COMMERCIAL CAUSES

REPORT OF THE CONTRACTS & COMMERCIAL LAW REFORM COMMITTEE

Presented to the Minister of Justice
March 1974

REPORT OF THE CONTRACTS & COMMERCIAL LAW REFORM COMMITTEE ON COMMERCIAL CAUSES

To: The Minister of Justice

1. With your precedessor's authority the Contracts and Commercial Law Reform Committee has considered whether any alterations should be made to existing court procedures relating to the disposal of what may conveniently be called commercial causes. In doing this the Committee has had regard to procedures available in other jurisdictions, to what it considers are the needs of present day commerce in New Zealand, and to the role of the courts in fulfilling such needs.

The Problem Stated

2. For the purposes of this report we have taken commercial causes (definitions of which are set out in paragraphs 6 and 7 post) to be those matters concerning commerce and trade generally in which some dispute arises requiring judicial determination. In such matters the parties concerned often require a quick determination of a specific issue, as opposed to a final determination of all matters relating to the transaction in question. The obvious reason for this is to enable a future course of action to be decided upon. Those of us in private practice are well aware from practical experience of the problems which can arise from the inability to have such an issue (e.g. whether a contract has been concluded, or terminated, or breached so as to entitle rescission) decided. Present procedure and the restrictions on, for example, arguing a question of law before trial or obtaining a declaratory judgment, can and do operate to prevent the determination of such issues. It is no answer to say that speedy

determination may sometimes be achieved under existing provisions, given full cooperation of all parties. What is necessary is a method of ensuring speedy determination in all appropriate cases whether or not all parties cooperate.

3. We also see as vital the retention of the Supreme Court as the tribunal to determine matters of commercial importance in today's community. Again from experience, we know that there is at present a very real and marked tendency for parties to commercial disputes to avoid litigation in court, and instead to arbitrate, or simply to take their chances on a particular course of action.

Some principles of our law are, by their very nature, uncertain in their application. An important example is the law governing discharge by breach. Because questions of degree are involved, situations can arise where no legal adviser is able to say with confidence whether what has occurred constitutes a "fundamental" breach. (This is because the word "fundamental" is not, and cannot be, precisely denotative). Yet an unjustified termination of the contract at that point can convert an injured party into a wrongdoer.

There are other areas where the requirements of the law are prescribed in terms of what is "reasonable". An example is the law relating to restraints of trade. Here, too, because questions of degree are involved, genuine uncertainty can arise as to the courses of action properly open to the parties. A third example occurs where the courts have been given wide discretions, such as those under the Illegal Contracts Act 1971.

Unavoidable though these uncertainties may be, it does seem to us that a legal system which perpetuates them ought, for that very reason, to try to provide machinery for their resolution in particular cases, as and when they arise, and in time to enable the parties to order their dealings on the basis of such resolution.

4. The present procedural provisions allow two possible courses of action - first, the issue of a writ of summons in the ordinary way and second, the issue of an originating summons under the Declaratory Judgments Act 1908. The writ, although it may be confined to the seeking of a declaration as the only relief (Wright v. Collie [1959] N.Z.L.R. 767), is subject to all the delays which a party may create before a hearing is obtained. The existence of a right to apply for determination of a question of law before trial does not overcome this defect, particularly because of the limitations which the courts have placed on their exercise of this jurisdiction. This was highlighted in the Kaimai air disaster case, (Graham v. Attorney-General [1966] N.Z.L.R. 937), in which the Court of Appeal held that the procedure was inappropriate despite the fact that a particular finding of the Court in that case might well have ended the litigation. A further example is Arthur Barnett Limited v National Insurance Company [1965] N.Z.L.R. 877. There the applicant on the originating summons wanted to know whether certain correspondence from its insurer constituted a request by the insurer to take action against a third party. If so, consequential questions as to the control and costs of the action would arise. The Court of Appeal declined to deal with the question.

The Declaratory Judgments Act 1908 is itself restrictive, as it permits determination only of questions of construction or validity. The problems with which we are

concerned in this report are not so confined, and often will require, for example, determination by the court of issues of fact. Again, it is frequently desired to have determination of a specific issue, relating to only part of the transaction, and not being necessarily determinative of the final rights of the parties. Indeed, successive issues may each require a decision at different points of time. In our opinion both procedural courses of action presently available are inadequate to meet the difficulties we have outlined.

