Bleak House in Australian courts

By the Hon Leslie Katz SC

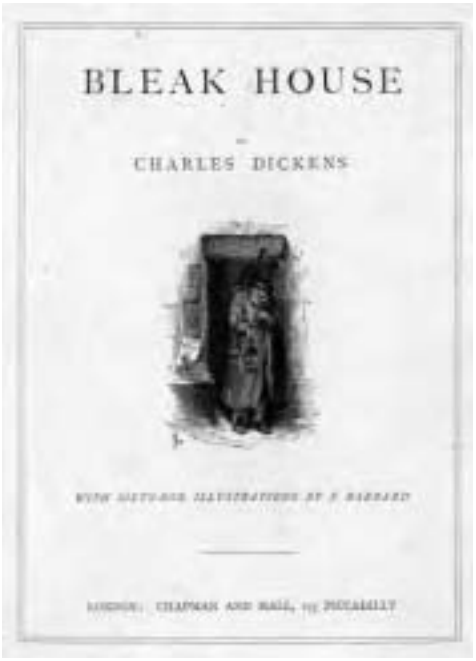
Herman Goering is said once to have remarked, 'Whenever I hear the word culture, I reach for my revolver.'[1] In similar vein, whenever one sees the words 'Bleak House' in reasons for judgment of courts in the English-speaking world, one's natural disposition is to reach for one's perpetual calendar, since it seems likely that a tale of gross delay in legal proceedings is about to be unfolded.

References to *Bleak House* are not lacking in reasons for judgment of Australian courts, although, so far as can be told by using electronic searching facilities, they have occurred almost as frequently in reasons for judgment of the courts of New South Wales as in reasons for judgment of the courts of all other Australian law areas combined. (It would be invidious to suggest a reason for that statistic.)

Of the references in Australian reasons for judgment to *Bleak House*, made in the context of discussions about delay in legal proceedings, one example will be discussed. In *Tyler v Custom Credit Corp Ltd & Ors*,[2] Atkinson J wrote (footnotes omitted),

> [3] Unnecessary delay in proceedings has a tendency to bring the legal system into disrepute and to decrease the chance of there being a fair and just result. The futility and self-perpetuating nature of some litigation was viciously satirised by Charles Dickens in *Bleak House*. In referring to a case (fortunately fictional) in the Chancery Division of the Courts in London called *Jarndyce v Jarndyce*, Dickens wrote:
>
> Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least, but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not three Jarndyces left upon the earth perhaps since old Tom Jarndyce in despair blew his brains out at a coffee-house in Chancery Lane; but Jarndyce and Jarndyce still drags its dreary length before the court, perennially hopeless.
>
> Jarndyce and Jarndyce has passed into a joke.

One may ignore the anachronistic description by Atkinson J of the court in which *Jarndyce* was supposed to have been proceeding, but what of her reference to the fact that the case was 'fortunately fictional'? Was her Honour implying that what Dickens wrote about *Jarndyce* was not, in essence, an accurate representation of the



characteristics of Chancery proceedings at the time of which he was writing?

If so, she may have Australian judicial company, since, in *Lemoto v Able Technical Pty Ltd*,[3] McColl JA wrote,[4] 'The days when the suit of *Jarndyce v Jarndyce* wound its apocryphal way through the pages of Dickens' *Bleak House* are long gone—if they ever were.'

Others, however, haven't doubted that those Jarndycian days did exist, among them, Sir William Holdsworth. Sir William, having located in the year 1827 the date of the action of the story in *Bleak House*, wrote,[5]

> … I do not think that it can be alleged that his statements of fact in that book are erroneous. He says in his Preface that 'everything set forth in these pages concerning the Court of Chancery is substantially true and within the truth.' That is not wholly true if he meant, as I think he did, to refer to the date when the book was written [which was 1851-53]—though much of it was then still true. It would have been wholly true if he had meant to refer to the date of the action of the story. In fact, I am sure it would be possible to produce an edition of *Bleak House*, in which all Dickens's statements could be verified by the statements of the witnesses who gave evidence before the Chancery Commission, which reported in 1826.

Not surprisingly, no one seems to have taken up since the challenge of producing such an edition of *Bleak House*.

If, as Holdsworth held, *Bleak House*'s description of the characteristics of Chancery proceedings in 1827 had been accurate, had Dickens based that description on some particular real case?

