THE FUTURE OF LITIGATION OF CONSTRUCTION LAW DISPUTES

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I thank the University of Melbourne, and, in particular, the Faculty of Law Masters Graduate Program for the honour which they have bestowed upon me. I have long had a keen interest in all aspects of building projects and in the law and practice that attends dispute resolution in this field. I am pleased to be able, in a small way, to play an ongoing role in the training of future participants of these projects.

I had my first taste of building disputes in the mid-1960s when, as a law clerk to the well-known solicitor Allan Moore, I instructed counsel in an arbitration arising out of the construction of the spire of St Dominic's Church in Camberwell. Over the half century which has followed, my interest in this area of disputation has not waned. This would not be surprising for those associated with construction law if it were not for the fact that most lawyers would see this as a symptom of some mental disability or aberration. The occasion of preparing a paper such as the present has caused me to consider why this is so. It is also the occasion to pause and to consider the changes which I have witnessed and, in the end, to consider what the future may hold.

Let me immediately qualify my subject matter. "Construction disputes" is a far more precise expression than the commonly heard "building disputes" or "building cases". The topic extends beyond the design and construction of buildings, for it includes all manner of construction projects including engineering works such as roads and bridges and commercial works not intended for human habitation such as sewerage plants and oil refineries. The expression would also cover the design and construction of large chattels such as ships, aircraft and satellites. Having enlarged my topic in this way, I insert a qualifier with respect to disputes concerning domestic buildings, this being a matter of which I have had no experience over the past 20 years.

The topic then, which I have given myself is to consider the future of litigation of these construction disputes. Shortly stated, my conclusion is that the patient is seriously, if not critically, ill but that with the application of heroic resuscitation processes there is every prospect that it will survive.

Particular Features of Construction Disputes

The first question which must be addressed in a consideration of this topic is why we need to address it at all. We have heard from many quarters that litigation requires reform if it is to satisfy the needs of the commercial community of the 21st century. For that reason, the shelves of any law reform commission groan with the weight of numerous reports dealing with the reform of procedures and even of the substantive law. I should add immediately that this concern is not limited to civil litigation. Governments complain that courts seek more and more resources to resolve longer and longer cases. Litigants despair at the burdens which are imposed upon them, unendurable delays, painful demands of their personnel and, of course, crippling costs.

Why, then, single out construction disputes for special consideration? The answer to this is that it is in this area of commercial activity that the disease is most advanced. Consider then special features which demonstrate this.

- The issues of fact and law which they raise are commonly numerous. There may be many reasons for this but the consequence, very often, is that the trial is required to deal with numerous matters of which any single matter would warrant a full trial in another area of commercial activity.

- They will typically involve complex technical issues. These may concern matters geotechnical, structural, chemical and architectural. They may also be concerned with difficult issues of programming and work practices.

- They usually involve consideration of an enormous number of documents. And in the new electronic and paperless commercial environment, the volume of the paper has continued to increase. Where is this more evident than in a major construction project? Moreover, the ready availability of modern computerised techniques for document management means that there is now no incentive to limit the number of these documents deployed at trial.

- The law is complex. This is partly because of the matters mentioned above but also by reason of the efforts of Parliament, and sometimes the judges, to overcome these difficulties and to mitigate the hardship of the common law principles in the application to these cases. In this latter regard many examples spring to mind. I need only mention the state of the law with respect to negligence claims for what is called "pure economic loss" and that with respect to limitation of actions where a defect is latent.

- Construction cases are unpopular. I think we must all face up to this. Judges and lawyers shy away from them. And this has the consequence that, where this is possible, in the lawyer's office and, dare I say it, the judge's chambers, the construction case may be put to one side in favour of less unattractive work.

- Finally, and this may come as a surprise, construction disputes have an emotional component which is often absent in other commercial litigation. I need hardly mention the emotion which is so often at the forefront of domestic building disputes. In my experience, even in major construction projects where you might expect the dollar to rule, there is often in the client a sense of outrage at the perceived attitudes and conduct of other parties. This emotional component may, in the extreme case, lead to the litigant announcing to a delighted lawyer that it would rather see its assets consumed in legal costs than pay a penny to the claimant. As we shall see, a logical conclusion of this attitude is that litigation then takes on the characteristics of a war of attrition. An associated consequence is that points may be taken, not in the expectation of their success, but in the furtherance of the objective of making life as difficult as possible for the opponent, particularly if it is seen as having more limited resources.

