ADVANTAGES OF REFERRING BUILDING DISPUTES TO THE COURTS

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JUSTICE ANDREW ROGERS

CHIEF JUDGE COMMERCIAL DIVISION

SUPREME COURT OF NEW SOUTH WALES

(Delivered to Master Builders Centennial Conference

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A participant in dispute resolution has correctly observed:-

> "In any relationship brought about by contract particularly in areas at the forefront of technology such as computers and microchip applications or in complex operations such as large construction projects disputes will inevitably arise"

Given the inevitability of disputes what is the best way of resolving them? The public interest demands that justice be provided as swiftly and economically as possible.

In what follows I shall restrict myself to the only court I know well, the Supreme Court of New South Wales. We are in a fairly unique position. We have a specialised Construction List, it is working well, the delay is now within acceptable limits. I believe it is safe to say that the face of the litigious landscape in building disputes in New South Wales has changed drastically in the last two years. The Commercial Division of the court took over the administration of what was then the Building List in mid 1988. I am bound to say that notwithstanding the best efforts of those previously attending to the List, it was in a sad plight. There were outstanding disputes going back some ten years. I hope that today justice is not achieved by a war of attrition in which survival is a prize to be awarded to the party with the greatest determination and longest purse.

Chief Justice Burger of the Supreme Court of the United States has described the obligations of the legal profession, including that of the Courts, as requiring the provision of mechanisms "that produce an acceptable result in the shortest possible time, with the least expense, and a minimum of stress on the participants" [(1982) 68 ABAJ 274]. The objective that we set ourselves on taking over the Building List, lay, in attempting to achieve the results called for by Chief Justice Burger. We adopted the following guidelines:-

1 In so far as possible, strip the disputes, of unnecessary legal technicalities in documentation and presentation.

2 Ensure that the issues between the parties are clearly defined at the earliest possible time.

3 Establish procedures which, with the minimum of delay, will allow for a hearing of those issues.

4 Require all the proposed evidence to be in the form of statements so as to avoid surprise and to cut down on required court time.

5 Send technical issues to a technical expert, designated as a referee, for a report and confine the proceedings in court to determination of legal and nontechnical factual issues.

To implement all the foregoing we published a Practice Note in what we believe is, easily understandable, non legal language. This should ensure that, not only solicitors and barristers, but all those involved in the litigation will understand what is required of them.

It must be recognised and accepted that participants in the construction industry were formerly greatly dissatisfied with the service provided by the courts in resolving construction disputes. It is only right to say that their feeling of distaste for courts was warmly reciprocated by most judges who, generally speaking, disliked with a passion the hearing of building disputes. This was for a number of reasons. The disputes tended to occupy much court time, they were tedious in detail and they involved determination of technical, sometimes highly technical, issues with which many judges were unacquainted and disinclined to come to terms of familiarity.

In these circumstances the construction industry tended to turn to arbitration. The prime advantage which that procedure was perceived to have was that the tribunal could be selected by the disputants, or by an expert body nominated for that purpose, and it was thought that by reason of the familiarity of the tribunal with technical issues the dispute could be determined more quickly and with more likelihood of conformity with technical learning. Unfortunately, over time, arbitrations came more and more to mimic court proceedings and lost the presumed advantages of speed and informality. As well the lawyers who participated in the arbitrations tended to distrust the expertise of the tribunal and to lead evidence on technical issues that were in dispute much as though the tribunal was a layman, unacquainted with the particular matters of expertise. As well, I am afraid that, some lawyers attempted to delay resolution of disputes which could involve their client in having to pay money, took unsustainable points by way of stated case to the courts, and worst of all put legal submissions which attempted to take advantage of the arbitrator's lack of familiarity with legal principles.

It was in this setting that we endeavoured, by adoption of the system of referees, to distil the best features of the Court system and of arbitration and by a division of function to ensure that appropriate segments of the dispute were dealt with by the most appropriate person. Notwithstanding the long period for which various types of building and engineering contracts

have been in use it is surprising how many legal questions remain unresolved. To give but one example no Appellate Court has yet considered the question whether a proprietor giving a notice of termination has to act reasonably. For questions of this kind the training of Judges makes them the appropriate tribunal for the resolution of the problem. There may be as well factual disputes not involving any question of technical knowledge.

