FACILITATING AND REGULATING COMMERCE – THE COURT PROCESS

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I INTRODUCTION

My instructions for this paper were that it should consider the topic of Facilitating and Regulating Commerce from the perspective of the lawyer as litigator. It will be immediately recognised that written from an advocate's perspective this paper, by definition, will not be academic and, many will say, far from objective.

In a litigation context, the topic lends itself to consideration of how well commerce is served by our courts, and whether improvements in efficiency could be made. Efficiency is achieved by ensuring that the court system is structured to facilitate quality decision-making through effective procedures. One of Sir Ivor's contributions to perspectives in the law is his insistence on the importance of informing judicial decision making from other than exclusively legal sources. In particular, he has emphasized the links between the disciplines of economics and law and the importance of efficiency considerations in the administration of our laws.[1] In this paper, I propose to deal with some issues relating to efficiency in the court system and processes affecting commercial litigation.

That immediately raises the question whether what courts do matters in the broad context of facilitating and regulating commerce? In a direct sense, courts do not regulate or facilitate, certainly not in the way that the legislature and its agencies do. However, courts:

(1) Make decisions specific to particular parties which affect those parties' commercial dealings, usually retrospectively;

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1 For example, Rt Hon Sir Ivor Richardson "Law and Economics" (1998) 4 NZBLQ 64.

(2) Make decisions specific to particular parties which have a wider and sometimes dramatic effect on commercial dealings;[2]

(3) Make decisions that can significantly affect developing commercial practices;[3]

(4) Facilitate commerce because there is in existence a forum to determine disputes and associated processes to enforce obligations which have been so determined;

(5) Ultimately, because all legislation and regulation is subject to judicial interpretation, create referential parameters which not only litigators but other market participants must take account of in planning, costing, and undertaking their commercial activities.

Accordingly, what courts conclude is of significance. But of more significance to commerce is the predictive value of what courts may conclude in the future. It is the risk assessment arising from these predictions, which ultimately will be costed into commercial transactions. As Sir Ivor has noted, risk, inevitably has a cost and so: "… business puts a high value on certainty and obtaining the expeditious resolution of disputes …"[4] and commercial clients expect: "… law that is predictable and certain and that deters parties from engaging in opportunistic behaviour".[5]

To those values should be added the businessperson's expectation that the courts will consciously attempt to meet reasonable commercial expectations or, as Lord Goff has written regarding the Judge's role:[6]

> We are there to help businessmen, not to hinder them: we are there to give effect to their transactions, not to frustrate them: we are there to oil the wheels of commerce, not to put a spanner in the works, or even grit in the oil.

Grit in the oil has a cost, or as Sir Ivor has written: "… intrusion by the Courts on the operating of markets tends to add to the cost of goods and services", and the less efficient that intrusion the greater the added cost.[7]

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2 For example, the recent Court of Appeal decision in *Foodstuffs (Auckland) Ltd v Commerce Commission* [2002] NZLR 353 (CA), which threatened a number of completed mergers and which the legislature quickly moved to reverse.

3 For example, the recent conflicting decisions in respect to floating/fixed charges over book debts, see *Commissioner of Inland Revenue v Agnew* (2001) 20 NZTC 17,192 (PC); [2000] 1 NZLR 22 (CA); (1999) NZTC 15,159 (HC).

4 Rt Hon Sir Ivor Richardson "What Can Commercial Lawyers Expect of a Legal System?" (1998) 4 NZBLQ 128, 133.

5 Richardson "Commercial Lawyers", above, 129.

6 Rt Hon Sir Robert Goff, "Commercial Contracts and the Commercial Court" [1984] LMCLQ 382.

But there are other consequences. Sir Ivor has also drawn attention to the existence of a market for legal systems:[8]

> The search for favourable procedures also influences the choice of venue for litigation. The legal procedures of the jurisdiction, including the quality of lawyers and [j]udges, would influence forum selection as much as substantive law .... Commercial contracts with international participants almost as a matter of course specify where and how and under what law disputes are to be resolved. There, as we know, the United Kingdom is regarded as the leader in the market.

