5TH ANNUAL NORTH QUEENSLAND SYMPOSIUM, 9 NOVEMBER 2012, RYDGES SOUTHBANK, TOWNSVILLE – LAWYERS DUTIES: A VIEW FROM THE JUDICIARY

The Hon Justice Margaret McMurdo AC[∇]

The President, Queensland Law Society, Dr John de Groot, and North Queensland legal practitioners. What a pleasure to be with you today to discuss the topic of lawyers' duties, something dear to my heart, as it is to every judge and legal practitioner.

This may be only the fifth of these symposia, but it follows an ancient tradition. For tens of thousands of years before European contact, the traditional owners here, the Wulgurukaba people, prospered in this land of plenty. Their lore men and women met from time to time to discuss and better understand the rules that governed their community. In essence, we are continuing that tradition today. I acknowledge the traditional Elders of the Wulgurukaba people, past and present.

It is especially fitting that the important topic of lawyers' duties and responsibilities occupies both this opening session and, tomorrow afternoon's closing session. I apprehend that tomorrow's discussion of the Australian Solicitors' Conduct Rules (ASCR) will have a practical bent. My address, therefore, will provide the historical background and context from which lawyers' duties derive, together with a perspective from the bench, peppered with examples and anecdotes.

In our busy lives we seldom stop to consider how lawyers' duties have arisen. The Queensland legal profession has its roots in the common law tradition of the English legal profession. In the 12th century, King Henry II amalgamated Norman and Anglo-Saxon laws with some Roman influences into a recognisable body of national law. He established a centralised court system to interpret the common law and lawyers first emerged as an organised group of men, the law not then being a woman's place. The role of the solicitor emerged in the late 16th and into the 17th century from the earlier roles of attorney and pleader. The solicitor was apprenticed to a practitioner from whom he learned the common forms and processes of the law whilst the barrister was educated in mooting and discussion, reading and reporting. The solicitor had more contact with the lay client whilst the barrister was consulted through the solicitor. During the 18th century, practising attorneys and solicitors were excluded from the Inns of Court. They formed their own association, the Society of Gentlemen Practisers in the Courts of Law and Equity, the precursor of the modern law society. Barristers appeared in court only when instructed by a solicitor and were not generally permitted to accept work directly from clients.[1] Barristers and solicitors had separate admission to

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∇ I gratefully acknowledge the research and editing assistance of my associate, Q Michael Noakhtar, and the editing assistance of my executive assistant, Ms Andrea Suthers.

1 *Doe dem Bennett v Hale* (1850) 15 QB 171.

the profession. Barristers had an exclusive right of audience before superior courts, the judges of which, after the *Act of Settlement* 1701, had security of tenure, a crucial step towards the modern Westminster democracy.

With the First Fleet in 1788, the English legal system came to the colony of New South Wales without a thought about the established system of regulation and dispute resolution in Australian Indigenous communities. The New South Wales penal station of Moreton Bay was established in 1824 on the Brisbane River in an area known to the local Turrbal people as Mian-jin. As an early 19th century prison with the prison commandant having wide summary powers, there was no need for lawyers. In 1842, Moreton Bay, by then known as Brisbane, ceased to be a penal settlement, and with its first free settlers came the lawyers. Brisbane was serviced bi-annually by a circuit court from Sydney until increased work justified a resident judge. When Queensland separated from New South Wales in 1859, out of a population of 25,000 there were two barristers and six or seven solicitors.[2] In 1873, 15 solicitors first met in Brisbane as the Queensland Law Society.[3] And in 1889, the Northern Supreme Court moved from Bowen to Townsville with the appointment of two Northern Judges, Mr Justice Cooper and Mr Justice Chubb.

