TITLE: "The Building Cases List of the Supreme Court of Victoria"

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I have to say that I have some trepidation in talking to a group such as this about the Building Cases List. Many of you have practised virtually exclusively in that List for many years and others have appeared regularly as expert witnesses in the cases managed in the List. My personal experience is far more limited, although at least I can say that I did appear on occasions in building cases in the List. I also appeared in a rather notorious and lengthy arbitration some 20 years ago in which I was led by John D. Phillips QC, lately of the Court of Appeal, instructed by Andrew Denehy then of Blake Dawson Waldron. Our opponents were Bill Gillard QC, now the Hon. Justice Gillard, leading Graham Anderson, now His Honour Judge Anderson, and John Digby, now of Her Majesty's Counsel, instructed by Chris Edquist of Phillips Fox.

Nevertheless, I have now been the Judge in Charge of the Building Cases List for all of this year and, although I have yet to hear a trial of such a dispute, I have learnt a lot about the challenges facing building cases litigation in the Supreme Court.

As most of you probably know the Building Cases List is the oldest specialist list in the Supreme Court. It was started in 1972. A number of distinguished Judges have sat as the Judge in Charge of the List in the intervening 33 years, none more so than Justice Brooking and Justice Byrne, both of whom are acknowledged to be experts in the field.

The reason for the establishment of the List was explained in a well known passage in the judgment of Justice Menhennitt in *CW Norris & Co Pty Ltd v World Services and Construction Pty Ltd* [1973] VR 753 at 755. At the risk of boring you, I want to read part of that passage because it seems to me that we would all do well to keep it constantly in mind. His Honour said:

> "It is notorious that in many building cases proceedings have been bedevilled by complexity and detail, interlocutory proceedings have been tortuous and slow, trials have been long and expensive, the real issues have often emerged only during the course of the trial and parties, often both of them, have been disillusioned. What O.76 aims to do is avoid or minimize these hazards. Its essence is in the provision for the judge to give directions at the outset of the proceedings. This power enables the judge to endeavour to sort out and identify at the earliest possible stage the issues in the proceedings and then decide how those issues should best be determined. This process may reveal a main issue or issues – one which may determine the case or, when decided, may result in the case being determined. It may identify an issue or issues which, unless determined, will stand in the way of the orderly and expeditious determination of the whole case."

His Honour then went on to refer to the various ways in which the case could be dealt with other than by a trial on all issues before a Judge, such as trying one or more questions of fact before others, deciding preliminary points of law or referral to a referee. I will return to this topic later.

I thought it might be interesting to provide some statistical information about the present state of the List. Currently there are 44 matters in the Building Cases List of which 12 have been referred to the Listing Master for the fixing of a trial date. Of the 12, six matters, all referred in the second half of 2005, have yet to receive a trial date. I have included the 12 matters referred to the Listing Master in the numbers in the List because experience has shown that applications for further directions in those matters are quite common.

In addition to the 44 cases, there are another four which have been allocated to a particular Judge who will hear them as well as managing them through the interlocutory steps. Of these four, one has been given a trial date and one is currently part heard before Justice Byrne.

A further addition to the 44 cases are eight proceedings apparently issued in the List but which are yet to come before me because no Summons for Directions has yet been taken out. In some cases the delay is well in excess of the time set down by r.3.04 of Chapter 2 of the Rules.

Eighteen cases have entered the List since 1 January 2005, including eight since 1 July. On the credit side, since 1 January 2005, 15 cases have been disposed of, mainly by settlement, including seven since 1 July.

As I understand it, there were eight building cases listed for hearing in 2005. Four settled, one partially settled with only a contribution claim between defendants remaining outstanding (nevertheless this is a lengthy dispute in itself), and one is part heard. With the remaining two the trial date was, I believe, vacated on the application of one of the parties. To have 25% of the cases listed for hearing in one year adjourned because pleadings were amended or new parties were sought to be added or for some other reason the matter was not ready to proceed, is not satisfactory. Further, without in any way criticising settlements, I also query whether the high rate of settlement at or shortly before trial (say 4.75 cases out of eight) indicates that not enough effort is being put in at the mediation stage or that the parties are not fully utilising the opportunity offered by mediation. My experience in the Commercial List was that most cases settled at mediation and those that did not, ran to judgment.

Only one of the 32 cases not yet referred to the Listing Master was issued before 2003. It was issued in 2002. Nine were issued in 2003, 10 in 2004 and 12 so far in 2005. It should also be noted that three of the nine proceedings issued in 2003 were not entered into the Building Cases List until May, June and September 2005 respectively, and one of the 10 proceedings issued in 2004 only entered the List in October 2005. Obviously, these are all substantial times after the proceeding was commenced. Thus, exactly half of the 32 cases being managed only entered the List in 2005, and over 80% (26 out of 32) have been in the List for less than 2 years.

