Frank Stewart Dethridge Memorial Lecture 1995

Rt Hon. Justice McKay Court of Appeal of New Zealand

NEGATIVE TRENDS IN ARBITRATION

I have had an opportunity to read the published book of the F. S. Dethridge memorial addresses. I am honoured and humbled to be invited to follow such a distinguished line of speakers. The late Frank Dethridge was not known to me personally, but I note that he was a partner and for many years a senior partner in the well known firm of Mallesons, and that he practiced in the fields of maritime law, industrial law and general litigation. He was the prime mover in the establishment in 1974 of the Maritime Law Association of Australia and New Zealand, and was its first President until his untimely death in 1976. The establishment of these addresses has provided a worthy memorial to a distinguished maritime lawyer, and I am pleased to add my own tribute to his memory.

My own experience at the bar was not in the field of maritime law. In my earlier years, it was sufficient to know that admiralty cases were dealt with under the English Vice Admiralty Rules of 1883, and that the only copy in Wellington was in the possession of the late Les Rose. Les was a leading barrister who was willing to assist practitioners and Court Registrars alike, without fee, and even to advise what documents required to be sealed with the crossed anchors seal. Since my appointment I have sat on the only three appeals listed under

'admiralty' in our computer index. I wrote the judgment in one concerning priorities of charges over a vessel, but unfortunately the appeal to the Privy Council was abandoned, so I will never know whether their Lordships would have reached the same or a different conclusion.

In this situation, I have not tried to prepare an address on a subject where I have no claim to expertise. I have chosen instead to speak of arbitration, with which I am familiar, and which has over a long period been the preferred forum for many maritime disputes. I propose to focus on what are perceived to be the advantages of arbitration, and on the erosion of some of those advantages as arbitration procedures follow more closely the procedures of the Courts. I want to look also at certain trends throughout the common law world affecting both arbitration and litigation, which pose a serious threat to both as effective means of ensuring justice.

A paper presented in 1993 to the annual conference of the Chartered Institute of Arbitrators looked at maritime arbitrations from the perspective of the consumer. The author, John Morris, identified the core values sought by maritime consumers as being the quality of the process, speed of decision making and reasonableness of cost. Those values, or perceived advantages, apply to arbitration in general. Until a generation ago, they were by and large achieved. The arbitrator or arbitrators were chosen for their particular expertise in the relevant field, and had the confidence of the parties to the dispute. They could focus quickly on the key issues, without the need for the time consuming exercise that might be necessary to bring a judge up to speed in an unfamiliar technical area, and the risk that even then he or she might get it wrong. Speed was achieved, because the procedure was flexible, and could be adapted to the needs of the particular dispute. If a formal hearing was necessary, its timing was not constrained by the pressures of Court lists, and there was little in the way of preliminary procedures. Costs were less than in the Court because of the time savings. Awards were rarely challenged in the Courts, and the grounds for possible challenge were limited. To use an example given by Lord Mustill, in addressing the Geneva

Global Forum on 21 October 1993, it would be difficult to show an error of law in a decision which simply said 'The buyers have no right of rejection. There will be an allowance of 5% against the price'.

Unfortunately, the scene has changed. John Morris said that maritime arbitration in London has undergone a radical transformation in the space of a generation. It has become a good deal more formal and structured. Parties no longer entrust their disputes to shipbrokers to resolve either by negotiation or by referring them to more experienced members of the Baltic Exchange. The defence club's managers are consulted, solicitors are engaged and counsel instructed. Lawyers, being innately conservative, follow the familiar procedures of the High Court. Time and cost escalate accordingly.

Similar complaints have been made in regard to construction arbitrations, which can become lengthy legal battles involving preliminary disputes over pleadings and particulars, discovery and interrogatories, and unduly lengthy hearings. Litigation in the Courts is beset by similar problems. The Master of the Rolls, the Rt Hon Sir Thomas Bingham, who is President of the Court of Appeal in England and is also President of the Chartered Institute of Arbitrators, painted a gloomy picture when he delivered the Holdsworth Club lecture at the University of Birmingham on 18 March 1994. Months or years, he said, are spent in preparation for trial, all by lawyers working on hourly rates. The parties engage in procedural skirmishes the cost of which may run into tens or even hundreds of thousands of pounds. The longer the trial is delayed the more skirmishes there are, and the more the costs mount.