- I add to this list a characteristic of construction law disputes which is of relatively recent origin. Following the introduction of proportional liability there is now a powerful incentive for defendants to bring in any other party which might be considered responsible in part for the plaintiff's loss. This has already and will

continue to have the consequence that the trial of construction disputes will have all the complications of a multi-party trial.

To a greater or lesser extent these have always been features of construction disputes. It is worth briefly noting what has been the responses to them over the half century or so that I have had an involvement in this area of law.

Responses to the Challenges Posed by Construction Disputes

Contractual responses

At a contractual level there have been attempts to establish contractual dispute resolution regimes. I do not limit this observation to the insertion of compulsory arbitration clauses, although, this is perhaps the most important of these strategies. I refer to contractual provisions which seek to confer finality on the determinations of contract administrators, particularly determinations with respect to progress certificates, contractual discrepancies, time extensions and the like. Other strategies have been to require contractual claims to be made as the circumstances have arisen rather than let them fester away, infecting other aspects of the project and then to be brought forward as an enormous global claim at the end. In some cases, too, novel dispute resolution processes have been established in the contract, I refer to provisions for mini-trials and for negotiations at CEO level.

Case management in litigation

The response of the courts has been to impose case management to these disputes in an effort to winnow out the real issues in dispute and to determine how those issues might best be resolved. It is of interest in this regard to note that the first specialist case management list to be established in this country was the Victorian Supreme Court's Building Cases List which was introduced as Order 76 of the old Rules of Court in October 1972. I well recall what an impact was felt by lawyers handling these cases when the judge in charge of the list started telling them how and at what speed their case should be progressed. The old laissez-faire regime became a thing of the past. And we all know how case management has spread to other areas and, ultimately, in those courts where the workload is such that this is possible, to the docketting of all cases before the courts. I

underline, because this is the matter to which I shall return, that the activism of the judge in charge of the Building Cases List has had profound effect upon the way lawyers in the field approached their work in the decades that followed. This effect has been both positive and negative. It is positive inasmuch as the lawyers are required to analyse the case at an early stage and to move it forward with expedition. It is negative inasmuch as the initiative in the interlocutory process has passed to the judge so that nothing tends to be done unless the judge directs it and, also, because directions hearings are costly.

Alternative dispute resolution

Perhaps the most important response to the particular features of construction disputes resolution has traditionally been to refer them to arbitration, and arbitration clauses have long been a feature of building contracts. Sometimes these clauses have provided for compulsory arbitration, as in the *Scott v Avery* clause, and sometimes it is optional. But even in the latter event, the courts have lent their aid to arbitration by very readily granting a stay of the litigation where the dispute was arbitrable. This had the consequence that a lawyer in the field of construction dispute resolution in the early days of my practice might expect to spend a large part of their professional life before arbitrators.

In theory it might have been expected that the trend would have continued over the past 50 years or even extended so that these troublesome disputes should be resolved in an informal way by persons experienced in the building industry with a view to achieving a speedy and commercial result. In this way, too, a component of the cost of determining these disputes passes from the State, which needs no longer to provide a court for the purpose, to the contending parties themselves. A number of pressures have had the consequence of resisting this conclusion.

In the early 1980s by section 55 of the uniform *Commercial Arbitration Act* the compulsory character of the *Scott v Avery* clause was removed for domestic arbitrations. This means that, where one party wishes to litigate an arbitral dispute it might do so unless a stay was imposed under section 53 by the court.

Furthermore, in a legislative provision which has had far reaching consequences, the *Domestic Building Contracts Act 1995* provided by section 14 that arbitration clauses in domestic building work contracts were void. Disputes thereafter had to be determined in the Domestic Building List in VCAT. The far reaching consequence of these provisions has been to deprive arbitration in this State of a most useful training ground for young arbitrators so that the number of experienced arbitrators has become somewhat depleted over the years.

I think it is fair to say, too, that the legal profession chafed under a dispute resolution regime in the hands of non-lawyers. Lawyers were uncomfortable with disputes involving large sums being determined by those whom they saw as legal amateurs. Trained in a forensic environment of some formality, these lawyers insisted that arbitrations be conducted as litigation. In this they derived some support from some judicial decisions which required arbitrators, at least in formal arbitrations, to follow the normal court procedures of openings, cross-examination of witnesses and final addresses, and which required comprehensive reasoned judgments. Decisions of the courts, too, made it difficult for an expert arbitrator to know to what extent his or her own expertise might be used. In short, to adopt the expression of the late Mr W. Brown, an experienced structural engineer and long-time arbitrator, the lawyers hijacked the arbitration process. The consequence of this has been that lawyers themselves have taken a seat on the arbitral bench. And so the process becomes entirely lawyer-driven. This has meant for the disputants that arbitration tends to be just as formal, lengthy and expensive as litigation — even more so because the lawyer arbitrator lacks the coercive clout of a judge.

