

ACCESS TO JUSTICE AND OTHER SHIBBOLETHS^{*}

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The phrase "access to justice" has become an effective password allowing incursions upon the administration of justice which would, in the past, have been repulsed by the courts. In particular, it has been effective in promoting acceptance of the commercial funding of large scale litigation by arrangements which give the funder a piece of the action and indeed control over the prosecution of the litigation. Such arrangements would, in the past, have been struck down as champertous.¹ The access to justice shibboleth also served, for a long time, as a distraction from the legitimate claims of case management as an essential tool in the administration of civil justice.²

The other shibboleths that I want to speak about are "Technology" and "ADR" (Alternative Dispute Resolution). Information technology has been enthusiastically embraced by the legal profession, and some court administrators, as a panacea for the strain which the growth of litigation has placed on the administration of justice. And ADR has been so successful that the role of the courts as quellers of controversies is seen now by some as secondary to a role of promoter of settlements.³

Litigation Funding

In a speech delivered to the Judicial Conference of Australia in October 2007, then Chief Justice Murray Gleeson made some poignant observations about the cost of justice. He stated:

"Litigation funding is now with us. Entrepreneurial activity in this respect raises issues that have come before the courts. It is not in all respects attractive, but subject to certain controls it may be a necessity. There is a need for some pragmatism about this, because the cost of access to justice is essentially a practical matter. Yet, a basic problem of access to justice is the remorseless mercantisation of legal practice. This reflects the dominance of the culture of the market, with its tendency to reduce society to the single dimension of producers and consumers. ...

The mega-trial is not a complete novelty ... What is new and more alarming is the length of the ordinary case. For well-resourced litigants, the time of judges is cheap. The government pays for judges; and it pays them much less than many litigants pay their lawyers. It is understandable

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¹ Cf *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 at 428 [75] and 442 [120].

² *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146.

³ Simon Roberts, "'Listing Concentrates the Mind': The English Civil Court as an Arena for Structured Negotiation" (2009) 29 *Oxford Journal of Legal Studies* 457, 457 – 459.

that some parties and their lawyers adopt a habit of thought which discounts the economic value of judicial services and court time. Judges should be conscious of this, and should be ready to assert their authority where that is necessary to secure reasonable expedition."⁴

Trading in litigation: the reasons against it

At the outset I want to take up the observation by Gleeson CJ that trading in litigation is "not in all respects attractive" and to consider the reasons why that is so. These reasons were formerly thought to be so strong that they afforded, at least in part, the rationale for the torts of maintenance and champerty at common law.

In the traditional conception the courts are an arm of government charged with the quelling of controversies. In this paradigm, the courts, in exercising the judicial power of the state, the courts are not "providing legal services". The parties to litigation are not acting as consumers of legal services: they are being governed — whether they like it or not. The torts of maintenance and champerty, whatever their historical origins, served the important purpose of protecting the administration of justice from having to deal with suits which would not be brought were it not for the funding provided by the intermeddler.

In *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*,⁵ Callinan and Heydon JJ said:

"... The purpose of court proceedings is not to provide a means for third parties to make money by creating, multiplying and stirring up disputes in which those third parties are not involved and which would not otherwise have flared into active controversy but for the efforts of the third parties, by instituting proceedings purportedly to resolve those disputes, by assuming near total control of their conduct, and by manipulating the procedures and orders of the court with the motive, not of resolving the disputes justly, but of making very large profits. Courts are designed to resolve a controversy between two parties who are before the court, dealing directly with each other and with the court: the resolution of a controversy between a party and a non-party is alien to this role. Further, public confidence in, and public perceptions of, the integrity of the legal system are damaged by litigation in which causes of action are treated merely as items to be dealt with commercially."⁶

To these unattractive aspects of trading in litigation can be added the point that the lawyers appearing before the court officers of the court. When lawyers act as officers of the court, they are not, and should not be thought to be, trading in legal services. Rather they are participating in that aspect of government which establishes, in the most concrete way, the law of the land for the parties and for the rest of the community.

It is unattractive that the exercise of judicial power should be viewed as a tradable commodity and that officers of the courts should act, or be thought to act, as factors for those engaged in the trade. It is, moreover, odd that when the judicial arm of the

⁴ Murray Gleeson, "Some legal scenery" (Speech delivered at the Judicial Conference of Australia, Sydney NSW, 5 October 2007) 9 – 10.

⁵ (2006) 229 CLR 386.

⁶ *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 at 486 – 488 [266].

state is straining to meet its constitutional obligation to quell the controversies which come before it in the ordinary way, the courts must also devote meager resources to dealing with suits that are brought only because a trader can make a profit from the exercise. That courts should themselves relax the restrictions which the common law imposed on such suits is an oddity which can be reconciled with the new reality only if one accepts that the common law restrictions are themselves at odds with the zeitgeist.

The *Fostif* decision

In 1982, Lord Wilberforce (in *Trendtex Trading Corporation v Credit Suisse*)⁷ expressed the then current view that "trafficking in litigation" is "under English law ... contrary to public policy." It appears that in *Fostif* views as to public policy had indeed changed.

The majority of the High Court expressed a tolerance for champerty which shows the powerful influence of the siren call of access to justice. Gleeson CJ, Gummow, Hayne, Crennan, and Kirby JJ stated:

"As Mason P rightly pointed out ([2005] NSWCA 83; (2005) 63 NSWLR 203 at 229 [116]) in the Court of Appeal, many people seek profit from assisting the processes of litigation. That a person who hazards funds in litigation wishes to control the litigation is hardly surprising. That someone seeks out those who may have a claim and excites litigation where otherwise there would be none could be condemned as contrary to public policy only if a general rule against the maintenance of actions were to be adopted. But that approach has long since been abandoned and the qualification of that rule (by reference to criteria of common interest) proved unsuccessful. And if the conduct is neither criminal nor tortious, what would be the ultimate foundation for a conclusion not only that maintaining an action (or maintaining an action in return for a share of the proceeds) should be considered as contrary to public policy, but also that the claim that is maintained should not be determined by the court whose jurisdiction otherwise is regularly invoked?

Two kinds of consideration are proffered as founding a rule of public policy - fears about adverse effects on the processes of litigation and fears about the 'fairness' of the bargain struck between funder and intended litigant. In *Giles v Thompson* ([1993] UKHL 2; [1994] 1 AC 142 at 164), Lord Mustill said that the law of maintenance and champerty could best 'be kept in forward motion' by looking to its origins; these his Lordship saw as reflecting 'a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants'.

Neither of these considerations, whatever may be their specific application in a particular case, warrants formulation of an overarching rule of public policy that either would, in effect, bar the prosecution of an action where any agreement has been made to provide money to a party to institute or prosecute the litigation in return for a share of the proceeds of the litigation, or would bar the prosecution of some actions according to

⁷ [1982] AC 679 at 694.

whether the funding agreement met some standards fixing the nature or degree of control or reward the funder may have under the agreement. To meet these fears by adopting a rule in either form would take too broad an axe to the problems that may be seen to lie behind the fears.

...

As for fears that 'the funder's intervention will be inimical to the due administration of justice' (*Clairs Keeley* (2004) 29 WAR 479 at 502 [125]), whether because '[t]he greater the share of the spoils ... the greater the temptation to stray from the path of rectitude' (*R (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8)* [2003] QB 381 at 413 [85]) or for some other reason, it is necessary first to identify what exactly is feared. In particular, what exactly is the corruption of the processes of the Court that is feared? It was said, in *In re Treppca Mines Ltd (No 2)* ([1963] Ch 199 at 219-220), that '[t]he common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses'. Why is that fear not sufficiently addressed by existing doctrines of abuse of process and other procedural and substantive elements of the court's processes? And if lawyers undertake obligations that may give rise to conflicting duties there is no reason proffered for concluding that present rules regulating lawyers' duties to the court and to clients are insufficient to meet the difficulties that are suggested might arise."⁸

Since the *Fostif* decision, the High Court has maintained a liberal approach to litigation funding.

In *Deloitte Touche Tohmatsu & Ors v JP Morgan Portfolio Services Ltd*,⁹ the Full Court of the Federal Court (Tamberlin and Jacobson JJ, Rares J dissenting) had dismissed an appeal from a decision of Wilcox J that an agreement that gave the entire benefit and control of litigation to a third-party was not void for maintenance or as being champertous in circumstances where the beneficiary owned the company that held the cause of action being prosecuted. The majority of the Full Court of the Federal Court noted, however, that the factual circumstances of the case were dissimilar from *Fostif*.¹⁰

On Deloitte's application for special leave to the High Court, Deloitte grounded its argument on the basis that *Glegg v Blomley*,¹¹ which permitted a party to assign the fruits of litigation but only where that party maintained control of the litigation, could not be reconciled with the holdings in *Fostif*. Gleeson CJ and Gummow J dismissed the application on the basis that this argument did not carry sufficient prospects of success to warrant the grant of special leave.¹²

⁸ (2006) 229 CLR 386 at 434 – 435 [89] – [93].

⁹ (2007) 158 FCR 417.

¹⁰ (2006) 229 CLR 386 at 434 – 435 [62].

¹¹ [1912] 3 KB 474.

¹² [2007] HCATrans 481.

The liberal approach can lead to outcomes which are practically unattractive. In 2007 in *Hall v Poolman*¹³ an action was brought by liquidators with the financial assistance of a litigation funder, against the company's former directors. Although it appeared to Palmer J that the proceeding was likely to result only in a return to the liquidators, the funders and the lawyers, his Honour considered that he was precluded by the High Court's decision in *Fostif* from concluding that the action was an abuse of process.