Then, for the trial itself, the grand finale, counsel are needed to act as the parties' champions; expert witnesses will be needed, perhaps for days on end; and solicitors will be in attendance to direct, control, manage and liaise. It is magnificent, in many ways effective, but it is very, very expensive. He described the fact that the resolution of civil disputes should be so costly as being not merely a wart on the face of the administration of justice, but a cancer eating at the heart of it.

In another address, the annual lecture at the JUSTICE Annual General Meeting on 7 July 1994, Sir Thomas gave an example which

he described as in no way remarkable. A man and his girl friend bought a plot of land on which a bungalow was built. The total cost was about £138,000. They entered into a substantial mortgage. A dispute arose between them and their nextdoor neighbours about where exactly the boundary between the two plots ran. There were only a few feet in it. But the dispute could not be resolved. So the neighbours issued proceedings in the local county court claiming a declaration that the boundary lay on the line for which they contended. The man and his girl friend counterclaimed for a declaration that the boundary lay on their line, and they claimed against the developer who had conveyed the plot to them, saying that if the conveyance to them did not give them the land which they claimed it should be rectified so that it did. The case went to trial. The trial lasted for 17 days, and the judge gave a written judgment running to some 35 pages. The neighbours and the developer won. The judge held that the boundary ran along the line for which they argued. The man and his girl friend lost and were ordered in the usual way to pay the costs of the successful parties. The neighbours' costs were assessed by an officer of the court at £45,000. The developer's costs came to £40,000. So the man and his girl friend faced a bill of £85,000, and that is before they start paying their own legal costs. Their equity in their bungalow was valued at some £50,000. They had no other means. So they would have to sell their bungalow to pay the cost of the other side, and even then they would be ruined. Unless of course, they could appeal successfully. But an appeal would cost a lot more money.

I do not think we have yet reached the stage where such a result would be other than remarkable in this country. But New Zealand has not been immune from similar trends, both in our courts and in arbitration. The problem is a serious one, and must be addressed. If we are to address it, however, we must first understand why it has come about. We can also learn from the steps which the courts have initiated to control the problem, and perhaps adapt them to the arbitration scene.

Lord Mustill is not only a Lord of Appeal in Ordinary, that is a member of the appellate committee of the House of Lords, but is also

a man of considerable experience in commercial arbitration. He is the co-author of *Mustill & Boyd on Commercial Arbitration.* In the address at Geneva to which I referred earlier, he identified three causes of the trend for arbitrations to become so lengthy and so expensive. The first is the increasing use of 'non expert' arbitrators, that is arbitrators who are not experts in the field which is the subject matter of the dispute. If the dispute was about timber, it used to be referred to an expert on timber who would decide by inspection and by the application of his own knowledge. To have called an expert witness before such a person would have been an impertinence. A technically qualified arbitrator may still need expert assistance in areas lying outside his own particular expertise or experience, but the parties will not be condemned to the long and expensive business of teaching the tribunal the subject entirely from the ground up.

In my experience this has not been a major problem in New Zealand. Most disputants in major disputes take their problems to lawyers, and are guided by their lawyer in choosing an arbitrator. A lawyer who is unfamiliar with the particular industry and its disputes may not know where to find a competent technical arbitrator, and may opt for the familiar by choosing a lawyer. That will not be a problem if the lawyer chosen is himself familiar with the industry, its technology and its disputes. My preference was always for either a technical person, such as an engineer for construction disputes, but one who I knew to be an experienced and respected arbitrator, or else a senior lawyer who I knew was familiar with the industry and its disputes. In a small country such as New Zealand there is no need to fly blind in choosing an arbitrator. Lists are available from the Arbitrators' Institute. The lawyer can seek advice from other lawyers who he knows have been involved in similar matters. It is not too difficult to obtain advice as to the suitability of a proposed arbitrator.

Lord Mustill's second reason for the change in the character of commercial arbitration was the increasing domination of procedures by lawyers. At the beginning of his career in arbitration the employment of legally qualified persons as advocates was exceptional, and even regarded with hostility by many trade tribunals, which felt that

lawyer involvement would only prolong and complicate the dispute beyond what was necessary. Of course, in complex matters, the assistance of lawyers in exposing, organising and exploring the issues is invaluable. But lawyers bring with them preconceptions bred in the courtroom, so that arbitrations are increasingly becoming like parodies of court proceedings, whereas their only justification is that they are something else.

