LATEST TRENDS IN FORMAL DISPUTE RESOLUTION

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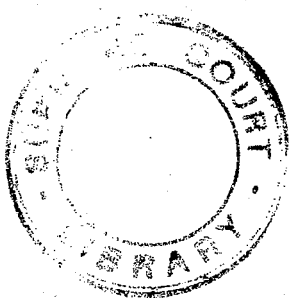
A Judge of the Supreme Court of New South Wales

(A paper delivered to a Seminar "Avoiding Disputes in Building and Construction Contracts" 15 March 1988)



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The category of disputes I will be speaking of satisfy two initial criteria. First, the amount involved is more than $100,000 and therefore lies outside the jurisdiction of the District Court. I should, however, mention in parenthesis that the District Court has now decided to create its own Building and Engineering List and disputes will come on for hearing more speedily. Second, there is no arbitration provision in the contract or contracts underlying the dispute or perhaps the dispute falls into that minute category where, notwithstanding the existence of an arbitration provision, a stay of proceedings has been refused. In the result then the dispute is brought to the Supreme Court.

It is no use mincing words. Construction disputes have become much more involved, much more expensive, much more time consuming than has been the case. There are a number of reasons for this but it is unrewarding to go into them for present purposes. The necessary consequence, however, is that the one judge who devotes his time to the hearing of disputes in the Building and Engineering List cannot hope to deal with them all in their entirety. We have to devise expedients whereby justice can be done, the dispute resolved

within a measurable period of time and without too much expense. In my view, we will be able to do this only by devoting available judge time primarily to resolution of legal questions and utilising experts in the particular field of dispute to resolve the technical issues.

To some extent I have already experimented with this approach back in 1983 and I daresay Mr Justice Smart has done likewise. The difference today is twofold. First, we did not have the detailed and specific provisions of Pt 72 of the Supreme Court Rules, which I will discuss later, and, second, we did not have the Commercial Arbitration Act 1984.

After proceedings are initiated in the Supreme Court, the dispute comes before a judge at a directions hearing. Initially, it is necessary to ascertain whether any other parties are intended to be joined. More often than not, the builder will join the architect, the engineer, subcontractors and so on. If the defendant happens to be in one of the other categories, then it will join the builder and associated entities. Not much can be done in elucidating the nature of the dispute until all parties are before the court.

There is legitimate room for difference in approaching the problem of defining the issues. Having accomplished that task, let it be assumed that some issues of law, some issues

of specialised engineering, of architectural practice and relating to quality of materials utilised are identified. The judge is then confronted with the delicate question whether it is possible to separate the legal and technical issues and, if so, whether it is desirable to determine the legal issues or the technical issues first. More often than not the legal issues cannot be entirely divorced from the factual issues and it is desirable to have the facts first ascertained. There are a number of ways in which this can be done otherwise than by a judge.

An innovative procedure for dispute resolution has been evolved in the United States called Early Neutral Evaluation. It can be utilised both to attempt to achieve a settlement and for fact finding. For an account of this programme, I am indebted to Brazil, Kahn et al in (1986) 69 Judicature 279. Judge Peckham, whose brainchild the project was, established a committee which sought to achieve a reduction in cost of litigation by identifying features in the litigious process which made an early disposition difficult. It was to meet these barriers to speedy resolution that the programme was designed.

The basic structure is first to encourage each party at the outset to confront and analyse its own situation. Second, provide each litigant and lawyer at an early time with an opportunity to hear the other side present its case. Third, help the parties isolate the centre of their dispute and

identify the factual and legal matters which will not be seriously contested. Fourth, offer all counsel and litigants a confidential, frank assessment of the relative strength of the parties' positions and the overall value of the case. Fifth, after receiving the neutral assessment, provide the parties with an opportunity to try and negotiate a settlement.