We have substantially restructured the way evidence proceeds. The evidence in chief is required to be provided in the form of written statements which are exchanged some weeks before the date fixed for hearing. This has a number of advantages. The most obvious one is that it reduces the time required to be taken in Court. However the other reasons which prompted the introduction of statements are equally important. A further reduction in Court time should be obtained because the cross examiner has time to formulate the questions to be asked so that they go to the heart of the issues. It is unnecessary for the cross examiner to attempt to formulate questions whilst conducting the cross-examination. This should result not only in a saving of time, but also in a more thorough examination of the points in contest. Finally, with the evidence for all sides exposed well before the hearing, a proper assessment should be able to be made by all concerned of the likely outcome of the proceedings. This then should encourage an appropriate settlement of the dispute prior to commencement of hearing. It

should no longer be necessary to leave a settlement to the moment the parties arrive at the door of the Court.

In further support of the notion that disputes should be settled, if at all possible, without a hearing, the Court has introduced procedures for the exchange of offers of settlement. It has always been possible of course to pay money into Court. The procedure newly introduced avoids a need for this to be done. Furthermore it reinforces the cost penalty attached to a refusal to accept a reasonable offer of settlement. A plaintiff who offers to settle for a sum which equals, or is less, than the sum finally awarded is entitled from the time of making of the offer to costs on a complete, or indemnity, basis. This should provide a powerful incentive to a defendant to seriously consider an offer of settlement especially in a proceeding which is anticipated to run for some time and involve very substantial cost. It was not thought appropriate to provide the same consequence in a case where a plaintiff fails to accept a defendant's reasonable offer of settlement, but the cost consequences follow the usual party and party basis.

It is quite unrewarding both financially, so far as the parties are concerned, and as a sensible utilisation of judicial man power to debate difficult technical issues in front of a Judge. Just consider what is involved. First, the expert has to acquaint the lawyers with the particular technical point and teach them the relevant degree of expertise. Then the barrister

in effect has to teach the judge through the expert, on what is the point in issue. Finally there has to be a debate between the experts on the points of difference between them. In the upshot not only is a lot of time spent in teaching the various categories of laymen something which the experts already know but it will be, I am sorry to say, a fortuitous chance if, in the outcome, the Judge's decision is technically correct. Conservative lawyers who have been content to allow dispute resolution to progress by these steps, in my respectful view, have failed to have sufficient regard not only to proper principles of case management, but also to the fact that the technical issues are getting more and more complex. Some of you may remember the celebrated dispute over the building of the gas pipeline carrying natural gas to Sydney. The subsequent dispute threatened to test the outer edges of technical knowledge in the particular field. What realistic hope would a Judge have had of acquiring the necessary technical expertise in an area in which experts of world stature, in all good faith, took differing stands?

At the lowest level of case management, what I attempted, in my early days as a Judge, was to direct that the opposing experts confer, one with the other, with a view to distilling the points of difference between them and the reasons which led them to take opposing view points on particular questions. This had some quite astounding results. On some occasions the experts found that they could accommodate the views held by the

other side on almost the whole of the dispute leaving only a very narrow question for decision of the court. From that approach I progressed to the next logical step. Instead of the expert whispering to the solicitor, or barrister, questions to ask the opposing expert, then in the witness box, I cut out the middle man. The experts on both sides were sworn at the same time. With some difficulty at times, they occupied the witness box at one and the same time. The barristers on each side were of course entitled to ask questions, but primarily it developed into a skilled technical debate between the experts in which they attempted to highlight the differences between them and the reasoning which led to their differing conclusion. It did not necessarily make the resolution of the point any easier for the Judge, but it tended to expose the points of difference and the reasoning not only more quickly and cheaply then would have been the case had the orthodox path been pursued. It also gave an opportunity for the Judge to see the reasoning of both of the experts tested by the appropriate method of technical questioning. I interpose here to say that obviously all these procedures presuppose that the experts are honest. Where there is an apprehension that the views embraced by an expert are not honestly held then the methods I have experimented with are inappropriate.

Another method for tackling technical problems is obvious, but, once again, to say the least, under utilised. It is one of the recognised difficulties in the field that even an honest expert

may become a partisan for the side that engages his or her services. Judges know from their days of active practice at the Bar, that sometimes a solicitor shops around amongst experts until one is located who feels that he or she can properly express an expert view favourable to the particular side which calls him. Then, under cross examination, pride drives the expert to maintain his view through thick and thin. The court expert is independent of such partisan outlook. At least in theory, it should be possible for the court to designate, from a panel of experts, an individual whose opinion on the technical aspects of the dispute in the particular case should be determinative. I am not quite sure why such a system has not worked. A recent case in the Federal Court demonstrated lawyers' reluctance to accept an adverse view without fighting to the client's last dollar. Neither side was prepared to accept the Court expert's view and insisted not only on cross examining the Court expert but also on calling other experts to contradict him. In the result the engagement of the Court expert merely introduced additional cost and a further witness.

