equally clearly not commercial. There is not likely in practice to be many borderline disputes, though there will be some.

In addition to the wide power to give directions conferred by *UCPR* 367, the practice direction follows the terms of the *Commercial Causes Act* and gives the commercial judges power to make orders and directions to ensure the fair, efficient and prompt disposal of cases on the list. Specifically the power extends to dispensing with pleadings.

Typically the directions given for the preparation of the action when the application is heard for it to be put on the commercial list should be sufficient to take it to trial. Sometimes there will be a need for additional directions, but cases in which there are ongoing disputes about preparation or interlocutory steps are not suited for the commercial list.

Normally a review will be held at about the time fixed by the timetable for the completion of interlocutory steps. If the matter is on track at the review, and the parties want a trial, dates will be allocated.

Cases in which parties ignore the timetable and create delay are a problem. Given the attitude of the Court of Appeal there is no effective sanction against a party who persistently fails to comply with directions designed to get an action ready for trial. Despite the provisions in the rules and statements made in some cases about the obligation of parties to get ready the reality is that the Court of Appeal will not support orders which strike out pleadings or enter judgment against a defaulting party. There is, however, one sanction which I expect to be effective. That is to insist that a trial go on even where one party has not bothered to get ready, but the other is and wants a trial. That is to say you should not expect to be granted an adjournment of a commercial matter set down for trial on the ground that your side has not got it ready despite saying it would and having agreed to a timetable to achieve that end.

Before that point is reached if it becomes apparent that parties are not acting in the spirit of the commercial list the matter can be removed from the list. The same thing can occur if, as sometimes happens, the complexion of the dispute changes and it becomes apparent that it is not truly commercial in nature.

From time to time one hears expressions of disquiet from litigating lawyers about the desirability of judges who manage or supervise a case also being the judge who tries it. The basis for the concern is that in disposing of interlocutory disputes the judge will form a preliminary view about the merits of the dispute which will carry over to the determination of the action. The preliminary view will necessarily be formed without regard to all of the evidence and submissions. The fear is, putting it

bluntly, that the judge will predetermine the case before it gets to trial. From my experience I suggest the fear is quite groundless. The ultimate merits of an action are, I think it is safe to say, never the subject of interlocutory disputes (ignoring applications for summary judgment) and a judge does not think about those merits when disposing of pre-trial matters. To the extent that there may be something said in the course of interlocutory arguments about the merits of the dispute the impression of a judge is no more than a pencil mark in the mind which is erased by the presentation of the case at trial. Nevertheless if anyone has a real concern it is easy enough to have the commercial list judge who has not overseen its preparation hear the trial.

Interlocutory Skirmishing

Disclosure of documents is a problem in all litigation. As far as I can see the situation has not improved with the recast obligation found in the *UCPR* to discover only those documents which are 'directly relevant'. The result is still that very large numbers of documents which tend to be irrelevant are produced and have to be inspected and are frequently provided to the trial judge. Only a fraction of these documents are ever referred to at the trial. There may be no solution to the problem and is not part of this morning's discussion to address it. It is no doubt easier to photocopy every document rather than think about which ones are not relevant, but the result of such an approach is unsatisfactory. There may be a fear that something relevant may be overlooked or a wish to avoid criticism that the parties have not properly performed the obligation to make disclosure of documents. Whatever the reason, the result is a

proliferation of documents which adds to cost and wastes time. A more robust attitude is required on the commercial causes list. Here there must be a rigorous assessment of what documents are directly relevant to the issues truly in dispute and disclosure must be limited to documents in that category. Of course within that category there must a strict compliance with the obligation to make disclosure. The fact that the issues being litigated are limited and there is compression in the process does not mean that documents which are relevant to the proceedings can be concealed because they might be embarrassing or damaging. Someone must take responsibility for the selection of documents which are to be disclosed and those which are not. At the moment there appears to be a degree of mindlessness in what is discovered. I have had a number of recent examples where documents, some lengthy, in a foreign language have been included in agreed bundles of documents. Obviously they were never referred to. No-one can have thought that they were helpful to the case. They were obviously inadmissible. No-one bothered to excise them.

