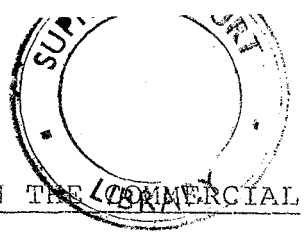

CONDUCT OF LENGTHY AND COMPLEX MATTERS IN THE COMMERCIAL LIST

by Mr Justice Andrew Rogers

It is desirable that I point out at the outset that the conduct of lengthy and complex matters, whether in the general list, or in the commercial list, or indeed even in criminal cases, have a number of features in common. Instances of long and complex cases, otherwise than in the commercial list, which readily come to mind are the trial taking over 84 hearing days before Mr. Justice Fisher where a former patient sued a group of psychiatrists and a hospital in respect of the treatment accorded to him. Mr. Justice Reynolds has not yet given judgment in what was essentially a building case concerning the allegedly negligent and deficient construction of a cool room. That trial has gone for some months. In the criminal field the Court of Criminal Appeal has recently concluded the hearing of an appeal from Mr. Justice Maxwell. The trial of some Croatians who were charged with respect to some activity they conducted on Australian soil took almost a year . Whilst the Commercial List has certain features which facilitate the relatively expeditious hearing of what would otherwise be lengthy and what are in any event complex matters there are a number of problems of common application.

The answer to the question of what is a lengthy case is self evident. What is a complex case may be more debatable. Without entering into sterile discussion on

this topic there are a number of factors present in any case which may be described as a complex case.

Firstly such a case will involve the processing of tremendous amounts of information. Initally the information will be in documentary form and will involve the location of the documents, their organisation into some coherent form and the extraction of the relevant information from them. There is too ready a tendency on the part of solicitors to content themselves by photostating every conceivable document that may be of the remotest relevance and then hope that out of this undigestable mass of material will be extracted the information for the conduct of the trial. Unfortunately this tendency does not stop with solicitors. In Paal Wilson & Co. A/S v Partenreederei Hannah Blumenthal 1982 1 A.E.R. 197 @ 207 the trial Judge Mr. Justice Staughton expressed the same view when he said "Before leaving the case I must observe that each party has put before the Court a vast pile of documents of which only a tiny proportion seemed of any relevance. I appreciate that in these days it is cheaper, quicker and easier to photocopy everything then to sit down and work out what documents are relevant. If the case goes further I recommend that consideration be given to some extensive pruning".

Having then gathered the written material that seems relevant, at the time of inception of litigation, it seems to me that consideration should be given to utilization of those technological aids which provide the only means of combating the difficulties confronting the legal representatives seeking to mount and contest a lengthy and

complex case. In the United States computers are now in regular use and there are off the shelf programs for use in litigation. This is not the place to discuss the varying approaches that there may be to software programs for establishing a data base for the purposes of litigation. I will content myself by pointing out that in Australia also endeavours have been made to utilize computers in litigation. A somewhat elementary method has been utilized in the Greek conspiracy trial where the whole of the transcript has been recorded on computer. This if I may say so is a rather unsophisticated approach to the problem. It does mean however that on command the computer is able to give all the references that appear in the transcript to say the 14th of June 1980. Again it can give all the references that relate to an applicant for social security benefit called Smith. When I say it is unsophisticated it is obvious that a great many instances will occur where the reference to Smith is so fleeting as to be quite irrelevant for any useful purpose. Both sides utilized computers in the arbitration between Qantas and Dillingham relating to the erection of the new Qantas Centre. Extremely sophisticated programs have been utilized by the Royal Commission into Painters and Dockers where Counsel assisting the Commission has devised the programs he required in order to further the work of the Commission. Instead of being a mere data retrieval base the computer there performs intelligent functions. Thus one of the problems facing the Commission was the use of aliases by persons the Commission was interested in. The one person may have used three or four aliases and the reference to Smith in document A may have been a reference

to the same person who appeared under the name of Robinson in document B. Every bit of information that was available concerning both these gentlemen such as the date of their birth, date of their marriage, the number of children they have, the names of the children, the birthdays of the children, the times they applied for workers compensation the treating doctor and the name of their bank were fed into a computer which then worked out the points of resemblance in order to arrive at a conclusion whether Smith and Robinson were one and the same person. It seems to me that in any really complex litigation there is a great deal of scope for the creative utilization of a computer data base.