The Commercial Court in England

5. In England the Commercial Court is now established under section 3 of the Administration of Justice Act 1970 which provides:

> (1) There shall be constituted, as part of the Queen's Bench Division of the High Court, a Commercial Court to take such causes and matters as may in accordance with rules of court be entered in the commercial list.
>
> (2) The Judges of the Commercial Court shall be such of the puisne Judges of the High Court as the Lord Chancellor may from time to time nominate to be Commercial Judges.
>
> (3) Nothing in this section is to be taken as prejudicing provisions of the said Act of 1925 which enable the whole jurisdiction of the High Court to be exercised by any Judge of that Court.

The reasons for introducing the Commercial Court in England are to be found in the introduction to the first volume of Commercial Cases [(1895) 1 Comm. Cas page (i)]. The Commercial Court was set up because of the frequent complaints of litigants (especially commercial men) about the delay and expense of the system under which actions were tried in the High Court. The result of this was a trend towards arbitration. The Judges of the Queen's Bench Division resolved to provide the remedy themsleves, and in 1895 they produced the commercial causes list. The English procedure has remained largely unchanged, and was the genesis of the New South Wales Commercial Causes Act.

Delay and expense were, however, not the only reasons for the establishment of the Commercial Court. In Butcher Wetherly & Co. Ltd v. Norman [1934] 1 K.B. 475, 477 - 479 Scrutton L.J. said -

> "It is, of course, inaccurate to speak about a Commercial Court, for there is no separate Division of the King's Bench Division so called. What happened was this: In 1894-95 when I was in large junior commercial practice, the Judges of the Queen's Bench Division agreed among themselves that just as they allocated year by year all revenue cases to a particular Judge, they would allocate cases coming within the definition of commercial causes to Judges specially conversant with commercial matters. There was great reason for this step being then taken. One of the objects of justice is to satisfy litigants that their cases are properly and adequately heard, but certain commercial cases are so complex that Judges unfamiliar with that class of business require many explanations in the course of the hearing. So it may be with any Judge. If I were invited to decide a question of conveyancing turning on the Law of Property Act I might reveal a good deal of unfamiliarity with the subject simply because my practice had not lain in that direction. Owing to the fact that a number of cases had come before Judges not conversant with

> commercial matters a good deal of dissatisfaction was felt in commercial circles .... . That lead to the resolution of the Judges that such cases should be heard by Judges with commercial experience .... .
>
> The Commercial Court, begun for the reason I have stated, worked quite comfortably and rapidly. I have known a writ being issued on a Monday and the case being heard on the Wednesday."

Greer L.J. (482) added to Scrutton L.J.'s comments:

> "In addition to the reasons for the establishment of the Commercial Court, or, to speak more strictly, the Commercial List, stated by Scrutton L.J. in his judgment, two other important advantages to commercial litigants may be stated:
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> (1) It is desirable that these cases should be tried by a Judge who can fix the date of trial so that people engaged in commercial undertakings may know in advance the date on which they should be ready to present their cases in Court: and
>
> (2) There had been much waste of time and money in interlocutory battles, and it was thought that this might be saved in commercial cases if all the interlocutory applications came before the trial Judge, and I am quite certain from my own experience that that had a markedly beneficial result not merely because of this power but by the recognition by practitioners that it was necessary for them to act reasonably with regard to interlocutory applications."

6. The procedure for the Commercial Court is set out in the Rules of the Supreme Court 1965, Order 72 which is reproduced in Appendix A of this report.

Order 72 applies to "commercial actions" in the Queen's Bench Division. The definition of "commercial action" (Order 72 Rule 1) is similar to that devised in 1895 and to that of "commercial cause" under the New South Wales Act. It "includes any cause arising out of the ordinary transactions of merchants and traders and, without prejudice to the generality of the foregoing words any cause relating to the construction of a mercantile document, the export or import of merchandise, affreightment, insurance, banking mercantile agency and mercantile usage." A "commercial list" is established in which commercial actions may be entered, and a Judge of the Queen's Bench Division is in charge of that list. The Judge has the powers of a Judge in chambers in relation to actions on the list. All interlocutory orders are made by the Judge.