The United Kingdom is the leader, because it has a Commercial Court in London, which has earned international respect. That court has a specific charter to meet the needs of the commercial community, substantively, as well as procedurally. Substantively, because the concomitant of good process must be appropriate outcomes – decisions that satisfy legitimate commercial expectations.

New Zealand businesses enter into thousands of international transactions a year, which will contain a choice of forum clause. Many of those transactions are with parties whose bargaining strength would allow them to dictate that choice. It is important that the New Zealand court system maintains the integrity and confidence of the commercial community in its processes and outcomes, so that New Zealand businesses can argue with confidence that New Zealand is an appropriate legal forum for determining disputes arising out of the international commerce they engage in.

And there is a related issue. At least in Auckland, the majority of substantial commercial disputes, other than debt collecting, are now determined by alternative dispute forums – arbitrators and mediators. On many occasions there are justifiable reasons to prefer those processes. However, on other occasions, where there is a choice, often the factor which tips the choice towards arbitration is the ability of the parties to select the arbitrator. The preference is almost always for a legal arbitrator but the clinching factor in commercial disputes is the ability to select a person who has demonstrated experience and understanding in the commercial area. To the extent that significant commercial issues disappear off to arbitration, and therefore the determinations are private and not available to the wider commercial community to make future informed decisions, there is a significant loss of value to our legal system.

Accordingly, it is important from time to time to consider whether the New Zealand judicial system might more effectively perform its function in relation to commercial

7 Rt Hon Sir Ivor Richardson "Law and Economics" (1998) 4 NZBLQ 64.

8 Richardson "Commercial Lawyers", above, 132.

litigation. In addressing that subject in this paper, I acknowledge the absence of empirical research, an absence that Sir Ivor would point to with regret,[9] and instead my reliance on thirty plus years in litigation, and innumerable conversations with other litigators and with commercial clients.

II QUALITY

The most important measure of the quality of the court's decision making is the evident appropriateness of any decision. I have no doubt at all that all of our Judges strive conscientiously to achieve that outcome. I am less certain that the structuring of our judicial system and certain of its processes sufficiently assist in obtaining the best outcome. I acknowledge immediately the inherent uncertainties that exist in any judicial process, with the need often to resolve the irreconcilable in respect to the factual issues. However, the inevitability of some uncertainty is no justification for compounding the risk.

I have said that the most important measure of quality is the evident appropriateness of a decision. There are two related aspects. The first is that the reasoning should be fully exposed in the decision and that it should be persuasive. If choices have been made they should be identified and justified. It is not good enough to say, "I prefer", without saying why.[10] Secondly, to be persuasive the reasons must be recognised by the parties to the litigation as relevant and consistent with the commercial context, which will importantly include commercial practice and expectation. A decision which meets those criteria of evident appropriateness, is more likely to be accepted by the parties and avoid the continued uncertainty and added cost of appeal. It is also likely to be an influence in increasing the confidence of the commercial community in the court system and thereby moderating the risk and consequential cost implicit in commercial transacting.

The core requirements to facilitate quality decision-making are not difficult to list. In my opinion, they are:

(1) Having an appropriately qualified decision maker;

(2) Working with the best available information;

(3) Working within an efficient system.

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9 Richardson "Law and Economics", above.

10 The most comprehensive discussion that I am aware of is in the paper by Hon Robert Fisher "New Zealand Legal Method: Influences and Consequences" in Rick Bigwood (ed) *Legal Method in New Zealand* (Butterworths, Wellington, 2001).

Real life and scarce resources always impose some limitations on any such ideals, but in my view there are improvements that can be effected by better focusing our present resources.