In her reasons for judgment in *Tyler*, Atkinson J, in a footnote,[6]

mentioned that *Jarndyce* was 'reputed to be loosely based on *Re Jennens, Willis v Earl of Howe* (1880) 50 LJ Ch 4: see Hurst, G. (1949) *Lincoln's Inn Essays*, Constable & Co Ltd at p 116-118.' No doubt, what was meant was that it was reputed to have been loosely based on legal proceedings involving the Jennens inheritance, to the extent to which such legal proceedings had already occurred by the time that Dickens wrote *Bleak House*.

However, that reputation seems to be unjustified.

Patrick Polden's conclusion on the matter,[7] after an exhaustive treatment of it, was as follows (footnotes omitted):

> The frequently expressed view that the Jennens case was fictionalized by Dickens as *Jarndyce v Jarndyce* is seriously misleading. When he began writing *Bleak House* in November 1851 the Jennens litigation had been dormant for fifteen years and it is highly improbable that the cases of the 1830s had lodged in his memory. There is no warrant for the assumption that because he mentioned (not by name) the Jennens and Day cases as examples of Chancery scandals when defending his attack on the court after publication, he had those in mind when planning the novel.
>
> There is, it is true, one important similarity: as in *Jarndyce* there was a host of potential inheritors irresistibly fascinated by their elusive dream of wealth only attainable through the court. But there is a crucial difference too: *Jarndyce* has the characteristics of an administration suit, with a fund trapped in court and relentlessly eaten away in costs until entirely consumed. Neither it, nor the innumerable parties, could escape the court's clutches, though really strong-minded men like John Jarndyce could ignore it. In Jennens there was no such fund, no ongoing case and the deadly refrain of 'costs in the cause' did not echo down the years.

Polden's reference, in the passage just quoted, to the defence by Dickens, after publication, of his attack on the Court of Chancery was a reference to Dickens's preface to the version of the novel in book form, that form only appearing after the novel had finished appearing in serial form. The relevant part of that preface, referred to, not only by Polden, but also by Holdsworth, was as follows:

> [E]verything set forth in these pages concerning the Court of Chancery is substantially true, and within the truth. The case of Gridley is in no essential altered from one of actual occurrence, made public by a disinterested person who was professionally acquainted with the whole of the monstrous wrong from beginning to end. At the present moment (August, 1853) there is a suit before the court which was commenced nearly twenty years ago, in which from thirty to forty counsel have been known to appear at one time, in which costs have been incurred to the amount of seventy thousand pounds, which is A FRIENDLY SUIT, and which is (I am assured) no nearer to its termination now than when it was begun. There is another well-known suit in Chancery, not yet decided, which was commenced before the close of the last century and in which more than double the amount of seventy thousand pounds has been swallowed up in costs. If I wanted other authorities for Jarndyce and Jarndyce, I could rain them on these pages....

While Dickens did not include in the passage that I've just quoted the names of the parties to the two suits that he mentioned, there's no doubt that the suits were (in reverse order) those that Polden called 'the Jennens and Day cases'.

Though Polden gave much information about the Jennens case, he gave no information about the Day case. I'll therefore supply some.

First, I've said that there's no doubt that Dickens was intending to refer to the Day case when mentioning the first of his two authorities. That intention's established by a letter that Dickens wrote on 7 August 1853 to his right-hand man at Household Words, W Henry Wills. Dickens wrote as follows:[8]

> … Will you [at] once make an enquiry into the Day Chancery Cause, As—when was it instituted?
>
> How much nearer is it now to its completion[?]
>
> What has been spent in costs?
>
> How many Counsel appear—about—whenever the Court is moved[?]
>
> You did ask this for me before, but I made no note of it. I should like to glance at it in the Preface. Of course I will in no degree whatever, commit your informant; nor shall I even mention the cause by name.

Wills's answers, noted on Dickens's letter, formed the basis of Dickens's reference in the preface to the first of the two authorities that he mentioned.

Secondly, the Day case involved the will of Charles Day. Day had amassed a large fortune in blacking manufacturing, as a principal of the famous firm of Day and Martin.[9]

Thirdly, the first decision relating to Day's will that was reported in the traditional law reports occurred in 1838, while the last such decision occurred sixteen years later, in 1854, the year after Dickens's preface.[10] However, if one is prepared to move beyond the traditional law reports, one can find the judges being bothered about Day's will as early as November 1836, within a month of his death, and as late as March 1870, over thirty-three years later.[11]

Fourthly, the Day case was no more likely to have been used by Dickens as the model for *Jarndyce v Jarndyce* than was the Jennens case. The whole tenor of Dickens's request in August 1853 for information from Wills about the case militates against the conclusion that it was so used.