Before a writ or originating summons by which a "commercial action" in the Queen's Bench Division is to be begun is issued, it may be marked with the words "commercial" list. When the writ or originating summons is eventually issued, the action thereby begun is entered on the commercial list. In addition, any party to an action may apply to the Judge (or in some cases to the Registrar) after the action has begun to have it transferred to the commercial list. Alternatively, the Court may order such a transfer of its own motion, provided that one of the parties to the action wants the action so transferred. When an action is on the commercial list, the Judge may of his own motion or on the application of any party (within 7 days of the action being placed on the list) order its removal from that list. The entry of the action in the commercial list is appealable on the ground that the action is not properly a commercial action: Sea Insurance Co. Ltd. v. Cair [1901] 1 Q.B. 7.

Commercial Causes in New South Wales

7. In New South Wales, commercial causes (or disputes) are governed by the Commercial Causes Act 1903-1965. This defines commercial causes as "causes arising out of the ordinary transactions of merchants and traders amongst others those relating to the construction of mercantile documents, export or import of merchandise, affreightment, insurance, banking and mercantile agency and mercantile usages": section 3. Either party to a common law action in the Supreme Court can, by using a special summons, call upon the other party to show cause before a Judge in chambers why the action should not be entered on the commercial list. There is no appeal from an order that the action be so entered, and the Judge may by that order, or by any subsequent order, give directions he considers expedient for the speedy determination of the matters at issue between the parties.

The emphasis under the Act is speed, and to achieve a speedy determination of the dispute the Judge has power, inter alia, to do the following (section 6):

(i) dispense with pleadings;

(ii) dispense with the technical rules of evidence for proving any matter which is not bona fide in dispute, and with such rules as might cause expense and delay arising from commissions to take evidence and otherwise, and, without limiting the generality of this power, dispense with the proof of handwriting, documents, the identity of parties or parcels, or of authority;

(iii) require particulars of the cause of action, of the grounds of defence, or of any other circumstances connected with the cause, to be served within a specified time by either party;

(iv) order mutual discoveries and inspection, or that lists of documents be exchanged and inspection allowed;

(v) require either party to make admissions with respect to any question of fact involved in the cause;

(vi) settle the issues for trial;

(vii) order the trial to be either with or without a jury, or that special issues be tried by a jury;

(viii) state a case on matters of law for the full court.

The parties may, if they desire, agree beforehand that the verdict of the jury or the decision of the Judge shall be final: section 7.

The Judges also have power to make rules of court for the hearings of commercial causes. The Commercial Causes Rules 1965 are printed as Appendix B to this report. It will be seen from the form of summons in these rules that, as well as entering an action on the commercial list, a Judge may make the following orders:

(i) that the plaintiff shall file and serve his statement of claim within ten days.

(ii) that the defendant shall file and serve his statement of defence within ten days after service upon him of the statement of claim.

(iii) that the plaintiff shall file and serve his reply within ten days after service upon him of the statement of defence.

(iv) that within ten days after the close of pleadings, lists of documents shall be exchanged by the solicitors for the parties, and each shall permit the other to have inspection (as on discovery) within a further ten days.

(v) that the matter be listed for mention on .... next with a view to fixing a date for hearing.

(vi) that the trial be with or without a jury.

(vii) that either party be at liberty to apply for any interlocutory relief on two days' notice to the other.

8. Section 16 of the Law Reform (Miscellaneous Provisions) Act 1965 (N.S.W.) inserts sections 7A and 7B in the Commercial Causes Act 1903-1965. Section 7B reads as follows:

"(1) Where a commercial dispute has arisen concerning the construction of a document or its application to any facts, any party to the dispute may apply to a Judge in Chambers for the determination of the questions involvedin such dispute notwithstanding that no commercial cause has been commenced.

(2) A commercial dispute is a dispute which would be a commercial cause if made the subject of an action at common law.

(3) An application under this section may be made in a summary manner by summons returnable on two days' notice supported by an Affidavit annexing the document and deposing to any relevant facts.