The central feature is a confidential two hour case evaluation session by a neutral appointed by the court under its inherent power to appoint special masters. Each party delivers a short written evaluation statement identifying any legal or factual issues whose early resolution might reduce the scope of the dispute or contibute significantly to the productivity of settlement discussions. Each party makes a short presentation of the facts and the evidence relied on. During it, opposing parties are not permitted to ask questions or make comments.

The evaluator seeks to reduce the area of the dispute by identifying areas of agreement or in which substantial agreement seems possible. Doubtful propositions are postponed until settlement possibilities have been thoroughly explored. The key facts in dispute are identified. The evaluator probes why the parties disagree. The evaluator explores the nature and probative value of the evidence of each party.

The evaluator then assesses the relative strength and weaknesses of arguments and evidence and offers an opinion on the likelihood of liability and the probable amount of damages, if any. The evaluator's assessments serve as a reality check for parties or lawyers. The process increases client involvement in law suits and in making basic decisions about how litigation is handled. The evaluator introduces a fresh, creative perspective to the litigation, helping parties to rethink or recast their objectives and search for alternative solutions to their problems.

In another first, Judge Peckham's court is establishing a programme to train lawyers in the skills necessary to serve effectively as evaluators.

Even if the procedure fails to achieve a settlement, it should serve to narrow theissues and provide a springboard for the speedy determination of what disputed facts remain. A more orthodox method of out of court fact finding is by remission to a referee. In essence, the referee is a person with the appropriate technical knowledge who does not require to be instructed by expert evidence in order to acquire the requisite expertise and who can go straight to the heart of the dispute. A further significant difference between a referee and a judge is that under the Rules he is not bound by the strict rules of evidence unless the judge so directs. The advantages of this are obvious. Whilst a referee is required to accord to the parties "natural

justice" he is not shackled by the ordinary rules of procedure in court. Lest the mention of "natural justice" should puzzle or terrify anyone there is no mystery attached to it. As an English judge has described it, it is nothing but "fairness writ large".

Let me diverge slightly at this point to discuss the question of possible conciliation of the dispute. As you are all aware, under the Commercial Arbitration Act (s 27), unless the parties otherwise agree in writing, the arbitrator or umpire has power to take such steps to achieve a settlement as he may think fit. What is contemplated is conciliation. No objection may be taken to the arbitrator continuing to hear the arbitration in the event of a failure to settle the dispute. This very far sighted provision has created great concern amongst arbitrators and in the legal profession. If a conciliator is to do his job properly he is almost bound to come into possession of information which would not have been given to him as an arbitrator and which could embarrass him in the further conduct of the arbitration. Nonetheless, I do believe that the concept of an attempted settlement by conciliation or mediation is to be strongly supported and attempts at settlement are vital if these disputes are to be disposed of speedily. Conscious as I am of the difficulties confronting a referee in the discharge of his duties if he is also required to function as a conciliator, I have the following suggestion to make. In a dispute of sufficient magnitude and involving a

sufficient sum of money, which applies to most disputes coming to the Supreme Court, there should be two persons appointed as referees. One should be responsible for the report to the Court; the other should be the intended mediator. The mediator referee may then, without any possible embarrassment, and in the absence of the other referee, carry out the task I will discuss below. If mediation efforts fail, the other referee who has not participated in the mediation discussions can continue with the hearing. The mediator should nonetheless continue to participate in the hope that a further opportunity at mediation may arise as the evidence is further explained.

It is of some interest to notice that in the new Practice Direction issued by the Queensland Supreme Court for its Commercial Causes jurisdiction, cl 6 provides:

> "The Court may, on such terms as it thinks fit, direct at any time that the parties confer on a 'without prejudice' basis for the purpose of resolving or narrowing the points of difference between them."

In an appropriate case the judge in charge of the Commercial Causes list may conduct such conference, in which event he will not preside at any subsequent trial of the action. It will be interesting to see what cases will be considered appropriate for such treatment and to what extent mediation by a judge will be successful in resolving points of dispute. The Queensland experiment is but part of a world wide trend in which judges are experimenting with techniques

designed to avoid lengthy court battles. We should join in this process.