Post-Fostif

The *Fostif* decision has its academic critics. In this regard, Dr David Capper of Queen's University, Belfast spoke for those who view the proliferation of funded litigation with concern when he wrote in an article insightfully entitled "Maintenance and Champerty in Australia – Litigation in Support of Funding!":

"Litigation and a litigation culture should not be encouraged. Just as war is the failure of diplomacy litigation should be seen as the failure of dispute resolution. Litigation should be a last resort attempt to resolve a *real* dispute when all other efforts can offer no effective release ... The litigation in *Fostif* was not real ... Allowing litigation like this to proceed would have wasted a large amount of judicial time to the detriment of persons with *real* cases, who would have experienced further delay in having those cases come on for trial. This is why it is to be hoped that English courts would take no positive inspiration from the attitude of the majority of the High Court.

The majority opinions, while being appropriately sceptical of some of the minority's reasons, never really got to grips with the fundamental problem just explained."¹⁴

Peta Spender has expressed the concern about the maintenance of claims for a windfall benefit in cases where:

"... the right-holder has no perception of injury and no knowledge of a right to sue; however, through the provision of information by lawyers and funders a conscious decision is made to proceed. The right-holder is ambivalent or uninterested in vindicating a pre-existing right other than to secure the proceeds of judgment or a settlement. The claim is therefore a windfall. The *Fostif* case falls into the windfall category due to the poor design of the substantive law. More commonly windfall claims lack merit but rely on defendants choosing to settle rather than incur the costs of defending them.

The 'undeserving' nature of windfall claims has led to several expressions of moral hazard by judges, particularly where there is an allegation of 'claims harvesting' in proceedings. Moreover, in *Deloitte Touche Tohmatsu v JP Morgan Portfolio Services Ltd* (2007) 158 FCR 417 the absence of a desire on the part of a right-holder to quell a controversy led Rares J to conclude that the proceedings were an abuse of process. He

¹³ (2007) 215 FLR 243.

¹⁴ David Capper, "Maintenance and Champerty in Australia—Litigation in Support of Funding!" (2007) 26 *Civil Justice Quarterly* 288, 290 – 291 (citations omitted).

considered that the proceedings represented 'the form, but not the substance, of a basis to invoke the exercise of the judicial power.'

However, proving that an individual proceeding is a windfall claim is difficult. More importantly, attempts to establish systemic abuse and claims harvesting have been unsuccessful and satellite litigation by defendants contributes to the overall concern about excessive litigation."¹⁵

Spender concluded with the point that the unregulated proliferation of third party funded litigation may work as an obstacle to access to justice generally, that:

"the doctrines of maintenance and champerty still have salience. However, effective regulation must move outside case law to embrace different instruments and contexts of regulation. This capacity to respond will hopefully diminish the 'remorseless mercantisation of legal practice' and reassert the intrinsic value of access to justice."¹⁶

The litigation funding industry in Australia has, understandably, embraced the majority view in *Fostif* in the name of access to justice. Mr John Walker of IMF (Australia) Ltd, a publicly listed litigation funder, commented:

"Some Judges remain wary of the involvement of litigation funders and strong objections to litigation funding, which carry more than an echo of the ancient abhorrence with champerty, are still heard. Some courts and regulators also fear that litigation funding may lead to undesirable 'trafficking' in litigation, the misuse or overuse of court resources, the exploitation of vulnerable litigants, the exposure of defendants to unfair risks and the creation of unacceptable conflicts of interest and ethical dilemmas for the lawyers who are being paid by funders.

Thankfully, most of these issues were addressed by the High Court in 2006."¹⁷

Mr Walker addressed in particular the concern that litigation funding may promote the prosecution of baseless claims in the following terms:

"A funder, acting rationally, will not fund proceedings which have poor prospects of success, given the likely loss of its investment and its exposure to uncapped adverse cost orders. As Justice Austin said: '... there is the commercial reality that [the litigation funder] would not, acting rationally, prosecute litigation at its expense unless there were a reasonable prospect of a verdict or settlement...'.¹⁸

I would argue that experience in Australia of large scale funded litigation suggests that this argument is not compelling.

¹⁵ Peta Spender, "After *Fostif*: lingering uncertainties and controversies about litigation funding" (2008) 18 *Journal of Judicial Administration* 101, 108 – 109 (footnotes omitted).

¹⁶ Peta Spender, "After *Fostif*: lingering uncertainties and controversies about litigation funding" (2008) 18 *Journal of Judicial Administration* 101, 115.

¹⁷ John Walker and Wayne Attrill, "Policy issues in litigation funding" (Paper presented at the Supreme and Federal Court Judges' Conference, Hobart, January 2009) 8.

¹⁸ John Walker and Wayne Attrill, "Policy issues in litigation funding" (Paper presented at the Supreme and Federal Court Judges' Conference, Hobart, January 2009) 16.

There is a view that most cases fuelled by litigation funding can be expected to settle before trial and so the courts themselves will not become institutionally embroiled in the commodification of this aspect of government. This view does not accord with my experience. Moreover, there is data which shows that private litigation funding actually discourages settlement.¹⁹ And why would that be surprising? What incentive is there for lawyers funded by traders in litigation to recommend settlement? It is certainly not the concern to balance the vindication of rights of victims of misconduct against the risk of an exposure to an order for costs if the suit fails. And the vindication of victims' rights is the last thing on the mind of the funders and the lawyers whose interests they serve. The profit-making expectations of the trader who controls the litigation add a special complication to the risk-benefit calculations which inform settlement negotiations. And finally, it would be odd if it were the policy of the law to facilitate the raising of a controversy in the hope that it might then be resolved by negotiation.

It is also not easy to see why our judge-made law would develop so as to emulate the liberal approach to champertous agreements which prevails in the United States. Experience in the United States suggests that lawyers are still as susceptible to distraction from their obligations as officers of the court by the prospect of earning large fees. In an article in the *Louisiana Law Review*, Kent Lambert said:

"Perceptions of opportunistic, if not outright collusive, settlements by class counsel have recently led to charges that most class settlements, policed by an overburdened judiciary with little incentive to oppose them, are choreographed by the class attorneys to line their own pockets with huge sums of money garnered at the direct expense of the class members whom they are supposed to be serving."²⁰

Good News

I suppose we should be celebrating the good news that the pessimistic view of human nature which, for several hundred years, has informed the common law's disapproval of champerty is no longer correct. Lawyers used to be greedy, but now we're better. And to the extent that we lawyers might still be susceptible to distraction from our duty by our own pecuniary interests, it is comforting to be reminded that the courts can prevent abuse of their processes. But, in my respectful opinion, these sanguine expectations are not justified by experience. Rather, experience suggests that the reasons which caused the law to anathematise champerty remain of real concern in relation to litigation funding agreements and, further, that the notion that the courts are able to prevent abuses of process is an over-valued idea.

One of the things which has struck me about the public discussion about litigation funding is the absence of discussion of, or even reference to, two particular pieces of litigation. I refer to the *Emanuel Case*, and the *Maconachie Case*, known formally as *Idoport Pty Ltd v National Australia Bank*. These cases seem to be the elephants in the room that are studiously ignored. I want to talk about them because they

¹⁹ Tom Schepens, "Bridging the funding gap: the economics of cost shifting, fee arrangements and legal expenses insurance and their prospects for improving the access to civil justice" (Working Paper No 1, German Working Papers in Law and Economics, 2007) 30.

²⁰ Kent A. Lambert, "Class Action Settlements in Louisiana" (2000) 61 *Louisiana Law Review* 89, 90.

illustrate the price that may actually be paid for private funding of access to justice, especially when there are alternatives which should be considered.

Both of these pieces of litigation were funded by third parties as commercial ventures for profit. The *Emanuel Case* is an exemplar of the concern that litigation funding does promote the pursuit of frivolous litigation. The *Maconachie Case* affords a striking example of the practical need for case management over the theoretical claims of access to justice.

Emanuel & Ors v Fosters

Companies in the Emanuel group borrowed large sums from companies in the Fosters Group on mortgage security. The borrowers defaulted leaving a debt of over \$180 million. Judgment by default for this sum was obtained by Fosters in February 1995. The Emanuel companies entered into a deed (described as a Deed of Forebearance and Release ("the DOFR") with the mortgagees to transfer the mortgaged properties in return for a partial cancellation of the debt. The result of this agreement was that the mortgagees were still out of pocket for more than \$100 million.

The liquidator of the Emanuel companies commenced proceedings against Fosters and the accounting firm that audited the Emanuel companies to recover benefits he alleged the Fosters' companies obtained under the DOFR which was alleged to have been procured through fraud and breaches of the company laws. An important allegation in the case was that the default judgment was obtained as a result of an agreement between Mr Joe Emanuele and the officers of mortgagees to defraud creditors. It was also alleged transfers of land effected under the DOFR gave effect to the fraud.

The action was funded by a company intriguingly named Gordian Run-off Ltd ("GRL"), a member of the GIO Australia Ltd group of companies.

The action proceeded to trial and judgment.²¹ The trial occupied from August 2002 to April in the following year. In the upshot it was held that the liquidator's claims, especially the claims of fraud, were without any foundation at all. As a result, costs orders on an indemnity basis were made in favour of Fosters.²² Chesterman J, who tried the case and made the orders for costs, said:²³

"... It was of concern that the plaintiffs made and persisted in allegations of the most serious misbehaviour by solicitors and senior officers of public companies when no evidence was adduced to support them, and the plaintiffs avoided putting the allegations to the witnesses in cross-examination when they could have been answered directly. It is enough to recall the many allegations of undue influence concerning Mr Emanuele and that he was not called to support them. Other evidence suggested that he was a man most unlikely to be put upon. No other evidence in support of such a case was led.

²¹ *Emanuel Management Pty Ltd (In liq) v Foster's Brewing Group Ltd* (2003) 178 FLR 1.

²² *Emanuel Management Pty Ltd (in liquidation) & Ors v Foster's Brewing Group Ltd & Ors and Coopers & Lybrand & Ors* [2003] QSC 299.

