# BUILDING CASES – A NEW APPROACH

## PRACTICAL ROLE OF THE BARRISTER

## UNDER

## PRACTICE NOTE NO 1 OF 2008

The Hon Justice David Byrne

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I am grateful to have been given the opportunity to make this presentation to the Construction Bar in Victoria. I am pleased – doubly pleased – to do so. First, because I have, for a long time, been a construction law barrister. And even since I have crossed William Street, I continue to see myself as one of your number. It is just that I now see things from a different point of view. I still feel that I am among like minds – perhaps even friends. The second reason is that, I fear, the main burden of the New Approach is going to fall upon your shoulders. It will be you, the barristers, who will be called upon to make the hard decisions and you will cop it when things go wrong. And I make no apology for this. For it is you, I should say we, who have largely contributed to the problem to which the New Approach is directed. As a fellow building barrister, I will speak frankly of my concerns.

I start with the proposition that the current litigation processes for the resolution of major building disputes tend to be neither efficient nor economical. In making this statement, I intend no criticism of any court or of any judges. The fact is that the conventional litigation process, when applied to twenty-first century building disputes, makes it difficult to achieve economy and efficiency. The consequence often is that the parties compromise their claims or defences because the cost and delays attending the trial and judgment are intolerable or they just give up. We, the courts, tend to see settlement of a proceeding as a satisfactory outcome and assume that each party walks away from the deal, away from the negotiating table, well satisfied with the deal which has been struck. The parties may not see it this way. A settlement may be the product of exhaustion. A resolution of a building dispute achieved in this way is a reproach to the legal system – it denies justice to the exhausted litigant.

Let us then pause for a moment to list the reasons for the difficulties of the litigation process to achieve an efficient and economical and, in consequence, a just resolution of major building cases. In essence, there is but one – time. The complexity of both factual and legal aspects of modern construction disputes requires time to understand and unravel them. Time consumed in this necessary professional activity produces costs. This is because costs are generally calculated by the application of time units to a rate of charging and there is little that we can do to contain rates of charging. Time looked at in the wider conspectus means delay. And so, the complaints of litigants about cost and delay come back to the time which modern disputes require to be invested in the litigation process.

Logically, such a problem of containing the amount of time spent in litigation might be addressed in any or all of the following areas:

1. Reduce the complexity of the factual dispute.

2. Reduce the complexity of the law.

3. Encourage early settlement.

4. Simplify the pre-trial procedures so as to reduce professional time and consequent cost and delay.

5. Simplify the trial so as to reduce lawyer and support time and consequent cost and delay.

6. Prepare shorter judgments so as to reduce judge-time and consequent delay.

It will be immediately apparent that (1) and (2) are not achievable by the court or by practitioners. The fact is that, with increased documentation and more sophisticated construction techniques, a building project today is increasingly complex and no end to this is in sight. Likewise, the law is more and more complex. Consider that the modern law of negligence, especially for pure economic loss, dates only from the mid-1970s. Likewise, the statutory causes of action for misleading and deceptive conduct. More recently, the proportionate liability regimes under the *Building Act 1993* and later the *Wrongs Act*. There is no reason to expect that these developments will not continue.

The encouragement of settlement, which is the third area for improvement is now part of ordinary pre-trial processes. Mediation and all manner of techniques which encourage parties to settle are a fact of life and they are, by and large, successful. When I last managed the Building Cases list all, or nearly all, cases were subjected to at least one bout of mediation. The records, as I recall, showed that about 70% of these cases settled at mediation or shortly thereafter. Whether these settlements were the product of sweet reason, coercion, fear of what lay ahead, exhaustion or just despair, I cannot say. This, as I have said, may be a matter of concern or of satisfaction depending upon the reason for the settlement.