A yet different approach is to allow the Judge to sit with one or more technical assessors. This is not a method favoured by barristers. They are afraid that the Judge's mind will be influenced, some times the word "poisoned" is used, by the assessor in private discussion with the Judge, and in a way not susceptible to correction by the barrister who is unaware of the nature and content of the discussion between Judge and

assessor. Once again this highlights the innate conservatism and apprehension of members of the legal profession.

It was in this setting then that we came to utilize the referee. Almost as a matter of course, technical issues, involving engineering, building, architectural or other expertise are referred to appropriately qualified persons for report. Generally, the parties select their own referee, whether from a list supplied by the appropriate Professional Institute, the Australian Commercial Dispute Centre, the Institute of Arbitrators or, indeed, from the list of persons who have volunteered to act as referees maintained by the Commercial Division of the Court. If appropriate, more than one person may be appointed as the referee. This occurs where the matters in dispute and the subject of the reference cover more than one area of expertise. Sometimes the joint referees may be a lawyer and an expert. At the time the appointment is made, the parties are required to advise the court of the date when the referee can commence the hearing and the expected duration of the reference. The judge then fixes a date some time after the conclusion of the reference hearing, by which the referee's report is required. A further, later, date is allocated at which time the report comes before the Court to be appropriately dealt with. At the time that the appointment of a referee is made, the judge makes a number of other orders. These orders generally follow a standard form.

There are a number of significant matters in the Usual Form of Order for Reference to which I should draw attention. By the time the referee is appointed, the court will have subjected the dispute to considerable preparation. First, the issues will have been identified with precision and particularity. Any necessary discovery of documents will have been carried out. Statements of the evidence proposed to be adduced by each of the parties will have been ordered to be exchanged. Similar orders will have been made for experts' reports. As well, the judge may have directed the experts to confer with one another in an attempt to further refine the points of disagreement and attempt to reduce the points in issue. It seems to me that the referee, being himself an expert, could usefully attend such a conference at least in its concluding stages, in order to determine whether there is any further room for the differences to be narrowed. It will not have escaped your attention that for the referee to complete the assignment within the time specified, if an oral hearing is required and barristers will participate, they have to make themselves available. To assist the referee in this regard, the court will fix the time for commencement of the reference. In order to adhere to the timetable, the referee cannot afford to grant extensions of time and is not expected to seek one for his own report either. It is up to the referee to ensure that all steps necessary to complete the report can be transacted in the available period. Obviously there will be unusual circumstances, e.g. sickness, where an adjournment cannot be avoided. The point I am making is that the barristers' availability is not one.

A referee is properly described as a delegate of the court. This involves mutual rights and obligations. The court regards it as its duty and obligation to assist the referee in return for the assistance which it derives from the referee's work. If a referee encounters difficulty, of one kind, or another, in the handling of the reference, it is always open to him to approach the court, on short notice, or no notice at all, and in as informal a fashion as may be appropriate, in order to obtain further direction or guidance. For example, it seems to me that, there is absolutely no reason why, if there is some short point on which guidance is required, contact should not be made with the judge by the referee, in the presence of the parties, on a conference telephone.

The expert referee does not have to be tutored in the particular field. Even if other experts are called to give evidence the referee can go to the heart of the matter without any introduction. This must result not only in a speedier, and therefore cheaper, hearing but also in a better quality result. However, lawyers are not so readily defeated by measures calculated to achieve a speedy resolution. Time and time again attempts are made to challenge the referee's report by seeking to impugn the technical accuracy of the result at which the referee arrived. The Judges are resolute in rejecting these attempts.

The referee's report need not be a formal document. What is required is a statement of the facts and the referee's conclusions. Obviously, the referee should not be required to make findings of law if he is not legally qualified. However, if legal difficulties arise, then the referee may seek assistance from the court.

In conclusion the advantage of the courts lies in the extensive armoury available to a judge to ensure that the objectives stated by Chief Justice Burger are attained.

With the Compliments

of

Justice Andrew Rogers

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