And so, in the domestic context, arbitration has suffered a decline in importance. How this has affected the number of arbitrations I do not know. I suspect that they have declined in absolute or relative terms.

A further and perhaps less significant response to the difficulties facing construction litigation has been the adoption of other ADR processes such as mini-trials and expert appraisal in an effort to bring to the parties a realistic attitude of the prospects of success and in that way to encourage settlement of these disputes. At this point I should mention,

for completeness, the widespread and very effective adoption of mediation techniques which have been of particular benefit in this difficult area of law.

Specialist tribunals

The decline in arbitration has been accompanied by the establishment of specialist tribunals such as the Domestic Building List in VCAT. Some disputes, too, might be referred to the Building Appeals Board established under the *Building Act* 1993. This is itself a significant development which might provide a pointer to the future, for this has been the trend overseas in jurisdictions where the number of construction disputes is sufficiently large to warrant it. I refer to the Official Referees Court in England which is now the Technology and Construction Court (TCC) within the Supreme Court of Judicature and to the Court of Claims established by federal legislation in the USA.

Specialisation

As a consequence of the particular difficulties of resolving construction disputes and the general unpopularity of these disputes with litigation lawyers, a trend over the past few decades has been that the work has passed to a small band of lawyers who are interested in and prepared to undertake this work. This has produced a group of specialist barristers and solicitors which itself provides part of the environment in which the future should be considered. When I came to the law there were no barristers who might describe themselves as having a practice which comprised wholly, or in substantial part, construction cases. This has changed. There is now a community of specialists in the field including a number of specialist silks. So, too, apart from a handful of whom Doug Jones, John Dorter and John Sharkey immediately spring to mind, there were few specialist solicitors in the field. Now any number of firms either specialise in construction law or have within their office specialist construction law departments.

This has had the consequence that there are any number of lawyers who do not shy away from the detail, the technical aspects or the volume of the issues or documents which are a feature of construction disputation. Whether by their disposition or from their training, these lawyers appear to revel in it. This is their strength in the conduct of construction law litigation; it is also their weakness. Undue interest in the detail of a case often distracts the

mind from the big issues involved. Put bluntly, is it worth spending time which may collectively cost the parties $100 per minute exploring an issue which is worth only a few thousand dollars and where the prospect of success on that issue is uncertain?

Legal Responses

Finally, I mention a few developments in the substantive and procedural law which have arisen over the past years which create the legal environment in which the future must be considered.

Substantive Law

First and foremost, of course, is the enlargement and later diminution of the role of the law of negligence as it affects those engaged in building projects. In its ascendancy, negligence threatened to supplant the contractual relationship between a contractor and a proprietor both in their liability to each other and in their liability to others. In present company I need hardly trace this progress from the early 70s with the now forgotten decisions in *Dutton v Bognor Regis*[1] and *Rivtow Marine Ltd v Washington Iron Works*[2], and the still remembered *Caltex Oil (Aust) Pty Ltd v The Dredge Willemstad*[3], to its apogee in *Bryan v Maloney*[4] and then its subsequent descent which I suspect is ongoing. I mention for completeness, too, the statutory modifications to the law of negligence made in 2003 in Part 10 of the *Wrongs Act 1958*.

Various statutory changes have also played a responsive role. I have already mentioned the removal of domestic construction disputes from the purview of litigation and arbitration. Reference might also be made of legislation restricting the rights of house builders under the *House Contracts Guarantee Act 1987* with respect to progress claims and variations. Further statutory developments which have had bearing on construction disputes are those contained in the *Trade Practices Act* relating to misleading and deceptive conduct generally[5] and with respect to the provision of services,[6] and those creating

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1 [1972] 1 QB 373.
2 (1973) 40 DLR (3d) 530 (SC Canada).
3 (1976) 136 CLR 529
4 (1995) 182 CLR 609.
5 Section 52.
6 Section 55A.

warranties with respect to the supply of architectural and engineering services.[7] There is, too, the *Building and Construction Industry Security of Payment Act* which is directed to the protection of subcontractors. I mention in passing that, for some reason, this legislation has produced little litigation at Supreme Court level and no reported decision of which I am aware. In this respect the position is to be contrasted with that in New South Wales.