It can be seen from these figures that whilst the progress of the cases though the interlocutory stages has generally proceeded relatively quickly, the real bottleneck is in the

obtaining of a trial date. As you would know, the Listing Master is now fixing building cases in 2007. This is obviously a most unsatisfactory situation for everyone concerned. The main difficulty is that building cases invariably fall into the category of Long Cases, that is cases in which the hearing is thought to exceed 12 days. My experience is that on average building cases are estimated to take at least eight to ten weeks. Needless to say, it only takes a few Long Cases of this length and a year is filled. It is very difficult to allocate sufficient Judges to Long Cases when the demands of other areas are so great and resources are so stretched. In particular, for most of the latter part of this year and next year much of the resources of the Court have been or will be devoted to hearing many long and complex but very important criminal trials. Even with the extra two Judges appointed for this purpose, this is a very heavy consumption of Judge time. The Court is most certainly committed to the efficient management and expeditious hearing of building cases, notwithstanding the challenges posed by the length of the hearings and the other significant stresses on the Court's resources at the moment. As an example of this commitment I note that the Chief Justice herself, although usually presiding in the Court of Appeal, has sat, and will continue where practicable to sit, in building cases.

As I understand it, the Government intends to alter the jurisdiction of the County Court by imposing no monetary limit in matters such as building cases. It seems to me that it must be uncertain what effect, if any, the proposed change in the jurisdiction of the County Court will have on delays in the Supreme Court. Most of the building cases I have dealt with involve claims and counterclaims of millions of dollars. Whether these cases will in the future be brought in the County Court I cannot say. That will be a matter for the parties and their legal advisers. My only other observation is that, without knowing what the present situation in the County Court is with respect to delays in obtaining hearings, it will be no solution for litigants if bringing more matters in the County Court simply causes its hearing times to blow out.

Earlier this year I was invited to attend a meeting of the Victorian Sub-Committee of the Construction and Infrastructure Law Committee of the Law Council of Australia. This was an opportunity for a welcome exchange of views with leading members of this part of the legal profession. A number of issues were discussed and I thought it might be of interest to mention them tonight.

The first point raised by the Sub-Committee was the introduction of a docket system at an early stage in the proceeding. The idea was that at the discretion of the Judge in Charge of the Building Cases List a case would be allocated to one of a number of Judges, with some expertise in the area of construction disputes, to hear all further interlocutory issues and the trial itself and, after liaison with the Listing Master, to allocate a trial date as soon as possible.

In my view there is much to be said for the idea that the Judge managing a case should also hear it. This is the aim for all shorter cases in the Commercial List and in my experience it works well. It could not work there for longer cases and it is this aspect which would cause problems for the Building Cases List. A docket system of allocating cases amongst a panel of Judges is certainly one way of overcoming this difficulty.

However, it just does not seem practical to introduce this system into the Supreme Court at this time because of the sheer volume of cases. Given the competing demands for Judges to hear cases, I doubt that the Listing Master could facilitate Judges to fix their allocated cases any earlier.

After discussion with the Chief Justice, some steps have nevertheless been taken along this path. I have already referred to the fact that some cases have been allocated ahead of the hearing date to a particular Judge. With respect to the two most recent allocations, one was not long before the trial date and the other was well ahead of the hearing date in an enormously lengthy and complex dispute. Allocation to the trial Judge has also been sought in a number of matters recently referred to the Listing Master, but the problem is that it is very difficult for the Listing Master to allocate a case to a particular Judge so far into the future.

The Sub-Committee's second point was that it was desirable to have directions hearings more frequently than once a month, in order to avoid too many cases having to be heard on the one day and to accommodate urgent or complex applications. There is sense in this suggestion. Recently, directions hearings were heard on two out of the four available Fridays in both September and October and another day was set aside in October for the hearing of a lengthy application. Also, current commitments would indicate that there will be hearings on every Friday in November and December. I intend to follow a similar practice next year, other than when I am sitting in the Criminal Division. It must be understood, however, that such a response comes at a cost in terms of the Judge sitting on trials or writing judgments. I also note that a significant proportion of matters listed for directions hearings are simply adjourned by consent on the papers. This might indicate that more time is needed between directions hearings.

Next, it was suggested that directions should be given in opposed matters for the exchange of written submissions prior to the hearing of the application. I find that even without specific directions counsel generally follow this practice and that it is very useful for the Judge, particularly if an ex tempore decision is to be given.