A second feature of a complex case may very likely be that, in addition to there being a tremendous amount of information, some or most of it may be of a complex technical nature. In the commercial list at the present time there are three long cases alleging negligence against auditors of company structures over a period of a number of years. One assumes that there will be some considerable debate about auditing principles. In the trial heard by Fisher J. there was a great deal of evidence relating to psychiatric practices. In the case before Reynolds J. there was a great deal of technical evidence concerning building practices. At an early stage, an assessment should be made, by those responsible for the conduct of the proposed litigation, as to whether it would be of advantage to seek to segregate certain discrete issues posing purely technical problems and seek an order of the Court under Section 15 of the Arbitration Act

remitting those issues to arbitration. That course may be followed, by having an arbitration prior to the commencement of the hearing of the factual and legal issues to be determined by the Court, or at some stage during the trial, or perhaps when the factual and legal issues have been determined otherwise than for the technical matters. Alternatively to arbitration there is open the avenue of the Court appointed expert. That has never been a popular course in Australia and following the decision of the High Court in Minnesota Mining and Manufacturing Co. v Beiersdorf (Aust) Limited 144 CLR 253 it is unlikely to become more popular. The drawback to the utilization of a Court appointed expert is that neither party is bound by his views, he may be cross examined and experts may be called in rebuttal of the views expressed by the Court appointed expert. One view is that all that may be achieved is the addition of yet another expert to the range of expert evidence provided.

It is questionable whether there is another alternative available to be utilized. That possible alternative course is having the trial Judge sit with the assistance of an assessor or assessors. This last course seems to me to be the most useful. The judge would have assistance at the interlocutory stages in the definition of technical issues and in determining the most desireable method of attacking them. He could be educated by the assessor in the technical subject under consideration rather than attempt to glean knowledge from experts who usually display some degree of partisanship. The subject of the use of assessors is itself a complex and very important field deserving of a separate examination.

The legal representatives of the plaintiff having got to the point of locating, organising and digesting the factual material available and having considered the nature of the issues posed are required even at that early stage of the litigation to give consideration to the legal theories involved in the proposed action. By the very nature of things more often than not these also will be of a somewhat involved nature.

At this point, the legal advisers are armed with as much of the factual and legal information as is available and come to the first of many cross roads to be faced. In accordance with orthodox procedure, a statement of claim may be drafted. More likely than not, that, will evoke a request for particulars of some considerable dimensions. In the fullness of time that is likely to be followed by interrogatories. Not only is there considerable labour involved in the preparation of a statement of claim in an action of the kind that we are considering, but the answering of particulars is likely to be a mammoth undertaking. Thus in Gollin Holdings Limited v Adcock 1981 1 NSW LR 691, the solicitors for the defendants delivered themselves of a request for particulars running into 56 pages divided into 412 questions which in turn were subdivided into a number of other queries. The question is whether there is a viable alternative to orthodox procedure where it is clear to all concerned that the parties will be engaged in lengthy and complex litigation. The matter has long been the subject of examination both by members of the judiciary and members of the profession in the United States. The impetus to such examination

came from anti trust actions which have involved literally years of preparation and millions of documents. Any attempt to conduct such litigation in accordance with the ordinary procedures of the Court would create a nightmare of jumbled thoughts and documents.

The procedure which has been devised, and which I adopted in Gollin (Supra),is the filing of narrative pleadings. Essentially it involves the plaintiff deserting all the accepted dictates of pleading, in that the narrative will detail the evidentiary facts which will result in the establishing of a matrix of facts whence the legal conclusions desired by the plaintiff are hoped to be drawn. The evident advantages of this procedure are, that firstly, it exposes in full the evidentiary material then in the plaintiff's possession which the plaintiff would at that point adduce. It should obviate the need for any particulars or interrogatories. To put it colloquially the plaintiff has nothing left in the locker. Secondly, it provides a frame work against which the defendant's admissions and denials may be signified. The parties will therefore know, after the defendant has filed its narrative statement of defence, not only that they are at issue on a particular subject matter, but that whilst certain surrounding circumstances are admitted there will be an evidentiary contest as to fairly precisely delineated subjects. Thirdly, the parties will be able to focus more accurately and decisively on the points which will emerge as major points of contest.

It will be appreciated, that I made a point of emphasising, that the narrative pleadings can only, by the very nature of things, refer to the material then within the knowledge of the party drawing the document. Certainly so far as the plaintiff is concerned it will not have had discovery at the point when the document is delivered or at least not complete discovery. Because of the breadth of the material to be covered, it may be convenient to allow discovery to proceed in waves rather than to await a final delimitation of issues. By discovery in waves is meant, discovery of documents as issues surface. No general order for discovery should ever be made in litigation of the kind under consideration.

The narrative statement of defence will in similar fashion condescend to deal with evidence. Admissions require no special mention. A statement that the defendant "does not know and cannot admit" should not be allowed without verification as to the enquiries which have been made and which still left the defendant bereft of knowledge.