I have no doubt that there is an element of truth in that complaint, but I think it has more to do with particular lawyers than with lawyers as a profession. The same attitudes which some lawyers bring to litigation in the courts, and which create problems in that area, are also having their impact on arbitration. My own experience as an arbitrator has been that most lawyers are helpful and sensible, and act responsibly. One is aware of the exceptions.

Nor do I decry the fact that major arbitrations are conducted in a manner similar to court proceedings. There are many simple arbitrations where less formal and speedier procedures are appropriate, and are commonly adopted. A quantity surveyor dealing with a multiplicity of issues as to quality of workmanship and the value of work can make his own assessment on the site. Where larger and more complicated issues are involved, however, the court process can provide a sensible model of an effective procedure. It enables the issues to be identified and each party to address them with evidence and submission, and to answer the other party and rebut that party's evidence, all in an orderly and expeditious way. The court process, whatever its faults, has been developed on the basis of experience to achieve just that. The parties do not choose arbitration in order to reinvent the procedural wheel. They wish to choose an experienced arbitrator for the particular dispute rather than leave it to a judge allocated from the cab rank, to have the matter heard in private, and to enable a more flexible approach to procedure when this is desirable. I will return to the problem of lawyers' attitudes later.

The third reason advanced by Lord Mustill is the attitude of the parties to a dispute. In the past, he says, commercial people chose

arbitration because they wished their dispute to be resolved with the minimum of antagonism by someone whom they trusted and respected. Sadly, the picture is in many cases now different. The defendant does not look for the prompt and speedy resolution of the dispute by economical means, in as harmonising a manner as possible. He would prefer it not to be resolved at all, or for this to happen at as distant a date as possible. Parties set about making life as difficult as possible for their opponents, taking every point, good, bad and indifferent and employing every procedural device.

I have myself suffered from these tactics. In one case it took years to settle the submission to arbitration and to agree on an arbitrator, and this was only achieved by conceding valid points and agreeing to the other party's nominee as sole arbitrator. He turned out to be a good arbitrator, both on liability and on quantum, and he awarded my client some 99 percent of the amount claimed. There followed a long delay. My application to enforce the award was belatedly met with a long drawn out application to the High Court to set aside the award on the most specious grounds. When this failed, it was followed by the lodging of an appeal, but no steps were taken to progress the appeal. After lengthy delay I moved to strike out the appeal for want of prosecution. The then President of the Court told my opponent that he had a clear impression the Court was being used simply as a means of delaying payment to obtain cheap finance. He was right, and with inflation running at a much higher rate than the then rate of interest on judgments and awards, it was obviously in the defendant's interests. Despite this abuse of process, the Court was reluctant to strike out, and instead imposed a timetable. After further delay we obtained judgment in our favour. Then, nearly at the end of the three month appeal period, an appeal was lodged to the Privy Council. By this time inflation had already reduced the real value of the claim by half, so to avoid further delay we settled. That was not justice.

I think there are a number of factors which contribute to the trend for court and arbitration proceedings to become longer and more expensive. One is the greater complexity of some of the issues which

arise. An example is a case in which I was the arbitrator, involving defective piles for a major new building. The piling subcontractor claimed the additional costs of removing and replacing the piles, on the basis that the defects were due to ground conditions at the site which could not reasonably be foreseen. He claimed that there were underground water flows which removed the fines from the freshly poured concrete. Two civil engineers of undoubted general experience and competence gave evidence supporting the claim. The main contractor called experts in more specialised fields. One was an expert in underground water flows, and he was able to show that the movement of water in the particular area was at far too slow a rate to have the effect the engineers had ascribed to it. A second expert, a petrologist, produced photographic enlargements of microscopic slides of specimens taken from the defective piles. These showed that the cement paste had never travelled sufficiently to envelope the aggregate in the freshly poured concrete, because it had too low a slump, ie there was insufficient water in the concrete mix. This was the fault of the contractor. I give this as an example of the complexity of many modern disputes requiring the involvement of highly specialised experts. It may also serve as a warning that the trend in England to try to confine expert evidence to that of a single expert may well shorten hearings, but only at the expense of justice. A second reason is that society has become more aggressive and more adversarial. In many cases there is no longer a desire to reach a fair solution in a speedy and cooperative way. The object is to win at all costs. We all know some lawyers who adopt this attitude, sometimes to the disadvantage and at the ultimate cost of their client. Others adopt it at the behest of the client, in the mistaken belief that their job is to be a 'hired gun' doing whatever their client asks. Their true role should be that of a professional, seeking by proper means the best resolution of the dispute for the client, but exercising an independent professional judgment as to how this should best be achieved. The use of interlocutory procedures, whether in the courts or in arbitration, as a deliberate means of achieving delay is an abuse of procedure. No lawyer should be a party to that, whatever his client

may ask of him. The same applies to procedural or other manoeuvres designed to escalate the cost in order to discourage an impecunious opposite party.