The need for clear pleading is obvious in all cases, but especially so in commercial cases. There is much to be said for dispensing with pleadings in the conventional sense and instead requiring the parties to produce short documents which succinctly set out the rival contentions of fact and law concerning their dispute. Directions to that effect have not been made frequently but I think there is great scope for that approach, if only to break the mind set which gives rise to prolix and complex statements of claim and defences, and instead encourage clarity and conciseness.

The commercial list is infertile ground for applications to strike out pleadings, or for particulars, or for security for costs. If you have a case which is appropriate for these kinds of applications it is probably not suitable for the commercial list. Of course there are no hard and fast rules but generally speaking cases on the list are those in which interlocutory applications are kept to a minimum. Of course there may be need in a particular case for an injunction pending trial or for the preservation of property. I am not saying that the commercial list is not one in which you can or should make interlocutory applications but the emphasis is on getting the action ready for trial.

Agreed Bundles

Those seem to give rise to enormous difficulty and anxiety for reasons that are not readily apparent to me. People often have odd ideas about the consequences of putting documents in an agreed bundle, and therefore become nervous about agreeing to their inclusion. Some people on some occasions also seek to qualify the use to which documents included in an agreed bundle can be put.

I take a simplistic view. To me an agreed bundle of documents is simply that. It is a collection of documents which the parties agree are relevant and admissible. A degree of common sense and co-operation should be shown in the compilation of the bundle in the sense that one has to accept that documents harmful to one's own case may nevertheless be relevant and admissible and should be included. The bundle should, I think, be kept as small as the circumstances of the case allow. There is no point in putting in copious pages of documents because it is hoped they might

become relevant. The agreed bundle should be reserved for those documents which are plainly relevant and are plainly admissible. If everyone has a copy of the bundle it facilitates the presentation of evidence and argument.

Can I say that it is useful for a judge to be given his own copy.

The agreed bundle has obvious uses. Apart from putting before the court in a convenient form the relevant documents it is possible for witnesses to be examined and cross-examined by reference to the documents in the bundle. There is convenience and saving of time if everyone has the same compilation of papers and the witness, judge and parties can have their attention directed easily to the particular passage or passages at the same time.

There is nothing radical or innovative about this but it is astonishing how seldom agreed bundles are used to proper effect. I have tried a case where the parties simply could not agree on what should be included in the bundle with the result that three separate sets of 'agreed bundles' were provided, almost none of which contained documents which were in fact the subject of agreement as to relevance or admissibility. The case, I remember particularly, was a building dispute involving claims for variation, acceleration and prolongation. It should have been relatively easy to compile lists of site instructions, signed variations, timesheets and the like which were relevant to those claims. That was not done. Each party, as I mentioned, produced their own bundles all of which were bulky and led to inconvenience and confusion.

The fact that a document does not appear in the agreed bundle does not mean that it cannot be got into evidence. If it is relevant to some issue and can be proved by any of the means available for that purpose it can be tendered. I think a misunderstanding on this point is responsible for much debate about the compilation of agreed bundles. I have seen people become anxious because their opponent would not agree to the inclusion of some documents or classes of documents. Whatever the merits of that particular discussion between the parties the preparation of the bundle need not have been delayed.

The documents that were the subject of agreement could have made into the bundle and the other documents, if they were helpful to the party's case and could be proved, could have been tendered in due course in its case. Likewise it is unhelpful to include in the bundle documents about which there is to be some argument, for example that their use is to be limited, or their inclusion in the bundle is conditional upon the occurrence of a subsequent event. It is too much to expect a judge to have to remember that some out of maybe hundreds of documents in an agreed bundle may not be taken at face value. If some sensible objection is to be taken to a document it should not be included in an agreed bundle. The party who wants it in can attempt to prove it in his case during the trial. Whether or not it ultimately becomes part of the evidence, the debate about its admissibility before the point can be tested at trial, is no reason to delay the preparation of an agreed bundle.

Another difficulty I have encountered is that some people appear to have taken the view that every document, or almost every document the

subject of disclosure, should be included in the bundle. There may be cases where that is necessary but I suspect they will be few in number. The point about an agreed bundle is that it should contain the important documents which will be frequently referred to or on which the issues will largely depend. They are there for ease of reference and convenience. The bigger the bundle the less convenient it is to use. In some cases it is of course not possible to have concise bundles but conciseness is relative and one should aim at it to the extent it is possible.