It is well within the realms of likelihood, in any truly complex litigation, that a second and perhaps even more stages of narrative pleadings may be required after discovery has been completed so that the parties may incorporate therein the additional information obtained by the process of discovery. In the recently terminated anti trust action brought by the United States against the giant American Telephone Company four successive sets of narrative pleadings were called for by the Judge's pre trial orders. It is interesting to note, the different

standards which were applied to amendments to the pleadings at the successive stages. Whilst there was no difficulty whatever in making amendments by the second set of narrative pleadings, a strong case had to be made out for allowing amendment by the fourth set.

I am bound to say that in Gollin (Supra), contrary to my initial expectations, I have found it necessary to permit the defendants to administer interrogatories on a very restricted number of subjects. I would think that as both Judges and Counsel require greater management skills in the preparation of complex matters for litigation, the need for interrogatories should disappear.

Once the pleadings are completed as is discovery, the parties will be required to file two further types of documents. The first will be, a document setting out the findings of fact which will be contended for by the party filing the same. Not only will the party be required to specify the findings of facts sought, but also indicate the basis on which it will be submitted that the party is entitled to such a finding. The entitlement may be founded variously on an admission in the narrative pleadings, a document obtained on discovery, an expert's report, or oral evidence to be adduced. In the latter,event the name ofthe witness, who it is hoped, will give the relevant evidentiary material should be given. The one possibility that the document cannot cater for is the situation where it is hoped to elicit the necessary information in cross examination.

The other document which will be called for, is one setting out the propositions of law which will be contended for, in order to support the case of the party filing the document in question. The necessary authorities which will be relied upon to support the proposition contended for will require to be cited.

Preparations of this kind will achieve three objectives. Firstly, they should obviate the need for amendments at the hearing an almost invariable feature of trials at the present time. Secondly, they should ensure, that there can be no surprise of either party to the litigation either as to any proposition of law or any question of fact. Thirdly, this preparation, will enable the trial judge to become seized of the issues at an early stage and therefore enable him to follow the progress of the matter on a more satisfactory basis. Also it will enable him to conduct directions hearings aimed at further reducing the area of contentious issues between the parties.

The parties themselves, of course, have a crucial role to play in enabling the Court to discharge its statutory duty under section 56 (3) of the Supreme Court Act in arriving at a speedy determination of the real questions between the parties. The width of discretion conferred on a judge sitting in the commercial list by that provision has been recently emphasised by the Court of Appeal in Stanley Hill v Kool (unreported 7 May 1982).

One of the relatively little utilized provisions of the Act, which yields to much creative thinking on the

part of practitioners, is Section 82 of the Act, which provides in sub-section 1(a) that, "the Court may at any stage of the proceedings dispense with the rules of evidence for proving any matter which is not bona fide in dispute, also with such rules as might cause expense and delay arising from any commission to take evidence or arising otherwise; and, without limiting the generality of this power, dispense with the proof of handwriting, documents, the identity of the parties or parcels, or of authority". Thus insofar as there may be matters not admitted by the narrative statement of defence or for that matter reply, the opposing party may, perhaps with the assistance of documents obtained on discovery, demonstrate the absence of any bona fide dispute and obtain an appropriate order. Again, the general circumstances or history of the matter may show that although there is some room for argument the particular matter cannot be the subject of serious contention. In dispensing with the rules of evidence the judge may accept some quite informal proof and throw on the opposing party the burden of showing the non existence of some fact or other which otherwise stands proved by a relatively informal method.

Another aspect, which is thrown up for consideration, by such means of preparation, is the isolation of issues which, if decided one way, might effectively dispose of the litigation. One always has to be careful in these matters, because a successful appeal may do away with the apparent time saving to be obtained, but, particularly in matters of the nature with which we are concerned, where a lengthy hearing might otherwise obtain, considerations of appeals do not weigh quite so heavily against the determination of points by way of separate issues.

There may then be matters which whilst the subject of dispute are not matters where credit is involved. In those circumstances a verified statement may save a great deal of time in the taking of oral evidence.

Compulsory conferences between experts, perhaps even with the participation of the Judge, may again reduce the area of controversy and eliminate points which are either on the fringes of the argument or are merely the product of partisan thinking. Expert evidence presents problems quite peculiar to it. There is of course the problem of understanding, which I have already adverted to, when making a reference to the possibility of assessors and/or Court appointed experts. Beyond that however there are two very real questions which need to be faced. Firstly, should a party seek an order limiting the number of experts to be called on each side? This can be particularly important where the opposing parties are not well matched financially. By the very nature of things no poor man or company can ever embark on lengthy and complex litigation. Nonetheless there may be a wide disparity between the parties' respective financial resources. The English Rules specifically contemplate limiting numbers of experts. I know of no reason why in exercise of his powers under section 56(3) a Judge should not make such an order in appropriate cases.