²³ *Emanuel Management Pty Ltd (in liquidation) & Ors v Foster's Brewing Group Ltd & Ors and Coopers & Lybrand & Ors* [2003] QSC 299 at [19] – [31].

I do not wish to revisit my reasons for judgment but it may be remembered that two of the three components of the '1995 Scheme' foundered at the first ripple. The February 1995 judgment could not be set aside without evidence that it was obtained by a dishonest agreement. Not only was there no evidence of agreement the evidence which the plaintiffs led showed there was no agreement.

The claim to set aside the judgment was always, I think, doomed to fail and its fate should have been apparent. Not only was there no evidence led of an agreement to enter judgment for an amount known to be exaggerated, the objective facts established that the plaintiffs had no prospect of challenging the amount for which judgment was entered. There was never any doubt about the existence of a debt owed by the corporate plaintiffs to the second, third and fourth defendants. The amount was fixed by the DOOR. That deed had been the subject of litigation in the Federal Court and could not again be assailed in litigation, however limited a view one might take of the operation of *Anshun* estoppel. Consequently the amount of the debt was unalterably fixed as at March 1993. Its computation as it grew with compounding interest over the next two years was not a matter of particular difficulty. The amount so computed was the debt for which judgment was given.

There being a real debt for an unchallengeable amount there was no basis for setting the judgment aside.

The third component, that land was transferred at an under-value, failed when the plaintiffs led evidence from Mr Purvis and Mr Slect that the land could not be worth as much as the figure advanced by the plaintiffs' own valuer. In addition the case that the value was fixed arbitrarily at a known under-value was never advanced at all in the evidence. The valuer who undertook the valuations was not taxed with the point.

The second component of the 1995 Scheme, the operation and making of DOFR, gave rise to greater difficulties of analysis and called for a more detailed examination of the facts surrounding them. I found in favour of the first defendants but I would not say that than outcome was clearly inevitable from the commencement of the trial. It should have been, however, by the time the first defendants had waived privilege and disclosed communications between them and their solicitors and the delivery of their witness statements. Notwithstanding the delivery of that information the plaintiffs persisted with their claim that DOFR was tainted with fraud and bribery.

The real point to my mind is that had the plaintiffs succeeded on that aspect only of the 1995 Scheme it would have produced no more than a return of the money paid to Simionato Holdings less the amount recovered from that company by the liquidator. The amount is less than \$3,000,000 which would have to be set off against the judgment debt owed in favour of the first defendants. That claim could not have produced any positive outcome for the plaintiffs.

The plaintiffs' inability to mount an argument to have the judgment set aside had a number of consequences. The existence of the judgment made the prosecution of the other causes of action worthless. It precluded the prosecution of the claim in respect of the preference shares. The statement of claim itself made it clear that the debt in respect to which judgment was entered took account of the monies (wrongfully it was claimed) recovered from Emanuel Management by way of dividends and redemption. While the judgment debt stood the plaintiffs could not prosecute that claim.

Even assuming complete victory for the plaintiffs on their claims in respect of the issue and redemption of preference shares, the amount recoverable was only a fraction of the judgment debt. A set off of judgments which would have been the only appropriate course would have left the plaintiffs very substantial net judgment debtors.

The plaintiffs and GRL both argued that this view of the litigation was unduly censorious. Their argument was that although the result went against the plaintiffs it was only after a thorough investigation of the facts at the trial, and that it was reasonable for the plaintiffs to believe that the materials they had gave rise to a reasonable belief that the case was a good one. They should not be penalised, they submit, by an order for indemnity costs because their view was not, in the end, shared by the trial judge.

The submission was made by counsel who did not appear at the trial. The view that the documents gave rise to an arguable case of a conspiracy to defraud, wide ranging dishonesty and cynical misuse of a fiduciary position could not be advanced by anyone who had taken the necessary weeks to read the documents which were put forward as evidence of the transactions the plaintiffs sought to impugn. As I mentioned in the reasons for judgment the documents tendered by the plaintiffs offered no support for their case but rather proved the first defendants' contention that there had been honest negotiations between the parties dealing at arms length.

The liquidator is responsible for the conduct of the corporate plaintiff's claims, as well as his own.

I have said enough to indicate that in my opinion there was a degree of irresponsibility in the plaintiffs' bringing and prosecuting their action against the first defendants. It is significant that extravagant claims of dishonesty, corruption and gross impropriety were made in support of which not the slightest evidence was called. It is a case in which it is right to regard to the defendants as having been vexed. It is therefore an appropriate case in which to order an order of indemnity costs."

This case was able to proceed only because of the litigation funding agreement. The liquidator of the Emanuel companies, Mr Macks, with the approval of a judge of the Federal Court,²⁴ had arranged a funding agreement with GIO Insurance Limited

²⁴ *Re Addstone Pty Ltd (in liq)* (1998) 83 FCR 583.

("GIO") and the Commonwealth Bank of Australia ("CBA"). The liquidator was empowered to enter into such a funding arrangement with the Court's approval by virtue of s 477(2)(c) of the *Corporations Law*, which is reproduced in the *Corporations Act 2001* (Cth).

Proceedings were originally commenced by the liquidator in the Supreme Court of South Australia, but transferred to the Supreme Court of Queensland by order of DeBelle J under the cross-vesting legislation.²⁵ Fosters sought to challenge the validity of the funding arrangement entered into by Macks with GIO and CBA. Williams J of the Supreme Court of Queensland dismissed the action.²⁶ The Fosters' companies appealed to the Queensland Court of Appeal, which affirmed his Honour's decision.

The Fosters' companies sought an injunction to restrain the continued performance of the litigation funding arrangements. In the Court of Appeal these proceedings were formally described as *Elfic Ltd v Macks*.²⁷

It was held by the Queensland Court of Appeal that the disposal by equitable assignment of the future proceeds of a cause of action was a disposal of property of the company which might be authorised by s 477(2)(c) of the *Corporations Law*. It was accepted that the funding arrangements, which included an entitlement in the family company of GIO's solicitor to a percentage of the amount recovered was champertous²⁸ but because the arrangement had been approved under s 477(2) of the *Corporations Law* it was held to be exempt from the consequence of being void or unenforceable for champerty.

The Fosters' companies sought to demonstrate before both Williams J and the Court of Appeal that the full facts concerning the funding arrangements had not been put before the judge of the Federal Court who approved the arrangements in ex parte proceedings, and that the proposed action had no real foundation. The argument advanced on behalf of Fosters that the funding arrangement was champertous (and thus void as contrary to public policy) was confronted by a substantial line of authority that property disposed pursuant to s 477 was exempt from such a categorisation.²⁹ Davies JA observed:

"The public policy of ensuring the realisation of the company's property in the best interests of creditors and contributories, and in obtaining finance for that purpose under agreements which would otherwise be champertous, has been thought to outweigh the competing public policy against an outsider, with no commercial interest in litigation apart from obtaining a share in the proceeds, from intermeddling in that litigation for that share."³⁰

²⁵ *Emanuel Management Pty Ltd (in liq) & Ors v Fosters Brewing Group Ltd* (1999) 73 SASR 303.

²⁶ *Elfic Ltd v Macks* [2000] QSC 18.

²⁷ [2003] 2 Qd R 125.

²⁸ [2003] 2 Qd R 125 at 160 [171].

²⁹ [2003] 2 Qd R 125 at 139 – 140 [77] per McMurdo P and at 160 – 161 [173] per Davies JA.

³⁰ [2003] 2 Qd R 125 at 161 [175] per Davies JA.

The courts were also unimpressed by the attempt of Fosters, a third party to the supposedly champertous agreement, to sustain the prosecution of the case against it.

Gaudron and Hayne JJ heard the application for special leave to appeal to the High Court.³¹ Gaudron J, explaining the Court's refusal of special leave, mentioned this difficulty confronting Fosters:

"Given that the applicants are not parties to the agreements, the validity of which they seek to challenge, an appeal to this Court against the refusal of the declarations that were sought at first instance would not enjoy sufficient prospects of success to warrant a grant of special leave. Moreover, the questions which the applicants seek to agitate about the construction and operation of sections 477(2)(c), 565, 588F and 588M of the Corporations Law would not fall for decision even if special leave to appeal were granted.

The power to grant declaratory orders is ample. Nonetheless, to grant at the suit of a stranger a bare declaration about the enforceability of rights and duties undertaken by others under agreements which those others have made would, in the circumstances of this case, travel beyond the limits of the power. A declaration, if made, would not bind the parties to the impugned agreement because there is no issue between them that would be litigated in or decided by the present proceedings. That being so, it would be wrong to make the declarations that are sought."

But, of course, the party who has the most urgent interest in seeking to halt the prosecution of a champertous agreement is the target. On this view the target of champerty has no means to take the point even if the point were otherwise a good one. I should acknowledge that I was the Counsel whose urgings failed to persuade the Court of Appeal and the High Court. I do not wish to suggest that the courts were wrong to reject my urgings. Once we retreat from the anti-champerty public policy, we go from complete prohibition to, in effect, no real regulation at all. The point I want to make is that this litigation affords actual experience which throws doubt on the notion that the court's powers to control abuses of its process can be relied upon to prevent travesties of justice.

There is, also, as a matter of our judicial culture, an entrenched reluctance of Australian judges to bring litigation summarily to a conclusion. In this regard, Murray J of the Supreme Court of Western Australia recently said:

"Generally the remedy is sought by a defendant who does not wish to be vexed by having to defend an action which is otherwise maintainable but would, in all probability, not have been brought if it were not for the funding arrangement of which complaint is made.