(4) Where it is necessary in the determination of a commercial dispute to decide any question of fact the Judge shall settle the issues for trial and give any consequential directions necessary for the determination of such issues in a convenient and expeditious manner.

(5) A determination of any issue of fact or of any question of law pursuant to this section shall be binding on all parties to the summons in the same manner as if the issue or question had been determined in a commercial cause.

Applications under section 7B are listed for hearing once a week.

In an article by H.H. Glass and R.P. Meagher, (1966) 40 A.L.J. 232, the advantages of section 7B are specified. These advantages arise mainly from the speed with which commercial matters can be determined.

"(1) A party wishing to avoid committing a breach of contract is enabled to have the contract interpreted and his rights and liabilities thereunder determined without being forced to do an act which might involve him in a breach of contract justifying either damages or even rescission by the other party.

(2) A party to a contract having conducted himself in a certain way pursuant to his imagined rights under the contract is enabled to have determined by the Court -

(a) whether his conduct amounts to a breach of contract; and

(b) if so, what are the legal consequences of the breach.

(3) A plaintiff who is uncertain of his rights is enabled to seek from the Court -

(a) a binding declaration that a contract has come into existence; or

(b) a binding declaration from the Court that any contract which once existed has been terminated.

(4) A party to a contract is enabled to obtain a binding declaration that the defendant is liable in damages for breach of contract without then concerning himself to claim or qualify the damages. According to some authority it is possible to claim at that stage part only of the damage suffered or likely to be suffered.

(5) A party to a contract is enabled to obtain a speedy determination of his rights thereunder."

Privacy

9. Privacy is a matter not dealt with in either the English or the New South Wales provisions but it deserves separate mention. There are many instances in commercial litigation where it is perfectly understandable that one

or both parties should resist full public disclosure of such things as business arrangements, financial secrets, trade secrets and the like, even to the point of refusing to embark upon court action. Many administrative tribunals, notably in the licensing fields, allow certain evidence to be given in confidence to the tribunals. Arbitration provisions are sometimes inserted in commercial contracts in order to preserve secrecy.

This aspect was the subject of some debate among members of the Committee. It is pertinent to note that when the Administration of Justice Bill in England was being debated, a provision relating to private hearings was deleted, the decision to do so being that of a bare majority. There are undoubtedly strong reasons in favour of allowing privacy, but there are also reasons of policy which tend the other way.

The majority of the Committee has come to the conclusion that, while there are circumstances which would justify the admission of evidence in private, the general principle that justice must take place in open court is too important to be sacrificed for commercial causes. The commercial litigant should not be given preferential treatment in this respect over the non-commercial litigant, whether his claim be brought in tort, contract, property, or anything else.

Conclusion

10. The Committee recommends that there should be special provision for commercial causes, defined as disputes arising out of the ordinary transactions between businessman. Writs in commercial causes should require the defendant to file an address for service within say three days, and there should be provision for an application for directions

with the court having power to make orders to ensure speedy determination analogous with the English and New South Wales procedure. In addition there should be provision, where an issue of interpretation of any contract or its application to facts not genuinely in dispute arises in the course of performance of that contract that either party shall have the right to apply to the court for determination of such issue.

Our proposals do not require the creation of a special division of the Supreme Court to deal with commercial causes though overseas experience indicates the advantages of a degree of specialisation on the part of both bench and bar. However, it would be preferable to arrange, wherever possible, that the same Judge should deal with both interlocutory matters and the final determination of any particular case.

C I Patterson

Chairman

MEMBERS

Mr C.I. Patterson (Chairman)

Mr B.J. Cameron
Professor B. Coote
Mr D.F. Dugdale
Professor E.P. Ellinger
Mr J.R. Fox
Mr J.S. Henry
Mr W. Iles
Mr J.H. Wallace

Mr A.E. Wright (Secretary)

APPENDICES

Appended to the report were the following:

Appendix A: Rules of the Supreme Court (U.K.) 1965 Order 72.

Appendix B: New South Wales Commercial Causes (Judges) Rules 1965.

These appendices deal with procedural matters and have not been printed with this report. The Rules may be found in the main law libraries or may be obtained on request from:

The Secretary,
Contracts & Commercial Law
Reform Committee,
Department of Justice,
Private Bag 1,
WELLINGTON.