uniform Commercial Arbitration Act and to the Rules of Court could facilitate and encourage settlement of actions.

In making amendments, it should be borne in mind that frequently it may be appropriate to attach conditions to an offer and that in the interests of encouraging settlement, arbitrators should be encouraged to take into account conditional offers and not adopt the view that any offer which is not in settlement solely of the matters in arbitration makes the offer invalid. Compromises frequently involve terms not all of which involve direct payment of money. Compromises involving complex terms are often effected by a "Tomlin order" [see The Law and Practice of Compromise 3rd Ed. Fosker, D Sweet & Maxwell, London 1991]. The author of that work at.p.120 makes the point:

> "Mere passive refusal of the offer should not be regarded as acceptable behaviour when considering the question of costs."

If the offeror does have the onus of proof which in *Dueeasy* Giles J held to exist, amendments to the legislation should reverse the onus of proof.

This would facilitate the making of offers of settlement and encourage compromise.

- Philip Davenport

Discovery - The Importance Of Being Earnest

Commonwealth Bank v Quade (1991) 102 ALR 487

The High Court's judgment in *Commonwealth Bank v Quade* emphasises the necessity for strict compliance with a court's pre-trial discovery procedures. Litigants stand to lose favourable trial decisions and waste costs if they do not prepare for the hearing properly .

The Commonwealth Bank (the "Bank") had lent Swiss francs to Quade and other respondents. Their repayments doubled as the Australian dollar weakened against the Swiss franc between 1985 and 1988. The borrowers sued the Bank in the Federal Court on a variety of grounds, chiefly negligent misstatement and misleading and deceptive conduct in breach of section 52 of the Trade Practices Act. The trial judge found against the borrowers.

The Bank had not given complete pre-trial discovery. This is the process whereby parties must list, and make available for inspection, all relevant documents which are, or once were, in their possession. This is notoriously tedious for both clients and lawyers, as sufficient effort must be devoted to ensure that every document relating to the case is traced and disclosed.

The Bank admitted that during the pre-trial discovery process it had not revealed the existence of a large number of relevant documents in its possession. The reason for this was never explained. The borrowers appealed, asserting that these documents were crucial to their case and proved that the Bank officers had misled the borrowers as to the dangers of foreign currency loans. The Full Federal Court found for the borrowers. The Bank appealed to the High Court.

The High Court considered the following matters to be relevant in confirming the decision of the Full Federal Court and ordering a new trial:

- the reason for the Bank's failure to disclose the particular relevant documents;
- whether greater vigilance on the part of the borrowers could have uncovered the existence of the documents before the end of the first trial;
- the likelihood that the result would have been different if the order for discovery had been properly carried out; and
- the demands of justice between the borrowers and the Bank and generally.

Accordingly to the High Court, it was not necessary that the inclusion of the missing documents would make a different result probable. It was sufficient that there was a real possibility that they could. The Bank was also ordered to pay the costs of both the first trial and of the appeal.

This appeal shows the importance which the courts attach to the discovery obligation and that a litigant failing to comply risks adverse costs orders as well as a second trial on the merits of the case.

- Tom Russell, solicitor, Baker & McKenzie, solicitors, Sydney.
Reprinted with permission from Baker & McKenzie's Pacific Basin Legal Developments Bulletin.