Finally, the recent introduction of proportionate liability. This was imposed in 1993 in building disputes under section 131 of the *Building Act* and in 2003 upon disputes more generally by Part 4AA of the *Wrongs Act 1958*.[8] The 1993 legislation went largely unnoticed but the amendments to the *Wrongs Act* are likely to transform the nature and character of litigation of construction disputes, at least insofar as they depend upon claims for breach of duty of care. This legislation was not, as best one can tell, enacted in response to the particular difficulties attending construction litigation and, indeed, it may have the consequence of compounding these difficulties. This proportionate liability regime represents an important aspect of the framework against which future developments must be considered.

Procedural Law

Over the past century or so lawyers have made, to a greater or lesser extent, extensive use of a number of established procedures to accommodate the difficulties attending the resolution of construction disputes. Many of them, of course, have been adopted in other areas of litigation. These will include staged discovery, trial of preliminary issues, referral of issues to special referees and, of course, mediation. At trial, too, time in court has been reduced by the extensive use of written opening and closing addresses, witness statements and court books.

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7 Section 74.

8 See, too, *Trade Practices Act 1974* Part V1A.

The Future of Litigation

I must confess to a considerable pessimism about the future of the litigation of major construction disputes unless something drastic is done. Litigation has traditionally been expensive, probably expensive beyond the reach of ordinary persons, and it has been slower than the commercial community might prefer. But the present cost of conducting this litigation in any but the largest cases will rarely be justified on a commercial basis. I know that lawyers and litigants have been saying this for a very long time but, it seems to me, that the cost of building litigation relative to other litigation is now more disproportionate than at any time that I can recall. It must be seen as a matter of regret, if not self-reproach, for us all if a claimant for an amount of, say, $1m is advised that it is not worthwhile to pursue such a claim in the court or if a party to the litigation settles disadvantageously because of an inability to continue the struggle.

Nevertheless, subject to one matter, I do not see delay as a serious problem independent of the factors that are responsible for the costs problem. The matter to which I refer is the interval between the time the case is ready for trial and the commencement of the trial. This interval, which may be a year, is essentially the product of the application of the limited judicial resources to cases which are likely to occupy a lengthy period. The task of scheduling construction cases in competition with criminal trials and the other work of the Court is a challenging one.

I have examined, as best one can from the available written material, the procedures of the English Technology and Construction Court (TCC) and the Court of Claims in the United States, both of which are held out as success stories in construction law dispute resolutions. There I find that the procedures are not so very much different from ours. In some respects they are less advanced. These documents, however, say nothing about how these procedures are implemented or, perhaps, ignored. As practising lawyers we well know that, in the realm of forensic procedures, the letter of the law and the reality of practice are often at variance.

I have examined the cases in the Building Cases List to seek to identify the causes of delay up to the point of readiness for trial. They fall into three or four classes. The first, and

perhaps the least significant, is represented by those cases where the parties appear to have great difficulty in pleading and particularising their claim or defence. The second concerns delays and disputes over discovery. The third is delays attending expert reports. To these may be added a fourth which is the consequence of the new setting down Practice Direction which is presently operating on a trial basis.[9] Mediation, witness statements and court books must all be completed before a trial date may be fixed. The time involved in these activities must then be counted at this early stage rather than during the period from setting down to the commencement of the trial.

To a very large extent, these delays are unavoidable: they are a function of the characteristics of construction cases to which I have referred. Because the cases have these characteristics, the work involved in the ordinary interlocutory process requires a large number of work hours. From my perspective it is difficult to know whether these hours are excessive or might be reduced.

Returning, then, to the costs problem. The challenge is to reduce or to contain these costs. This must be addressed in terms of the time that litigation requires, for it is unreal to suppose that the hourly rates of those involved will be reduced. The attention to time reduction must not be addressed merely with respect to court time. If the cost of litigation is to be reduced it will be necessary to simplify the issues in dispute by eliminating those which are peripheral or without prospect of success.

I have on occasions in the past sought to encourage lawyers to focus upon the central issues of the case rather than those at the periphery. Generally, my efforts have been fruitless. This is not surprising. This is a manifestation of the culture of construction lawyers. It takes great courage and a confidence in one's own judgment, and in the judge, to abandon an issue which is seen as having little prospect but which is not so hopeless as to warrant being struck out as futile. This is particularly the case if your opponent is not at all minded to do so. Nor can the client be blamed for failing to participate in this endeavour when the lawyers themselves are not committed to it. I return to my medical analogy; it is a hard thing to ask a doctor not to undertake an expensive investigatory procedure

[9] Practice Direction No. 4 of 2006.

notwithstanding that it has a slender prospect of utility, particularly if it is a procedure commonly used by others.