Great care must be taken that a remedy of this kind is not applied except in a case of absolute necessity. As a general proposition, I would endorse

³¹ (2002) 23(6) Leg Rep SL4.

the view that other means to control the undesirable features of litigation funding arrangements should be found."³²

As to what these "other means" might be, Murray J continued:

"If the availability of litigation funding for profit improves, as it must, access to the civil justice system, then that must be accommodated by the courts, not by denying funded litigants access to the judicial process, but by improving the efficiency of the system (a matter upon which the courts have, over recent years, worked assiduously to improve the process) and perhaps by modifying the judicial process available to all litigants, primarily by more sophisticated judicial case management and the careful application of the principle of proportionality now enshrined in the rules of most of the courts"³³

A concern for access to justice, allied with a deeply entrenched legal culture that even a barely arguable case deserves its day in court, means that cases which, if subject to critical scrutiny might not pass muster, will simply not be filtered out by our traditional processes of summary disposal. I respectfully agree with Murray J that it is more sophisticated - and rigorous - application of case management which can limit, at least to some extent, abuses of the kind which occurred in *Emanuel* and *McCochnie*.

There is a view, adverted to by Kirby J in *Fostif*,³⁴ that litigation funding, in combination with the class action, serves the public interest by ensuring that economically powerful defendants can no longer cynically calculate that the harm they inflict on the mass of consumers will be so spread as not to warrant any individual consumer bringing an action. This view is animated by the spirit of the age in which ever infringement of every right must be remedied.

There is surely room for doubt as to the desirability of pursuing the public interest in policing the activities of suspected rogues by privately funded and directed litigation, at least in the absence of a clear demonstration that public agencies such as the ACCC are not up to the task. The view that the public interest may be best served by public agencies whose focus of concern is the public interest not private profit does not seem to be overly naïve. And at the very least, those responsible for the public interest should have a say in the decision to pursue by litigation what is said to be the public interest.

Funding arrangements might be the responsibility of a public agency. In the United Kingdom much work has been devoted to the study of a proposal for establishing a Contingent Legal Aid Fund. The Bar Council produced a discussion paper dated 27 February 2009.³⁵ This paper addressed issues raised by Lord Justice Jackson's Preliminary Report for his Civil Litigation Costs Review.³⁶

³² Justice Murray, "Policy issues in litigation funding: commentary" (Paper presented at the Supreme and Federal Court Judges' Conference, Hobart, January 2009) 5.

³³ Justice Murray, "Policy issues in litigation funding: commentary" (Paper presented at the Supreme and Federal Court Judges' Conference, Hobart, January 2009) 5.

³⁴ (2006) 229 CLR 386 at 442 [120], 450 [142], 468 [202].

³⁵ The General Council of the Bar, *The Merits of a Contingent Legal Aid Fund: Discussion Paper* (2009)

The central idea is that the administrators of a Contingent Legal Aid Fund assess the prospects of success of a prospective plaintiff's claim and agree to fund the claim if the likely prospects of success justify support. If support is given, the plaintiff's lawyers run the case and are paid at ordinary rates. In return, the client pays a percentage of the money recovered – if the claim succeeds – back to the Fund. The plaintiff's contribution back to the Fund serves to fund ongoing assistance to other plaintiffs. A possible variation of this model would have the unsuccessful defendant obliged by legislation to meet the liability for the sum which would otherwise be deducted from the successful plaintiff's award.

This model recognises the fundamental need to ensure that legal remedies are available to those who have been wronged, that harm done is recompensed and that obligations are honoured. At the same time it recognises that "'Satisfaction' that a wrong has been righted" is simply not a marketable commodity, and that litigation funding arrangements operate by extracting a profit from the administration of justice which – apart from being unattractive in itself – is apt to inflate legal costs. The establishment of a Contingent Legal Aid Fund recycles resources deployed in the public interest rather than allowing them to be appropriated by entrepreneurs.

May I also suggest that it is not taking an unduly pessimistic view of human nature to say that advice from a lawyer asked to advise on the prospects of success of litigation proposed to be undertaken as part of the business of a litigation funder is apt to be, no doubt unconsciously, less astute to possible weakness in the proposed case than advice from a lawyer whose client is concerned only to get justice and must incur the expense and risk of the proceedings necessary in that regard. Getting to run a piece of mega-litigation should not be able to be seen as a reward for positive advice as to prospects.

So far as the ongoing debate about litigation funding is concerned, surely there should be, in any legislative framework, an insistence on a strict demarcation between the lawyers who advise the funder that a claim is truly worthwhile in terms of prospects of success and likely recovery, and the lawyers who actually run the case.

Idoport v NAB (Maconachie)

There were 75 separate judgments delivered during the course of this litigation. I mention some of them now.

In the litigation better known as the *Maconachie Case* in New South Wales, the immediate antagonists were Mr Maconachie's company, *Idoport Pty Ltd* ("Idoport"), and the National Australia Bank Ltd ("NAB"). The proceedings were brought on the strength of a litigation funding agreement between *Idoport* and a syndicate of Dutch dentists incorporated into the company *Efficiency Investment BV*.

Einstein J summarised the dispute in the following terms:

³⁶ <<http://www.barcouncil.org.uk/assets/documents/CCF%20Paper%202%20April%202009.pdf>> at 7 October 2009.
The Rt Hon Lord Justice Jackson, *Review of Civil Litigation Costs: Preliminary Report* (2009) <http://www.judiciary.gov.uk/about_judiciary/cost-review/preliminary-report.htm> at 7 October 2009.

"Speaking very generally, the action consists of claims by the plaintiffs for damages in connection with the alleged failure of the defendants to properly commercialise what has sometimes been described as an Automated Market Quotation System called 'AUSMAQ.' Whether that description is apt is to be litigated. This alleged failure is said by the plaintiffs to sound in damages for, inter alia, breach of contract, breach of fiduciary duty, contravention of s 52 of the *Trade Practices Act* and s 42 of the *Fair Trading Act*, the tort of procuring breach of contract, knowing involvement in breach of fiduciary duty and accessory liability for contravention of the *Trade Practices Act* under s 75B of the Act. In part, those damages are claimed in respect of what are alleged to have been commercial opportunities to exploit the AUSMAQ System in various parts of the world, including the United Kingdom, the United States, Japan and Taiwan, which opportunities are said to have been lost as a result of the alleged malfeasance of the defendants."³⁷

Idoport sought to recover billions of dollars in damages.

In [1999] NSWSC 686, Idoport sought orders restricting the dissemination of witness statements, including statements by expert witnesses as to the assessment of damages claimed, which allegedly contained confidential and commercially sensitive information. Rolfe J dismissed the application, innocently observing that: "Efficiency in the administration of the case demands ... the minimum of delay and impediment."³⁸

In [1999] NSWSC 828,³⁹ Einstein J refused interlocutory injunctive relief to Idoport, which sought the appointment of a receiver and manager to the special purpose vehicle that owned the intellectual property rights ultimately in dispute. His Honour, presciently, remarked: "In general terms, it is unlikely ... that a final resolution of the proceedings on a final basis, following any appellate proceedings, could be expected to be reached until in all likelihood the year 2002, if that." In [1999] NSWSC 940, Einstein J instead ordered that NAB keep and procure to be kept a record of profits made by the entities concerned in the exploitation of the challenged intellectual property rights.

In [1999] NSWSC 1026, Einstein J granted an application by Idoport for further discovery from NAB of "high level documents" rejecting arguments by NAB that the discovery exercise amounted to a fishing expedition. In [2000] NSWCA 8, the NSW Court of Appeal (Mason P, Priestly and Fitzgerald JJA) leave to appeal against His Honour's orders was denied to NAB.

³⁷ [2000] NSWSC 1141 at [12].

³⁸ [1999] NSWSC 686, [45].

³⁹ In [1999] NSWSC 803, Bryson J made rulings refusing claims for client legal privilege with respect to certain documents, except an advice by counsel, produced by Idoport in response to a call for production by counsel for NAB from the Bar table during the interlocutory hearing before Einstein J. In [1999] NSWSC 964, Santow J made a ruling upholding a claim for privilege by Idoport against NAB with respect to the advice by counsel not dealt with by Bryson J, in circumstances where an officer of the second and third plaintiffs disclosed the advice to counsel for NAB beyond the authority of the second and third plaintiffs to waive privilege without the consent of Idoport.

In [2000] NSWSC 63, Einstein J made orders as sought by Idoport that it should have access to "critical documents" discovered by NAB upon it making certain undertakings. NAB challenged the application with respect to dissemination of the critical documents to Idoport's expert witnesses, but his Honour limited any dissemination by Idoport to four proposed experts with leave to apply.

In [2000] NSWSC 148, Einstein J refused an application by NAB for the discharge of orders for discovery on the basis that Idoport had made certain admissions, which it argued had the effect that any evidence led from any discovered documents would no longer be relevant as pertaining to a fact in issue. His Honour was of the view that the discovery properly related to the material issues in the substantive proceedings.

In (2000) 49 NSWLR 51; [2000] NSWSC 338, Einstein J made orders that the final hearing of the matter be heard in the Technology Court, despite the weak opposition by NAB to the proposal.

In [2000] NSWSC 599, Einstein J dismissed an application by NAB to strike out sections of Idoport's defence to a cross-claim brought against it, on the basis that the prejudice claimed by NAB that Idoport could run a separate case in response to the cross-claim after NAB had presented its defence against the claim brought by Idoport could be adequately dealt with by appropriate case management.

With less than a month until the final hearing, during a directions hearing with respect to non-compliance with the discovery timetable in [2000] NSWSC 660, Einstein J intimated the need for self-restraint in the course of the proceedings, though was not moved to compel such restraint:

"... it has to be said that the approaching hearing date and the series of sets of directions and varied directions given in the first half of this year, and the last months of last year, have now led to a point in time where the Court is going to have to be reasonably strict in limiting the parties to the statements which they have mobilised for the hearing which, after all, has to commence at some time and in respect of which the parties, in a real sense, have to draw a line at some time."

