The Honourable Justice Stynes

Judge of the Supreme Court of Victoria

Determining the real issues in dispute:

Efficient and effective case management in the TEC List[1]

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A Introduction

1 I am delighted to be here this evening and to have this opportunity to talk about the Technology, Engineering and Construction List (the '**TEC List**') and what the near future holds for construction disputes at the Victorian Supreme Court.

2 Having now spent three years in Court I feel well placed to say that a big part of my job is managing the cases in my list and that is why 'case management' is the topic of my presentation.

3 The overarching purpose of the rules of Court is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute. I am obliged to seek to give effect to that purpose in the exercise of any of the Court's powers. In my view, in relation to construction disputes with all of their inherent complexity, careful case management is an area where the Court, with the parties' cooperation, can make a significant difference to the timely identification of the real issues in dispute which in turn facilitates their cost effective resolution.

4 Tonight I will be describing some of the most recently introduced case management techniques aimed at the early identification of issues in dispute. However, I will first provide some context for them.

5 In my experience as a barrister, I found that parties to disputes have always been flexible in their approach to dispute resolution. More often than not, they have

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[1] A speech delivered to the Society of Construction Law Australia on 14 June 2023. I would like to express my appreciation to my Associates, Cameron Inglis and Yazmin Judd, for their assistance preparing this speech.

embraced layers of alternative dispute resolution in their contracts in an effort to reach a negotiated settlement, and thereby avoid the lengthy and complex litigation they believe is the only alternative.

6 What I have found intriguing since my appointment to the Court is that once parties are resigned to the litigation process, that flexibility in approach seems to dissipate. They may well be continuing commercial negotiations behind the scenes, but they otherwise doggedly step through the interlocutory steps as they have always done – pleadings, particulars, discovery, lay evidence, expert reports and so on.

7 And suddenly, gone is the flexibility that they might otherwise take to a mediator, an independent expert or arbitrator.

8 In my view, that approach does not necessarily serve construction disputes which are notoriously complex. The causes of complexity vary but generally fall into two categories:

(a) technical complexity; and

(b) evidential complexity.

9 I will describe what I mean by each in turn because they drive the need for new case management techniques.

10 Let's start with technical complexity.

11 As a result of many scientific and engineering advancements over the years, the complexity of technical issues raised for determination has increased. The determination of these issues invariably turns on expert evidence. As a consequence, we have seen an increased dependence on expert evidence in TEC List matters.

12 Expert evidence is crucial to the Court's ability to determine the issues in dispute. However, the use of expert evidence does not come without its difficulties.

13 Let me ask you this rhetorical question – have you ever seen an expert report that

does not align with the case theory of the briefing party?

14 Experts are required to be independent. Their primary duty is to the Court, not the parties which retain them.

15 However, left unchecked, the Court may be presented with as many opinions as there are parties (opinions produced at considerable cost to the parties) and yet the Court may remain deprived of the independent assistance it should reasonably be entitled to expect.

16 I think it is fair to say that expert evidence plays an important role in the resolution of the majority of construction disputes. In my view, grappling with the scope and production of expert evidence early in the proceedings and the close management of that process is crucial to the efficient resolution of cases that are technically complex.

17 Now, a few words about evidential complexity.

18 The sheer scale of construction disputes differentiates them from other commercial disputes.

19 Construction projects produce vast quantities of documents, including:

(a) contractual documentation;

(b) drawings across numerous disciplines (architectural, structural, mechanical, electrical, hydraulic and so forth);

(c) correspondence;

(d) diary notes;

(e) minutes of project and site meetings;

(f) RFIs;

(g) variations – requests and orders; and

(h) financial documentation.

20 Quite simply, the volume of material that must be reviewed for relevance in significant construction disputes is vast.

21 Having regard to these sources of complexity, it will not surprise you that discovery and expert evidence have been early targets of the changes introduced into my list. But I digress.

22 I was explaining why, in my view, doggedly stepping through the traditional interlocutory steps – pleadings, particulars, discovery, lay evidence, expert reports - may not be the most efficient way forward in complex disputes.

23 I realise I have been on the bench for only a short period but it didn't take too long to observe some obvious causes of inefficiency. Let me explain.