Mediation by judges has been utilised in the United States for some time. An essential feature of this procedure is the separate meeting the mediator holds with each of the parties. In the course of it, information may be obtained which a party would not disclose in the presence of the other. Thereafter, in a joint session, the mediator summarises areas of agreement or disagreement. The mediator then employs two fundamental principles of effective mediation: first, creating doubts in the minds of the parties as to the validity of their positions on issues and, second, suggesting alternative approaches which may facilitate agreement. These are functions which parties are often unable to perform by themselves. The mediator produces options, discusses the workability of each option, encourages the parties by noting the probability of success where appropriate and suggests alternatives not raised by the parties.

Mediation by judges has been a natural evolution in the United States from pre-trial hearings. The temptation to attempt to dispose of the whole of the dispute proved irresistible to activist judges. It was in the State courts that settlement oriented pre-trial with active judicial participation really took off. Initially, the judge enquired from counsel what they considered a case to be

worth then expressed an opinion what the settlement figure should be. If that was not acceptable, the case was reassigned to another judge.

The next development lay in the words of a Federal District judge:

> "I urge that you see your role not only as a home plate umpire in the courtroom calling balls and strikes. Even more important are your functions as a mediator and judicial administrator."

Today, the virtue of active judicial participation in settling civil cases is part of the received wisdom. As has been said: "Judicial activism in the settlement process appears to have received quasi-official sanction within the judicial family." Judges are more aggressive and inventive in pursuing settlement and they regard it as an integral part of their judicial work. As Professor Galanter of the University of Wisconsin-Madison, remarked, "We have moved from dyadic to mediated bargaining." The hallmark of change is that mediation is not regarded as radically separate from adjudication but as part of the same process. Litigation and negotiation are not viewed as distinct but as continuous. Interestingly, research has not so far confirmed that more judicial intervention produces more settlements.

The advantage of mediation over arbitration is said to be that parties have an opportunity to discuss the issues at their leisure and reach an agreement that reflects a mutually acceptable compromise. The parties themselves are

more involved in mediation than they would be in an arbitration hearing. They may devise their own solution.

Let me then return to a survey of the procedure whereby issues of fact are remitted to an expert referee. It is crucial that the reference be structured carefully. The form of the order must specify the questions upon which the referee is to report. These must be carefully defined. A reference may be made by the judge without the consent of the parties. Mr Justice Smart made it clear that the court will be anxious to obtain the consent of the parties if possible but, if necessary, will act without their consent. The considerations which moved the judge included:

> "There has been a change in the attitude of the courts as to the value of arbitrations and references and the desirability of people of suitable standing, experience and qualifications dealing with, inter alia, technical matters and contract administration. In part, this has been due to the training provided for arbitrators by bodies such as the National Institute of Arbitrators. Delay, costs, and their effect, have been important. With the heavy loads on the court lists it has often not been possible, despite the best will of the courts in organising lists and trying to streamline the hearing and the profession in preparing matters, to provide for the early hearing desired, especially when the increasing complexity of construction cases often results in a two to four weeks hearing and sometimes longer. Many contractors, sub-contractors and small consultants have limited financial resources and need the money claimed to survive financially or to carry on and develop their business in the normal way. As arbitrations and references usually take place promptly the parties are not encumbered with the costs of proceedings extending over several years awaiting a hearing. Because of the technical knowledge of the arbitrators or referees, the hearing may be quicker. It is sometimes submitted that the hearing before an arbitrator or referee will be more expensive because of the need to pay the

arbitrator, the increased transcript costs and room hire. In the overall context of the legal fees, those of the expert consultants, and the costs of the lost executive time, this extra expense is usually not significant. It is often offset by the factors mentioned earlier, and if, as is often the case, the amount at issue is large, it loses any importance."