To this a cynic might add that it is more difficult to persuade the doctor to forego this procedure when its implementation produces a financial benefit for the doctor. The cynic may say the same about lawyers who are content to pursue every issue to the end, notwithstanding its slender prospect of success. I do not count myself among these cynics.

Nor do I despair at the future of litigation as an appropriate dispute resolution technique. But this future does not lie solely in procedural or other legal reforms. What is required of all involved in the resolution of construction disputes is nothing less than a cultural change, a change which requires them to take a more professionally detached view of their responsibility to their clients and a more co-operative approach to the resolution of disputes. I interrupt myself at this point to underline that I am not critical of the existing culture; it is perfectly understandable. The problem is that, without change, it is likely to kill the organism upon which it depends. This change, like any culture change, will not be easy to achieve. How are we to prevent lawyers churning their cases, engaging in futile and expensive interlocutory proceedings, incurring enormous and often unnecessary costs in discovery? How are we to restrain the barrister who wishes to make a submission of little prospect and to pursue every factual rat, however sickly, up every drain in order to scotch it?

In a small way, I have sought at trial to persuade lawyers to approach their case with a sense of co-operative nature of the process in which they are involved. Assuming that the parties really want to resolve the dispute and are not merely engaged in tactics of delay and obstruction, I have put the question to the lawyers in this way. We, that is the parties, have a problem. How best can we, that is the lawyers, resolve this question? The reaction has sometimes been quite positive and helpful. It is in such an approach that the interest of the parties, which is to obtain a satisfactory result, can be reconciled with our broader interest which is that litigation should have a role to play in bringing the particular expertise of the court to bear in the obtaining of such a result. We, the judges, and the legal profession generally, readily impose similar obligations on prosecutors in criminal trials. We impose it

on expert witnesses. Each in their own way is asked to place self-interest and the demands of the client behind a higher interest which is to serve the law and the court process. Lawyers, too, are expected not to be the mere mouthpiece of the client. They may not mislead the court, misstate facts or fail to bring forward adverse authorities. They are not permitted to make allegations without sufficient instructions that these allegations will be supportable. Government direction also requires that departments and agencies act as "model litigants".

Even so, I can see grave difficulties in the way of expecting lawyers not to bring forward issues which are not so hopeless as to warrant a strike out order but which they think are not likely to succeed. The problem is that we all have experience of such issues which to our great surprise have turned out to be winners. But, although I do not take the position that lawyers should be free to ignore their paramount obligations to the court, I see little prospect of reducing costs in this way.

This brings me back to the point which I mentioned earlier. The sort of person who is content to specialise in construction litigation is by nature a person who is not put off by detail, by voluminous documentation, by technical issues or by a large number of issues. Such a person's strength lies in an ability to focus on the detail, but they cannot be expected easily to give up the detail. Realistically, I consider that the best we can hope for is that the lawyers, as well as clients, should approach litigation as they do any commercial venture. In this way the amount of time, energy and cost which is invested in the venture should bear a relationship to the amount which is in issue and to the prospect of success. This is referred to in the new English rules of court as the principle of proportionality.[10]

I suspect that the catalyst for this culture change must be the role of the judges themselves. The judges will achieve this not only by exercise of coercive power, but, more effectively, by their example. When the Building Cases List was established some 35 years ago its avowed purpose was to use judicial resources to cause the parties and their lawyers to focus on the real issues in the case and to address their efforts to resolving these issues in a speedy,

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10 Civil Procedure Rules 1998 (UK), R 1.1(2)(c).

efficient and just way.[11] If there is to be a future for construction litigation, these efforts must be redoubled and it must be the role of the lawyers to assist and not to resist them. Without the active co-operation of the lawyers involved, the judge's efforts will come to nought. This must be so because, at the time decisions are made, the judge is probably the person in the court least informed about the issues and evidence to be given in the case. Moreover, it will be the lawyers who are best aware of the practical and commercial agendas underlying litigation including the insurance implications.