24 Proceedings are commenced and pleadings are filed – a necessary first step. Because of the technical and evidentiary complexities, pleadings are likely to change once expert and lay evidence is procured. For that reason, applications for further and better particulars do not serve much purpose in the TEC List. Accordingly, in most matters, the parties are keen to get on with their expert evidence. That strikes me as a good plan. But this is where I started to see some real inefficiency. To brief their experts, parties sought discovery – often by category. I have a number of observations I want to make about that approach:

(a) *First*, in light of the number of disputes I experienced concerning document categories, I am not sure, from the Court's perspective, that it is necessarily more efficient than general discovery. However, parties who attend to the task are better placed to answer that question.

(b) *Second*, the categories of documents identified as necessary for the expert were being identified by solicitors – sometimes informed by their experts, but often not.

(c) *Third*, an immediate consequence of commencing discovery is that all other steps in the proceeding were being put on hold for extended periods, usually in excess of six months. It was only when discovery was completed that the parties could be persuaded to commence preparation of their lay and expert evidence.

(d) What was frustrating about that process from my perspective was that:

(i) discovery is rarely necessary for any party to put on their own lay evidence. Their direct evidence about what they did, saw, heard, touched and tasted cannot be influenced by the documents they have not seen; and

(ii) lay evidence goes a long way to clarifying a party's case and identifying relevant documents in a way that discovery does not. To put it another way, with pleadings and lay evidence in hand you have a pretty solid idea about the issues in dispute and whether they can be or how they will be proved.

25 In the context of those observations and bearing in mind the Court's obligation to facilitate the efficient and cost effective identification and resolution of the real issues in dispute, I will describe some of the case management techniques recently introduced into the TEC List. Specifically:

(a) my approach to discovery;

(b) my approach to the preparation of expert evidence; and finally

(c) the introduction of case management conferences.

26 I will discuss each in turn.

B <u>Discovery</u>

B.1 Filing of evidence before any orders for discovery

27 As to discovery. Parties in my list will, as a general rule, be expected to file their evidence together with a bundle of the documents that they intend to tender through those witnesses, **before** seeking any orders for discovery.

28 This practice is not new.

29 In 2011, the Australian Law Reform Commission emphasised the need to ensure that judges have the power to restrict discovery and that they be encouraged to take an active role in managing and minimising discovery.[2]

30 The NSW Supreme Court's practice note on disclosure in the Equity Division has been in operation for over 10 years. It provides that no order for disclosure will be made unless it is necessary for the resolution of the real issues in dispute, and in any event, will not be made until parties have served their evidence.

31 In the year of its introduction, the regime was described as one which reflects a longstanding concern about the potential for discovery to involve activity and cost which is disproportionate to the just, quick and cheap resolution of proceedings.[3] One of its purposes is to force parties at an early stage of proceedings to confront the real issues and to consider how they are going to prove their case.[4]

32 Similarly, over 10 years ago, the rules for discovery in the Federal Court were changed so that discovery is no longer as of right. Whether to order discovery (and its extent) is a matter for the exercise of the discretion of the Court.[5]

33 In international arbitration, under the IBA Rules, disclosure is only permitted where it is "relevant to the case and material to its outcome".[6] Other rules, like the Prague Rules, expressly discourage document production and require the parties to submit evidence on which they intend to rely as early as possible.[7]

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2 Australian Law Reform Commission (ALRC), *Managing Discovery: Discovery of Documents in Federal Courts*, Report 115, 2011, [5.23]-[5.24].

3 Lexis Advance, *Ritchie's Uniform Civil Procedure NSW* [21.2.50].

4 *Leda Manorstead Pty Ltd v Chief Commissioner of State Revenue* [2012] NSWSC 913 at [3].

5 *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd (No 8)* [2021] FCA 295, [66] (Middleton J).

6 IBA Rules on the Taking of Evidence in International Arbitration (2020), Article 3(3)(b).

7 Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules), Article 4.1.

34 As a result of requiring evidence ahead of discovery, the scope of any discovery is sensibly defined not just by the pleadings, but also by the evidence each party files.