The fourth area for attention is pre-trial procedure. Considerable efforts have been directed to these procedures especially since the establishment of the Building Cases list in October 1972 and the general acceptance that these cases should be managed by a judge. But, I think it is fair to say that, with the exception of the practical abolition of the right to deliver interrogatories, the progress of a building case through its interlocutory stages in 2008 is not

very different from that of any commercial case and that these procedures have not really changed since the Rules of Court were introduced a century ago. There has been in this country no development of special procedures and management techniques which have been moulded to meet the very special requirements of major building litigation. In this respect, compare the experience in London where the official referees have over the past century or so developed their own procedures of which the most famous is Master Scott's eponymous Schedule.

In my experience, the areas which call for attention here are pleadings, including particulars, and discovery. There appears to be an acceptance by practitioners that one's own pleading should be as comprehensive and general as possible so as to provide a basis for contending that anything is relevant and to permit maximum room to move. The consequence of this, of course, is that a wide range of documents become discoverable. So far as the opponent's pleading is concerned, maximum particularity is insisted upon so as to minimise its room to manoeuvre and to found an argument that evidence is not relevant. I pause to wonder how often these pleadings and particulars, which may range over hundreds of pages and which cost a small fortune to produce, are scarcely referred to at trial and certainly play little part in it. Attempts at procedural reform often include the abolition of pleadings but they tend to return, under other names. It will always be necessary for someone somehow to nail down the matters in dispute.

Much ink has been spilt about the abuses of discovery. The problem here is that experience shows that in a major building project which produces hundreds of thousands of e-mails, drawings, reports, diaries and other documents, a very small percentage of these really warrant careful examination and, of these, only a small part will be useful for the resolution of the dispute. And yet we are persuaded by practitioners that the world as we know it will crumble if the *Peruvian Guano* test of relevance is modified or if any limitation upon discovery is imposed. This may be due to the caution which is inherent in lawyers, to a wish to avoid the expensive exercise of culling the documents or, as cynics would have it, because solicitors make a fortune from copying, imaging and the general management of documents.

Consider also the experience of the procedures which involve identifying an issue for preliminary trial[1] and the associated procedure whereby the issue is then referred to a special

[1] R. 47.04.

referee.[2] This is neither the time nor the place to undertake an extensive discussion of these procedures. The fact is that they have been sabotaged by a series of factors:

- The resistance of judges, especially appeal judges, to accept that this may be a useful and flexible procedure which does not undermine the authority of the court and may have a useful role to play in identifying and resolving important issues, even if this may not resolve the whole proceeding.[3] This is the role which this procedure plays in the Technology and Construction Court in London where preliminary questions are readily tried.

- The resistance and inflexibility of lawyers when the question of the trial of a preliminary question is raised.[4]

- The gamesmanship of lawyers who will delay the litigation process by appeal from the preliminary determination or even subvert its purpose by later amendment.

- In the case where the issue is referred out, the shortcomings of official referees. All too often, they permit themselves to be persuaded by the lawyers to conduct the reference like a trial in court so that the hearing becomes very long. Very often their report to the court setting out their reasons is unduly long and produced after long delay. Sometimes, I regret to say, the reasoning is subject to just criticism.

The fifth area for consideration is the trial itself. Much has been done to shorten this the most expensive part of the litigation process. I refer to witness statements, court books and to electronic aids. My own impression is that, in general, the improvements have gone about as far as they can. You will appreciate that all of the evidence, argument and information which is deployed at trial must pass through the least-resourced bottleneck in the court room – the judge. The judge is required to absorb and understand in short-frame information which teams of lawyers and helpers have taken weeks or months to put together. The challenge to the modern advocate of presenting such a case in a way that is both digestible and persuasive is one which is worthy of the future attention of those who are interested in the art of advocacy.

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2 R. 50.01.

3 See, for example *AT & NR Taylor & Sons Pty Ltd v Brival Pty Ltd* [1982] VR 762; *Jacobson v Ross* [1995] 1 VR 337.

4 See *Bridge and Marine Engineering Pty Ltd v Taylor (No 2)* [2205] VSC 154 at [15], per Harper J.

The sixth and final area for attention is a matter for the court itself, including appellate courts. Is it necessary for judges to write long judgments dealing with every pleaded issue? This is a question which trial judges are encouraged to address. Work remains to be done here.

