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NEW ZEALAND LAW SOCIETY

LAW CONFERENCE

ROTORUA, NEW ZEALAND

WEDNESDAY 25 APRIL 1984

COURTS ARE FAILING THE BUSINESS COMMUNITY

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The Hon Justice M D Kirby CMG *
Chairman of the Australian Law Reform Commission

CER AND OSCAR WILDE

Oscar Wilde once apologised for writing a long letter. He did not have time, he said, to write a short one. Well, I have written both a long paper and this short oral introduction.** I am keeping the long paper as quiet as possible. It raises once again the suggestion that the CER Agreement between Australia and New Zealand will and should lead on not only to closer economic relations but closer political relations between our two countries. The last time I suggested this to a conference in Auckland in July 1983, I was denounced by Sir Robert Muldoon as 'a comic'. The editorial comment on my suggested that revival of serious discussion about a trans-Tasman federation is collected in my paper. It was generally unfavourable on both sides of the Tasman. But editors have been wrong in the past. The free press includes the freedom to fall into foolish error.

Today I propose to take up four themes:

- First, the CER Agreement will increase trade between our two countries by at least a quarter in each direction. Inevitably, that will mean more dispute and hence more work for the law, lawyers and the courts.
- Secondly, this development will inevitably lead to a search for a neutral forum in which to resolve disputes involving both Australian and New Zealand businesses. In my paper, I explore the possibilities. But one by one they failed to pass muster. The Privy Council, the one court we share, is an imperial relic and on the way out, in Australia at least. A regional Privy Council would involve turning the clock back. Appeals to the High Court of Australia, as in the case of Nauru, are out of the question for a country like New Zealand.

A trans-Tasman commercial court or arbitration tribunal might be possible. But under the Australian Constitution prerogative writ review by our High Court could not be excluded. So most important disputes would end up in the Australian court.

- Thirdly, this logic led me once again to revive, amongst my fellow lawyers, the suggestion of serious thought about an appropriate trans-Tasman federation. Of course such a federation would not be created just to solve a few lawyers' problems about a commercial court. But we are two English-speaking cultures, left in the wake of Empire. The Fleet has gone. Unless the opportunity is seized, we may miss it forever. Developments are occurring in both our countries that suggest that it may, in the words of the song, be now or never.
- Fourthly, if the bold ideas of federation are to be put aside, I suggest a number of initiatives that should be taken to improve the service given by courts and lawyers to the business community. These suggestions include improvement of the court system. But also improvements outside the courts in the alternative mechanisms for dispute resolution that may be quicker, cheaper and have other advantages, attractive to business.

A COMMERCIAL COURT FOR NEW ZEALAND?

My detailed paper builds up to a crescendo of the seemingly indisputable arguments by Mr Ted Thomas QC in favour of the establishment in New Zealand of a commercial list in the High Court of New Zealand. This could rival the facilities now being increasingly offered in Sydney and Melbourne and to some extent in the Federal Court of Australia. Unless New Zealand is willing to abandon a great deal of commercial litigation to Sydney and Melbourne, the proposal made in 1974 for the creation of a commercial list in the High Court of New Zealand, should be reconsidered. But, at the last minute, Mr Ted Thomas has suffered a Damascus Road conversion against the idea of a commercial list. Apparently he feels there is not the work, not the experts and that the idea is premature. I am not so sure. Three considerations should be kept in mind:

- Expectations of experts. In both Australia and New Zealand, multinational insurance companies, banks and others are daily engaged in the intricacies of commercial transactions, including an increasing number with a trans-national component. Such bodies, not unreasonably, expect to have access, in local jurisdiction, to courts in which they can quickly test the application of local laws, local notions of due process and local perspectives of proper commercial practice. In such cases it does seem appropriate for a jurisdiction at least of New Zealand's size to endeavour to provide a judge who will be both swift and correct. Swiftness alone or correctness alone will not be adequate for such litigants. Both qualities must be present at once.