This said, judges have ample power to achieve these objectives provided they are ready to exercise them. Unfortunately, some of these powers have been circumscribed by judicial decisions which are difficult to ignore. I mention by way of example the constraints imposed upon the exercise of the power to sever and determine preliminary issues pursuant to rule 47.04[12] and upon the existence of the power to refer a question to a special referee under rule 50.01.[13] At trial, too, the judge has wide power to decide how and in what order evidence is to be presented[14] and, in the appropriate case, to impose time limits for various forensic activities. This is, of course, subject to the overriding duty of the judge to accord justice to the parties and to determine all issues of fact and law which are properly raised in the proceeding. Historically, these powers which are available in all civil litigation have been exercised rarely and with restraint. Here we have another example of the impact of culture – this time it is the culture of the judiciary. This raises a difficulty for their ready exercise in construction cases. What warrant is there for the application of the ordinary judicial management powers differently in one class of cases? My attempt to provide an answer to this question in the light of my topic leads me into relatively uncharted territory as I gaze into the future.

I start from the position that it is inevitable that the commercial activities of those engaged in the construction industry will always produce disputes which will require resolution. If the courts do not provide a satisfactory forum for this resolution, the disputants will look

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11 See *CW Norris & Co Pty Ltd v World Services & Construction Pty Ltd* [1973] VR 753 at 755, per Menhennitt J.

12 See *Jacobson v Ross* [1995] 1 VR 337.

13 See *AT & NR Taylor & Sons Pty Ltd v Brival Pty Ltd* [1982] VR 762 at 765, per Beach J.

14 R. 49.01.

elsewhere. In such an event, my response to the topic of this paper would be that there is little or no future for litigation of construction law disputes. But I am not one who would accept with equanimity such a state of affairs. Parliament has entrusted to the judges the duty of resolving these disputes and they must perform that duty even at the cost of suffering adaptations to their traditional procedures.

Nor do I take the position of some that complaints about cost and delay have always been addressed to litigation and that, notwithstanding this, litigants continue to line up at the doors of the court. We should, they say, simply continue with business as usual. This is, to my view, a head in the sand attitude. The problem will not go away by ignoring it. I wonder whether a contribution to the attractiveness of such a view might be the fact that these persons do not really care if some construction cases, especially the big ones, will go elsewhere.

The future of the resolution of construction law disputes must be that they will inevitably be resolved by compromise, by judicial decision, by arbitral award or by the determination of some specialist tribunal to be established by Parliament. My present concern is to see how the litigation process might be developed so that it might continue to have a productive and useful role to play in their resolution.

Always bearing in mind that procedural reform without cultural change is not likely to achieve very much, I will now consider a number of possible procedures which might be adopted to better fit the litigation process to meet the requirements of construction law dispute resolution in the 21st century. Notwithstanding the topic which I have given myself, I do not advance these by way of prediction, but rather as a wish list for those concerned with procedures which might be availed of in the future. Some of them are possible within the existing procedural framework, some will require amendment to the rules of court or even statutory intervention. I do not offer them as a panacea – a cure for all the difficulties posed by construction cases; they are strategies which in the appropriate case should be considered in an effort to make the resolution of these disputes easier and more economical for the parties and for all concerned. All of them require that judges and lawyers be ready to look at new and unfamiliar ways of doing things.

Pre-Action Protocol

This is the process whereby a party may not commence a proceeding without exchanging detail of the proposed claim with the other parties and receiving, in turn, details of their proposed defences. This is, obviously enough, intended to alert the parties to the positions of their opponent and to encourage early settlement. This is a practice required at the TCC[15] and one which is presently under favourable consideration by the Victorian Law Commission's Civil Justice Enquiry. I must confess to some reservations about the utility of this procedure in major construction disputes because, under most standard contracts, the exchange of this information is required before arbitration or litigation is permitted.

Expert Witnesses

By Part 35.7 of the English Civil Procedure Rules the court has power to direct that evidence be given by a single expert. We have no equivalent. Considerable saving of time and cost, however, might be achieved if it were possible to direct that there be a single or limited number of expert witnesses in a particular discipline. In a case I heard recently there were nine parties, seven of which had retained an expert to assist in the preparation of the case on a particular discipline. The experts met in conclave prior to the trial and produced a useful report as to matters agreed and disagreed.[16] Nevertheless, all were called as witnesses. Why was this necessary? True it is that each had his own contribution to make upon certain respects of the technical issue, but I suspect that the real reason was in order to ensure that the experts' costs were recoverable upon taxation. Recognising that there may be difficulties in finding an expert acceptable to all parties, it would have been more efficient if a single or limited number of experts was or were engaged by all parties collectively and available to all for conferences and then called as a non-party witness available for all to cross-examine. This would also have had the consequence of assisting the expert to maintain an independence from the client litigant. Where it is not possible to appoint a single expert, there are also benefits to be had by limiting the number of experts in any discipline.