Trial and Technology

A recent experience makes me suspect that the use of documents in electronic form to replace paper copies is not likely to be successful. There may be a use for an electronic data base of documents at the pre-trial stage. The attempt to conduct a paperless trial in Emanuel failed. I am not, for a moment, being critical of the service provider in that case or of any of the parties who, I am sure, all tried very hard to make the system workable. The fact is it did not work and in the end was effectively abandoned in favour of photocopies of documents organised in a conventional manner.

I am not sure why the experiment failed. From my point of view the problems were that not all the documents to which the parties referred in evidence were on the data base. One didn't know whether a failure to find a document was because it wasn't there or because the search technique was inadequate. This led to a lack of confidence in the data base so that reliance was placed on paper. Another feature was that much

of the case involved examination of audit files and financial statements. The size of the documents, their length, made it very difficult to comprehend them by looking at a screen. The witnesses who gave evidence on these topics could not be expected to, and did not give, evidence by reference to documents on the data base. They looked at their hard copies of the documents.

Another drawback was the difficulty of document identification. Initially the parties each had their own identification system rather than one common system. That problem was overcome, no doubt at a large cost, by the time the trial started. Nevertheless retrieval was often slow. Another drawback was that the particular program in use did not allow a document of more than one page to be scrolled. Instead each page was a separate document which had to be separately called up, adding to the delay. No doubt these problems can be overcome with suitable program adjustments but the first problem I mentioned is, I suspect, insuperable.

If you have a case in which you think that an electronic data base of documents and their presentation to the court in electronic form would be appropriate, it will be imperative to reach an early agreement with your opponents as to the compilation of the data base. I mean such things as the manner of identifying documents and their retrieval, as well, of course, as the documents that should go on the data base. If you cannot reach agreement at a very early stage, really before the task has begun, you should apply to the court for directions about it so that the ground rules are laid down early and you will all work on the same system to the same rules. You should resist the temptation to put every document on

the data base. Those that you do not realistically believe can be conveniently used in that form should not be. It may be harmless to put them on the data base, depending upon cost, but you should work on presenting those documents in hard copy.

Real Time Transcript

Real time transcript is comparatively new, although it has been in use for some years. It is not used much. I do not know why it is thought that it increases the pace of hearings. My experience of it is that it has the opposite effect. All that happens is that the transcript is made available almost immediately rather than an hour or so after the close of business for the day. That does not affect the pace with which witnesses are asked to answer questions or at which points are debated between parties and the court.

I have only one experience of real time transcript and that was as counsel. I have declined the opportunity to have a trial I conducted as a judge with real time transcript because of my experience in the earlier trial. I will tell you why. It was of some weeks' duration involving three parties so it was complicated but not inordinately so. What I noticed about the real time transcript was that everyone, senior and junior counsel for all parties, solicitors and judge all watched the screen as the transcript was produced. No-one looked at, or listened to, the witnesses. The pace of proceedings actually slowed a little because counsel who was asking questions would wait for the previous answer to appear on the screen before proceeding with the next question. Real time transcripting

involves a small delay. It is not quite instantaneous so that the examination and cross-examination was a little slower than usual.

This, however, is not my real objection.

Not many cases turn on a simple issue of credit between a few witnesses but in nearly every case in which oral evidence is called the impression made by a witness on the judge has some importance. It is important for the court to assess how a witness deals with searching questions or with points which might be awkward for his side. Even in witnesses of intelligence and experience, one sees indications which are of assistance in arriving at an overall assessment of the evidence in a case. This advantage is lost if one's eyes are glued to a computer screen. I think it is important for cross-examining counsel in particular and the judge to observe a witness when giving evidence. Real time transcript detracts from that process if one watches a screen closely. If one does not there is not, I think, much point in having it. I have spoken to a solicitor who gave evidence at a trial in Sydney in which there was real time transcript. His experience was the one I described. No one watched as he testified. No one looked his way. He found it a bit unnerving. Most people would.

The transcription service given by the State Reporting Bureau is a very good. The accuracy level is very high and, as I mentioned, transcripts are delivered within an hour or so of the court adjourning for the day. Sometimes the morning's transcript is available by the time court resumes in the afternoon. There are not many occasions on which one needs quicker service than this.

I speak, of course, of the Supreme Court. I do not know what the standard of transcription service in a Federal Court is.