The trend appears to be world wide. Chief Justice Veasey of the Delaware Supreme Court, in an address to the American College of Trial Lawyers in Phoenix, Arizona in April 1994 condemned what he described as 'Rambo tactics'. The problem starts, he said, with the belief of some lawyers that their clients demand Rambo tactics and they must accede to those wishes. Clients whose expectations are largely influenced by television may expect aggressive lawyers, and need to told that Rambo tactics are *not* in their best interests but are decidedly *adverse* to their interests. Lawyers, said Chief Justice Veasey, must develop a professional backbone. He referred to the model Rules of Professional Conduct, which require a lawyer to act with commitment and dedication in the interests of the client, but state that the lawyer is not bound to press for every advantage, and has a professional discretion in determining the means by which a matter should be pursued.

Another factor in the increased cost of litigation and arbitration has been the general adoption, at least in the common law countries, of time costing. I believe it is proper that time spent should be recorded, and should be taken into account in fixing a fee. But so should other matters, such as the amount in dispute and whether the time was necessary. A slavish adherence to time costing penalises the efficient and rewards the inefficient. It can operate as a blank cheque for hours of unnecessary and unproductive research by inexperienced staff. Fee targets for staff solicitors put pressure on them to maximise their work on the particular case. As pointed out in a recent article in *Business Law Today,* the magazine of the American Bar Association's Section on Business Law, one of the results is the lawyer's own disillusionment with the practice of law in the modern 'billable-hours factories', and the loss of professional satisfaction in one's work. A succession of unnecessary interlocutory applications can enable monthly reports to the client company which give an impression of great activity on its behalf, but the true interests of the

client lie in the end result. The object should be to achieve the best bottom line result as expeditiously as possible. That means the best net recovery after costs, or the least liability including costs. The lawyer who loses sight of these objectives has lost sight of the meaning of his or her profession.

Changes in the law have added to complexity. A claim which 25 years ago would have been brought as a simple claim in contract will now have a multiplicity of causes of action. In addition to contract, there will be alternative causes of action under the *Contractual Mistakes Act* and the *Contractual Remedies Act.* For good measure, there may be further alternatives under the *Fair Trading Act* or the *Commerce Act.* There may also be a claim in negligence, and in case all else fails, a forlorn attempt to allege breach of fiduciary duty. In part this may be due to the lawyer's concern to cover his or her own back, in case the omission to raise every possible point could be seen as negligence. It is usually a sign of a certain lack of judgment or lack of confidence in identifying what basis of claim is truly arguable, and discarding what is not.

We are fortunate in New Zealand in that a great many cases are tried and a great many disputes are arbitrated with good cooperation between counsel, economy of time and an awareness of the need to minimise cost. In those cases where this does not happen, the remedy is to a large extent within the control of the legal profession. A totally professional attitude, including resistance to one's client when asked or expected to act unprofessionally, is in my view the first and most important means by which the difficulties can be overcome.

Another reason for the incurring of unnecessary cost is the tendency of some lawyers to adopt a slavish adherence to the court model. One of the advantages of arbitration is its flexibility. I have been involved in a major arbitration involving millions of dollars which turned on the meaning of a regulation. Counsel agreed, with their client's approval, to accept the decision of a senior barrister as sole arbitrator, to be given on the basis of written argument without oral hearing. A statement of facts was agreed upon, to provide the necessary background. Each counsel was able to put his argument

succinctly in about half a page. The arbitrator gave his decision in the form of an award. There was no need for pleadings, particulars, discovery, interrogatories, witnesses or hearings. In other cases involving, only a question of the proper interpretation of a clause in a contract, a brief agreed statement of the background facts and a short oral argument from counsel has sufficed. Instead of pleadings, the question in issue was simply stated in the formal submission to arbitration. In every dispute consideration should be given to the best and most economic means of resolving it, consistent with fairness to both sides.