As England moved from an absolute monarchy to a constitutional monarchy with an elected parliament as the major source of law making, the role of lawyers and judges also changed and developed. Over centuries, the right of British citizens to vote for members of parliament was incrementally extended to all male citizens and in the early 20th century to women. So, too, in Queensland, where, consistent with Westminster democracy, the government, both State and Commonwealth, comprises three arms: the legislature, the executive and the judiciary. Effective democratic government is reliant on the concept of the separation of those powers, of checks and balances, so that no one arm of government can exercise or abuse total power. The government, through the legislature, elected by universal suffrage, enacts laws. An independent judiciary interprets those laws and ensures citizens' rights against other citizens or against the State are recognised. An independent executive implements the laws and ensures that orders of courts relating to rights are enforced. As Justice Stephens of the US Supreme Court noted in delivering the majority opinion in *Hamdan v Rumsfeld*:[4]

> "[t]he accumulation of all powers, legislative, executive and judiciary in the same hands, … may justly be pronounced … the very definition of tyranny."

Queensland today has 9,244 solicitors and 920 barristers with practising certificates. Since 1973, Queensland solicitors have had the right to appear in all State courts as advocates. And barristers, subject to the Bar Association of Queensland Barristers Conduct Rules (BCR),[5] need no longer receive

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2 B McPherson, *Supreme Court of Queensland* (1989) 79

3 Queensland Law Society, Annual Report 2002-2003, 4.

4 No 05-184, 29 June 2006, 12.

5 See rules 95(k) and 99(a).

instructions from clients through a solicitor. The distinction between the two branches of the profession is therefore no longer as defined as it once was, although most practitioners consider the split profession to be effective.

In a democracy like ours, the independent legal profession has a duty to ensure access to the rule of law which provides equal justice for all, regardless of gender, race, skin colour, religion, sexual preference, power or wealth. The High Court of Australia recognised in 1951 in the *Australian Community Party* case[6] that the essence of a modern democracy is the observance of the rule of law.

In the words of erstwhile New South Wales Chief Justice, James Spigelman:

> "The independence and integrity of the legal profession, with professional standards and professional means of enforcement, is of institutional significance in our society. It is an essential adjunct to the independence of the judiciary. … a bulwark of personal freedom, particularly against the hydra-headed executive arm of government, which history suggests is the most likely threat to that freedom. The profession, no less than the judiciary, operates as a check on Executive power. Indeed, if there should ever be an indication that a member of the judiciary was unduly favouring the Executive, the profession would play a primary role in preventing such conduct."[7]

As Justice Kirby explained to the Presidents of Law Associations in Asia conference:[8]

> "The rule of law will not prevail without assuring the laws principal actors – judges and practising lawyers and also legal academics – a very high measure of independence of mind and action."

Independent lawyers' fundamental duty is therefore to protect and pursue their clients' rights in independent courts, unswayed by the power, privilege or wealth of others and subject only to their duty to the court as officers of the court. That is the background and context to the ASCR which provide that a solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.[9] And it is why the BCR provide:

> "The object of these rules is to ensure that all barristers: …
> (b) act independently;
> (c) recognise and discharge their obligations in relation to the administration of justice; and
> … These rules are made in the belief that:
> (a) barristers owe their paramount duty to the administration of justice;
> ... ."[10]

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6 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193.

7 'Extra-Judicial Notes' (1998) 17 *Australian Bar Review* 105, 106, 108.

8 Kirby J 'Independence of the Legal Profession, Global and Regional Challenges' (2005) 26 *Australian Bar Review* 133.

9 Rule 3.

10 Rules 4(b) and (c) and r 5(a).

Carrying out this paramount duty may sometimes involve representing the least popular and least attractive members of society against governments, the rich and powerful, and in defiance of populist views and media and public harassment. A lawyer pursuing those rights in independent courts, presided over by impartial, competent judges is an essential aspect of any functional modern democracy. Never forget this background and institutional democratic role which makes you part of a profession and distinguishes your work from that of entrepreneurs and business operators.

But always remember, the lawyer's role is different from the judge's role. Lawyers' duties to the court and the administration of justice require lawyers to adhere to their unique role in the administration of justice; they are not judge or jury.