The other problem, which I have noticed, arises from orders which I make regularly, requiring exchange of expert's reports. These reports are almost invariably drafted by the experts themselves without any legal input. The result is that they are inadmissible in form and ill

suited to do more than outline the areas of disagreement. To give a ready example, an expert may say that, having looked at the documentation with which he had been supplied, he is of the opinion that a certain state of affairs obtains in relation to which he then proceeds to express an opinion. That leaves the opposing party guessing as to just what documents are the ones which bring the expert to the conclusion as to the existence of the stated facts. In the result, quite apart from the inadmissability of the statement that, X or Y facts existed, which could be readily cured by the expert making an assumption to that effect, the value of the opinion is lost by the lack of definition. Bearing in mind the likelihood, that the matters of expertise are likely to be of the utmost importance, in trials of the kind under consideration, a very much greater role needs to be played by the legal advisers in the preparation of expert's reports, which, I regret to say will require the parties and their counsel to become acquainted with the technicalities involved at a much earlier stage than is the present practice. This will no doubt require an undertaking from counsel engaged in the matter that they will not accept an appointment to the bench prior to the conclusion of the hearing. A concern has been expressed that if the suggested procedure is followed, the expert will be exposed to criticism on the ground that his opinion has been moulded by the legal advisers. I can understand the force of the comment but at the same time I can see ready ways of avoiding the problem. If the expert were to express his opinion in his own way in the first instance, it will serve as a record of his views at a time prior to discussions with Counsel and Solicitors.

One area of mixed fact and expertise, which in my experience, yields much agreement, by discussion out of Court, is in the area of quantum. Even if it be necessary to isolate points of principle, for determination by the Judge, to a very large extent commercial people can be left to work out the financial consequences of the Court's rulings. Again perhaps there may be a couple of major points of factual dispute requiring determination before parties may be left to their own figuring. The adversaries should be astute in identifying matters of principle and/or major matters of factual dispute a resolution of which would yield this happy result. In my view, it is most important that both principals involved in the litigation should be present in Court at all important Directions hearings.

In some cases it may be of assistance to have prepared a document in the nature of a Scott Schedule For example, in an action involving allegations of say, a tractor not being of a merchantable quality, details of the competing contentions as to alleged defects and the cost of rectifying then will be clearly brought out in such a document.

A great deal of time is wasted, particularly where a number of parties are involved, in the tender of documents Even where a bundle of documents is filed prior to the hearing, time is taken by Counsel looking at the particular document at the moment of tender. The preferable course in this class of action is to require parties to tabulate and mark their respective Exhibits. Objections

to documents should be argued prior to the calling of oral evidence so that a witnesse's time is not spent sitting in the box listening to the debate on admissability.

The actual hearing will no doubt take the usual form. By "usual", I mean the method customarily employed by the trial Judge in question. Whether an action be lengthy and complex, or relatively short, consideration must be given to control of the cross examination. The only difference is that the need is much more apparent in a long case.

What I have said does raise questions about the role of the Judge. Of necessity he will be a much more active participant in the organisation and management of the proceedings than has been the general practice in the past. In my view this is inevitable. I do acknowledge that great care is called for from the Judge to ensure that his impartiality in the contest not only continues to obtain but is so perceived by the parties.

Another feature of litigation along the lines suggested, is that the proceedings resemble the inquisitorial rather than adversary method of litigation. A great deal of the Judge's work, including acquisition and assimilation of information, will take place out of Court. So long as, care is taken to inform the parties of the imformation coming to the attention of the Judge as for example from a possible assessor, and they are given a full opportunity to address the Judge and persuade him to their respective points of view, I see no intrinsic objection in this.

At the conclusion of the evidence the parties should be called upon to provide the Judge with full and detailed written submissions on all issues including credibility. The original statements as to findings of facts and law desired by the respective parties will serve as useful skeletons. Of course it will be essential that there be oral argument during which the Judge may test his tentative views in debate with Counsel. My point is simply that the written material is the most effective, and time and cost effective way of transmitting information to the tribunal.

It will be obvious from what I have said, that proceeding along these lines will be expensive indeed. The proceedings will indeed have to be lengthy and complex to justify the expenditure that will be thus called for. It has been pointed to me that the basic structure of the Costs Rules does not allow for recovery by a successful party of any reasonable proportion of the costs required by the procedures I have outlined. This is a valid criticism, which however, I think can be met by an appropriate special order.

It is not putting it too high to say that the conduct of a long and complex case is an art in which both the judges and the profession will profit from careful preparation.