The problems I have referred to are world wide, and the solution is claimed to lie in the exercise of greater control over the proceedings by the judge or arbitrator. In our own courts we have in recent years developed the practice of judicial conferences and the setting of timetables. In major arbitrations much the same practice has been followed. In England, the recent practice notes issued by the Lord Chief Justice, Lord Taylor of Gosforth [1995] 1 All ER 385 and by the President of the Family Division, Sir Stephen Brown [1995] 1 All ER 586, are in the same direction. Both include the following:

> 1. The importance of reducing the cost and delay of civil litigation makes it necessary for the court to assert greater control over the preparation for and conduct of hearings than has hitherto been customary. Failure by practitioners to conduct cases economically will be visited by appropriate orders for costs, including wasted costs orders.
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> 2. The court will accordingly exercise its discretion to limit: (a) discovery; (b) the length of opening and closing oral submissions; (c) the time allowed for the examination and crossexamination of witnesses; (d) the issues on which it wishes to be addressed; and (e) reading aloud from documents and authorities.

I am sure that there is scope for arbitrators to exercise greater control in many cases. By doing so they may improve the effectiveness of the procedure to secure a just result without unnecessary delay or cost. There are, however, certain pitfalls to be avoided. The

efficiency of the process cannot be judged merely by the number of cases heard, or the speed at which they have been progressed. Judges or arbitrators may be convinced that they have achieved justice, and they may well have done on the basis of their perception of the facts and arguments put before them. They will be unaware, however, of the matters which should have been canvassed but were not. Judges and legal arbitrators can sometimes be tempted into an excessively interventionist role, enjoying participation in the action rather than remaining on the sidelines. They need to be careful not to prejudge matters before they have been fully explored.

It must be remembered that every prehearing conference, even if held by telephone, will itself involve costs. What is required is sensible management, so that effective procedures are adopted for the particular case, prehearing issues are resolved and an appropriate timetable is set while keeping costs to a minimum. If either party, or either counsel, is being obstructive, then the judge or arbitrator should take firm control. In most cases, however, the ready availability of recourse to a firm arbitrator should discourage any obstructive or unreasonable attitudes.

An arbitrator does not have the powers of a High Court Judge. He nevertheless has very considerable powers, and these have been strengthened in recent years by the increasing reluctance of the Courts to intervene in arbitrations, and their general policy to uphold awards. In most cases the arbitrator can achieve a just result in a reasonable time frame by enlisting the cooperation of the parties and their counsel, and by relying on his or her own personality, and on a scrupulous fairness of approach, and by dealing with procedural issues promptly and fairly. If one party is obstructive, or if Rambo tactics are sought to be employed, the arbitrator must take firmer control. In doing so the arbitrator must be more than ever careful to provide no valid grounds for challenging the rulings made. Each step taken and the basis for each ruling must be adequately recorded.

I believe there is a need for all who are involved in the field of dispute resolution, whether as parties, solicitors, counsel, arbitrators or judges, to be aware of the trends I have described and to be vigilant

to combat them. Counsel and arbitrators should identify and agree on the simplest and least expensive procedure appropriate for the particular case. If counsel in arbitrations act unprofessionally, the arbitrator must be prepared to coax or to shame them into being true professionals. We have the advantage of being a small country, where reputations can be made or lost very easily. If necessary the arbitrator must take firm control, using his or her powers fairly but effectively in a way which the Courts will support.

I share these thoughts with you as an association involved in maritime law and therefore in maritime disputes. Your association and the clients of your members should be aware of the trends I have described, and be alert to control them. Your clients' best interests will in the long run be best served by good counsel, rather than by Rambo types seeking to impress or to maximise their own time costs. The aim of every maritime lawyer, as of every lawyer, should be justice. The role of counsel is to assist in achieving justice by the effective presentation of the evidence and the valid arguments which are available to support the client's case, and by probing and demonstrating the weaknesses of the opponent's case. The conduct of a case should always be governed by this objective, with due regard to minimising the cost to one's client. To seek delay or the inflation of an opponent's costs for tactical reasons is an abuse of process. Those of you who are marine or maritime arbitrators need especially to be aware of the trends, and to be prepared to exercise firm control where this is required.