Tuckiar's case[11] is the most famous Australian illustration. Tuckiar was a traditional Aboriginal man convicted of murdering a policeman on a remote island in the Northern Territory. He did not speak English and was represented at trial by counsel. The trial was flawed in a number of respects which are not of present concern. But in the presence of the jury during the prosecution case and after conferring with Tuckiar, his counsel announced that he "was in a predicament, the worst predicament that [he had] encountered in all [his] legal career". The jury convicted Tuckiar and prior to his sentence his counsel said in open court:

> "I have a matter which I desire to mention before the court rises. I would like to state publicly that I had an interview with the convicted prisoner Tuckiar in the presence of an interpreter. I pointed out to him that he had told these two different stories and that one could not be true. I asked him to tell the interpreter which was the true story. He told him that the first story … was the true one. I asked him why he told the other story. He told me he was too much worried so he told a different story and that story was a lie. I think this fact clears [the deceased]."

Tuckiar successfully appealed against his conviction to the High Court. The court set aside the verdict and, because of the statements made by counsel in open court, refused to order a new trial. The High Court's comments are as apt today as they were in 1934 as to the role of an advocate in a criminal trial:

> "Why he should have conceived himself to be in so great a predicament, it is not easy for those experienced in advocacy to understand. He had a plain duty, both to his client and to the court, to press such rational considerations as the evidence fairly gave rise to in favour of complete acquittal or conviction of manslaughter only. … Whether he be in fact guilty or not, [Tuckiar] is, in point of law, entitled to acquittal on any charge which the evidence fails to establish that he committed, and it is not encumbent on his counsel by abandoning his defence to deprive him of the benefit of such rational arguments as

[11] (1934) 52 CLR 335.

> fairly arise on the proofs submitted. The subsequent action of [Tuckiar's] counsel in openly discussing the privileged communication of his client and acknowledging the correctness of the more serious testimony against him is wholly indefensible. It was his paramount duty to respect the privilege attaching to the communication made to him as counsel, a duty the obligation of which was by no means weakened by the character of his client, or the moment at which he chose to make the disclosure. No doubt he was actuated by a desire to remove any imputation on [the deceased]. But he was not entitled to divulge what he had learned from [Tuckiar] as his counsel. Our system of administering justice necessarily imposes upon those who practise advocacy duties which have no analogies, and the system cannot dispense with their strict observance."[12]

There was renewed interest in the fate of Tuckiar when the Northern Territory celebrated the High Court's centenary in 2003. One view is that Tuckiar's High Court victory may have been pyrrhic. He disappeared in suspicious circumstances shortly afterwards, some say murdered by supporters of the policeman he was charged with killing.

R v Nerbas[13] provides a recent variation of the *Tuckiar* principles in Queensland. During a trial with others for the importation and possession of prohibited drugs, Nerbas changed his instructions to his lawyers about his role, still denying his guilt. On their strong advice, which included a threat to withdraw if he did not plead guilty, he then changed his plea to guilty and the allocutus was administered. Before he was sentenced, he unsuccessfully applied to withdraw his guilty plea on the basis that he had been induced to plead guilty by matters including threats and intimidation by his lawyers. He successfully appealed and was granted leave to withdraw the plea of guilty. The Court[14] held that Nerbas's change of instructions did not, contrary to what his lawyers told him, require his lawyers to withdraw from the case. The Court noted:

> "They were precluded from conducting his case upon any factual basis which they *knew* to be false. But they would not have been placed in that position by this change of instructions. They would have been understandably sceptical about [Nerbas's] new instructions. But it was not for them to adjudicate upon their truth.
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> …
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> the lawyers' problem with the change of instructions would not have been an ethical one, rather it would have been the practical difficulty for an advocate in explaining to a jury how his client might now be truthfully recalling an event after having been mistaken for much of the trial."[15]

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12 Above, 346-347 (Gavan-Duffy CJ, Dixon, Evatt and McTiernan JJ).

13 [2011] 1 Qd R 362; [2011] QCA 199.

14 McMurdo J, de Jersey CJ and Dalton J agreeing.

15 Above, McMurdo J, de Jersey CJ and Dalton J agreeing

The unjustified threat by Nerbas's lawyers to withdraw if he did not plead guilty deprived him of the option of defending the charges with the benefit of legal representation upon the factual position which he claimed to be true. This threat at least in part induced him to plead guilty. For that reason, the Court allowed the appeal and granted Nerbas leave to withdraw his guilty plea.