After the commencement of the final hearing, Einstein J made an order that a folder containing up-to-date pleadings be kept in the registry for inspection by members of the public upon reasonable notice,⁴⁰ including taking such notes and copies as appropriate.⁴¹

In [2000] NSWSC 945, Einstein J ordered that new proceedings instituted by Idoport with respect to new projects established by entities associated with NAB since the commencement of the original proceedings be heard and determined concurrently with the original proceedings. His Honour made directions for discovery and exchange of submissions to give effect to that order.

During the course of the hearing, objection was taken to the admissibility of evidence by foreign law experts as to the foreign law and its application in the present case.

⁴⁰ [2000] NSWSC 769.

⁴¹ [2000] NSWSC 776.

Einstein J gave reasons in which he discussed the applicable principles (which tended to favour the admissibility of the evidence) but did not rule on the objections.⁴² His Honour was, however, also confronted with establishing a regime for determining the admissibility of challenged evidence to be given by over 130 witnesses.⁴³ His Honour permitted various witness statements relating to regulatory materials and technical requirements and timing to be read on terms.⁴⁴

In [2000] NSWSC 1141, Einstein J noted that "enough is enough" and stated:

"The volume of statements, the number of witnesses and complexity of the issues has meant considerable difficulty in the Court being able to do otherwise than adopt a reasonably broad brush approach in working through these complaints - a pragmatic approach has been taken so as to ensure that, within limits, neither party has room for further complaints. But clearly the line has to be drawn somewhere and the stage has now been reached where ... a rigorous approach is to be taken to any steps by either party to supplement their cases which have already been supplemented on a number of occasions. The 'enough is enough' proposition, even in litigation of this order, must clearly now be applied."⁴⁵

In [2000] NSWSC 1215, Einstein J dismissed an application by Idoport for the separate determination of the liability and quantum issues on the basis that "the net effect of the exercise would ... in fact increase rather than decrease the amount of court time to be taken by these proceedings. This is because there is a high likelihood of interlocutory appeals which would be prosecuted going to the problems thrown up by the separation of issues at a number of levels."⁴⁶

In [2001] NSWSC 142, Einstein J allowed an application by which Idoport sought leave to file a fourth further amended statement of claim, which arose at a point during the hearing when legal argument as to the expertise of one of Idoport's expert witnesses, Mr Manconochie, was being presented. Accepting that "the overriding purpose of the Rules being to facilitate the just, quick and cheap resolution of the real issues in civil proceedings",⁴⁷ his Honour permitted the amendments since descending into the NAB's challenge of the amendments would require an involved analysis of the evidence that will be undertaken in the course of the hearing in any event. In [2001] NSWSC 328, his Honour dealt with the balance of the purported amendments, refusing leave to plead the tort of inducing breach of contract against certain defendants, but invited further submission with respect to the possibility of pleading the tort against others. Upon those further submissions, leave was ultimately granted.⁴⁸ Further to those submissions, Idoport filed a further application to amend its pleadings to allow an additional implied term in the relevant contract, which was also granted.⁴⁹

⁴² (2000) 50 NSWLR 640; [2000] NSWSC 1077.

⁴³ [2000] NSWSC 1250.

⁴⁴ [2000] NSWSC 1140.

⁴⁵ [2000] NSWSC 1141 at [11].

⁴⁶ [2000] NSWSC 1215 at [22].

⁴⁷ [2001] NSWSC 142 at [75].

⁴⁸ [2001] NSWSC 485.

⁴⁹ [2001] NSWSC 509.

In [2001] NSWSC 196, Hodgson CJ in Equity ruled that legal professional privilege had been lost in relation to affidavits that were attached to emails exchanged between junior counsel for Idoport and a witness. His Honour held that insofar as the emails were disclosed and privilege was thus waived with respect to them, s 126 of the *Evidence Act* 1995 (NSW) also removed privilege from other material necessary to enable a proper understanding of those emails.

In [2001] NSWSC 222, Hodgson CJ in Equity ruled that legal professional privilege subsisted in documents inadvertently disclosed by Idoport to NAB, notwithstanding objections by NAB to the effect that the documents were not protected by privilege insofar as they were said to evidence an abuse of process by Idoport.

In [2001] NSWSC 246, Einstein J made rulings to the effect that Mr Martin, a witness for Idoport, possessed the necessary specialised knowledge to give evidence on various matters. Mr Martin prepared a further statement in light of those rulings with the leave of the Court. The defendants objected to certain passages on the basis that Mr Martin had failed to identify with precision the documents that he inspected in the preparation of his evidence, but his Honour in [2001] NSWSC 434 overruled the objections pending such identification from the witness. His Honour ruled further passages admissible over challenges by NAB in [2001] NSWSC 449.

In [2001] NSWSC 435, Einstein J permitted further and better discovery on notice of motion by the defendants pending further submissions from the parties.

In [2001] NSWSC 427, Einstein J considered a notice of motion brought by Idoport that the disputes being heard by the Court be referred to mediation in the face of NAB's attitude "that a mediation would be futile",⁵⁰ such that "there is simply no room for negotiations in good faith".⁵¹ His Honour ultimately considered that the disputes should be referred to mediation as long as the hearing is not disrupted.

In [2001] NSWSC 487, Einstein J dismissed a notice to produce by NAB as against another party by which NAB claimed an entitlement to the documents named therein insofar as it considered those documents necessary to prepare witnesses for cross-examination.

In [2001] NSWSC 530, Einstein J revoked parts of the orders relating to further and better discovery, which involved retrieving data from computer hard drives, insofar as they permitted NAB's preferred expert, Mr Hetherington, to be involved in that process given that conflicts of interest existed between him and the firm undertaking the forensic analysis, PriceWaterhouseCoopers.

In [2001] NSWSC 529, Einstein J made rulings on the admissibility of opinion evidence given by a lay witness, Mr Ling, and in [2001] NSWSC 670, Mr James.

In [2001] NSWSC 648, Einstein J made orders imposing a condition of access upon the defendants with respect to confidential documents in relation to the notice of motion for security for costs that the defendants undertake not to use the documents other than for the purposes of the security for costs application. In [2001] NSWSC

⁵⁰ [2001] NSWSC 427 at [47].

⁵¹ [2001] NSWSC 427 at [49].

661, the defendants sought to have those judgment and reasons vacated insofar as they contended that it proceeded on a misapprehension of fact, but the application was dismissed.

In [2001] NSWSC 722, Einstein J considered the confidentiality of the documents in question on the defendants' application. The confidentiality regime was ultimately lifted on the basis that much of the material had been traversed in open court in the context of the security for costs application brought by NAB and, as a consequence of Idoport's failure to comply with adverse orders made on that application, the proceedings had been delayed.⁵²

In [2001] NSWSC 660, Idoport sought, by way of notice to produce and notice of motion, discovery with respect to documents held by the defendants, which was allowed.

In [2001] NSWSC 744, Einstein J made orders that Idoport must pay security for costs to continue the proceedings against NAB. In this context, his Honour said:

"A material consideration in relation to dealing with the claims for security clearly concerns the involvement of third party funders who had no pre-existing interest in the proceedings, are in some instances resident out of Australia and who, in accordance with certain agreements, stand to benefit very substantially from any recovery from the proceedings."⁵³

In submissions on the application for security for costs, NAB raised the issue of maintenance and champerty with respect to the funding arrangement as an answer to concern that the funders were prejudiced by the delay on the part of the defendants in applying for security for costs. Einstein J declined to deal with the issue. He said:

"The defendants submitted that if prejudice was found to have been suffered by the funders, then because of what was asserted to be the champertous nature of the funding agreements, the Court should not take this prejudice into account, being prejudice arising out of contracts which it would not, as a matter of public policy, enforce. In this regard, the defendants relied upon a number of authorities and the Court was taken to s6 of the *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW). The defendants put the matter as follows in their written submissions of 10 September 2001:

'The Defendants say that because of the funding arrangements, no prejudice has been suffered by the plaintiffs, and accordingly the question of delay as a factor is irrelevant to the present application. The Defendants further say that no evidence of prejudice has been led by the Plaintiffs either as to any prejudice they have suffered or any prejudice that any funder claims to have suffered. Further, even if prejudice to the funders had been established (which it has not), as a matter of public policy the Court ought not take into account any prejudice, arising as it necessarily would from a champertous

⁵² [2001] NSWSC 1024.

⁵³ [2001] NSWSC 744 at [107].

contract (as explained in Appendix B of the Defendants' Confidential Submissions in Reply).

The Defendants' short point is that it would be contrary to both policy and logic for the Court to attribute any significance to such prejudice in circumstances where it would not, for reasons of public policy, enforce the contract pursuant to which moneys had been advanced. What is not permitted directly should not be permitted indirectly.'

The plaintiffs opposed any course whereby the Court would proceed to determine this issue for a number of procedural reasons, including the submission that the security for costs application was simply an inappropriate vehicle for such a significant matter to be determined, and that if the defendants wished to maintain this stance and to have the issue formally determined, they should seek a declaration or an injunction or some other appropriate relief. The plaintiffs also advanced submissions traversing the proposition that any of the funding arrangements were void or illegal as contrary to public policy as being contracts of, or savouring of, maintenance or champerty.

In the manner in which the Court has dealt with the applications for security it is unnecessary for these questions to be determined."⁵⁴

In [2001] NSWSC 837, Einstein J delivered reasons contemplating that "guillotine" orders might be made so that the proceedings would be stayed in the event that the security for costs regime was not complied with "to the letter". His Honour observed that "this is simply the price of the plaintiffs being entitled to regularly continue this extensive litigation."⁵⁵ His Honour also ordered that Idoport pay the entirety of the costs of the application for security.⁵⁶

In an endeavour to ease the forensic burden, Einstein J ordered the appointment of an examiner to take cross-examination evidence from selected experts.⁵⁷

In [2001] NSWSC 868, Einstein J addressed three further applications to amend brought by Idoport, and other notices of motion with respect to case management. These culminated in his Honour imposing time limits on cross-examination for the approximately 160 witnesses, who produced in excess of 280 statements, to deliver evidence in the case.⁵⁸

In [2001] NSWSC 922, Einstein J determined competing applications with respect to the discovery or production of various documents. Einstein J also made various rulings on the admissibility of expert evidence.⁵⁹

⁵⁴ [2001] NSWSC 744, [135] – [137].