B.2 The role of section 26 of the *Civil Procedure Act 2010* (Vic)

35 Of course, no party is to be deprived of documents critical to the proceeding. Victoria's *Civil Procedure Act 2010* has been in operation for over 10 years. Section 26 requires parties to disclose the existence of documents considered critical to the resolution of the dispute. That is an obligation automatically imposed on parties to litigation – no order of the Court is required.

36 The category of 'critical documents' is certainly narrower than the kinds of documents which may ordinarily be discoverable. However, it should capture documents underpinning the claim, as well as documents that might adversely affect the case of the disclosing party.[8]

37 Section 26 was introduced to facilitate the early resolution of disputes by requiring parties to disclose critical documents prior to discovery.[9] It is an ongoing obligation.

B.3 Summary of approach

38 So, what is happening in my list? The starting point is that, generally, parties will be required to serve the evidence on which they rely in support of their case together with the documents they propose to tender before discovery.

39 The main exception to this rule, as has been developed through 10 years of case law in NSW, is where information necessary to a party's case is *solely* within the knowledge of the other party. This situation rarely, if ever, arises in matters in the TEC List.

40 And where it does, I raise this question for consideration - in light of the obligation to make continual and ongoing disclosure of critical documents, and in circumstances where reply and responsive evidence can be filed following an initial

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8 Explanatory Memorandum, *Civil Procedure Bill 2010* (Vic) 12.
9 Explanatory Memorandum, *Civil Procedure Bill 2010* (Vic) 11.

exchange of evidence in chief, how will you be disadvantaged at trial by the lack of any formal discovery regime ahead of that evidence in chief?

C **Preparation of expert evidence**

41 But what about the discovery of documents necessary for expert evidence? Well, that brings me to the second case management strategy recently introduced.

42 There is no doubt that construction litigation involves an extensive documentary record and that the discovery of some documents will be necessary for the preparation of expert evidence.

43 In my view, the people most qualified to identify the categories of documents required for the relevant expert opinions are the experts.

44 Over the last 18 months I have adopted the following procedure in relation to the preparation and exchange of expert evidence:

(a) *First*, the parties disclose the experts they intend to rely on.

(b) *Second*, the parties then meet, in the absence of their experts, to confer and agree on:

(i) the issues to be addressed by the proposed expert evidence; and

(ii) the high level documents necessary for the experts to participate in an early expert conclave which I will describe in a moment. Those documents may be the pleadings, the latest version of the project program for a delay expert or maybe a contemporaneous investigation report concerning the relevant incident – very high level introductory material.

(c) *Third*, the experts convene that early expert conclave, in the absence of parties and their lawyers, for the purposes of refining and agreeing the issues to be addressed by their evidence, the methodology to be adopted to address those

issues, and the categories of documents upon which they expect to rely. The purpose of this early conclave is for the experts to identify the documents necessary to undertake the task required of them. The experts produce a first joint report following the conclave setting out these matters.

(d) *Fourth*, with the benefit of the experts' first joint report, the parties confer, in an attempt to agree on the questions to be addressed by the experts – usually a simple refinement at this stage.

(e) *Fifth*, the parties disclose the documents identified by the experts. I have noticed that the parties rarely dispute the categories of documents identified by the experts and that the experts, knowing precisely what they want, identify fewer categories of documents than legal practitioners.

(f) *Sixth*, having received the discovered materials, the experts convene a second expert conclave, again in the absence of parties and their lawyers, for the purposes of considering the questions to be addressed and identifying areas of agreement. They will produce a second joint expert report.

(g) *Finally*, to the extent there is any difference in opinion between the experts, each expert files an individual expert report in the ordinary way, in relation to the issues that remain in dispute.

45 The result is that the experts end up providing two joint expert reports – one identifying the documents required and the methodology to be adopted, and the other identifying areas of agreement and disagreement, all prior to them filing individual expert reports.

46 The purpose of the first early expert conclave is to ensure that the expert briefing process is transparent and results in the experts providing evidence:

(a) on the same questions;

(b) based on the same materials; and

(c) employing the same methodology.

47 The aim is to give the experts an opportunity to engage with the materials and each other before there is any significant interaction between them and their solicitors. Sometimes they may need assistance from the parties to identify the issues to be addressed but in my view, once those issues have been identified, the experts are best placed to identify the methodologies they will adopt in the preparation and presentation of their material and the documents they require to attend to that task.