III THE DECISION MAKER

I have no quarrel at all with the calibre of our Judges. They are without exception competent, conscientious, and considerate. However, each Judge brings a different set of skills and experience to the bench. What I do question is our present system of case allocation, which purports to randomly allocate cases without specific regard to the individual skills and experience of the Judge.[11] In my opinion, that system can be unfair to Judges and, more importantly, to litigants.

It is explicit in my view that a person who has experience in a particular area is more likely, more quickly, and more readily to get to an answer which is consonant with the law and expectations existing in that area than a person with limited or no experience.[12] What must be recognised is that choices inevitably have to be made in a disputed case, and ultimately some of those choices will depend upon the intuitive reaction of the Judge. Unless that intuition is soundly grounded it will be a matter of chance whether the conclusion is correct.

What then should be done to improve the quality of and confidence in the process? In my view, this requires increased specialisation at first instance.[13] Continuing the present process is an added cost to society in whichever area of the law that inefficiency is occurring. This issue of specialisation is significantly more acute now than in the decades past. Obviously in expressing that opinion, I am taking the position that commercial issues are different from family issues, are different from criminal issues, are different from resource management issues, and so on. None is more or less important than the other, but they are different. Indeed we have partially recognised this in providing for specialised jurisdictions for family, employment, and resource management.

My impression is that, at the present time, it is in the commercial area that the risk and perception of inconsistency is at its greatest. Commercial transactions are more sophisticated, more complex, and more specialised than ever before. It is odd, and in my view an anachronism, that the demands that drive specialisation in commercial law at the

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11 I appreciate that on occasions, Executive Judges appear to have exercised influence to ensure that particularly difficult cases ended up in safe hands. Commerce has reason to be grateful for that, but the system should be explicit and open to the parties.

12 After all, there is presumably a similar rationale in having different referees for netball, rugby, and soccer.

13 There is not the same issue at the appellate level where there are checks and balances.

practice level, are expected to disappear at the judicial level.[14] In fact they do not, as is evidenced by criticism of judicial decision-making in commercial cases, and the preference that the market is demonstrating for arbitration over litigation.

In seeking to remedy this situation, I am not advocating that the New Zealand solution should be the establishment of a separate Commercial Court, as operates so successfully and profitably in London. For some time, there has been a Commercial List in Auckland. Judges are appointed to the Commercial List[15] by reason of their commercial experience. It was, when established, innovative for New Zealand (but not for other jurisdictions) and it had a positive impact in speeding the disposition of commercial cases. However, while the Commercial List Judges determine the procedural and interlocutory decisions during the progress of the case for trial, the cases fall back into the general list for allocation of a Judge for the substantive hearing.[16] All commercial counsel of my acquaintance regard that as the fundamental weakness of the Commercial List.

Now that judicial management of the procedural steps in most proceedings is an accepted part of the court process, much of the management advantage of the Commercial List has been lost. The opportunity should now be taken to correct the omission of the past and resuscitate the Commercial List by permitting Commercial List Judges to determine which cases brought in that list are of sufficient commercial significance to be substantively adjudicated upon by a Commercial List Judge. Commercial litigants would then have the choice of bringing their cases on the Commercial List when they believed there was the need for specialist expertise or of leaving their cases in the general list. By giving that choice one of the principal disadvantages of court litigation compared to arbitration will be corrected.

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14 Professor Sealy has written of the consequences of the wrong type of specialization. As he points out it was an accident of history that led to company cases being assigned to the courts of Chancery in England. The seminal cases in company law were therefore decided by equity Judges whose experience was with trusts and settlements, deceased estates, conveyances of real property, mortgages and leases, and deeds. The consequence was the adoption of trust principles by company law, for example in the nature of the duties imposed on company directors. As Professor Sealy comments, the experiences of those Judges was "a world away from the cut and thrust of commerce and the risks and rapid fluctuations of the marketplace" and probably not "the best environment in which to nurture and develop the legal rules governing the business corporation" – Len Sealy *Company Law and Commercial Reality* (Sweet & Maxwell, London, 1984).