⁵⁵ [2001] NSWSC 837, [9].

⁵⁶ [2001] NSWSC 1031 at [11]. See also [2001] NSWSC 1080.

⁵⁷ [2001] NSWSC 838.

⁵⁸ [2001] NSWSC 868 at [75].

⁵⁹ [2001] NSWSC 937; [2001] NSWSC 944; [2001] NSWSC 960; [2001] NSWSC 939; [2001] NSWSC 995; [2001] NSWSC 1070.

By this time the Dutch dentists behind the litigation had paid out approximately \$7.5 million on the litigation; they had had enough. They sought to terminate the funding arrangement. In [2001] NSWSC 1081, Einstein J adjourned the proceedings in order to permit Idoport to secure a new source of funding after its funder, *Efficiency Investment BV*, withdrew its support. Idoport was unable to secure a new source of funding, however, and his Honour dismissed a further application for an adjournment, and foreshadowed the dismissal of the substantive proceedings, in [2002] NSWSC 18. Einstein J stated:

"Anyone familiar with the history of this litigation would accept that the proceedings are unusual in the extreme. In any case where orders for security for costs have not been complied with and the Court is faced with an application thereafter for the proceedings to be dismissed the justice of the situation requires to be treated with. The Court must take into account the nature of the proceedings and every aspect of or related to the circumstances in which the security for costs orders have not have been complied with. The identity of the parties, the nature of the proceedings, the issues involved, the nature of the tribunal hearing the proceedings, the special arrangements, if any, which may have had to be made to permit the proceedings to be heard in a particular way, all require to be taken into account. In short every circumstance would require to be weighed in balance when the Court was asked to take the extreme step of dismissing the proceedings. This is generally how I approach the instant applications.

...

The proper exercise of the Court's discretion is in my view to presently dismiss the application for the adjournment and to presently dismiss each of the proceedings. Time has simply run out for Idoport. There is a real limit to the extent to which the Court can continue to accommodate Idoport's attempts to procure funding."⁶⁰

Idoport unsuccessfully challenged the purported termination of its litigation funding agreement by the defendant, *Efficiency Investment BV*.

This aspect of the dispute culminated in the judgment of Palmer J in [2001] NSWSC 1197. From his Honour's reasons, it appears that Efficiency had decided to exercise its rights under the various agreements giving rise to the funding arrangement that had the effect of ending Idoport's right to make calls for further funds under the arrangement. The matter turned on the competing constructions of the five constituent agreements. The Dutch dentists prevailed, and Idoport could not pay the security for costs ordered by Einstein J in [2001] NSWSC 744.

The orders requiring security for costs (which Idoport did not give), were appealed to the Court of Appeal, which granted leave to appeal but dismissed the appeal with costs.⁶¹ An application for special leave to appeal to the High Court was heard by Kirby and Heydon JJ, who dismissed the application with costs.⁶²

⁶⁰ [2002] NSWSC 18 at [58], [60].

⁶¹ [2002] NSWCA 271.

⁶² [2003] HCATrans 797.

In [2002] NSWSC 623, it came to light that Idoport had purported to instruct a California-based law firm to commence proceedings in that jurisdiction with respect to arguably similar issues. NAB obtained an interim anti-suit injunction from Barrett J with respect to the proceedings instituted in California.⁶³

In [2004] NSWSC 212, Burchett AJ issued a declaration on the construction of the Court of Appeal's orders and their consequential impact on Einstein J's order for security for costs. His Honour held that the ultimate effect of the orders was that "the orders prevent the institution of a fresh proceeding until the costs are paid."⁶⁴ Burchett AJ described the litigation in the following terms:

"As an aftershock of a litigious earthquake of a case, there has come before me an application to restrain its renewal until satisfaction of a costs order made on its dismissal. When one appreciates that the principal action was barely half heard at almost the end of a year of hearing at a cost to date of many tens of millions of dollars and a total projected cost, if fought to a conclusion, of the order of one hundred million dollars, and that the claim for damages expanded from some billions of dollars to more than the entire market capitalisation of the National Australia Bank, the main defendant, it will be realised that this was indeed a huge dispute. Perhaps, as one theory asserts of the dinosaurs, the fatal defect of the claim was its enormous growth, which attracted such an expenditure on lawyers, evidence, investigations and documents that the claimants were inevitably unable to meet the consequential orders for security for costs."⁶⁵

Nothing daunted, Idoport had commenced further proceedings on summons with respect to "Performance Bonuses" allegedly owed to it by NAB, which it claimed was permitted to be brought notwithstanding the declaration by Burchett AJ and Einstein J's order. Bergin J ordered that the summons be dismissed as an abuse of process insofar as it concerned "the whole or any part of any claim for relief" with respect to the main proceedings.⁶⁶ Idoport appealed against her Honour's order to the Court of Appeal, which granted leave to appeal but dismissed the appeal with costs.⁶⁷

With a view to obtaining costs orders against the litigation funder, *Efficiency Investment BV*, NAB instituted proceedings for discovery to demonstrate that *Efficiency* had engaged in an abuse of process of the Court including maintenance and champerty.⁶⁸

In [2004] NSWSC 270, Einstein J dismissed an application by Idoport that the determination of the costs payable be heard before another Judge on bias grounds. Idoport argued that his Honour had expressed opinions touching upon matters at issue in the proceedings for a gross sum award of costs, namely "the reasonableness of charges of the defendants' lawyers, the volume of work which was undertaken for the case, and of the expenses incurred by [the defendants]".⁶⁹

⁶³ [2002] NSWSC 623.

⁶⁴ [2004] NSWSC 212 at [23].

⁶⁵ [2004] NSWSC 212, [1].

⁶⁶ [2005] NSWSC 752, [55].

⁶⁷ [2006] NSWCA 202.

⁶⁸ [2004] NSWSC 695.

⁶⁹ [2004] NSWSC 270 at [32].

In [2005] NSWSC 1273, Einstein J explained the principles underlying the Court's assessment of a gross sum for the award of costs,⁷⁰ and in [2006] NSWSC 895, his Honour awarded the costs of eight interlocutory skirmishes, which were determined without costs orders, to NAB as the successful parties.

In [2007] NSWSC 23, Einstein J made an order that Idoport pay the costs of NAB in the amount of \$50,000,000 plus interest from 29 January 2002.

On 16 March 2007, NAB applied for an order to wind up Idoport on the basis that it did not pay any part of the costs owed under the gross sum costs order made by Einstein J.⁷¹ Idoport served on NAB a notice of set-off by which it purported that the judgment debt had been paid, such that NAB could not be creditors and thus would not have standing to commence winding up proceedings.⁷² Idoport argued that its claim with respect to Performance Bonuses (see fn 42, above, and [2005] NSWSC 752) could, as an "arguable claim", be raised as a defence in opposition to NAB's application that it be wound up. Young CJ in Eq, however, considered that the claim was not capable of set-off insofar as its prosecution was barred by the judgment of Bergin J. Idoport applied for special leave to the High Court. Mercifully, the application was refused.⁷³

Idoport was ultimately wound up on the order of White J on 3 September 2008.⁷⁴

Case Management

As the review of the *Maconachie* litigation demonstrates, the repeated applications to amend pleadings brought by both parties were a particular cause of frustration for the Court as it endeavored to manage the mammoth litigation. A much more rigorous approach to case management was called for. Looming over this sorry episode in the administration of justice was the decision of *Queensland v JL Holdings*,⁷⁵ the decision being frequently cited in the course of argument and the interlocutory judgments. The overarching importance of "access to justice" was the ongoing justification for what was becoming, ever more obviously, a scandalous waste of judicial resources.

The approach adopted in *Queensland v JL Holdings* has now been qualified by the High Court in *Aon Risk Services Australia Ltd v Australian National University*.⁷⁶ One can only speculate as to the influence which the spectacle of the *Maconachie* litigation had upon the thinking of the High Court.

In *Aon Risk Services*, French CJ said:

⁷⁰ In [2006] NSWSC 1191, his Honour dismissed an application for discovery by Idoport for discovery of documents relating to claims by NAB with insurers in respect of litigation costs. In [2006] NSWSC 1296, his Honour refused cross-examination of a solicitor about his knowledge of the facts in Idoport's main proceedings in the context of the application for a gross sum costs order.

⁷¹ *National Australia Bank Ltd v Idoport Pty Ltd* [2007] NSWSC 1349 at [30].

⁷² [2007] NSWSC 1349 at [30] – [32].

⁷³ [2006] HCATrans 673.

⁷⁴ [2008] NSWSC 999.

⁷⁵ (1997) 189 CLR 146.

⁷⁶ (2009) 258 ALR 14.

"Recognition of the public interest in the administration of civil justice procedures in Australia and the United Kingdom pre-dates the Woolf Report and its attendant reforms. In *Dawson v Deputy Commissioner of Taxation* ((1984) 71 FLR 364 at 366), King CJ acknowledged the responsibility of judges to ensure, 'so far as possible and subject to overriding considerations of justice', that the limited resources which the State commits to the administration of justice are not wasted by the failure of parties to adhere to trial dates of which they have had proper notice ...

...

... [T]he mischief engendered by unwarranted adjournments and consequent delays in the resolution of civil proceedings goes beyond their particular effects on the court in which those delays occur ..."