This rather lengthy introduction is intended to set the scene for the court's decision to undertake a new approach to building cases. For reasons which have been developed elsewhere[5], the commercial judges have formed a view that the most likely areas for achievable improvement are the fourth area which I have identified as the interlocutory procedures and, to a lesser extent, to the fifth area, the trial.

The New Approach is the product of a number of factors and trends which have all come together at this time. Let me list them.

- The march of case management continues. When the first steps were taken some 35 years ago in this State we did not appreciate what might lie ahead. Litigants and lawyers now clamour for it; they cannot have enough. And with the passage of time a new breed of judges is ready to exercise their powers of management. Let there be no mistake, I am not talking about timetabling management, but that where the judge, being familiar with the case, gets into the arena and assists the parties to formulate the issues. Some of you may have heard a paper presented by Ian Hunter QC to the Anglo-Australasian Lawyers Society last month. He spoke of the pleadings as merely a starting point for the judge – the judge, mind you, formulating the real issues to be tried. This list of issues becomes the blueprint for the proceeding. It is by reference to these issues that discovery is managed, witness statements prepared, preliminary issues for trial selected and the trial itself conducted. Mr Hunter is, of course, coming from a background of international arbitration, but I can well envisage this being a feature of litigation in the future. And hearing this, you might be forgiven for imagining that you are in a European civil law court rather than one in the common law tradition. The New Approach is but a small step in the direction in which all of our feet are pointing.

- There is increasing pressure on court resources and an expectation that courts be more self-funding and accountable for the application of those resources. Why should the State provide, at virtually no cost, an arena for two wealthy companies to slug it out

[5] See my article, *The Future of Litigation of Construction Law Disputes* (2007) 23 BCL 398.

for months on end? We have long thought, and I still do think, that this is a proper function of the justice system. But others do not. And they are calling for some accounting.

- Litigants are unhappy with cost and delay. How often have I heard that the litigants, above all, want a fair and speedy result. They would sacrifice the luxury of a full investigation for a speedy trial and a quick judgment. I can well recall major city building projects which had a timetable of three years in the planning and design, one year in the construction and two years in the litigation/arbitration. Sensible contractors, architects and engineers do not want to spend 30% of their working lives in the trenches with the lawyers.

- Some recent bad experiences. It is absurd, for example, for a plaintiff to be involved in litigation where the number of parties and the nature of the issues are such that the prospect of its recovering a positive net result after costs is minimal.

- My perception is that the main offenders are ourselves, the building barristers. We have, assisted by State legislation, virtually killed arbitration. Arbitration will remain dead so long as we insist that it be conducted like ordinary litigation. Our strength as building barristers lies in our readiness to attack the volume of issues and documents which construction litigation inevitably throws up. Therein, too, lies our weakness. We must be ready to back our own judgement – to put aside issues which are peripheral or which are not cost effective. We must have the courage and the confidence in ourselves and in the judges before whom you appear to abandon the arguable long-shot. If we do not change, then change will be imposed upon us. If we do not deal appropriately with construction cases, they will be removed from us and relocated elsewhere. Much has already passed to VCAT. And when you think about it, the sort of procedures that have and will increasingly be adopted by that Tribunal, and any other which may come into existence, are those which ought to have been practised in arbitral tribunals.

  My vision for the conduct of construction cases in the year 2020 is one where we have the best of both worlds. The process is collaborative and cooperative: the parties, their lawyers and the judge work together to achieve a result. Trenches are replaced by round tables. I do not see this as a picture painted in warm and fuzzy tones where

the lion lies down with the lamb. My image is that of two lions together eyeing each other warily, but each realising there is sufficient in the carcass for both to have their fill. There will inevitably be fights over the choicest bits and these fights will be the issues to be resolved by the judge.