. The value of expert lawyers and judges. In most jurisdictions, certainly in Australia, there has been a move away from the general list, in recognition of the growing specialisation, sophistication and complexity of the law, particularly burgeoning statute law. How many of us would go to an opthalmic surgeon for a heart transplant? Likewise there is an enormous body of law on letters of credit, for example. A good lawyer can generally master this body of mixed common law and statute law quickly. In the future, computers will assist in this regard. But the lawyer, even so instructed, will not deal with a case involving the law on letters of credit with quite the same assurance as a lawyer who has a detailed and up-to-date knowledge of the body of the law in question. In the case of the judge, he will not perhaps know immediately the issues to which evidence is being directed. He may not appreciate fine points on the relevancy of evidence. He may experience difficulty in ruling as to relevance. He will not himself be able to direct questions with precision towards matters raised by the issues for trial. If he is not entirely familiar and comfortable with the law in question, he will move more cautiously and hence more slowly. It is a commonplace to say that judges behave differently when they are comfortable and confident in handling issues. It is impossible to ignore the feeling that it is held in commercial circles that business people should be able to place even a difficult and complex problem before a superior court judge and secure a swift and correct decision from a person having the highest expertise in the field and able to master the intricacies of law and fact with facility, economy and assurance.

. Haemorrhage from Hong Kong? For Australia and New Zealand, there is an additional consideration. With the suggestion of the establishment of commercial centres in Australia and possibly in New Zealand, to seize the opportunities that may be created by the haemorrhage of business activities from Hong Kong. It is more than usually vital that the business community, including the international business community, be provided with the judicial system in both countries with something more than independence, integrity and workmanlike mastery of a wide range of legal problems. The multinational business community will fairly demand from the judiciary the same qualities of specialist expertise that it will insist upon from its own lawyers. Lawyers can be changed. They can even be trained and prepared to offer service of a highly specialist kind. But the parties have no control over the choice, training and preparation of the judge. It is for the community, through its court organisation and laws, to provide the facility the parties expect. If the community fails to do this, the problems will not go away. The parties will. They will look elsewhere for the swift and correct decisions that they require. Skill in the New Zealand legal profession and judiciary may only develop if the institutions and facilities are there to permit them to be honed and refined.

Though the workload may not be great at first, the provision of a specialist facility by people of high talent will tend to attract legal business. The starting point is the provision of the facility. If it is not provided in New Zealand, common sense suggests that parties, recognising this vacuum, will settle upon a jurisdiction of convenience, where speedy and correct decisions can be provided.

MAKING A COMMERCIAL COURT WORK

What about the suggestion that New Zealand does not really have sufficient work, sufficient specialists, judges and lawyers? To these I would respectfully offer three comments:

- Travelling judges. The establishment of a commercial court may be an expensive way, at first, to centralise expertise and develop a special skill and facility. But the process has to begin somewhere. The suggestion that there would only be the requisite volume of business in Auckland rings somewhat hollow in the ears of a Federal judge in Australia. With much greater distances to cover, those judges simply practise the lesson which Henry II introduced in England in Plantagenet times. Justice must be taken to the litigants. New Zealand is linked by excellent domestic airline services. Apart from occasional difficulty in getting away from Wellington because of the wind, it would be relatively simple for circuits to be organised for a specialist judge at relatively short notice so that he or she could sit where needed. This is a commonplace in Australia, with much great distances to cover. Sir David Beattie, when a judge, evidenced just such a willingness to travel. Once, when argument on a change of venue arose, to move a trial from Wellington to Auckland, he resolved the difference, with the same Solomon-like wisdom he displayed during the Challenge ceremony yesterday. He indicated that he would hear the 14 witnesses from Auckland in that city and allow the ten witnesses in Wellington to be called there.
- Telemotions. A second innovation which must be tried relates to the use of telecommunications. Reports now to hand indicate that arguments in appeal leave applications to the Supreme Court of Canada are being taken by telecommunications from Vancouver to Ottawa via the satellite. In Australia, the Administrative Appeals Tribunal has for a long time been using telephone hookups for direction hearings and the taking of some witnesses in remote country towns. Now the Social Security Appeals Tribunal is doing the same thing. In the United States, so-called 'telemotions' are long established in a number of the States. A hundred years after Alexander Graham Bell invented the telephone, lawyers and the judiciary are at last coming to terms with the invention. As we all know, in our profession we rarely rush things.

. Written argument. In any case the pressure on courts generally (and on commercial judges in particular) is likely to become so great that the facility of open-ended oral argumentation is likely to be replaced by very limited oral argument supplemented by precise written briefs of argument. Lawyers must quickly adapt to the implications of the revolution in information technology. The courts too must adapt or they will run the risk of losing their relevance to the community, including the business community, they serve.