15 I am not suggesting that other High Court Judges do not have experience in commercial litigation – they do and produce many important decisions; see, for example, the recent decision of Justice Potter in *Citic v Fletcher Challenge Forests Industries Ltd* (1 March 2002) High Court, Auckland CP 583-SW/99. My concern is with the consequences of the randomness of allocation of cases and the lack of confidence that this engenders in the process.

16 There are minor exceptions, for example a Commercial List Judge can determine a question of the construction of a contract – High Court Rules, Rule 446P.

There would be other important consequences of such a change:

(1) Obviously, the specialist expertise of the Commercial List Judges would increase with exposure to a regular diet of the more significant commercial cases;

(2) It would create a controlled environment in which those Judges could experiment with alternative and prospectively more efficient procedures to achieve the prompt resolution sought by the commercial community; and

(3) It would create a confined jurisdiction, which would be more amenable to empirical research than is the general jurisdiction of the High Court at present.

Above all, this reform, modest as it is, would improve the rigour of the process and the quality of the outcome of commercial litigation. Even if it did nothing else, the allocation of Judges with commercial law experience would increase the confidence of the commercial community in the judicial process. That is a value in itself, in maintaining respect for the rule of law, stemming the outflow of commercial litigation to alternative dispute resolution, which in itself undermines the rule of law, and moderating the risk assessment, and hence cost of unnecessary uncertainty created by the present system. In short, it would improve the performance of the courts' role in facilitating and regulating commerce.

IV BEST INFORMATION

It has often been said by Judges, here and abroad, that in determining commercial cases, courts should seek to implement the expectations of commercial parties. In order to meet such an objective, it is first necessary for a Judge to understand what are the reasonable expectations of commercial parties. As I have already suggested a court is unlikely to be able to do that effectively if the particular Judge has limited experience or familiarity with the commercial world. But even for Judges that do, or believe that they do, there are pitfalls. One is that commercial practices and expectations change and evolve, these days increasingly rapidly. It does not take too many years on the bench for a Judge to have a tenuous contact with what commercial practice is; again a situation that can in part be remedied by a specialist Commercial List division being refreshed by regular contact with commercial cases. And it has to be recognised that there is also a difference between experience with commercial law and experience with actual commercial practice.

What these observations point to is the desirability of having adequate evidence before the court of commercial practice and expectations, so that a Judge is not left solely to the devices of his or her intuition. The consequences of abandoning a Judge in that way are

explored in a recent article by John Gava of the University of Adelaide.[17] Gava compared Justice Kirby's exemplary statements in a number of cases as to why Judges needed to exercise restraint in making assumptions in commercial litigation about matters they know little, and his willingness in other commercial cases to make exactly such assumptions. As Gava points out, in the cases he instances there was no evidential basis for the assumptions that were made. Accordingly, Justice Kirby could not be sure that his intuitive assessments were correct. On the other hand, if he did not make an intuitive judgment, then he would be unable to factor in commercial practice or expectation.

The need for Judges to resort to intuitive assessments of commercial "reality" highlights a deficiency, not so much of the courts, but of us litigators and commercial litigants. As Sir Ivor has noted in a related context, the absence of empirical evidence to support economic analysis is an obstacle to the courts making fully informed decisions where public interest assessments are required.[18] In my experience, and as the Gava article indicates, there is often a similar absence of evidence that would establish for the court the context of commercial practice and expectation of which the decision should take account.

In part, that may be the result, as Sir Ivor has also noted, of a lack of imagination on the part of litigators and in part the reluctance of commercial parties to accept the cost of producing evidence that is not specifically targeted to their immediate objectives.[19] However, in my experience, that lack of imagination or reluctance does have some foundation in a not altogether welcoming attitude by some Judges to receiving evidence about matters where they clearly believe that their intuition is sufficient. This is most often seen in respect to economic evidence.