Turning now from references to *Bleak House* made in the context of discussions about delay in legal proceedings to references to it made in other contexts, *Bleak House* has been referred to in discussions of the evidentiary privilege for 'without prejudice'

communications.

In *Lukies v Ripley [No 2]*,[12] Young J referred[13] to the fact that, 'Between 1820 and 1850 there was great growth in the significance of the words 'without prejudice' which by 1850 [written thus; no doubt, 'the 1850s' was meant] was able to be satirised by Dickens in *Bleak House*.'

In *Jumitogad Pty Ltd v Garraway*,[14] Kearney ACJ dealt with that matter as well, although offering some elaboration. He pointed out that, 'It is as sensible and effective to use 'without prejudice' in relation to the provision of particulars of a Statement of Claim, as it was for the lawyer's clerk in Dickens' *Bleak House* to make a 'without prejudice' proposal of marriage.'

Finally and not unexpectedly, Dickens's scarifying prose in *Bleak House* about lawyers and the legal system[15] has been mined to support propositions about the technicality to be required of pleadings. I'll give two examples.

First, in *DPP(SA) v B*,[16] Kirby J wrote[17] that, 'On the brink of the twenty-first century, we can leave an approach of excessive technicality in pleading to the legal history of the nineteenth century where it properly belongs.' As a description of legal procedure in the nineteenth century, Kirby J chose[18] the following passage from *Bleak House*:

> [I]t's being ground to bits in a slow mill; it's being roasted at a slow fire; it's being stung to death by single bees; it's being drowned by drops; it's going mad by grains.

Secondly, in *Burrows v Knightley*,[19] Hunt J wrote[20] (first set of bracketed words added; second set of bracketed words in original),

> If the point taken by the defendants in the present matters is correct, … pleadings [in defamation proceedings] have … become as complicated as a quadrille. I am reminded somewhat of Charles Dickens' description of lawyers as 'tripping one another upon precedents, groping knee-deep in technicalities [and making] mountains of costly nonsense': *Bleak House* (Ch 1).

Endnotes

1. Whether Goering ever made the remark is doubtful. According to the Columbia World of Quotations, 'the only recorded source of this remark is the play *Schlageter* (1933) by Hanns Johst (1890-1978), Nazi playwright and President of the Reich Chamber of Literature. The line is spoken by a storm trooper in act 1, sc.1: 'When I hear the word culture, I cock my Browning.''
2. Unreported, [2000] QCA 178.
3. (2005) 63 NSWLR 300.
4. At page 322, paragraph [95].
5. *Charles Dickens as a Legal Historian*, 81
6. Footnote 16.
7. 'The Jennens Inheritance in Fact and Fiction', (2003) 32 CLWR 211 (Pt 1) and 338 (Pt 2) at page 363.
8. Graham Storey, Kathleen Tillotson and Angus Easson (eds), VII *The Letters of Charles Dickens*, at pages 128-129. See also Dickens's letter to Wills of AUG 09 1853, at page 129.
9. See John Strachan, *Advertising and Satirical Culture in the Romantic Period*, at pages 118 and 124, note 20.

   So famous was the firm of Day and Martin that, on 28 December 1844, it was said in *Chambers' Edinburgh Journal* (at page 401):

   > No one can deny that the names of those very respectable blacking-makers of High Holborn, Messrs Day and Martin, are quite as well known to the public at large as Scott of Abbotsford, and Wellington of Waterloo.

   It's my belief that Dickens's choice of the case involving Day as one of the two to mention in his preface was a private joke by him, given the fact that he'd been forced, when a boy, to work in the blacking manufacturing business. I've dealt with that matter at length in an appendix to the electronic version of this paper, which version is available from http://ssrn.com/abstract=1315862. Space constraints have prevented the reproduction in *Bar News* of my discussion of the matter.
10. See *Croft v Day* (1838) 1 Curt 782 [163 ER 271] and *Day v Croft* (1854) 19 Beav 518 [52 ER 452].
11. See respectively *The Gentlemen's Magazine*, January 1837, at page 101 (available here), and *The* [London] *Times*, March 31 1870, at page 11.
12. (1994) 35 NSWLR 283.
13. At page 286.
14. Unreported, NTSC, 9 October 1998.
15. Did the ghost of Chancery past smile when, over sixty years after his death, Dickens's own will came to be construed in the Chancery Division and then in the Court of Appeal? See *In re Dickens. Dickens v Hawksley* [1935] Ch 267.
16. (1998) 194 CLR 566. An electronic report of the case is available here.
17. At page 608, paragraph [69].
18. At footnote 189.
19. (1987) 10 NSWLR 651.
20. At page 654.