48 Parties were initially reluctant about this process. I heard numerous submissions about the additional cost of the early conclave and the unlikelihood of early agreement. However, in relation to most cases that have advanced past the early conclaves, I have seen the experts reach agreement on almost all the matters raised for their consideration – i.e. issues to be addressed, methodology to be adopted and documents required.

49 The purpose of the second early expert conclave is to allow the experts the opportunity to narrow issues in dispute before putting pen to paper. All parties, experts and their legal representatives have an overarching obligation to narrow issues in dispute. Why wait three to six months for their report to realise that they actually agree on some issues or parts of them? That makes no sense to me.

D <u>Section 23 Conferences</u>

50 The final case management technique I wish to speak about tonight is what I have been referring to as case management conferences.

51 Under s 23 of the *Civil Procedure Act 2010* (Vic), parties have an overarching obligation to actively narrow the scope of the issues in dispute.

52 The obligation applies at every stage of a proceeding. Parties should consider at each and every juncture whether their actions are working to narrow the issues in dispute.

53 As we all know, TEC List matters are particularly dense and complex. Pleadings in

construction disputes are frequently extensive and comprise layers of claims (primary claims, third party claims, apportionment and contribution). This makes it both difficult, but even more crucial, to narrow the scope of issues in dispute.

54 What I have introduced to the list is a Case Management Conference, or what I may refer to as a '**Section 23 Conference**'. I have spoken about it before but I am keen for the idea of it to reach a wider audience for the purpose of triggering discussion and feedback.

55 The conference is usually fixed around two or three months ahead of trial after the parties have filed evidence.

56 Ahead of the conference, I require the parties to prepare a list of issues.

57 The draft list of issues has proven to be an invaluable step for identifying issues that remain in dispute having regard to the pleadings and evidence. It does not make the pleadings irrelevant, but that list usually provides a better guide to the parties and the Court as to how the trial will be approached and submissions will be prepared.

58 Ahead of the case management conference I will review the list of issues, pleadings and evidence and, usually with the parties' cooperation, identify those issues that represent the killing ground of the dispute. It may or may not surprise you that there are usually very few such issues, even in complex matters, maybe three to five.

59 While I seek input from the parties as to how the conference ought to proceed, I expect that, in relation to each issue addressed by a party, that party will:

(a) provide an overview of its position – not quite an opening, but more than a simple recitation of the case as pleaded; and

(b) identify the key evidence in support of the essential elements.

60 In other words, I am interested in parties speaking frankly and putting legal language to the side. They should tell me in simple terms what their case is – for example: who is liable and in what proportion; what conduct is said to underpin that

liability; and what is the key evidence in support of that position.

61 It is intended to be an interactive process and one which I am finding parties to be particularly drawn to.

62 The results have been terrific:

(a) *First*, it leads to a significant reduction in the number of documents relied on. If you have a limited amount of time in the conference to put your best case, it focusses your mind on which documents actually matter.

(b) *Second*, it facilitates a much better understanding of how each party puts its case.

(c) *Third*, it provides a springboard for fruitful settlement negotiations. The conference is directed at arming each party with the information they need to assess the strengths and weaknesses of their case. I require that a representative of each party who has authority to settle the dispute to be in attendance at the conference. Unlike mediation, which the parties are likely to have already attempted by this stage, the trial judge who will hear the matter participates in the process. I will be across the material and will scrutinise how each party puts its case, thereby providing a unique and tailored approach to dispute resolution.

63 I am pleased to report that all cases in which I have held a Section 23 Conference have settled.

E <u>Conclusion</u>

64 I hope you now have a clearer sense of what to expect should you find yourself with a matter in my list.

65 Construction disputes have a tendency to be long running, complex and expensive to resolve. We can choose to accept that or, as I think we do, we can continually strive to improve the dispute resolution processes.

66 In short, it is my aim to continually improve our practices so that, rather than being seen as some sort of ominous venue of last resort, parties view the Court as a powerful ally in their pursuit of just, efficient, timely and cost-effective resolution of disputes.