There are already pressures upon those engaged in litigation to look not solely to the immediate interests of their clients, but at the larger picture. We accept that we require our clients to disclose awkward documents which they would prefer to bury or even destroy. Expert witnesses are no longer mere hired guns, government litigants are expected to be model litigants. Word is that the Cashman Civil Justice Report will recommend legislation imposing on lawyers and others overriding obligations of co-operation, candour and consultation and with penalties for default. What the commercial judges have in mind is that this should become the accepted culture of those engaged in building litigation in the Supreme Court. And if you are not content to litigate on these terms there are abundant alternative forums.

Coming to a more practical level, what will this mean for the barrister. First, you may expect the judge to ask Why? How does this advance the main objective of the client? Why are you running this point? Why is this discovery necessary? Why is it necessary to multiply the expert witnesses? And if no satisfactory response is forthcoming, then there will be encouragement to the barrister and client not to pursue the proposed course.

This Why question is the first question which you will be encouraged to ask yourself as you list the available causes of action and the defences when you plan your pleadings.

Second, you must be ready continually to re-evaluate the state of the litigation. It is often convenient, even necessary, at an early stage to add a large number of defendants, particularly where the limitation period is close to expiry. From time to time, it will be counsel's role to consider whether a defendant should be let go or a cause of action abandoned when the prospect of success is not sufficiently high. There are, of course, grave difficulties now in the way of releasing a defendant under the new proportionate liability regime. Nevertheless, the obligation of counsel to

consider whether the case meets the objective of the litigation must be seen as an ongoing one, like the obligation of discovery.

Third, you might expect that time limits will be fixed and acted upon. This means times for taking a step in the proceeding and times allowed for certain activities, such as cross-examination.

Fourth, there will be an emphasis on cost-effectiveness. Points to be pressed and issues raised must meet this standard. The magnitude of witness statements and court books might attract attention in this regard.

Fifth, it will be expected that you deal with each other in a professional way. This means that there should be consultation between opposing counsel so that, as far as possible, issues which can be resolved are not brought to court.

Sixth, judges will expect what I have called "fidelity to the process". Where a procedure or strategy is to be undertaken, even if you have opposed it, your responsibility to the system is to make the strategy work – to achieve its objective – not to undermine.

Seventh, associated with all of this will be a greater readiness for you as barristers to fulfil the important function of acting as a filter for the wishes of the client and of the solicitor. We shall, in the near future, be speaking to organisations of solicitors and contractors with the same message. Counsel's true responsibility to fashion the case in a responsible way will become increasingly important under the New Approach.

Eighth, and this underlies much of what I have already written, barristers must be co-operative with the Court. I do not mean that you should be deferential or submissive; the tradition of the Bar of one of fierce independence. What I mean is that when options are being discussed as part of the management process barristers should see themselves as part of a collaborative enterprise with the judge in arriving at an appropriate procedure for the proper management and resolution of the litigation. This will involve them being candid with the judge where they see difficulties ahead and ready to provide the judge with the information which is necessary for the case management process. It will also require them to approach the task in a positive way,

not focussing upon the difficulties, but rather looking to the ways these difficulties may be avoided or overcome.

Before I leave this part of my paper, I want you to understand this. We are stepping into relatively uncharted waters. There will be risks and, I regret to say, there may be some mistakes made. But even mistakes can be overcome with cooperation.

The Commercial Judges are concerned that the New Approach should work. Inevitably, given the greater role of the judge, different judges will approach their role with differing enthusiasm and techniques. You can, however, be confident that all of the judges are keen to show the leadership which the New Approach requires. It will be for you to assist them to make it work.

I turn now to the Practice Note. The objective and features of the New Approach are set out in paragraphs 1 and 2. For present purposes these may be divided into three heads: administration, procedure and trial.