A fourth suggestion was that there could be more early mediation, before significant costs have been incurred such as occurs with extensive discovery. I support this idea and have tried to implement it, where I considered it appropriate. There are difficulties, however. It is said to me by counsel that the issues need to be defined by pleadings, that there is no point mediating before expert reports are obtained and that discovery is required before the experts can prepare their reports. This may be required in some cases, but in others the issues must be sufficiently understood to enable a mediation to take place, even if it only results in a narrowing of the issues in dispute and not a complete settlement. The costs issue is undeniable. I could not begin to count the number of cases in which I was involved where prior to a hearing the parties started to see sense about the issues in the case only to find then that the real impediment to settlement was the large amount of costs already incurred.

The final suggestion of the Sub-Committee that I want to menton tonight is that of "the desirability of encouraging the greater use in Victoria of the 'reference out' procedure." I see no reason, other than the question of cost, why such a procedure should not be adopted in appropriate cases. Obviously, the potential benefits are great, particularly in terms of reducing the backlog of cases waiting for a hearing. One difficulty is knowing when it is appropriate to refer matters out to a referee, and knowing what issues should be referred out. It is here, I think, that the legal representatives have an important role to play, and I want to conclude by speaking more generally about the role of the lawyers in building case litigation.

You will recall that at the beginning of my speech I quoted from the judgment of Justice Menhennitt speaking of the problems of construction litigation in the 1960s and early 1970s. I regret to say that it seems to me that on one view very little has changed. Building cases are still "bedevilled by complexity and detail" and trials are still "long and expensive". Some of you will say that that is the nature of the beast. But must it be so? Must every little point be the subject of lengthy requests for further and better particulars and voluminous discovery? Can not trials be shortened in some way?

I hope my memory is accurate, but as far as I can recall there has been no application to me this year to refer a matter to a referee, or to order preliminary points of law to be argued or to try certain questions of fact before others. The only qualification I should make is that I have been told in one matter that an application to refer a matter to a referee will be made on the next directions hearing and that in another matter on a stay/strike out application I refused to finally determine the point of law essentially because it would not have avoided the need for a trial or lessened the burden of preparing or running such a trial. This lack of applications of the type described by Justice Menhennitt may simply be a result of no case being a suitable vehicle, but I do ask the question whether it might not be a result of not enough thought being given to those alternative procedures. Why is it that trials of building cases must always be "long and expensive"? Are there not cases where a decision on one principal issue would likely bring about a settlement of the remaining issues, even possibly after an appeal on the principal issue? Are there not cases where the real issue is a point of law? Are there not cases which would be better decided by an expert rather than the poor old overworked Judge?

I do not pretend that these would be simple lay down misère applications. Serious consideration would have to be given to whether they were appropriate in the particular circumstances. This is particularly the case where both the Court of Appeal and the High Court of Australia have warned of the dangers of splitting hearings, in cases such as *Dunstan v Simmie & Co Pty Ltd* [1978] VR 669, *Verwayen v The Commonwealth of Australia* [1988] VR 203, *Jacobson v Ross* [1995] 1 VR 337 and *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1 at 55 per Kirby and Callinan JJ.

Nevertheless, it does seem to me that more thought could be given to considering whether one or other of these alternative procedures might be appropriate. Solicitors handling the matters and their barristers, often with the assistance of the experts, are the persons best placed to take the initiative in this respect. It is very difficult for a Judge to know enough about the case to do other than suggest that these are matters which should be considered by the advisers. Deciding between competing arguments about whether or not such a step would be appropriate is likely to be a difficult enough task.

Finally, I would like to add what I hope is a helpful practical comment. Summary judgment applications can be a useful weapon in a plaintiff's armoury in disposing of issues, particularly in cases under the *Building and Construction Industry Security of Payment Act* 2002. It must, however, be remembered that bringing such an application at an early stage requires the plaintiff to be able to prove every element of its cause of action without necessarily receiving any assistance from a defendant, such as by discovery of crucial documents thereby proving receipt. In the two summary judgment applications I have heard this year, on both occasions the plaintiff's proofs were lacking in terms of proof of service of the crucial documents. In one case, the defendant successfully took the point, and in the other the defendant's material cured the potential deficiency. Therefore, I would encourage practitioners in summary judgment applications to take care to ensure that all of the

necessary elements of the cause of action have been proved. This particularly applies to proof of service of progress claims or certificates.

Thank you once again for the invitation to speak to you about the operations of the Building Cases List. I understand there is time for discussion and I would welcome any questions or comments on some of my more provocative statements.

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