Whilst *Nerbas* is a straight forward application of well-established principle, it has caused some controversy at the Queensland criminal bar: see Peter J Davis SC, Ethics in Criminal Trials, Issue 55 *Hearsay*.[16] Mr Davis referred to the following passage in *R v McLoughlin*,[17] a 1985 decision of the New Zealand Court of Appeal, which was cited with approval in 1995 by the Privy Council in *Sankar v The State of Trinidad and Tobago*:[18]

> "It does happen from time to time that a barrister will find himself unable or unwilling to act in accordance with his client's wishes. They may, for example, be incompatible with his duty to the Court or with his professional obligations; or he may consider that compliance would be prejudicial to his client's best interests. Should such a circumstance arise, then he must inform the client that unless the instructions are changed he will be unable to act further … But certainly counsel may not take it upon himself to disregard his instructions and to then conduct the case as he himself thinks best. It is basic in our law that an accused person receives a full and fair trial. That principle requires that the accused be afforded every proper opportunity to put his defence to the jury. … The present appellant has been deprived of that opportunity and justice has therefore been denied to him."[19]

McLoughlin was a clear case where counsel failed to act on his client's instructions. The first six and a half lines of the passage extracted above were obiter without any connection to the facts in *McLoughlin*. In *Sankar* the practical effect of counsel's conduct was to deprive Sankar of deciding whether or not he should give evidence or make a statement from the dock and resulted in a miscarriage of justice. Lord Woolfe, in delivering the Privy Council's judgment, cited the passage from *McLoughlin* above and noted that "the principle to which [it] referred applies equally here". In doing so, his Lordship was accepting that counsel may not disregard their client's instructions and conduct the case as counsel thinks best; an accused person must receive a full and fair trial and be afforded every opportunity to put his or her defence to the jury. In my view, neither *McLoughlin* nor *Sankar* is inconsistent with the correctness of the decision in *Nerbas* based on the material before the Queensland Court of Appeal. A client's change of instructions, unless they amount to an admission of guilt and the client wants counsel to put forwards a positive case of innocence, does not necessitate counsel's withdrawal from the case. Withdrawal would be ordinarily

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16 http://www.hearsay.org.au.
17 (1985) 1 NZLR 106.
18 (1995) 1 All ER 236.
19 *R v McLachlan* (1985) 1 NZLR 107.

inappropriate either during the trial or so close to the trial that new lawyers could not be adequately briefed.

The cab rank principle applicable to barristers, set out in BCR rr 21 to 24B, follows from the legal profession's independent democratic role. Lord Reid explained the principle in *Rondel v Worsley*:

> "It has long been recognised that no counsel is entitled to refuse to act in a sphere in which he practises, and on being tendered a proper fee, for any person however unpopular or even offensive he or his opinions may be, and it is essential that that duty must continue: justice cannot be done and certainly cannot be seen to be done otherwise. If counsel is bound to act for such a person, no reasonable man could think the less of any counsel because of his association with such a client, but, if counsel could pick and choose, his reputation might suffer if he chose to act for such a client, and the client might have great difficulty in obtaining proper legal assistance.'[20]

Courts have exercised jurisdiction over lawyers as officers of the court "from time immemorial".[21] Lawyers owe a duty to the court as an attendant consequence of the court's duty to the public to ensure the administration of justice. Superior courts may penalise a lawyer's conduct which is prone to defeat justice in the very cause in which the lawyer is professionally engaged.[22] As an officer of the court, the barrister or solicitor-advocate is concerned in the administration of justice and has an overriding duty to the court, to the legal profession and to the public even where this conflicts with the client's instructions or personal interests. Counsel must not mislead the court. I will give some examples. In *The Council of the Queensland Law Society v Wright*,[23] a solicitor, who obtained an adjournment by relying on an affidavit which she knew was no longer accurate, was held to have acted unprofessionally. Counsel must not cast aspersions on other parties or their witnesses without a proper basis. They must not withhold authorities or documents which may tell against their clients.[24]

Brennan J in *Giannarelli v Wraith*[25] explained:

> "The purpose of court proceedings is to do justice according to law. That is the foundation of a civilized society. According to our mode of administering justice, parties with inconsistent interests are cast in the role of adversaries and the court or judge is appointed to be an impartial arbiter between them. Counsel (whether barrister or solicitor) may appear to represent the adversaries, but counsel's duty is to assist the court in the doing of justice according to law. A client – and perhaps the public –

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20 *Rondel v Worsley* [1969] 1 AC 191, 227. See also *Giannarelli v Wraith* (1988) 165 CLR 543, 550.