**Administration**

The existing Building Cases Rules of Court[6] remain in force.[7]

The Master will have a greater role to play inasmuch as she will conduct the new resources conference[8] and will assist the managing judge.[9]

**Procedure**

No changes are made to the Rules of Court. What is intended is that they be applied in a more energetic, creative and business-like way. How this is achieved will necessarily depend upon the circumstances of the case and upon the judge concerned. The intention is that the judges will proceed with confidence, but with caution, to explore new ways to deal with the particular issues raised in the litigation before them. They will be constantly asking themselves, and the litigants and their practitioners, the Why question. Why is a proposed step necessary or desirable to achieve the object of the litigation?

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6 Chapter II Order 3.
7 Para 18.
8 See para 5.
9 See paras 2(j), 3.

There are important procedural changes introduced early in the proceeding. A trial judge will be appointed by the judge in charge of the list. The case will be docketed to that judge for management and trial. The new sequence of events will be as follows:

- 30 days after last appearance – an information sheet is provided to the Master by email.
- Pleadings close.
- Resources conference is convened by the Master.

The intention of requiring the information sheet at this early stage is that the parties will be encouraged to look ahead to the likely interlocutory steps and the trial and to consider the costs which are likely to be incurred.

The resources conference is an important feature of the New Approach. It is conducted, not by the trial judge, because confidential or privileged matters may be discussed. The matters which might be discussed at the conference are set out in paragraph 8. This is not an exhaustive list. It may be supposed that questions such as settlement or mediation might be raised. The Master will need to know what are the principal issues of fact and law so as to consider the resources issues. The Master's report upon the matters discussed will provide an important guide for the management and trial of the proceeding.

An indication of the matters to be considered by the managing judge at the directions hearing is to be found in paragraph 12. Again, this is not a comprehensive list. The judge will mould procedures to fit the case. It will be seen that there is mention of the cooperation of the lawyers in this task and an emphasis upon time limits. These will be readily imposed and compliance with them will be insisted upon. The trial judge will attempt to restrict the number of directions hearings[10] and practitioners may expect that consent adjournments will not readily be granted without good cause. Interlocutory orders will be readily made on the papers.[11] Judges and masters are encouraged to award costs on interlocutory applications and to fix them.[12] Paragraph 12(i) provides for consensual non-binding evaluation. This procedure, called in England "early neutral evaluation", is available in the TCC and in various states of the USA as an aid to mediation to settlement.

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[10] See para 2(h).
[11] See para 2(i).
[12] See para 2(k).

**Trial**

Not less than one month before the trial there is to be a final directions hearing.[13] This will, in all probability, often be held earlier than this and many of the matters referred to in paragraph 15 will have been discussed and decided at earlier directions hearings. It will be recalled that information relevant to the trial will have been provided in the information sheet.[14] This information will have been updated from time-to-time as is required by paragraph 6. At the final directions hearing any uncertainties attending this information will have been resolved.

It will be seen from paragraph 15 that the trial judge will be likely to consider how best the trial might be conducted, having regard to the interests of the parties and those of the court. Again, it will be noted that the co-operation of the lawyers at this stage is expected.

**Conclusion**

I conclude this brief overview by repeating that what is expected of building barristers is no mere cosmetic makeover. The rules have not been changed; their application will change. This will represent a new approach – a new culture for the court in its handling of building cases - which will not be easy. Neither will your role be easy. It will be no less easy in that we will all be stepping out of our respective comfort zones and we will be taking risks. Risks always attend novelty. It will be a measure of the skill and commitment of the construction bar to the litigation process that they and we make it work.

One last practical role for the Bar. There has always been a very strong relationship between the barrister side of the profession and the Court. I would like to be confident that we will receive from the building bar feed-back as to the successes and difficulties which the New Approach enjoys or faces, as well as suggestions for improvement. This may be informally between colleagues, or through the Building Cases List Users Group which is, I understand, enjoying a new lease of life. As in 1972, the Victorian profession is leading the lawyers on Australia into a new era. We must all work together to make it so.

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[13] Para 13.

[14] See parts C3 and 4 and part D.