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15 See TCC Guide, s. 2, White Book pp. 309 ff and pp. 2386 ff.

16 See Rule 44.06.

Containing Discovery

Much ink has been spilt on this vexed topic and I have nothing new to contribute. Principal techniques suggested have been to narrow the definition of relevance for the purposes of reducing the ambit of discovery and to direct discovery by reference to particular issues.

Strict Interlocutory Time Limits

Considerable determination has been displayed by judges in the past in requiring that steps be taken by fixed dates, with severe penalties for default, including striking out claims or defences. The problem is that this often causes injustice and the judges are reluctant to implement them.

A particular aspect of this is to impose time limits on the joinder of parties. This has been adopted in the case of defendants who may wish to join co-defendants for apportionment purposes.

In my experience, time limits are useful to encourage parties to address these matters at the appropriate time, reserving always the possibility of an extension of time if the justice of the case requires.

Trial of Preliminary Issue

This has always been one of the procedures for which the Building Cases List was established. Nevertheless, there are limitations upon its utility and judges again and again warn that it is a power to be exercised sparingly. What is involved here is the final determination of an issue before the trial of other issues. An immediate concern then is as to the interruption and delay which might result from an appeal from the determination of that issue. To my mind, this concern would be allayed if an appeal from such a preliminary determination had to be postponed to the end of the trial of all issues unless leave be granted.

I will not here consider the suggested limitations on this process. They are to be found in the practice books and the cases referred to in them.[17]

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17 Williams, *Supreme Court Practice* pp. 4751 ff; UK White Book Vol 2, pp. 327 ff.

Special Reference

The power to refer a question to a special referee is one which the court has had for over a century. In England it was under this power that the Official Referees Court was originally established in 1879. It is a power which was expected to be exercised in the Building Cases List and has been exercised there from time to time. It is, however, a power which I have not used greatly. In short, I have had bad experiences with inordinate delays in the reference, large costs and with reports which have been subject to criticism.

Another aspect of this power is that it requires an issue to be identified and severed so that it may be referred. This raises the issues discussed with respect to the trial of preliminary issues above.

It is not a power which is used in the TCC, perhaps for these reasons.

Support for Arbitration

I do not see the court as being in competition with arbitration. Indeed, those familiar with arbitration will see that I have a vision that the construction dispute judge of the future will conduct the trial in a flexible way which is the hallmark and strength of arbitration. What I have in mind here is that procedures be devised, if they do not already exist, and be readily implemented, whereby the court will assist the arbitral process by resolving difficult legal questions which may arise in the arbitration and by lending its support to the arbitrants by enforcing awards or, where appropriate, identifying their deficiencies. All of this must be done swiftly and with minimal interruption to the arbitral process. I am pleased to report that the Supreme Court has recently put in place a procedure for bringing on such applications on short notice so that this support is available.[18]

Trial

Much effort has been directed to shortening civil trials. Court books, witness statements and outlines of argument are commonly used to this end. I am not at all confident that much more can be done on this score. As things stand, these procedures impose a very great stress on the trial judge who is required to digest, at a great rate, large volumes of

[18] See Practice Note No. 7 of 2006.

material. Personally, I would not like to see an increase in this stress.

I have had some success in the staging of trials and the clustering of witnesses. What is involved here is the calling of all of the evidence from all of the parties on a given topic or within a given period of the project before passing to the next stage or the remaining issues. In a long trial I have found this helpful when I have had to compare conflicting evidence and otherwise to decide issues of fact because the evidence of all the witnesses is fresh in my mind when I sketch out my judgment after that stage is completed. This process is to be contrasted with the trial of preliminary issues because no formal judgment on the staged issue is given until the end of the whole trial.

The procedure of clustering witnesses is particularly useful where there are a number of contending expert witnesses on the one topic. I believe, too, that it is helpful for cross-examining counsel who then have their own experts to hand to assist them in this difficult task.

It has been a matter of surprise to me when a proposal that a trial be staged or that witnesses be clustered is resisted. Usually the argument offered is the extra burden it imposes upon a witness who might be required to return to give evidence at another stage. This will normally be a very minor consideration.