ARBITRATION AND OTHER EXTRA CURIAL REMEDIES

Generally speaking, the courts in Australia and New Zealand have failed adequately to serve the business community in the resolution of its disputes. The ordinary businessman on both sides of the Tasman does not understand and so cannot sympathise with the procedures of the courts : their costs and delay. These procedures are entrenched by tradition, reinforced by lawyerly conceptions of 'due process', cemented by stereotyped approaches to problems, embalmed in rules of evidence which reflect a fascination with oral testimony and a mistrust of documentation. They are reinforced by professional training and immured by conservative attitudes on the Bench and at the Bar table.

For these reasons it is probable that whatever is done to improve the courts, by the provision of a commercial list, a specialist commercial judge and improved and simplified procedures, most businessmen will still regard the courts as a place of last resort. They will look elsewhere for extra judicial mechanisms which are cheaper, quicker, less technical and less stressful and time-consuming to the business people involved.

Lawyers concerned with a proper servicing of the business community will not resist these developments. They will encourage them and seek to find a proper, supportive role in them. In New South Wales, this is already happening. In Maschinenfabrik Augsberg-Nurnberg Aktiengesellschaft v Altikar Pty Limited (unreported, 4 August 1983) Justice Rogers made an innovative use of the facility of an expert arbitrator to deal with particularly highly technical issues that arose in a commercial case before him. The judge made it plain that the procedure had to be 'moulded to the requirements of the moment'. As a check against dilitariness, incompetence or lack of attention to the interests of the parties in swift and expert service, Justice Rogers and Justice Foster who is here, lays down some rather firm guidelines. These evidence a forthright and vigorous judicial participation and activism. Whilst this might be considered out of place in the traditions of the criminal trial, it would almost certainly be welcomed by all but the unjust in most business law disputes where time and inflation, to say nothing of inconvenience and legal costs, operate against the interests of the business disputants before the court.

Justice Rogers has even raised the spectre of lawyers regularly in breach of interlocutory orders in the commercial list being made themselves liable for the costs incurred as a result.

For all the reservations we may have as layers about court appointed experts, it is plain that the languid way in which the normal civil courts deal with disputes is inappropriate to much litigation and specially inappropriate to business disputes. None but the very rich or the legally-aided very poor can afford such a pace. That is why the efforts of specialist commercial judges to improve their through-put, including by the adoption of novel techniques, are to be welcomed.

Other ideas deserve exploration but cannot be elaborated here. They involve the creation of a specialised panel of arbitrators, including some who have international reputations, for use in arbitrations of trans border disputes; the improvement of Antipodean procedures for arbitration which have tended to replicate court hearings without the advantages courts offer; the use of retired judges for the purpose of arbitrations of this kind; harmonisation of substantive law; use of tribunals set up by bilateral treaties; exchanges of judicial commissions; joint projects of law reform and mutuality of at least some rights of legal practice.

1200 REASONS

Sir Henry Parkes used to talk of the 'crimson thread of kinship' which bound us all in Australia and New Zealand. The thread may be getting a bit thin. The crimson may now be somewhat paler hue. But it is important that lawyers should address the issues of closer relations between our two countries. It is my hope that our courts, judges and lawyers will find a useful role ministering to the improved relationship between Australia and New Zealand. The 1200 reasons for our legal separation have become little more than two-and-a-half hours in an armchair on a windy day and less than a second as computers chatter away to computers via satellite across the sea. The physical distance has been bridged. But the question remains whether our hearts and minds can catch up? On Anzac Day 69 years on, this is a specially appropriate question for us to be asking. Of course it is a question that far transcends commercial courts, closer economic relations and even the law. It is a blessing of our free societies and their free institutions under the law that we can ask the question and continue to ask it. We can do so despite scornful editors and mirthful politicians. People who laugh at the idea of some kind of closer political association should reflect upon this fact. Eighteen years before the Australian Federation was achieved, it was being described as a 'far-off divine event'. So my message to the sceptics is : watch the next 18 years! .

* Chairman of the Australian Law Reform Commission. Judge of the Federal Court of Australia. The views expressed are personal views only. The author acknowledges the suggestions of Justice Andrew Rogers of the Supreme Court of New South Wales concerning the latter part of this paper.

** The full paper is MD Kirby 'Law, Business and CER', paper for the New Zealand Law Society Conference, Rotorua, April 1984, mimeo.