One of the difficulties with economic evidence is that many of its principles reflect assumptions of rationality and so, once stated by a competent economic witness, may seem obvious. The judicial response is then "why do I have to listen to this evidence, I already know this". I am not certain that this judicial confidence is always securely based. There is a human tendency for the individual intuitive response to the immediate facts, particularly where the individual merits are strong, to overwhelm objective principle. I certainly find it useful to be reminded of principle and competent economic evidence does that.

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17 John Gava "The Perils of Judicial Activism: The Contracts Jurisprudence of Justice Michael Kirby" (1999) 15 JCL 156.

18 Rt Hon Sir Ivor Richardson "Law and Economics" (1998) 4 NZBLQ 64.

19 Richardson, "Law and Economics" above, 70. Sir Ivor has frequently written and spoken of the desirability of the courts having economic evidence before it, and has pointed out that few of the senior echelon of Judges or litigators have much background in economics.

Accordingly, there needs to be a mutual recognition – by litigators, commercial litigants, and Judges – that in the difficult case there is a value in expert evidence of commercial practice and expectations or, where appropriate, of economic evidence of the cost and benefits of particular outcomes. Of course, a Judge should not be subservient to such evidence but he or she should certainly be sensitive to the fallibility of his or her intuitive assessment.

The concern that I express about sensitivity can be illustrated by the Court of Appeal decision in *Benjamin Developments v Jones*,[20] which is, in my opinion, an example of the right sort of evidence being called, with the wrong answer resulting. There the core issue was whether the requirement of a developer to deliver to an end purchaser a building rented at a certain minimum rental could be satisfied by a rental obtained by providing inducements to the tenants or had to be a "genuine" rental. Evidence was called from a number of witnesses active in the property development area that a rental stipulation of that nature would require a "genuine" rent because of the implications that a non-market, ie induced rent, would have for the economic value of the investment. At first instance, Henry J accepted this evidence. However, the Court of Appeal preferred its own view of what the term "rent" meant on the wording of the contract.

The case illustrates that the Judges that made up that particular Court of Appeal were not prepared to subsume their view to that of market participants. In my opinion, they were wrong. Whatever expertise the members of that court had in commercial law is not the same as the expertise or experience that the market participants had in the actual market place. The contract was entered into in the context of the then existing commercial property market place and, absent rejecting the witnesses evidence as not properly based, that context or matrix should have been decisive. Given the objective nature of interpretation, the nature and expectations of commercial practice evidenced by participants in that particular commercial market place is likely to be better evidence of the matrix within which the parties will have contracted than judicial assumptions.

Indeed, for a time *Benjamin Developments* came to be cited by the Court of Appeal in judgments for a proposition that if the words are clear and unambiguous then the context in which they were used, ie the matrix, cannot be used to create an ambiguity.[21] The difficulty about that as a proposition is that context always determines the meaning with which words are used, albeit that in many situations the context is commonplace and so no issue arises. A Judge in saying that words are clear and unambiguous is implicitly judging those words within that Judge's perception of the context. In the *Benjamin Developments*

20 *Benjamin Developments v Jones* [1994] 3 NZLR 189 (CA).

21 See, for example, *National Provident Fund v Shortland Securities Ltd* [1996] 1 NZLR 45, 50-51 (CA).

case, the Judges preferred "their" context to the "market" context to which the evidence was directed. That approach seems to me to be fraught with danger.[22]

The point has now been made more eloquently and authoritatively by Lord Hoffmann, in *Investors Compensation Scheme Limited v West Bromich Building Society*[23] when he said:

> The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean … if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require Judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in … *The Antaios* [1984] 3 All ER 229, 233:
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>> … if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.

And, I would add, business commonsense is best established by evidence from the market.