"Whatever be the position in other States, in New South Wales there are a number of referees well-known to the Court in its Building and Engineering List with extensive experience in handling a variety of large complex building and engineering matters. They are used to having junior and senior counsel appear before them, ruling on evidence, controlling proceedings and resolving difficult factual and contractual issues. They are familiar with the standards required of professional engineers and architects. In appropriate cases retired judges of this Court, with experience in building and engineering matters, are appointed as referees. This Court does not make an order for a reference unless the partiess agree on a referee - and this often happens even where there has been a dispute whether there should be a reference - or a suitable referee is available. As a matter of practice, if during a hearing an issue arises on which the referee feels the court should rule in the first instance he tells the parties and the matter comes back before the court and is dealt with promptly. It is not uncommon for the court to deal with the matter at 9.30am and for the reference to resume later in the morning. The parties and the referee know that during a reference the court is available to assist on short notice."

"Each opposed application for the appointment of an arbitrator or referee has to be considered on its own merits in the light of all the prevailing circumstances. In some cases no reference will be appropriate whereas in others it will be appropriate to refer the whole of the proceedings or some issues. On occasions, the reference will be to determine the issues and on others to inquire and report. The matters which will generally require consideration include:

(a) the suitability of the issues for determination by a referee and the availabilty of a suitable referee;

(b) the delay before the court can hear and determine the matter and how quickly a suitable referee can do so. Building and

engineering matters, because of their length and complexity, often require either the judge or the referee to devote extensive time after the hearing to considering and resolving the issues;

(c) the prejudice the parties will suffer by any delay;

(d) whether the reference will occasion additional costs of significance or is likely to save costs;

(e) the terms of any reference including the issues and whether they should be referred for determination or inquiry or report."

When the referee has come to his conclusion, his report is delivered to the judge. The court may adopt the referee's report, vary it, adopt part of it, decline to adopt it or call for further elucidation. In consequence, the court maintains throughout careful control of the proceedings by the referee. In addition, as Smart J pointed out, the referee has a full opportunity of consulting the judge at any stage of the proceedings if he or she should need help or elucidation of any matter.

Of course, when the referee makes his or her report the party to whom it is adverse will seek to reopen the issues. The common submission is that the court is better placed to understand the fact finding process and that the reference was wrong. Although it is desirable to leave open the power to rectify an obvious error the value of the reference will be lost if the court fails to implement an apparently responsible report which reflects proper consideration of the questions referred. The problems which may arise in a

reference have been discussed by Mr Justice Marks, a judge of the Supreme Court of Victoria. He used the facts of a dispute involving computers as an illustration. I will borrow his account:

Although they took a little persuasion, the parties consented to referring questions, which they drafted, to an expert in the computer engineering field. Senior counsel on both sides appeared before the referee and, with the assistance of their own experts, made voluminous submissions. On the other hand, the referee was entitled to and did make whatever investigations and tests he thought were appropriate.

As to the conduct of the reference, the referee held meetings with the parties from time to time as required to discuss progress and obstacles. In addition, a number of informal technical discussions were held, most of which were attended by representatives of both sides. In cases where both sides were not present, the referee took notes and circulated a summary of proceedings to the parties. Sworn evidence was taken at formal hearings at which both sides were always represented.

At the direction of the referee, a number of tests were conducted at the premises of the plaintiff on its equipment and software to settle questions of performance and work ability. The referee had the assistance of a specialist in

data communications in the conduct and intepretation of the tests.

It saved a great deal of court time and the conclusions reached probably were more reliable measured by the standards of truth than those that could have been achieved by the ordinary Court process.

The special referee provided the parties with an interim report to which they were permitted to speak before delivering his final report to the Court, which showed amendments after those submissions.