Kirby J wrote a concurring judgment:

"It might be thought a truism that 'case management principles' should not supplant the objective of doing justice between the parties according to law. Accepting that proposition, *J L Holdings* cannot be taken as authority for the view that waste of public resources and undue delay, with the concomitant strain and uncertainty imposed on litigants, should not be taken into account in the exercise of interlocutory discretions of the kind conferred by r 502. Also to be considered is the potential for loss of public confidence in the legal system which arises where a court is seen to accede to applications made without adequate explanation or justification, whether they be for adjournment, for amendments giving rise to adjournment, or for vacation of fixed trial dates resulting in the resetting of interlocutory processes."⁷⁷

Gummow, Hayne, Crennan, and Kiefel JJ said:

"An application for leave to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim, subject to payment of costs by way of compensation. There is no such entitlement. All matters relevant to the exercise of the power to permit amendment should be weighed. The fact of substantial delay and wasted costs, the concerns of case management, will assume importance on an application for leave to amend. Statements in *J L Holdings* which suggest only a limited application for case management do not rest upon a principle which has been carefully worked out in a significant succession of cases (See *John v Federal Commissioner of Taxation* (1989) 166 CLR 417; [1989] HCA 5; *Imbree v McNeilly* [2008] HCA 40; (2008) 82 ALJR 1374 at 1385-1386 [45] per Gummow, Hayne and Kiefel JJ; [2008] HCA 40; 248 ALR 647 at 659; [2008] HCA 40). On the contrary, the statements are not consonant with this Court's earlier recognition of the effects of delay, not only upon the parties to the proceedings in question, but upon the court and other litigants. Such statements should not be applied in the future.

A party has the right to bring proceedings. Parties have choices as to what claims are to be made and how they are to be framed. But limits will be placed upon their ability to effect changes to their pleadings, particularly if

⁷⁷ (2009) 258 ALR 14 at 23 – 26 [25] – [30].

litigation is advanced. That is why, in seeking the just resolution of the dispute, reference is made to parties having a sufficient opportunity to identify the issues they seek to agitate.

In the past it has been left largely to the parties to prepare for trial and to seek the court's assistance as required. Those times are long gone. The allocation of power, between litigants and the courts arises from tradition and from principle and policy (Jolowicz, *On Civil Procedure*, (2000) at 79). It is recognised by the courts that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings.

Rule 21 of the Court Procedures Rules recognises the purposes of case management by the courts. It recognises that delay and costs are undesirable and that delay has deleterious effects, not only upon the party to the proceedings in question, but to other litigants. The Rule's objectives, as to the timely disposal of cases and the limitation of cost, were to be applied in considering ANU's application for amendment. It was significant that the effect of its delay in applying would be that a trial was lost and litigation substantially recommenced. It would impact upon other litigants seeking a resolution of their cases."⁷⁸

Heydon J concluded his Honour's concurring reasons observing ominously:

"The presentation and adjudication of the case in the courts below do cause it to merit a place in the precedent books. The reasons for placing it there turn on the numerous examples it affords of how litigation should not be conducted or dealt with. The proceedings reveal a strange alliance. A party which has a duty to assist the court in achieving certain objectives fails to do so. A court which has a duty to achieve those objectives does not achieve them. The torpid languor of one hand washes the drowsy procrastination of the other. Are these phenomena indications of something chronic in the modern state of litigation? Or are they merely acute and atypical breakdowns in an otherwise functional system? Are they signs of a trend, or do they reveal only an anomaly? One hopes for one set of answers. One fears that, in reality, there must be another."⁷⁹

Technology

Technology means that vast amounts of information can be stored and quickly retrieved – but it does not mean that the information can be understood. It is not a coincidence that the growth of the problem of discovery in litigation has accompanied the growth in the predominance of information technology.

In 2007 Chief Justice Spigelman of the Supreme Court of New South Wales commented:

"Often enough what lawyers are required or permitted to do is determined by statute or court rules and practices and directions. We must continually re-engineer the process of dispute resolution because the pressures on the process are in a continual state of flux. ...

⁷⁸ (2009) 258 ALR 14 at 46 – 47 [111] – [114].

⁷⁹ (2009) 258 ALR 14 at 46 – 47 [156].

The need to change is often driven by new pressures that have emerged, particularly in recent times with the acceleration of technological innovation.

A good example of this is the considerable expansion in the cost of discovery that has been occasioned by the explosion in the facility of the photocopier, the word processor, the computer and the internet. Telephone conversations which may never have been recorded in the past have now been replaced by emails which are either available on a hard drive or, with a sufficient expenditure of time, effort and energy, can be recovered from a hard drive. Disputes about what should be required to be done by way of recovery from databases are not easy to resolve. Many of these issues are new. What is required is not accurately called reform. We simply need to find ways to meet new challenges."⁸⁰

Some of those here will be old enough to remember receiving briefs to appear on trial in a commercial case which consisted of a handful of documents wrapped in pink ribbon. There would be the pleadings, five or six documents, the originals of which would go into evidence, and a couple of proofs of evidence from witnesses who were expected to give relevant testimony.

In relatively complex cases there might be a folder of documents discovered by a third party which might assist in proving a relevant course of correspondence or in showing some aspect of the other side's witnesses in a bad light in cross-examination. Very often the brief would be accompanied by observations by the solicitor on the evidence and the law. Briefs in building cases might have been more voluminous with Scott schedules and the like.

Today, even a relatively modest commercial dispute can be expected to generate an effusion of information which, at the beginning of the trial, none of the lawyers responsible for conducting the case will have mastered. I will concede that sometimes there will be a junior solicitor or articled clerk who has some familiarity with the contents of the database and the electronic record book which senior counsel – utterly innocent of its contents – thrust at the trial judge. What is missing is the application of the critical intelligence of an experienced lawyer to the task of sifting and evaluating the information to enable the trial to proceed with a focus on the real issues in the case.

You will all have heard judges in such cases complaining, or made the complaints yourselves, that in the mega-litres of electrons that the parties thrust at the court, there are still only a handful of documents that really matter. And yet the judge still has to sit patiently while Counsel trawl at length, but to little purpose and sometimes, it would appear, for the first time, through the database to see if something relevant comes up.

In the *Emanuel* litigation the plaintiff's counsel opened their case at trial for six weeks. There was a meander through the database with the judge being taken to an array of documents to see if any of them piqued his Honour's interest. But there was, at no

⁸⁰ JJ Spigelman, "Access to Justice and Access to Lawyers" (Speech delivered at the 35th Australian Legal Convention, Sydney NSW, 24 March 2007).

stage, a coherent formulation of the huge fraud cause which brought us all to court. And as is apparent from the observations of Chesterman J which I have mentioned earlier, in the months that followed, the situation did not improve.

In mega litigation, and indeed in more mundane commercial litigation, the rallying cry of the traditionalist judge: "We are not conducting a Royal Commission!" is now largely pietistic wishful thinking.

There are a number of reasons for this state of affairs, but the principal reason is, I fear, the combination of technological capability and economic incentive. It is highly remunerative for solicitors to transfer vast amounts of their clients' information into a database – and it can be done so easily – without the need for the time, effort, and expertise involved in the application of a critical lawyerly intelligence to the information. The enthusiastic embrace of technology by the legal profession plainly has a lot to do with the charging of costs for putting a client's corporate life history onto a litigation database. There is little evidence that it has much to do with the efficient prosecution of litigation.

And large commercial clients seem to acquiesce in this approach. Whether that is because their affairs are managed by in-house lawyers, who are by nature ultra cautious and are happy to accept over-servicing, or because they are cynically prepared to pursue the "needle in the haystack" theory of discovery, I do not know. Recently, there have been some indications in the commercial press that large clients are becoming more resistant to this culture with the growing groundswell against time costing.

The technology is not going away, and the culture of the solicitors' branch of the profession is likely to be resistant to change given the powerful economic incentives in favour of information collection and storage.

We as judges can, I think, do something about the problem. It begins by recognising that easy and lucrative reliance on technology is actually a part of the problem, not a part of the solution. The strategy must be to re-engage the critical intelligence of the lawyers who can actually make a difference to the fate of the case. An integral part of that strategy involves by-passing the connection between mere information collection and lawyers' remuneration.⁸¹

The sooner a senior lawyer's attention can actually be engaged upon an analysis of the real issues the better. We must not tolerate the idea that a case is in some way being progressed if millions of pieces of information are put in a database. And we must not tolerate a situation where the trial judge becomes the first experienced lawyer in the case to have any real understanding of all the relevant documents.

It is said in defence of the mega-litigators that there is nowadays a vast amount of relevant documentation because of the use of emails. It is also fair to say that statutes such as the *Trade Practices Act 1974* (Cth) invite the agitation of a bewildering range of statutory causes of action which tend to overlap in respect of the same conduct on the part of the alleged miscreant.

⁸¹ Adrian Zuckerman, "Editor's Note: Lord Justice Jackson's *Review of Civil Litigation Costs – Preliminary Report*" (2009) 28 *Civil Justice Quarterly* 435, 441.

But even if every allowance is made for these features of the modern legal landscape, there is little evidence to suggest, even in the age of the email, that it is no longer true that there are only a handful of critical documents in a case. If, in what are said to be complex cases, each side was required to file with its pleading copies of the ten most important documents to that party's case, it would, I think, serve to concentrate the lawyers' minds and on the real issues and provide a focus of, and limit upon, orders for discovery. Where mediation is thought desirable, this may get the parties to the table with less delay and expense than is presently the case and hopefully prevent long pocket strategies. If it does no more than ensure that the senior lawyers' attention is focused on the central aspects of the case at the outset of the litigation, it will be worthwhile. And if the parties are unable or unwilling to accept the discipline - if as in *Emanuel* - it is said that important inferences can only be drawn from many, many documents, that itself is reason for special scrutiny at the outset.