I recognise that difficulties can arise in adducing evidence directed towards principles, rather than the specific facts of an instant case. The evidence given in *Benjamin Developments* was admissible because it was the evidence of practical participants in the market place who could be cross-examined on their experience, knowledge, and so forth. It is a basic principle of the admission of expert evidence that the expert gives an opinion based on stated facts or assumptions.[24] That then allows the base reasons for the opinion to be challenged.

That requirement can be difficult to meet explicitly in respect to economic evidence built upon general economic theory. Economic evidence will build a conceptual framework within which to test choices of either liability or remedy. However, it is likely that the witness will be drawing upon the writings of others rather than any particular factual foundation. While it may require some bending of the rules of evidence Judges

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22 At the time when this approach prevailed I was comforted by Professor David McLauchlan's article "The Plain Meaning of Contract Interpretation" (1996) 2 NZBLQ 80.

23 *Investors Compensation Scheme Limited v West Bromich Building Society* [1998] 1 All ER 98, 114-115 (HL) Lord Hoffmann.

24 See for a recent review of the principles *Makita (Australia) Ltd v Sprowles* [2001] NSWLR 305 (CA).

should be willing to receive economic evidence of that nature for the value of the insights that it may provide, at least where the body of writing has a respectable provenance.[25]

V EFFICIENCY

So far I have been concerned with structural and attitudinal issues that can affect the efficiency of the courts in commercial litigation. There are, additionally, some procedural changes which, within the manageable confines of the Commercial List, could be tried to cut time and costs in commercial litigation.

The first is in respect to discovery. With the advent of modern technology that seems to encourage every relevant and irrelevant thought to be converted into writing or email and the multiplying of communications and copies, the burden of the discovery process has become in many commercial cases enormously expensive and time consuming. As a generalisation, it is unarguable that in most cases the burden has vastly exceeded the value of the exercise. All litigators can tell stories of vast volumes of discovery reduced to vast volumes of agreed bundles of documents reduced at the hearing to a very small number of documents that are ever referred to. As litigators, we have all been guilty on one or more occasions.

It has become a common practice in commercial arbitrations to manage this problem by requiring the claimant to file with its claim, the documents with which it intends to support the claim. Similarly the respondent is required to file supporting documents with its defence. Further discovery requires an application by a party, specifying with some particularity the documents for which discovery is sought, and justifying the need. Experienced commercial arbitrators are restrictive in their approach to such applications.

The obvious point of entry for trying out such a procedure would be the revitalized Commercial List. If the procedure proves effective there, as I believe it would, then its use may be generalised.[26]

Again, in the interests of cutting costs, delay, and the unnecessary volume of written material that now bedevils litigation, I would suggest that in appropriate cases the Commercial List experiment also with abandoning a full written statement of evidence procedure and instead, accept outline statements of evidence as in England. I am not aware of any empirical study that ever justified the alleged benefits of full text written

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25 Richard Posner raises this question in his *The Economic Analysis of the Law* (4 ed, Little Brown, Boston, 1992) 593.

26 The Rules Committee are presently considering proposals to amend the rules relating to discovery.

statements of evidence, which the High Court Rules now make the norm.[27] I am certain from my experience that their preparation has in many cases added enormously to the cost of litigation without nearly commensurate benefit. Because their content is so difficult to control in terms of rules of relevance, hearsay and the like, they have tended to substantially expand the scope of the evidence, challenge, and enquiry before the courts. The very discipline of having to lead oral evidence inevitably will confine its scope and length, a discipline absent with written briefs. Oral evidence also permits a credible witness to project that credibility in a way that written evidence or well planned cross-examination will not permit.

VI CONCLUSION

The emphasis in this brief paper has been on improvements to the efficiency of the judicial process in the commercial context. Efficiency is not the only consideration in judicial decision-making, other values have to be taken into account, and a balancing of values is often required. However, the suggestions which I have made would not, in my view, pre-empt or compromise any required balancing of values but instead would improve a process which, to its detriment, is increasingly avoided by commercial litigants.

27 High Court Rules, Rule 441A.