Countdown

These days a commercial cause is over almost before it begins. This is the result of the new procedures set out in Practice Note 39 which came into effect on 1 January 1987, the same day as was appointed for the commencement of the Supreme Court (Commercial Division) Amendment Act.

The latter Act inserted into the Supreme Court Act s.76A which enables the Supreme Court to give such directions as the Court thinks fit (whether or not inconsistent with the Rules) for the speedy determination of the real questions between the parties to proceedings in the Commercial Division. The new procedures are made pursuant to that section and are designed to give effect to the philosophy inherent in the concept of a Commercial Division, viz. to "provide a service to the commercial community by enabling commercial disputes to be decided as quickly and as cheaply as possible".

There are a number of innovations particularly in the area of commencement of proceedings, interrogatories, amendments and experts' reports. It is in the preparation for hearing, however, that the greatest changes have been wrought. Annexure 3 to the Practice Note sets out a "usual order for hearing". When a date for hearing is fixed the Court is to direct which parts of the "usual order" are to be complied with by the parties. The "usual order" requires a number of steps to be taken in the days immediately before hearing.

* Seven days before the trial each party is to serve on each other party a written statement by each proposed witness of the oral evidence which that party intends to lead on an issue of fact to be decided at the trial.
* Seven days before the trial each party is to serve upon the other a written notice specifying the documents it intends to tender at the hearing.
* No later than four working days before the trial each party is to inform the other in writing which of the specified documents may be tendered by consent.
* Three days before the hearing each party other than the plaintiff is to deliver to the plaintiff two copies of all documents intended to be tendered by such party at the hearing which have not been identified in the plaintiff's notes of documents.
* By midday on the last working day before the date fixed for hearing the plaintiff is to file two copies of the bundle of agreed documents duly paginated and indexed.
* No later than 4.30p.m. on the last working day before the hearing the plaintiff's counsel must file and serve:—

  — a statement of agreed issues;

  — a chronology of relevant events;

  — a list of **dramatis personae** (where appropiate);

  — a list of topics to be covered by submissions;

  — a list of propositions of law relied on together with the authorities to be cited in support.

If this sounds like the countdown to a NASA lift-off be assured, by one who has already had to comply with the order, that it feels like one. One might be forgiven for musing that the purpose of the order is to ensure counsel are so exhausted by the time they stagger to the door of the court armed with all the relevant documents (and praying fervently that their solicitors have delivered correct copies of everything to the right judge, opponent etc.) that they will be more interested in settling the wretched case than ever.

In fact, of course, the procedures are designed to reduce the time spent in Court while everyone from the judge down scratches their respective wigs and wonders what to do with a twenty page statement of claim, a defence of equal length, three hundred interrogatories and a cast of a thousand witnesses gazing anxiously into Court awaiting their turn in the box. To be fair, the procedures appear to achieve their purpose.

The procedures appear, to a certain extent, to be based on the new Guidelines to Commercial Practice which came into force in the English Commercial Court on 1 October 1986. These guidelines, which are set out as a note to Order 72 in the White Book were based on the recommendations of a Working Party of the practitioner members of the Commercial Court Committee chaired by Mr. Nicholas Phillips Q.C.

The guidelines in force in the English Commercial Court allow a somewhat more leisurely timetable. For example, the procedures for exchange of witnesses' statements contemplate that exercise will take place over a period commencing six weeks before the date for hearing. Bundles of documents are required to be filed and served, duly paginated and indexed, ten days before the hearing. Counsel must provide to the Court their list of issues and propositions of law to be advanced together with authorities relied on (with page references to the passages relied on) by 3.30p.m. on the day before hearing and must hand up at the hearing a chronology, list of **dramatis personae** and a list of topics to be covered by the submissions in the order in which they are to be covered. In addition, five days before the hearing counsel are required to submit to the Court their estimates of the length of the hearing.

The English guidelines go a bit further than Practice Note 39 in dictating the course of the hearing. The plaintiff's counsel is required to open in a "brief and uncontroversial" manner and the defendant's counsel is then required to respond (Chapter XV(2)). The evidence of all parties on one topic is required to be given before any other topic and all factual evidenced is given before the expert evidence. Every effort is to be made to "avoid prolonged reading aloud of documents and authorities".

The new procedures appear to have been effective **Counsel,** the Journal of the Bar of England and Wales reports that during the Michaelmas term (the first term in which the new procedures operated) the average length of a commercial case was 3.27 days compared with 5.61 days prior to the implementation of the new guidelines.

Counsel identified the main problem with the implementation of the new procedures as the failure to

provide a satisfactory bundle of documents. In many case, it pointed out, the pagination of the judge's bundle differed from that of one or both counsel or the court was just provided with a bundle of loose documents and left to sort them out.

Another common occurrence was "distraught telephone calls at twenty past four in the afternoon (prior to the date for hearing) confessing that the chambers' word processor had either broken down or that it refuses to divulge part of the contents of Counsel's written submissions". In England such problems are approached sympathetically and, apparently, counsel are even allowed to deliver their submissions in legible handwriting.

The Lord Chancellor still has the Commercial Court under review. In November 1986 he put forward a number of proposals aimed at further reducing the delay in the Court including:

* an increase in the judicial strength of the Court;
* control of access to the Court;
* close monitoring of commercial causes with a special procedure for especially complex cases.

These new proposals are based on a study of the Commercial Court carried out for the Lord Chancellor by Coopers & Lybrand Associats. One could be forgiven for thinking that some of them are based on the system already in force in New South Wales Commercial Division expecially that of control of access to the Court and the close monitoring of commercial cases. It does not appear that the English Commercial Court employs the system of early monitoring of each case by way of directions hearings so effectively employed in the New South Wales Commercial Division.

One assumes that the theory is that none of this new paperwork will add to the costs of the litigation. In practice, however, it is hard to see the counsel sweating it out producing the numerous documents required by the "usual order for hearing" not charging for their labours. Presumably, it is assumed that this cost will be offset by the reduction in hearing time. □

Just the Nearness of you . . .

Rivkin James Capel v. Allen
Cor: Rogers J., Hughes Q.C. is cross-examining stockbroker Rene Rivkin

"Q. Would you agree that you speak English about as fluently as anyone could? A. Not when excited.

Q. Not when excited? A. No.

Q. Are you excited now? A. I think that always in the witness box, on the rare occasions I have been there, barristers can excite me.

Q. Are you excited now? A. Mr. Hughes, you excite me."