The report was very long but also very detailed and impressive. Neither party wished to challenge the expertise, integrity or industry of the referee. They both conceded that many weeks, if not months, of court time had been saved. This did not prevent, however, the submission on behalf of one of the parties that certain issues should be re-litigated and that the report should be adopted only with qualification. The other party of course contended for unqualified adoption.

The course taken by the Court was to hear the submissions on the report and refer back to the referee for further report those matters on which doubt had been cast.

The referee reported again, explained further the reasons

for the conclusions which were challenged, and on 10 April 1987 I gave a ruling and adopted the reports in accordance with the Rules.

On a number of occasions the referee came to the Court and discussed problems in the presence of counsel for the parties. One of them concerned the form of the questions. He raised whether he was confined to the questions when giving his report. I indicated that it would be helpful for him to suggest any further question or change of wording of an existing question which enabled him to provide answers to what he perceived to be the matters really at stake.

In my opinion it is necessary, when a technical matter is referred to an expert, to cater for flexibility about the questions. It is almost inevitable that the questions asked are either wrong or deficient or inadequate to cover what is needed to resolve the dispute. The difficulty of framing the right questions should not be underestimated. This is why I think that the parties themselves must be given the opportunity to do the drafting. It is also why, in my opinion, the success of a reference can always be put in doubt where one of the parties will not accept it. An issue cannot be said to be decided unless capable of clear identification.

Another problem concerns the effect of 'adopting' a report. What was meant by this expression? The report was so large

that it would be difficult to contend that everything observed and said by the referee became binding on the Court. It might be clear enough that the answers to the questions were adopted and became binding on the parties. What, however, of the observations which led to the reasons and which conceivably had bearing on other issues which remained for the Court?

In his formal judgment on the application to vary the referee's report, Mr Justice Marks said:

> "The history of the approaches of courts to references of this kind was fully investigated by Brooking J, in Nicholls v Stamer, (1980) VR 479. While it is not possible to catalogue the bases on which the Court will refuse to adopt, in whole or in part or vary a report, it is clear that the fundamental objective of the Court is to satisfy itself that the ends of justice are satisfied.
>
> In my opinion, the court takes care, when it is in the position it now is, to ensure that its processes have been safely entrusted to a tribunal not necessarily tutored in the law. But it is wrong to think that the interests of justice can only be met in the curial environment. In the present case, the curial system could not match the investigation which a highly qualified scientific mind of independent spirit was able to apply in the field to the resolution of what was wrong, if anything, with the computer.
>
> The exercise involved highly technical matters and interpretation of technical written material.
>
> The plaintiff had the opportunity and took advantage of it, to put before the special referee all the matters put to me. It would be mischievous and, indeed, wrong to allow, certainly at the great expense which inevitably would be involved, the parties to put at nil so much of the exploration already done. Even if I were persuaded, which I am not, that this Court might well reach a different conclusion in some respects from that of the special referee, it would not be proper to allow territory to be re-explored by qualifying adoption of the reports.

> I agree with the observations of Brooking J in Nicholls v Stamer at p 494, in relation to the facts of that case:
>
> > 'It would be entirely contrary to the object and agreed character of the reference [Attorney General v Birmingham, Tame and Rea District Drainage Board, (1912) AC 788 at p 811] to treat the present report as a mere starting point in the sense that the dissatisfied party should, in the absence of unusual circumstances, be able to resist the adoption of the report by suggesting that the referee might have made different findings if the party resisting adoption had placed before him additional evidence which could have been called in the course of the enquiry.'"

Under Pt 72 of the Rules, not only may a judge send issues to a referee for a report, he may also send matters to an arbitrator for determination. The precise status of such a determination has not yet fallen for decision.

Again, a judge may remit issues for determination by an arbitrator not pursuant to the provisions of the Rules but the Commercial Arbitration Act 1984. That Act, of course, is a complete code.

Yet another aid to a judge is the use of an assessor. An assessor is a technical expert who assists the judge in the understanding of the technical intricacies of the dispute.

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