This is a very modest proposal; but because it is so modest it could be easily trialled at least in those jurisdictions where complex cases are managed by judges from the outset. It will focus the most effective tool in the armoury of the administration of justice, i.e. lawyerly intelligence, (especially that of the barristers or senior solicitors for each side), on each party's case early in the piece and at little additional expense. If it helps to reduce the effects of the passive approach whereby it is assumed that the relevance of any document in the database will somehow emerge during the course of the trial, then it will be amply justified. And the lot of trial judges will be a happier one.

Case citation

The technological capacity to hold, and then spew out, millions of pieces of evidence, unfiltered by the exercise of critical human intelligence, has been matched by the capacity to spew out whole wildernesses of judgments to which the organising intelligence of a lawyer has not been applied.

The worst thing that technology has done to judges is to arm lazy or mediocre lawyers with the means to inundate the court with case citations which may or may not (and it is usually the latter) have some bearing on the legal issues in the case.

All of us experience the excessive citation of earlier decisions which are at least merely illustration of a point of principle, and more often are essentially decisions on the peculiar facts of the case.

Good counsel don't need to be discouraged from doing this. Mediocre or lazy counsel can't be discouraged.

On 14 July 2009 in *R v Erskine* and *R v Williams* in the Court of Appeal of England and Wales, Criminal Division,⁸² Lord Chief Justice Judge, giving the judgment of himself, Thomas LJ and Treacy J, recognised that what was described as the "forensic technique" of extensive citation and analysis of previous decisions has been "sanctioned by the court" as the "modern way of addressing legal principle both on

⁸² [2009] EWCA Crim 1425.

appeal" and in the trial court itself.⁸³ When the "stark reality" is that "every single judgment of the court [is] now available to the advocate, whether it was reserved or unreserved, whether reported or unreported", then it was understandable that "the advocate doing his duty by his client sought to identify each and every case even remotely appeared to bear on the principle under consideration or which had some passing factual similarity to the one with which he or she was immediately concerned."⁸⁴

Lord Chief Justice Judge said that as a result of this process, "the development of legal argument in the criminal justice process was both much more complex and more rebarbative and less focused than it used to be."⁸⁵

His Lordship also referred to the "convention that the court should at least mention authorities referred to by the advocate in oral submissions, and that tended to add yet one more authority to the existing compendium."⁸⁶

Many here will recognise the sort of thing which occurs with the multiple citation of cases relating to the sentencing of offenders. And this, even though appellate courts regularly remind us that sentencing is a discretionary process of "intuitive synthesis" in which the criminality in one set of facts cannot be calibrated to the criminality exhibited in another set of facts. As Lord Chief Justice Judge said, "like Topsy, the process has grown, and lengthened, and continues to grow and lengthen without the slightest discernable improvement in the doing of justice in the individual case and to the delay and disadvantage of the administration of justice generally."⁸⁷

And so, in order to prevent "the administration of criminal justice [being] suffocated ... firm measures were required ... to ensure that appeals could be heard without excessive citation of, or reference to, many of its earlier, largely factual decisions."⁸⁸ His Lordship said:

"The essential starting point, relevant to any appeal against conviction or sentence, was that if it was not necessary to refer to a previous decision of the court, it was necessary not to refer to it. Similarly, if it was not necessary to include a previous decision in the bundle of authorities, it was necessary to exclude it. That approach would be rigidly enforced. It followed that when the advocate was considering what authority, if any, to cite for a proposition, only an authority which established the principle should be cited. Reference should not be made to authorities which did no more than either (a) illustrate the principle or (b) restate it."⁸⁹

The Practice Direction (Criminal Proceedings: Consolidation) as amended now contains detailed rules in this regard in paras 11.17 and 11.19.⁹⁰

This is a lead which surely we should follow.

⁸³ [2009] EWCA Crim 1425 at [2].
⁸⁴ [2009] EWCA Crim 1425 at [3].
⁸⁵ [2009] EWCA Crim 1425 at [3].
⁸⁶ [2009] EWCA Crim 1425 at [3].
⁸⁷ [2009] EWCA Crim 1425 at [3].
⁸⁸ [2009] EWCA Crim 1425 at [3], [74].
⁸⁹ [2009] EWCA Crim 1425 at [75] – [76].
⁹⁰ [2002] 1 WLR 2870.

Access to justice and ADR

It has been suggested to me by practitioners involved in mega-litigation that clients often expect to resolve their dispute at a mediation and, while they are content to incur the costs of disclosure to enable the mediation to proceed, they are unwilling to incur the expense of paying able and experienced lawyers to marshal and master the evidence in the way which would be necessary if the matter were to proceed to a trial.

The success of mediation and the capacity of mediation to lessen the burden on the courts by reducing the number of cases which proceed to trial has resulted in the judges themselves becoming champions of the "culture of settlement". I have in mind particularly the report prepared by Lord Woolf for the United Kingdom government in 1995.⁹¹ There are now suggestions by serious commentators that the role of the civil courts is itself being altered so that their principal responsibility should be seen as "settlement sponsorship".⁹²

It is, I think, of the first importance that we continue to keep in mind the fundamental difference between the processes of Alternative Dispute Resolution and litigation. The processes of ADR are accurately described as "alternative" forms of dispute resolution because they do not involve the exercise of judicial power of the state to quell a controversy by imposing a resolution of that controversy upon the parties.

Settlement sponsorship is not the primary function of the courts. No party should be obliged to defer its entitlement to a determination of its rights by the court because the court insists on that party negotiating with the other side.⁹³

ADR is essentially concerned with the provision of legal services by lawyers to assist their clients to reach a more satisfactory accommodation of their conflicting interests than they have been able to negotiate without those services. But the provision of those services is a different thing from the exercise of judicial power.

There are many good things about ADR. It involves people solving their problems for themselves without the aid of the State. But in a rights-focused society the assistance of lawyers may be necessary to remove power imbalances and to ensure that expectations are kept within reasonable bounds. The processes of ADR should certainly be encouraged. Ideally, where the parties desire to utilise those processes, those processes should be exhausted before the time and resources of the state are to be expended to any substantial extent.

Sometimes, the ideal must yield to pragmatic considerations: for example, in some cases the compulsory processes of the court may be necessary to force a recalcitrant party to provide discovery as a necessary step towards a meaningful

⁹¹ Lord Woolf, *Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995).

⁹² Simon Roberts, "'Listing Concentrates the Mind': The English Civil Court as an Arena for Structured Negotiation" (2009) 29 *Oxford Journal of Legal Studies* 457, 457 – 479.

⁹³ Hong-Lin Yu, "Is Court-Annexed Mediation Desirable?" (2009) 28 *Civil Justice Quarterly* 515, esp 542 – 543.

mediation. And the imposition by the court of a timetable for pleading and discovery leading to mediation may facilitate settlement.

I would suggest that in the first directions hearing of a commercial matter in a court, the judge should ascertain whether a mediation is sought by either party. The court should make orders to facilitate a mediation unless one side declines to mediate. After making such orders, then, absent good reason to the contrary such as a need to facilitate proper discovery by a recalcitrant party, the court should stay the litigation until one or more of the parties files a certificate that it is no longer willing to pursue any process of alternative dispute resolution.

Once again, this is a modest proposal. It deserves a trial to see if it does result in a reduction of the disproportionate demand of commercial litigants on public resources.

Conclusion

The Standing Committee of Attorneys-General is currently considering some form of regulatory framework for litigation funding arrangements. And you will be aware that on 23 September this year the Federal Attorney-General launched the Commonwealth's Strategic Framework for Access to Justice in the Federal Civil Justice System with a view to a constructive dialogue.

Dr David Capper's article, cited above, quotes Learned Hand, who said: "After now some dozen years of experience I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death."⁹⁴ It is not clear that this view – that litigation is a necessary evil – still commands general assent. We take our rights seriously and require that everyone else take them seriously too. But one would think that there is general assent that the public interest lies in ensuring that those embroiled in real controversies should have those controversies quelled as quickly and as cheaply as possible, and to this end, that the courts should not be delayed or distracted by claims which are brought only because there are profits in their promotion.

What is far from clear is that the public interest is advanced by the unregulated commodification of the role of the courts. The stakes include the integrity of the role of the courts and their officers as an arm of government whose concern is the quelling, not the promotion, of disputes.

Hopefully, the contingent Legal Aid Fund alternative to private funding will be considered.

At the very least, any regulatory framework for commercial funding should provide for a strict enforcement of a demarcation between the lawyers who advise the funder in relation to the prospects of the litigation which is proposed and the lawyers who actually run the case if it is pursued. At the practical level, such a demarcation would be in everyone's interests. And in terms of principle it would mean that the lawyers who appear before the court in the litigation remain officers of the court not traders in the court's function.

⁹⁴ David Capper, "Maintenance and Champerty in Australia – Litigation in Support of Funding!", (2007) 26 *Civil Justice Quarterly* 288, 290 – 291.

There should be a frank recognition that encounters between large scale third party funded litigation and the courts in this country have not been happy. And should there not be at least some attempt to identify the worthwhile cases that have been successful and have only been pursued because of litigation funding.

There should also be a general recognition of the importance of the use of case management as a tool to ensure that all litigants with genuine disputes have access to justice. And in this regard attention should be given to measures directed to sidelining the incentives to the legal profession which reward mere input and inefficiency and to providing encouragement for the active engagement at the earliest opportunity of the critical intelligence of senior lawyers for each side.

There are serious points to be debated, and these points should not be drowned out by loud shouts of catchphrases like "access to justice".

Clemencau understood that war is too important to be left to the generals. So we as judges must recognise that in this debate the administration of justice, and the costs and benefits which must be balanced in its service, are too important to be left to those who may have never actually litigated a case; and whose habits of mind lead them to consider these questions as a management issue about service delivery.