21 See *Meyers v Elman* [1940] AC 282, 382 (Atkin L); *Davies v Clough* (1837) 8 Sim 262, 267; 59 ER 105, 106.

22 D A Ipp, 'Lawyers duties to the court' (1998) 114 *Law Quarterly Review* 63.

23 [2001] QCA 58.

24 *Rondel v Worsley* [1969] 1 AC 191, 227-228 (Lord Reid).

25 (1988) 165 CLR 543, 578-579.

> may sometimes think that the primary duty of counsel in adversary proceedings is to secure a judgment in favour of the client. Not so. The true position was stated by Lord Eldon:
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> > 'He lends his exertions to all, himself to none. The result of the cause is to him a matter of indifference. It is for the court to decide. It is for him to argue. He is, however he may be represented by those who understand not his true situation, merely an officer assisting in the administration of justice, and acting under the impression, that truth is best discovered by powerful statements on both sides of the question.' " (cases and citations omitted)

Lawyers' duties include not abusing the court's process by the improper initiation or maintenance of court proceedings. See *Flower & Hart (a firm) v White Industries (Qld) Pty Ltd* [26] where the solicitor's conduct was found to be an abuse of process in instituting proceedings for the primary purpose of delaying White Industries' action to recover moneys from their client.

In *R v Szabo*,[27] an appellant's conviction for rape was set aside and a new trial ordered because his barrister did not disclose to the client the barrister's sexual relationship with the prosecutor. This provided a basis for a reasonable apprehension of a miscarriage of justice, even though the prosecution case was strong and the barrister's conduct of the case was sound.

Sometimes it can be a difficult call as to whether conduct is unprofessional. Take, for example, the case of *Vernon v Bosley*.[28] It concerned a father's action for damages for nervous shock after witnessing unsuccessful attempts to rescue his young daughters from a motor car driven into a river by the nanny. After the trial but before judgment, his barrister learned that the man's psychiatric position had significantly improved. In a split decision, the English Court of Appeal held that counsel should have disclosed this altered position to the defendant and to the trial judge.

Inherently intertwined with a solicitor's duty to the court and the administration of justice is a lawyer's obligation not to engage in conduct which is prejudicial to or diminishes confidence in the administration of justice or brings the profession into disrepute.[29] Examples of breaches in Queensland include failing to lodge personal income tax returns for 11 consecutive years;[30] back dating documents with an intention to mislead;[31] overcharging clients;[32] failing

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26 (1998) 156 ALR 169; (1999) 163 ALR 744.
27 [2000] QCA 194.
28 (1996) 3 WLR 683.
29 ASCR, r 5 and BAQBCR r 12.
30 *Legal Services Commissioner v Hewlett* [2008] 2 Qd R 292, 296, [20].
31 *Attorney-General v Bax* [1992] 2 Qd R 9.
32 *Legal Services Commissioner v Dempsey* [2008] QCA 122; *Legal Services Commissioner v Baker (No 1)* [2005] QCA 482.

to adequately supervise the conduct of employed solicitors;[33] using crude, insulting and offensive language in the course of professional duties; and making public derogatory comments about a former client's family.[34]

A key requirement at the heart of lawyers' professional duties, whether to clients, the court, or the administration of justice, is competence. Lawyers offering and delivering a truly professional service must ensure they are skilled in their areas of practice. continuing legal education is critical. I congratulate you for attending to this aspect of your professional duties in attending this symposium. Remember, incompetence is a fundamental breach of duty.