I now turn to more adventurous strategies. I have long been of opinion that the engagement of lawyers at a daily or hourly rate to conduct a trial whose length is uncertain and may depend upon their decisions is uncommercial. It is as if a principal engaged a contractor to build a substantial structure on a cost plus basis without a completion date. As to whether it is practical for a client to engage lawyers or perhaps counsel for a fixed fee no matter how long or how short the trial might take, I express no view. I am, however, interested in trial time estimates. For any of a number of reasons there is something to be said for a fixed length trial. This may be achieved by strict time limits, with time apportioned on a chess clock basis as is often the case in international arbitrations. I doubt that the court presently has power to impose such a regime. I did, on one occasion, persuade the parties to agree to this and, I understand, it worked satisfactorily.

More attractive is the provision of time estimates for the various components of the trial. In the TCC these are given early in the interlocutory process and the parties are expected to adhere to them. In my experience this has been a very useful practice and has been successful inasmuch as, with only one exception, all the trials were completed within the estimated time.

The last of the time and cost containing techniques which I would like to mention is, perhaps, the most contentious. In a trial which I was managing many years ago there were the usual miscellany of issues:

(1) issues as to the terms of the contract;
(2) issues as to variation;
(3) issues as to time extensions;
(4) issues as to defects; and
(5) issues as to determination of the contract.

With the consent of the parties, a building consultant was engaged to act as a special referee. The issues were identified as judge's issues, referee's issues or common issues. If I recall correctly, issues (1) and (5) were treated as judge's issues, issues (2) and (3) referee's issues and issue (4) a common issue. It was accepted that witnesses might give evidence on more than one issue. What was to happen was that the referee and the judge were to sit and hear such of the evidence which bore upon both of their separate issues and, of course, upon the common issue. They were to sit separately where the evidence did not concern the other. Unfortunately, the case settled so that I cannot report further on this experiment. I remain of opinion, however, that this might, in the appropriate case, be a procedure which would usefully bring to bear the separate expertise of the judge and the referee and yet be conducted within the framework of litigation. A question to be addressed, however, is whether the referee is deciding the issues referred or reporting to the court upon them. The latter course is that which is favoured in our R. 50.01 and in the English R. 35.15.

Conclusions

I described at the outset that the required resuscitation measures might have to be heroic. I do not resile from this adjective in the sense that the implementation of the procedures which I contemplate, or variants upon them, will be difficult and will require courage in lawyers – a courage which I have not much seen in my years in the law. It will be difficult to work out how the cultural change I have in mind – a new attitude of professional detachment and co-operation – will work out practice. As I had occasion to say in a recent case, any departure from the tried and true path involves risk. The taking of risk involves confidence and courage and acceptance that mistakes might be made. Judges who depend very much upon the lawyers before them at the stages when these decisions are made, cannot be expected to step out into these territories without the support of those lawyers. Experience shows that if the lawyers are not supportive of the trial procedure, whether it be traditional or innovative, the procedure will face difficulties. I have spoken elsewhere of the need for, what I have called, fidelity to the process. This means that the lawyers should not seek to undermine the procedures which they have agreed to or even those which have been imposed upon them.

And the judges, too, must be courageous. With the support of the lawyers before them great achievements lie within their reach. They, too, must be confident – prepared to try something new – confident in their own ability and in the support of their colleagues, not excluding those on the Court of Appeal. I can report, too, that there is now in the Supreme Court a stirring – the new generation of judges, led by a reform-minded Chief Justice and President is, I venture to say, more open to innovation and more ready to approach civil litigation in a commercial way. It will be interesting to see how this will work out in the future, especially for construction disputes. It will, I am sure, be a bumpy ride but an exciting one. I doubt whether we in Victoria will have, in the future, sufficient major construction disputes to warrant the establishment of a sophisticated specialist court or tribunal such as the TCC. I would resist, too, their removal to some tribunal such as VCAT which is not really geared to handle them. It is often put as a reason for the establishment of a specialist court or tribunal that the tribunal will develop its own specialist procedures. But, in the case of construction disputes, it is better that these successes be enjoyed within

the existing litigation structures rather than requiring the State to incur the trouble and expense of setting up a new forum with the attendant irritants of determining where its jurisdiction reaches.

And so I leave my topic with a challenge. The challenge is to address construction disputes in an innovative and commercial way, but at the same time respecting but not being bound by the traditional ways. It is a challenge which I address to all lawyers interested in the topic and, in particular, to all students in the Graduate Program in Construction Law, for these are the lawyers who will be preparing, presenting and eventually trying these disputes in the years to come. In their hands I confidently place the future of the litigation of construction disputes.