Institutional independence of the legal profession requires lawyers to ensure they do not act in matters in which they have an actual or potential conflict of interest or where, by reason of their relationship with their client, their professional independence could be called into question.[35] The test

> "is whether a fair minded, reasonably informed member of the public … would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in order to protect the integrity of the judicial process and the due administration of justice, including the appearance of justice. The jurisdiction is an exceptional one and is to be exercised with caution, and due weight must be given to the public interest in a litigant not being deprived of the lawyer of his or her choice."[36]

One of the greatest challenges for the legal profession in the 21st century is affordable access to justice. Lawyers and judges must work together to avoid undue delay, expense and technicality,[37] major contributors to the high cost of litigation. One professional duty of which I am especially fond is that lawyers must not advance unarguable grounds of appeal.[38] And they have an obligation to inform the court at the earliest reasonable opportunity when a listed case settles. Judges are never happy to learn for the first time in court on Monday that the case they spent half their weekend preparing settled at lunchtime the previous Friday!

The possibilities and types of potential ethical dilemmas for lawyers are infinite. Their resolution can be difficult and finely balanced. You do not have to decide these complex issues alone. If in the least doubt, seek confidential advice from a more senior and experienced lawyer; from a barrister on the Bar Association's list of ethical counsellors on its website; or from the QLS's ethics service whose hotline and email receive up to 20 enquiries daily.

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33 *Legal Services Commissioner v Baker (No 1)* [2005] QCA 482.

34 *Legal Services Commissioner v Tampoe* [2009] LPT 14. The case concerned Schapelle Corby's family.

35 See *Kooky Garments Ltd v Charlton* (1994) 1 NZLR 587, 590.

36 *Mitchell v Burrell* (2008) NSWSC 772, [1] (Brereton J).

37 *Westland Pty Ltd v Johnson* unreported, 29 October 1999, [11] (Wilson J).

38 *Steindl Nominees P/L v Laghaifar* [2003] QCA 157; *R v Lavery [No 2]* (1979) 20 SASR 430, 431, 435-6.

Finally, may I remind you of a duty which flows both from the lawyers' duty to the administration of justice and from the duty not to diminish public confidence in the administration of justice or bring the profession into disrepute, namely, courtesy in dealings with fellow practitioners: see ASCR 4.1.2 and 5; BCR rr 5(d) and 12. From what I hear, professional courtesy these days often falls victim to the pressures of working long hours, carrying high overheads and completing billable six minute blocks. My colleagues and I were disappointed recently when a young barrister, apparently inexperienced in appellate work, repeatedly asserted without any factual basis that the prosecutor at trial had lied to the jury in her closing address. I am confident no-one here would make such an error, but perhaps everyone could adopt a more civil approach in dealings with fellow practitioners. Courtesy costs nothing and makes often difficult work more enjoyable for all involved. It might even bring fun back into the practice of the law! Remember, your opponents are almost certainly trying to do their best in circumstances which may be more difficult for them than you realise. I am encouraged, however, in knowing that even if levels of courtesy between Queensland practitioners could improve, they are infinitely better than in the USA.

First, there was the male attorney who was fined by a New York judge for telling his female opponent: "I don't have to talk to you, little lady."[39]

Then Harper's Magazine published the following exchange in court between two US attorneys:

"Attorney A: You don't run this deposition, you understand?
Attorney B: Neither do you Joe.
Attorney A: You watch and see. You watch and see who does, big boy. And don't be telling other lawyers to shut up. That isn't your Goddamned job fat boy.
Attorney B: Well that's not your job, Mr Hairpiece.
Attorney A: What do you want to do about it asshole?
Attorney B: You're not going to bully this guy.
Attorney A: Oh, you big tub of shit, sit down.
Attorney B: I don't care how many of you come up against me.
AttorneyA: Oh, you big fat tub of shit, sit down. Sit down, you fat tub of shit.[40]

And, perhaps most surprising of all, a California criminal defence lawyer successfully appealed on the ground that the prosecutor conducted the case unfairly by interrupting the defence closing jury address by farting 100 times![41]

Now, if that doesn't generate some vibrant North Queensland discussion, I give up!

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39 When Learned Friends Fall Out in Court, "The Times", Tuesday, October 6, 1992, page 29, David Pannick QC.

40 The Honourable Marvin E Aspen, 'Procedural Reform in United States Court' (1994) *Civil Justice Quarterly* 107 (Paper delivered at the International Conference on the Reform of Commercial Arbitration Procedures, London, February 17 and 18, 1994).

41 Above.